THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 7

Case No. 3583 — Case No. 4130

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BOOK 7

DART—DUNBAR

Case No. 3,583—Case No. 4,130

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FEDERAL CASES.

BOOK 7.

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

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

Case No. 3,583.

DART et al. v. McKINNEY.

[9 Blatchf. 359.][1]

Circuit Court, S. D. New York. Jan. Term, 1872.

REMOVAL OF CAUSES—TIME OF REMOVAL—PRACTICE AND FORMS.

1. A judgment was rendered, in a state court, on the report of a referee, in favor of the plaintiff, against two defendants. The judgment was reversed, and a new trial was granted. After that, one of the defendants, before another trial, applied to the state court, under the act of July 27, 1866 (14 Stat. 306), for the removal of the suit, as against him, into this court. The state court ordered the removal, holding that the case stood for trial as if no former trial had occured. The plaintiff then moved, in this court, that the cause be remanded to the state court: *Held*, that, as the act gave the right of removal "at any time before the trial or final hearing of the cause," the cause was properly removed.

[Cited in Kellogg v. Hughes, Case No. 7,662; Fisk v. Henarie, 32 Fed. 425.]

2. Form of the order of this court, on the filing of the papers from the state court.

3. In the case of a removal, by one of two defendants, under the said act of 1866, after the cause is at issue, in the state court, on pleadings, there is no need of any new pleadings in this court, provided they are in a proper shape for a trial, as between the plaintiff and such defendant.

[Cited in McCallon v. Waterman, Case No. 8,-675.]

[Suit by James Dart and Charles J. Osborn against Andrew McKinney. On motion to remand.]

Starr & Ruggles, for plaintiffs.
Eldridge & Johnson, for defendant.

BLATCHFORD, District Judge. This case was, I think, properly removable to this court, as against the defendant McKinney, under the act of July 27, 1866 (14 Stat. 306). The right of removal is given "at any time before the trial or final hearing of the cause," not "at any time before a trial or final hearing of the cause." The judgment which the state court rendered in favor of the plaintiffs, on the report of the referee, on the trial which was had, was reversed, and a new trial was granted. The state court, in its decision granting the removal of this cause, as against McKinney, says, that the former trial was adjudged a mistrial, and that the case now stands for trial, as if no former trial had occurred. This being so, the case was a removable one, under the act of 1866, as against McKinney. The motion to remand it must, therefore, be denied.

The order that the cause "proceed in this court, the same as if it had been originally brought herein," ought to be modified, so as to provide, that the cause proceed in this court, against McKinney, in the same manner as if it had been brought in this court by original process against McKinney.

By the act of 1866, the copies of all pleadings in the state court, filed or entered by McKinney in this court, have the same force and effect, in every respect, and for every purpose, as the original pleadings would have had, by the laws and practice of the state court, if the cause, as against McKinney, had remained in such state court. There is, therefore, no need of any new pleadings in this court, provided they are in a proper shape for a trial as between the plaintiffs and McKinney. I think they are in such shape. The motion to set aside the rule to declare is, therefore, granted.

DARTON (UNITED STATES v.). See Case No. 14,919.

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

Case No. 3,584.

The DASH.

[1 Mason, 4.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1815.

DISTRIBUTION OF PRIZE-MONEY—PRIVATEERS—PAROL AGREEMENTS—ASSIGNMENT—PRIZE ACT.

1. Prize-money must be distributed according to some written agreement of the parties; otherwise, it is distributable according to the 4th section of the prize act of the 26th of June, 1812, c. 107 [2 Stat. 759]. A parol agreement as to distribution is void.

2. If the shipping articles omit to state the shares, to which some of the officers and crew are entitled, they are still entitled to claim their shares under the prize act.

3. A parol assignment of a share in prizes is void.

[4. Cited in Robinson v. Hook, Case No. 11,-956, to the point that admiralty possesses exclusive jurisdiction to ascertain who are the captors, because it is an incident to the general jurisdiction, and included in the power of distribution.]

Appeal from the decree of the district court of Maine in a prize proceeding. In August, 1814, the private armed brig Dash [Porter and others, owners] captured the ship Five Sisters, and having taken out her cargo, brought it into Portland, where it was duly libelled in the district court and condemned, and sold by the marshal for the benefit of the captors. Ross and Slater were officers, and Marshall, a seaman, belonging to the Dash at the time of the capture aforesaid. Ross claimed five shares, Slater four shares, and Marshall one share in the prize proceeds in the hands of the marshal of the district for distribution. The cause came on upon the petition of Seward Porter and others, owners of the Dash, asserting that Ross, Slater, and Marshall had shipped for wages only, and praying that the shares of the prize-money, to which they would have been entitled, if they had not shipped for wages only, might be paid to the owners of the Dash; and that a decree might pass upon the marshal accordingly. To this petition Ross, Slater, and Marshall appeared, and filed an intervention, denying the claim of the owners and asserting their own title to their shares of the prize proceeds, as above stated. At the hearing, the original shipping articles were produced. They were in the common printed form of articles for voyages in the merchant service. The first clause was as follows: "It is agreed between the master, seamen, or mariners of the letter of marque brig Dash, William Cammett master, now bound from the port of Portland to one or more of the southern ports of the United States, thence to St. Bartholomew's and back to a port of discharge in the United States, that in consideration of the monthly or other wages against each respective seaman's or mariner's name hereunto set, they severally shall and will perform the above-mentioned voyage, &c."—At the end of the common articles was added a clause, agreeing to defend the brig against the public enemy, and to assist in making prizes, &c.—Then followed these words: "The net amount of all prizes and prize goods taken during the voyage to be divided in the following manner, viz. one moiety to the owners of the vessel, and the other to be shared among the officers and crew in the proportion set against their names respectively." Against the names of all the officers and crew there is a sum placed in the column of wages, and against some of their names a share or shares of prizes. Ross and Slater were to have thirty dollars per month, and Marshall eighteen dollars; but no share or shares of prizes were set against their names, or against the names of a major part of the crew. On another paper, filed among the records of the court, was an apportionment of the shares of the officers and crew, in which were assigned to Ross and Slater and Marshall the shares, which were by them respectively claimed in their act in court. And on the same paper was the following memorandum: "Portland, October 7, 1814. We agree to the annexed apportionment of shares in the brig Dash's crew," &c. signed "Samuel and Seward Porter, William Cammett." The whole number of shares was fifty-nine and one half; but, on the shipping articles, eighteen shares only were specified against the names of officers or seamen. There was some testimony in the cause, to show that Ross and Slater had, in consideration of receiving higher wages, (viz. thirty dollars instead of twenty-five dollars per month,) consented in conversation to waive their shares of prize-money in favor of the owners, but there was no written memorandum or agreement to this effect.

The district judge decreed in favor of the respondents [case unreported], and from his decree the petitioners appealed to the circuit court.

Mr. Prescott, for petitioners.

W. Sullivan, for respondents.

STORY, Circuit Justice, delivered the opinion of the court; and, after stating the facts, proceeded as follows:

The prize act (26th June, 1812, c. 107, § 4) declares, that all prizes captured by private armed vessels shall accrue to the owners, officers, and crews of the vessels, by which such prizes are captured; and, after condemnation, shall be distributed according to any written agreement made between them; and, if there be no such agreement, than one moiety to the owners, and the other moiety to the officers and crew, to be distributed between the officers and crew, as nearly as may be, according to the rules of the navy act (23d April, 1800, c. 33). It is therefore clear,

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

that by the express provisions of the prize act, as well as the form of the commission, the officers and crew have a vested interest in all prizes after condemnation. If the quantity of this interest be not ascertained by the written agreement of the parties, it is ascertained by the law. It is an interest capable of being assigned; and the assignee takes it, not as an equitable, but as a legal interest. Morrough v. Comyns, 1 Wils. 211. But it cannot be granted or assigned by parol. It is at least requisite, that the transfer should be evidenced by writing under the hand of the party.

It is argued, in behalf of the plaintiffs, that here was a written contract as to the division of the prize-money. The shipping articles certainly provide, that the owners shall have one moiety, and the officers and crew the other; but the distribution among the latter is not provided for. It is only declared, that they shall have the shares set against their names respectively. Against the names of more than half of the officers and crew no shares are set. The only shares specified are eighteen in number; whereas it is conceded, the whole number is fifty-nine and one half. It is not pretended, that the parties, whose shares are so specified, are entitled to the whole moiety divisible among the officers and crew; yet, if the argument of the plaintiffs were right, such would be the legal inference. For, if the division be completely provided for by the shipping articles, those only can take, whose shares are specified. The others would be entitled to no shares; and of course the plaintiffs and respondents now before the court would be hors de la loy, as to their present controversy. But such a construction is utterly inadmissible. It is against the express words and intent of the prize act, for that gives a vested interest to all the officers and crew; and when their shares are not ascertained in writing, it ascertains them by an equitable reference to the distribution of prizes in the navy. Unless, therefore, there be express words of exclusion or of transfer in the articles, the prize act must be let in, to supply the omissions. And it may be very doubtful, how far, consistently with the law, a party could exclude himself, without a transfer, from the vested interest of prize. The respondents must, therefore, be held entitled under the act to reasonable shares in the prizes; and these shares have been liquidated by common consent to the shares asserted in their claims.

The next question is, whether the owners have acquired a legal or equitable title to the shares of the respondents. It is argued, that the respondents having shipped for higher wages than the rest of the crew, and no shares being set against their names, there is a necessary presumption from the articles, that they have excluded themselves from prize-money; and that a resulting trust, as to their shares, arises in favor of the owners, by whom the advance was made; and that this presumption is fortified by the parol proof. As to the parol proof, it must be altogether rejected. Supposing it admissible in point of law, it is much too lax and unsatisfactory, to furnish any sufficient ground for a decree. But it is inadmissible in itself. So far as it is applied to the explanation of the articles, it is attempting to give a construction unauthorized by the language of that instrument. It is expressly agreed, that the owners shall have one moiety only of the prize-money; but this construction will not only give them one moiety, but also a large portion of the other moiety of the officers and crew. It is, therefore, contradictory to the express stipulations of the parties. So far as it is applied to control the distribution, it is liable to this farther objection, that it undertakes to distribute the shares by a parol, instead of a written agreement, as the prize act requires. And so far as it is applied to sustain an assignment, by parol, of the prize shares, it is useless; for such an assignment is utterly void.

The only remaining ground, then, upon which the claim of the owners must rest, is that there has been a legal or equitable transfer to them, by the respondents, supported by written proof. There is no suggestion of an express written transfer; but it is supposed, that the articles contain an implied legal or equitable assignment. It is very difficult to comprehend, from what part of that instrument such an implication can arise. It cannot arise from the mere payment of wages; for this being a voyage under letters of marque for commercial purposes, as well as for captures, it is usual to allow wages; and here all the officers and crew have expressly stipulated for wages. Nor can it legally arise from the payment of higher wages than usual; for these depend upon the particular agreements of the parties. And, in no case, can the payment or non-payment of wages raise a legal presumption against the vested rights of prize. Nor is there any presumption of a resulting trust from the omission to state the shares of the respondents; for the law, in such cases, ascertains the shares for the benefit of the parties themselves, and not of the owners. The argument, therefore, for the plaintiffs is utterly untenable; and the respondents being entitled originally to the shares now claimed by them, must retain that title, since no written assignment can be produced in favor of other persons.

A decree must be entered, that the petition of the petitioners be dismissed; that the prize proceeds, now in the hands of the marshal, be delivered and paid over to the respondents, according to their claims asserted in the acts of court; and that a monition issue to the marshal accordingly; and farther, that the respondents be allowed their reasonable costs and expenses against the petitioners, to be taxed under the direction of the court.

DATER (CONRAD v.). See Case No. 3,127.

Case No. 3,584a.

DAUPHIN v. TIMES PUB. CO.

[18 Reporter, 10.][1]

Circuit Court, E. D. Pennsylvania. April 30, 1884.

LIBEL—UNLAWFUL BUSINESS—LOTTERY.

1. An action for libel in respect to the plaintiff's business cannot be maintained when the business in respect to which the alleged libel is published is an unlawful one.

2. Acting as agent for a lottery is such an unlawful business as will fall within the above rule.

Sur demurrer to declaration.

The declaration set up that the plaintiff was the manager of the Louisiana State Lottery Company, by virtue of which trade, occupation, and business he acquired great gains and profits; that the defendant published in its newspaper, the Times, a libel, inter alia, as follows: "Mr. M. A. Dauphin, the agent of the Louisiana Lottery, to whom deluded lottery victims addressed their remittances, and whose correspondence has been excluded from the mails, has decided that he is a bigger man than Dorsey or Brady, and that he must have damages if he can't publicly and insolently defy the laws. Mr. Dauphin will fail in his attempt to recover damages from a cabinet officer for the offence of honest fidelity to the laws; but the lesson is worthy of the study of the nation. It is the dying shriek of one of the most stupendous public robberies of our history, and will shed exceptional lustre upon the character of Postmaster General Gresham, who is honored with the last ebullition of malignity of a long omnipotent, but now overthrown, organized crime." After the innuendoes the declaration charged that the plaintiff had been brought into public scandal and disrepute, and had been injured in his business. The defendant demurred, and assigned as reason, inter alia, that it appeared by the declaration that the trade, occupation, and business set forth therein was an illegal one by the laws of the United States and of Pennsylvania.

James H. Heverin and Rufus E. Shapley, for demurrer.

The business is illegal by the laws of the United States—Rev. St. § 2894; Act April 29, 1878 (20 Stat. 39)—and of Pennsylvania,—Act March 31, 1860 (Purd. Dig. p. 331, pl. 54). If there is no right to recover for an alleged injury in the state where it is said to have been committed, there can be none in any other state. Phillips v. Eyre, L. R. 6 Q. B. 28; Scott v. Seymour, 1 Hurl. & C. 234; Smith v. Condry, 1 How. [42 U. S.] 28; Ekins v. East India Co., 1 P. Wms. 395; Consequa v. Willings [Case No. 3,128]; Richardson v. New York Cent. R. Co., 98 Mass. 86; Needham v. Grand Trunk R. Co., 38 Vt. 294; Whitford v. Panama R. Co., 3 Bosw. 67; Crowley v. Panama R. Co., 30 Barb. 99; Beach v. Bay State Steamboat Co., Id. 433; Whitford v. Panama R. Co., 23 N. Y. 465; Le Forest v. Tolman, 117 Mass. 109. "Ex dolo malo non oritur actio" here applies. If the vocation libelled be an illegal one there can be no recovery. Hunt v. Bell, 1 Bing. 1; Yrisarri v. Clement, 3 Bing. 432; Manning v. Clement, 7 Bing. 362; Marsh v. Davison, 9 Paige, 580. Even if the trade of a lottery were lawful in Louisiana, which is denied, there could be no recovery here, for the lex loci must yield to the positive law of the former, and by the law of the United States lotteries are illegal.

S. H. Alleman and B. T. Fisher, contra.

THE COURT held that the demurrer must be sustained on the ground that a lottery is an illegal trade, and that for any writing or publication affecting the plaintiff in the carrying on of such illegal trade no recovery could be had. Demurrer sustained.

[1] [Reprinted by permission.]

Case No. 3,585.

DAUSMAN & DRUMMOND TOBACCO CO. v. RUFFNER et al.

[15 O. G. 559.]

Circuit Court, N. D. Illinois. July 8, 1878.

TRADE MARK—INFRINGEMENT.

1. A registered trade-mark for plug-tobacco, consisting of one longitudinal line dividing the plug into equal parts and a series of transverse lines crossing the plug at right angles with the longitudinal line, and at equal distances from each other, will not prevent the use of a trade-mark for tobacco, consisting of a series of seven Greek crosses stamped on the center of the surface of the plug at equal distances from each other and a series of half crosses on the margin opposite the full crosses, as guides for cutting the plug into pieces.

2. Every manufacturer has the right to indicate points or lines of division by marks upon his goods or packages.

BLODGETT, District Judge. Complainant in this case seeks to enjoin defendants from using a trade-mark adopted by complainant, and registered in pursuance of the act of congress, to designate an article of plug chewing-tobacco manufactured by complainant. The complainant's proofs tend to show that it adopted the trade-mark in question in June or July, 1877, and applied it to designate a peculiar and superior quality of plug-tobacco; and on the 25th of August application was made to register said trade-mark, which registration was allowed and completed on the 20th of November. The trade-mark claimed is described in complainant's specification in the following terms: "Said trade-mark consists of a series of lines or indentations arranged in a specific manner

upon the plug-tobacco manufactured by us. The lines composing the peculiar mark consist in one longitudinal line, extending the length of the plug, and dividing it into two equal parts, and a series of transverse lines running across the plug at right angles to the longitudinal line, arranged at equal distances from each other and dividing the plug into equal parts, transversely of the lump, as shown in the accompanying fac-simile." No letters or name are combined with said lines to make the trade-mark claimed, but complainant alleges that soon after this style of plug was brought out and placed upon the market it received the designation from and is now known in the trade as "Cross-Bar Tobacco." The mark used by the defendants to designate their tobacco is also registered pursuant to the act of congress, and consists of a series of seven Greek crosses stamped or impressed upon the center of the surface of the plug at equal distances apart, and a series of half crosses on the margin of the plug opposite each of the full crosses, "which lines are so stamped upon said tobacco as guides for cutting or dividing the plug into pieces of one ounce each." Much proof has been offered on the part of the defendants to show that complainant was not the first to adopt and use longitudinal and transverse lines upon manufactured goods for the purpose of indicating the measured or equal portions into which the piece could be cut or separated, but I do not deem it necessary to analyze or consider all this testimony, from the view I take of the case. A mere ocular examination of the tobacco-plugs manufactured by complainant and defendants clearly shows that both parties have adopted their respective lines or marks for one purpose, and that is to enable the retailer to cut measured quantities from the plug. The defendants honestly and frankly admit that such is the purpose for which they placed their lines upon their plug-tobacco, namely, to enable the retailer to cut off the tobacco in ounce lumps or pieces. The complainants evidently intend to accomplish the same purpose, although they do not say so in their specifications, because they provide for running the longitudinal line through the center of the plug, and the cross lines at equal distances from each other transversely across the plug, so as to divide it into equal parts. One of the principles running through the law of trade-marks is that there need be no utility attached to the trade-mark itself,—that is, it shall have no useful purpose in connection with the goods, further than to show the origin or manufacture. But in this case there is evidently a purpose in these lines by both parties, and that is to designate the manner in which the plug can be cut up for the purpose of retail, and the complainants in their specification say: "The number of transverse lines may be varied slightly, according to the size of the plug, without materially modifying our trade-mark, the general nature of which is a single longitudinal line running along the middle of the plug, with a series of transverse lines at equal distances from each other and crossing the longitudinal line at right angles." Now they may vary, of course, the number of cross lines and their distances apart by the thickness of the plug. Having the plug thicker or thinner, the transverse lines might be farther apart or closer together, as may be required, in order to make the requisite quantity in each of these measured parts.

And the question is, can the complainant, by registering these longitudinal and transverse lines as a trade-mark to designate its plug-tobacco, prevent other manufacturers of plug-tobacco from so making their plugs as to enable the retailer to cut it off in equal or measured quantities? And I am of opinion that complainant's trade-mark cannot be so construed or applied as to prevent defendants from indicating by mark or lines upon their plugs the point at which to cut off equal or measured quantities. Any manufacturer of goods which are sold by the piece, such as cloths, for instance, must have the right, by marks or lines, to indicate where to cut, in order to remove each yard or part of a yard, or other specific quantity. So, in regard to liquids put up, for instance, in glass bottles or similar packages, lines might be drawn, showing the half or other portion of the contents of the package, so as to enable a consumer or retailer to withdraw measured parts, and no manufacturer by registering a trade-mark upon a package of that kind could prevent another manufacturer from thus showing how a measured portion of the contents of his package might be withdrawn. The defendants' mark is not precisely like the complainant's, and it is obvious the patent office was of the opinion that both were allowable as applied to the same class of goods, for almost contemporaneously with the registry of complainant's trade-mark the patent office allowed the defendants to register their trade-mark; and, in fact, the registration of the defendants' mark was completed and the certificate issued before that of complainant's, so that it is clear the patent office took the view that one of these did not infringe upon the other. The defendants' tobacco is known to the trade by another name or designation from that of the complainant. It is known and put upon the market as "Army and Navy Plug-Tobacco," instead of "Cross-Bar Tobacco." It was admitted by the complainant's counsel upon the argument that the complainant's trade-mark could not and should not be so construed as to prevent the defendants from marking their tobacco in some manner so as to indicate where to cut in order to remove a certain measured quantity, and it seems to me that in making this admission they practically admit away the case, as against these defendants. The Greek

cross, although it is the equivalent in every respect, so far as practical use is concerned, of the complainant's lines in its plug, yet, at the same time, as one has the right to show where to cut, so the other has, and my conclusion is that one manufacturer cannot, by registering straight lines intersecting each other as these do, prevent another from indicating to the consumers of his goods where they must cut for certain quantities. The motion for the injunction is, therefore, overruled.

Case No. 3,586.

Ex parte DAVENPORT.

In re FORTUNE.

[1 Lowell, 384;[1] 3 N. B. R. 312 (Quarto, 83).]

District Court, D. Massachusetts. Oct. Term, 1869.

BANKRUPTCY—PROOF OF CLAIMS—ASSIGNED CLAIMS.

1. The assignee of a chose in action not negotiable, may prove it against the estate of the debtor in bankruptcy upon his own deposition, without adding the deposition of his assignor.

[Cited in Re Strachan, Case No. 13,519.]

2. The deposition should show the name of the original creditor, in order to enable the assignee in bankruptcy to compare the debt with the books and accounts of the bankrupt.

3. If, as matter of form, the proof should stand in the name of the assignor, the assignee has all the rights of a creditor in the bankruptcy, including the right to take any action in the name of his assignor, but at his own expense, that may be necessary.

LOWELL, District Judge. One Davenport presented for proof against the bankrupt's estate an account for goods sold to the bankrupt by one Hovey, which account was duly assigned to Davenport, for value, before the bankruptcy. The deposition of Davenport only was produced. The register disallowed the proof, and two others offered under like circumstances; and, at the request of the parties, certified to me the question, whether they should have been allowed. The depositions are not sent up; but I understand them to have been sufficient in form, and that they were thought defective in substance because Hovey gave no deposition.

The important powers and rights given to creditors in bankruptcy in relation to the course of proceedings are to be exercised by the real creditor. No doubt could be entertained that the person entitled to vote for assignee, and to examine the debtor, and to oppose or assent to his discharge, is the assignee for value of a chose in action, and not his assignor. For though the assignor may be in some sort a trustee by necessity, for the person to whom he has transferred the debt, yet he has the merest technical title, with no real power over the debt in any court.

I suppose the question intended to be submitted is, whether the assignor must not join in the deposition before such a debt shall be admitted to proof. The English practice has been so, and the reason given for it is that the assignor should certify whether he has any security. 1 Cooke, Bankr. Laws (3d Ed.) c. 6, § 6, p. 182; 1 Griff. & H. Bankr. Laws, 714. So in the case of a trustee and cestui que trust, it is usual for both parties to join. But under our law it seems to me to be sufficient that the true and bonâ fide holder of the debt at the time of the bankruptcy should make the affidavit; such is the fair interpretation of the sections upon this subject; and the oath is so full and searching as to include all satisfaction and security held or received by the affiant or by any other person, in respect to the debt affirmed to; and there would seem no reason why the assignor should be joined in the case of a debt not negotiable at common law, more than of one that is negotiable. It is a question of fact, whether the debt has been paid or secured, in whole or in part, and a question as to which pertinent evidence is always admissible. But the prima facie case is made out by the affidavit of the real creditor.

As to the matter of form, however, it is proper to say that perhaps an appeal to the circuit court from the disallowance of such a claim, ought by analogy to the rule of the common law still prevailing here, to be taken in the name of the original creditor, and it would be right, in all cases, that the fact of the assignment, and its date, &c., should appear in the affidavit and in the record, in order that questions of set-off and security should be met and decided upon a full knowledge of all facts.

My answer is, that a deposition by an assignee for value, before bankruptcy, of a chose in action, is sufficient to entitle him to prove his debt, and to be considered the creditor in respect to such debt, to all intents and for all purposes. That his deposition should show the fact and date of the transfer, and the name of the original creditor, and that such assignee of a chose in action, so proving, should have the right to take any such action in the cause in the name of his assignor, but at his own expense, as he may be advised. Certificate accordingly.

Case No. 3,587.

In re DAVENPORT.

[3 N. B. R. 77 (Quarto, 18);[1] 2 Am. Law T. 136.]

District Court, W. D. Texas. 1869.

BANKRUPTCY—FEES OF ASSIGNEE—COUNSEL FEES.

1. Assignee has no authority to make specific charges for making and setting aside certificate of exempted property; drafting acceptance and notice of appointment for publication;

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

[1] [Reprinted from 3 N. B. R. 77 (Quarto, 18), by permission.]

drafting petition for sale of property, or drafting application for order of compromise. For such acts and services the court may allow reasonable compensation in its discretion, and allows ten dollars therefor.

[Cited in Re Cook, 17 Fed. 329.]

2. A charge of court fees in drafting an order of compromise is correct, if fees were actually paid. A charge of eight dollars for one day's service in preparing advertisements is disallowed as unauthorized. A fee of three dollars allowed. A charge of seven dollars for one day's service by assignee in ascertaining value of property, allowed. Charge of five dollars for writing and delivering deed, disallowed as improper.

3. An assignee has a right to seek professional advice and to employ counsel in necessary and proper cases. Charge of seventy-five dollars for counsel fees in simply compromising an inconsiderable debt with a lien creditor, under an order of court, questioned and suspended. Referee ordered to take testimony.

4. Assignee can only properly charge commission on the amount of debt canceled by compromise with a lien-holder.

[In the matter of J. W. Davenport.]

DUVAL, District Judge. The following charges made by the assignee in this case, J. K. Williams, have been brought before me for revision, under exceptions taken by C. L. Dawson, as administrator, etc., a creditor of said bankrupt's estate; viz.:

1. Making out and setting aside certificate of exempted property	$ 5 00
2. Drafting acceptance and notice of appointment for publication	8 00
3. Drafting petition for sale of property	5 00
4. Drafting application for order of compromise	5 00
5. Court fees in drafting order of compromise	3 00
7. One day's service in preparing advertisements for sale in newspaper and handbills	8 00
9. One day's service in ascertaining value of property and fixing compromise	7 00
10. Writing and delivering deed	5 00
11. To my attorney, S. T. Newton, for services and counsel rendered in making compromise and settlement of said estate	75 00
12. My percentage on whole amount of said debt and interest, $1,662.60	66 56

The debt due Dawson, as administrator, etc., amounted to sixteen hundred and sixty-two dollars and sixty cents, secured by judgment thereon, with a credit of seven hundred dollars on the same. The only money in the hands of the assignee was that arising from the lien property, except ten dollars received for a lot in Tyler.

Nos. 1, 2, 3, and 4. I see nothing in the law to authorize the assignee to make these charges. They refer to acts done, for which the court may, in its discretion, allow a reasonable compensation to the assignee, as a part of the general service rendered by him in the case, but they furnish no basis for the specific charges made. They are, therefore, disallowed, and in their place ten dollars is allowed as a sufficient compensation for the services charged for in the above items.

Item 5. This charge is correct, if the money was paid to the register or any other officer of the court.

Item 7. This charge is not authorized by law. For the service to which it refers, I think three dollars would be ample compensation, and this much and no more is allowed.

Item 9. The charge of seven dollars embraced in this item is reasonable enough, if the time was actually employed for the purpose, as charged.

Item 10. Unauthorized and improper. The purchaser should write his own deed, or cause it to be done. The charge is disallowed.

Item 11. In prosecuting or defending suits, the assignee has the right to employ counsel, and so I conceive he has in any matter where legal advice is really necessary to enable him to act for the interest of the estate or of creditors. But I should doubt greatly the necessity of employing a professional adviser in a case like the present, where the assignee is proceeding, under an order of the court, and with the law to guide him, to compound or compromise an inconsiderable debt with a lien creditor. It is that character of proceedings in which an assignee, of ordinary intelligence, would be able to act for himself, and would rarely need the aid of an attorney. I am at a loss to know what legal questions arose, in connection with the compromise made in this case, that rendered it necessary for the assignee to have professional aid. In addition to this, it appears to me that the charge made is extravagant. At present, I shall neither allow nor disallow it, but will refer the mattter to the register, who will proceed as hereinafter directed.

Item 12. The creditor excepts to this charge, because commission is computed on the sum of sixteen hundred and sixty-two dollars and sixty cents, when the whole proof of debt shows only that amount, less a credit of seven hundred dollars and interest. In my opinion the assignee could only rightfully charge commission on the amount of debt canceled, which amount not being given in the papers before me, I cannot say what it is. It cannot, however, be more than the amount of the debt proven up, viz.: nine hundred and sixty-two dollars and sixty cents. Moreover, while property, upon which a lien exists, should be held to pay all charges and expenses incurred in making the transfer to the beneficiary thereof, as well as a reasonable compensation to the assignee for services rendered therein, it should not be charged with anything more, nor for any expenses or fees incurred in the general business of the bankrupt's estate. To this charge for commission, I therefore sustain the exception of the creditor, but allow it to the extent before stated.

In regard to the charge embraced in No. 11, Mr. Register Whitmore is hereby directed, without delay, to hear evidence both as to the necessity which existed for the employment of counsel by the assignee, and the propriety of the amount charged. To this end, the assignee himself, as well as the attorney, may be examined under oath, and such other evidence received as may be pertinent and proper. And thereupon, the said register shall determine whether any charge for counsel fee be allowed, and if so, the amount thereof. His decision thereon, together with the evidence on which it is based, to be certified to me for revision, in case the creditor or assignee so desires. The clerk at Tyler will certify this decision to Mr. Register Whitmore.

Case No. 3,588.

DAVENPORT v. ALABAMA & C. R. CO.

[2 Woods, 519.][1]

Circuit Court, S. D. Alabama. Dec. Term, 1875.

RAILROAD RECEIVERS—JUDGMENTS FOR PERSONAL INJURIES—PRIORITY OVER BONDS.

A person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road is not entitled to payment out of the earnings of the road, or the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers.

[Cited in Turner v. Indianapolis, B. & W. Ry. Co., Case No. 14,260; Central Trust Co. v. East Tenn., V. & G. R. Co., 30 Fed. 897; Easton v. Houston & T. C. Ry. Co., 38 Fed. 14; Finance Co. v. Charleston, C. & C. R. Co., 46 Fed. 509.]

This was a petition filed by [T. H.] Davenport against the receivers of the Alabama & Chattanooga Railroad, in the principal cause, which was entitled John C. Stanton and others, Trustees, v. the Alabama & Chattanooga Railroad Company and others. [Case No. 13,296; Id. 13,297.] The original bill was filed by the trustees to foreclose the first mortgage on the road, and other property of the railroad company. The court made a decretal order, appointing Lewis Rice and Wm. J. Haralson receivers, and placing the road in their possession. The substance of this order will appear in the opinion of the court. While Rice and Haralson were in possession as receivers, the petitioner Davenport was injured while traveling on the road as a passenger. He got leave of this court to sue the receivers in their official capacity, in a state court, to recover damages for the injuries received by him. He recovered a judgment for $3,000, and then filed the present petition against the present receivers, who were the successors of Rice and Haralson, for an order of the court, that his judgment be paid out of the earnings of the road, or the proceeds of its sale, as a part of the expenses of executing the trust. The road had not paid running expenses, and the proceeds of the sale fell far short of paying the first mortgage bonds.

Thomas H. Herndon and John Little Smith, for petitioner, cited Kerr, Rec. 164; Meara v. Holbrook R. Co., 20 Ohio St. 137; Potter v. Bunnell, Id. 150.

John A. Elmore, representing the trustees of the first mortgage, and Robert H. Smith, representing the bondholders, contra.

WOODS, Circuit Judge. The claim is for $3,000 and costs, on a judgment rendered as damages, for an injury received by Davenport while traveling as a passenger on the Alabama & Chattanooga road, when it was run by the receivers Rice and Haralson. The question is, whether such claim can come in as a lien on the fund, superior to the first mortgage in existence, when the right to damages accrued. It is too clear for argument, that if the road had been run by the president and directors when the injury was sustained, no such claim could have priority. The party would have traveled over the road, taking the risk of the ability of the company to respond, just as every man, who obtains a right or contract, does so with the risk of the ability of the party to answer to him. The receivers of the court were merely appointed to act instead of the president and directors, except so far as the orders of the court otherwise direct, and the liability stands on the same footing as if it had been created by the president and directors, unless a higher right can be assigned to it under the orders of the court. The object of appointing a receiver is to take care of the property for those entitled to it, and he has no powers except such as are conferred upon him. In other words, he acts as special agent by appointment of the court. Kerr, Rec. 3, 46. A receiver stands like an administrator who certainly can by no act override existing liens, and he is under no personal liability to respond except for his own personal neglect. Meara v. Holbrook R. Co., 20 Ohio St. 137. This case is cited for petitioner. It holds that there is no personal liability on the receivers, and that the liability must be discharged from funds in their hands, but by no means settles that liens on such funds are subordinated to such later liabilities. The estate in the hands of a receiver must bear the loss. but only such estate as is liable for the loss, and not the estate of one who holds a paramount lien. Lord Eldon, in Norway v. Rowe, 19 Ves. 153, declares that the appointment of a receiver does not prejudice the rights of a prior mortgagee, and then uses this language: "And the constant habit of the court upon such a motion (to appoint a receiver) is not to look at mortgagees farther than to take care that they are not preju-

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

diced." In Redfield on the Law of Railways (volume 2, p. 363), the proposition is thus distinctly stated: "The appointment of the receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law, for whoever can make title to it, and when the party entitled to the estate is ascertained, the receiver will be his receiver."

The case, therefore, comes down to this: Does the decree of Circuit Justice Bradley, of August 26, 1872, or the decree of foreclosure of January, 1874, establish such liens? And it may be stated thus: Has Justice Bradley departed from a well settled rule of law, to create a lien not essential to running the road, and not necessary for increasing, either directly or consequently, the rights of the first mortgage bondholders, for the protection of whose rights the appointment was made? It is clear that such a lien is not one of the incidents to running the road, nor was its creation necessary to procure traffic and travel; nothing of the kind is intimated in the application for a receiver, and no such view or idea is presented in the order, an analysis of which will make this clear. The order of the circuit justice recites that the property is deteriorating in value, and being wasted and scattered and destroyed, whereby the security of the first mortgage bondholders, and the interest of all other persons then concerned in said property are subject to hazard, danger and sacrifice. It then recites the impossibility to dispose of the property in its then present condition without great sacrifice, and the proposal and agreement of the parties * * "that a receiver or receivers shall be appointed in this cause, to take charge of said property and put the same into proper condition for its preservation and disposition, for the mutual benefit of all parties interested therein. And whereas, in view of all the evidence and admissions of the parties, the court is satisfied that a receiver or receivers ought to be appointed to take charge of the entire property and manage the same, and to put the same in order and repair, to prevent the entire destruction thereof:" Therefore it was ordered that receivers be appointed: 1. To take possession, recover and receive the property covered by the first mortgage. 2. To sue for damages done to it, etc. 3. To put the property in repair, and to complete the road, and to procure rolling stock, etc., necessary to operate it, "and to operate the same to the best advantage, so as to prevent the said property from further deteriorating, and to save and preserve the same for the benefit and interest of the said first mortgage bondholders, and all others having an interest therein." Then follows the creation of the prior lien, and it is for money raised or advanced "for the purposes aforesaid." The order then, in words, provides: "That any funds raised by said receivers, by loan as aforesaid, or received by them from any other source, as such receivers, which may not be employed or required for the purposes above mentioned, or allowed to them by the court for their services as such receivers, shall be paid by them into this court, for the use of the said first mortgage bondholders, as their interest or principal shall become due." We here have an explicit declaration that no money is to be used by the receivers except for the purposes above mentioned. Now is it necessary, in order to operate the road, that any man entitled to his action for injuries should have a prior lien on the road for such damages? And is the lien to be created by inference, and on conjecture that the creation of such a lien was necessary in order to operate the road? As a fact, it is known that almost every railroad in the United States is under mortgage, and that every such one is operated without being subject to a lien for such liabilities. There is not one word in the inducements recited for the appointment of the receivers, or in the purposes named for which they were appointed, which, by the remotest inference, countenances the creation of a prior lien.

The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts. The party has a right to be paid from the fund remaining, after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining. He has the same right against the property which he could have had if the road had been run by the president and directors when his right accrued, and none other.

Turning to the decree of foreclosure of January, 1874, we see how clearly the court viewed the order of the circuit justice in the light presented. It devotes the proceeds of sale, first, to necessary expenses incident to the execution and due prosecution of the trust created in behalf of the mortgage, etc. But it cannot be said that the giving of a prior lien to a traveler for damages is an expense incident to the execution of the trust which was created in behalf of the mortgagees. Such a claim is in fact no "expense" at all, in the proper or ordinary sense of the word. It is a liability resulting secondarily from operating the road and that is all. The petition must be dismissed.

DAVENPORT, The C. Y. See Case No. 3,527.

DAVENPORT (EVANS v.). See Case No. 4,558.

DAVENPORT (HOWARD v.). See Case No. 6.759.

DAVENPORT v. LAMB. See Case No. 8,015.

Case No. 3,589.

DAVENPORT v. The SEA FLOWER.

[9 Betts, D. C. MS. 26.]

District Court, S. D. New York. March 18, 1847.[1]

MARITIME LIENS—ADVANCES AND REPAIRS—WAIVER—BONA FIDE PURCHASER.

[A lien arising upon advances made to pay for salvage and repairs is waived, as against a subsequent bona fide purchaser without notice, by taking a time draft duly accepted.]

[Libel by John Davenport against the brig Sea Flower for advances made to pay for salvage and repairs.]

BETTS, District Judge. It appearing to the court, upon the pleadings and proofs in this cause, that the Croton Insurance Company, of the city of New York, underwrote on the 31st of October, 1845, a policy of insurance on the brig Sea Flower, for one year, in the sum of $4,000, in favor of the claimants in this cause, her then owners: and it further appearing to the court that, because of injuries by collision and perils of the sea, the said brig was, on the 13th of February, 1846, abandoned by the claimants, as a total loss, to the said insurance company, and such abandonment was duly accepted by said insurance company; thereby becoming liable to satisfy to the claimants the whole amount of said policy: and it further appearing to the court that said brig, after the injuries received as aforesaid at sea, was carried into the port of St. George, in the island of Bermuda, by salvors, and was there duly libelled and attached for the recovery of salvage compensation therefor: and it further appearing to the court that the said Croton Insurance Company, after her abandonment to them, procured the libellant to advance at Bermuda the monies necessary for the reparation and refitment of said brig, and the satisfaction of salvage, costs, and other expenses chargeable upon her there, and that the libellant, at such request, advanced for the necessities of said brig the sum of $1,381.45, for which sum a bill of exchange, at sight, was drawn to the order of the libellant on the president of said insurance company, by their agent at Bermuda; the said agent stating to the agent of the libellant, when the bill was delivered, that he had authority to draw only at a credit of 30 or 40 days: and it further appearing to the court that the said brig, after such repairs, returned to this port, into the possession of the Croton Insurance Company, and that on such arrival of the brig, the president of said company refusing to accept the bill of exchange drawn on him in favor of the libellant at sight, a new bill of exchange was drawn on the said president for $1,381.45, the amount of the charges and expenses of the libellant as aforesaid, payable 40 days after sight, and was duly presented to him and accepted by him on the 18th day of April, 1846, and was delivered to and received by the agent of the libellant: and it further appearing to the court that the brig remained in possession of the Croton Insurance Company, without hypothecation to the libellant, and on the 27th of April, 1846, was by the company sold and transferred to the claimants, and received and accepted by them in part satisfaction of the amount due from the company to them on the policy of insurance aforesaid, and thereupon went into the exclusive possession of the claimants: and it further appearing to the court that the claimants, at the time the brig was transferred to and accepted by them, had no notice of any claim or lien of the libellant upon her, and that the transaction on their part was bona fide and for a valuable consideration: and it further appearing to the court that the said Croton Insurance Company, at the time of accepting said bill of exchange and making the transfer of the brig as aforesaid, was transacting its regular business, and continued to pay its engagements and liabilities until the 15th of May thereafter, at which time it stopped payments, and before the maturity of said bill of exchange became wholly insolvent, and that the same remains unpaid: and it further appearing to the court that this bill was filed and said vessel attached on the 22d day of May, 1846, for the recovery of the sum included in and intended to be secured by the said bill of exchange,—it is considered by the court that, upon the facts and circumstances in proof in this case, the libellant must be decreed to have lost or waived all liens on said vessel, as against the existing rights and interest of the claimants thereon. Wherefore, it is ordered and decreed by the court that the libel be dismissed, with costs to be taxed, and that the said brig be discharged from her arrest in this case, and be delivered up to the claimants, unless this decree be appealed from according to the course of the court.

[1] [Affirmed in Case No. 12,577.]

DAVENPORT (UNITED STATES v.). See Case No. 14,920.

Case No. 3,590.

DAVEY v. GLENS FALLS INS. CO.

[9 Ins. Law J. 497.]

Circuit Court, D. Minnesota. April 4, 1879.

FIRE INSURANCE—WAIVER OF CONDITIONS BY AGENTS—WAIVER BY CONDUCT.

1. Agents of foreign companies who make contracts on behalf of the companies may waive conditions contained in the policies; it is within the apparent scope of their authority and binding on the company unless the insured is informed of their limitations.

2. Such an agent may dispense with a condition requiring the consent of the company to

be endorsed in case of non-occupancy, by acts amounting to a waiver, as he may endorse such consent.

3. But mere knowledge of the agent, and his failure to cancel the policy or inform the company, does not amount to a waiver.

Motion [by Margaret, Frank, and Agnes Davey, by Catherine Shehan, their guardian ad litem] for judgment upon special verdict.

Davis, O'Brien & Wilson, for plaintiffs.
Bigelow, Flandrau & Clark, for defendant.

NELSON, Circuit Justice. The special verdict finds the agent of the defendant company also had charge of the property insured, as the agent of the owners; that the house was occupied when the policy was written; also that the agent and the guardian of the plaintiffs, the mother of the minors, knew that the house had become vacant and remained so up to the fire, January 1, 1877, but no request was made by the guardian or any one on behalf of the owners, upon the company or its agent, to waive a condition which declared the policy void if the premises became vacant. The following is the condition in the policy: * * * "If the above mentioned building * * * shall become vacant or unoccupied without consent of the company endorsed hereon, then and in every such case this policy shall cease and be void." No consent was endorsed upon the policy, waiving this condition. The agent of the company could waive this condition, and if his consent had been obtained that the building might remain unoccupied, it would have bound the company, although not endorsed upon the policy. The agents of foreign insurance companies, who make contracts on behalf of the companies, can dispense with conditions contained therein. It is within the scope of their apparent powers and obligatory upon the company, unless the insured is informed of their limitation.

As the agent could have indorsed consent upon the policy, waiving this condition, he may, by acts which amount to such waiver, dispense with conditions and with the requirement that such waiver shall be endorsed on the policy. The difficulty with this case is that the proof fails to establish any waiver by the agent. He knew the building insured was vacant, and did not cancel the policy or inform the company until after the fire, yet the company is not thereby precluded from taking advantage of the stipulation in the contract. It was necessary for the plaintiffs to prove that the defendant, by its agent, dispensed with this condition, and proof that the policy was not cancelled after knowledge by the agent that the building was vacant is not sufficient evidence of a waiver, and none can be implied. See Wood, Ins. c. 2, § 89. Judgment ordered for defendant.

Case No. 3,591.

DAVEY v. The MARY FROST.

[3 Cent. Law J. 419;[1] 22 Int. Rev. Rec. 82.]

District Court, E. D. Texas. 1876.[2]

SALVAGE SERVICES BY CITY FIREMEN.

Firemen employed and paid under a city ordinance are not entitled to salvage for vessels saved while lying at their wharves, as their services are simply in the line of their duty.

MORRILL, District Judge. The libel charges, among a great many other things, that the vessel, on the night of the 11th of January, 1876, was fastened at one of the wharves of Galveston, receiving her cargo, there being then on board 800 bales of cotton, when an alarm of fire was sounded throughout the city and the port of Galveston; whereupon libellants went immediately to the vessel, and finding a portion of the ship's lading on fire, with six steam fire engines, and firemen working under the control, direction, and superintendence of libellants, promptly proceeded to extinguish the fire, and in about four hours the cargo and that portion of the ship on fire were completely submerged and the fire extinguished. It is further alleged that the "night was cold and the weather inclement; that by reason of exposure and loss of sleep the libellants were worn out with fatigue." That in order to extinguish the fire it was necessary to submerge the cargo, and also, in order to recover the ship and cargo from the submersion, it was necessary to take out from the ship the water that had been thus put in; and that libellants did this the next day. The master of the ship admits the extinguishing of the fire, and the necessity of it; but denies that there was any necessity for libellants' labor in pumping out the ship, and that they did not, and could not, completely do so. The master further insists that the libellants are not entitled to salvage, because they were the firemen of the city, and as such did no more than their duty. It seems that one of the libellants was the chief engineer of the fire department, and receives a salary as such; that the other libellant was foreman of one of the companies; and that those employed to keep the horses, are constantly on the watch, so as to take the engines to fires upon hearing the alarm bells, and also that the engineers in charge of the engines, have salaries from the city as such employees; and that the libellants, as well as most of the others engaged, were dressed in firemen's uniform. There was much more testimony, some of which will be referred to. In fact, two entire days were consumed in hearing the evidence. The libellants introduced witnesses to prove that the ship was abandoned and derelict. But in what manner a ship fastened to the wharf of a city, and receiving her cargo, even if her

[1] [Reprinted from 3 Cent. Law J. 419. by permission.]

[2] [Affirmed in Case No. 3,592.]

officers and crew should be absent from her, can be said to be derelict, it is difficult to understand, unless we mean by the word what is meant if a storehouse or bank should be found in a similar condition.

The first point raised by the pleading denies the ability of libellants to maintain this suit. It is and must be admitted by all parties that this court cannot entertain jurisdiction unless it is a case of salvage, which is the first question for consideration. "'Salvage' means the compensation which is earned by persons who voluntarily assist in saving a ship or cargo from peril." 1 Pars. Mar. Law, art. 595. "Salvage in admiralty, and generally in the law merchant, is the compensation earned by persons who voluntarily assist in saving a ship or cargo from a maritime peril." Appl. Enc. "The relief of property from an impending peril of the sea by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage." 1 Curt. 355 [Hennessey v. The Versailles, Case No. 6,365]. "This definition quoted and adopted in" 1 Cliff. 216 [Adams v. The Island City, Case No. 55]. "The salvage services must be performed by persons not bound by their legal duty to render them." 2 Pars. Mar. Law, 599. "Courts of admiralty will not permit the performance of a public duty to be turned into a traffic or profit." [Post v. Jones] 19 How. [60 U. S.] 160. The foregoing quotations taken from authorities that we are bound to respect, though somewhat different in verbiage, yet concur in one point. Hence a person engaged on board a ship, whether as common seaman, pilot, mate or captain, or in any other capacity, cannot receive salvage, because whatever each and all may do in saving a ship, it is simply doing their duty. Not only so, but "in all cases of wreck or loss of vessel, proof that any seaman did not exert himself to the utmost to save the vessel, cargo and stores, would bar his claim to wages." Rev. St. § 4525; 1 Pars. Mar. Law, 599. But it is not only to the officers and crew of a ship in peril that these remarks are applicable, but all others whose duty, whether of a public or private nature, requires their action. Accordingly when the sloop-of-war Plymouth, on the 30th of September, 1846, fell in with the wreck of the Josephine on the high seas, some five hundred miles from the port of New York, drifting about at the mercy of the waves, entirely abandoned by her crew, derelict and partly plundered, and after considerable exertion by the officers and crew of the Plymouth, the Josephine was taken to New York and libelled for salvage, the claimants of the Josephine admitted the facts set forth in the libel, but insisted that the Plymouth in rendering service to the Josephine was acting under instructions from the government of the United States to render relief freely and promptly to American vessels in distress. Judge Nelson said: "Ordinary service in rescuing American vessels in distress, requiring no great hardship or peril on the part of the officers or crew, would seem to fall directly within the line of the general duty enjoined by the special instructions of the government on the subject." 3 Blatchf. 328 [U. S. v. Collier, Case No. 14,833]. The same principle of law applies in this case that is applicable in similar cases in daily transactions. A watchman stationed in a dwelling, hotel, bank, factory, or any other place, to guard the building against fire or robbers, and employed for that purpose, could not legally claim extra pay, should it be made to appear that the building would have been burned or robbed if he had not prevented it by his presence and exertion. I stated to the able counsel after hearing the pleadings read, and before any testimony was introduced, that it seemed to me that the only questions were, whether the libellants were firemen, and if so, whether it was their duty as such firemen to extinguish the fire; and I am still of that opinion. Of the facts that one of the libellants was the chief engineer in the fire department, and as such received a salary from the city, and had entire command of the fire brigade, and that the other libellant was foreman of one of the companies; that the engines used in putting out the fire were the property of the city, and were conveyed to this and all other fires at the expense of the city, and supplied by fuel and a competent engineer at the expense of the city, there can be no doubt. While libellants admit this, they insist that there is no law or ordinance of the city requiring of them that they should extinguish this or any other fire, and that all their acts are voluntary, and, though based upon a moral, yet not upon a legal, obligation.

This brings us to the charter of the city and the ordinances of the city council. The portions of the charter to which I refer are as follows:

Art. 2, § 1: That the limits of said city shall embrace so much of the island of Galveston, from the point thereof on the east to Fifty-sixth, or to include the league and labor of land known as the Menard grant; provided that said league and labor shall extend beyond Fifty-Sixth street; thence to include Galveston bay and Pelican island, and one mile north thereof, so as to extend the police authority and jurisdiction, inclusive of Pelican island, over all the area and territory aforesaid.

Art. 3, § 1: The city council shall procure fire engines and other apparatus for the extinguishment of fires, and have control thereof, and provide engine-houses for keeping and preserving the same; and shall have power to organize fire, hook and ladder, hose and axe companies, and a fire brigade; and the companies so organized with such assistant engineers as may be provided for, and the chief engineer, shall constitute the fire department of the city. Each company shall

have the right to elect its own members and officers. The engineer shall be chosen in such manner as said department may determine, subject to the approval of the city council, who shall define the duties of said officers, and pass such ordinances as they may deem proper for the interest and welfare of said department, and to contribute to the efficiency thereof. All officers so elected and approved shall be commissioned by the mayor; and the said companies, officers and members, shall observe and be governed by the ordinances of said city relating to said fire department. Said companies shall have power to adopt their own constitution and by-laws, not inconsistent with the provisions of this act and the ordinances of said city, and said department shall take the care and management of the engines, and other implements and apparatus, provided and used for the extinguishment of fires; and their powers and duties shall be prescribed and defined by the city council.

Art. 5, § 1: Every person actively serving as a fireman, or who shall have so served as a fireman in the city for a continuous term of seven years, shall be exempted from all military duty, excepting in cases of insurrection or invasion. A certificate of the mayor, under the city seal, shall be evidence of such exemption. The engineer and assistant engineers, and members of hook and ladder, hose and axe companies, fire brigade and fire wardens, shall be deemed firemen of this city within the meaning of this section.

The ordinances of the city provide: "An alarm of fire shall be given by ringing two or more strokes per second for the space of a minute or more on the market bell, or any church or hotel bell, in the city of Galveston, or any steamboat bell in the harbor, or the alarm bells in each ward. The fire department of the city of Galveston shall consist of the officers and members of the fire engine and hook and ladder companies now organized in this city, and of such other companies as may be hereafter organized and admitted to the fire department, under the regulations hereinafter provided. The officers of the fire department shall consist of one chief engineer, and first assistant engineer and one third assistant engineer. The number of active members, including officers, belonging to each company, shall not be less than twenty-five men, each of whom shall be duly reported to, and commissioned by the mayor; provided, that each company shall have the right, at any time, as a reward for long service or other merits, to place upon a roll of retired or honorary members any member of said company whose name shall not thereafter be counted on the roll of active members, but who shall be entitled to the benefits of membership, without compulsory service or assessment; and provided, that this section shall not conflict with the number of men allowed by the state legislature to chartered companies. In case of a fire or other assembling of the department, the chief engineer shall assume control, and be obeyed in all things pertaining thereto. It shall be the duty of the chief engineer, or senior assistant engineer, in command at fires, to establish a post of observation, to be designated in day time by a red flag, and at night by a red lantern, at which post he shall remain during the progress of the fire, and direct the operations of the department, except when his presence at some other portion of the field is temporarily indispensable."

It is not to be questioned that a ship at any of the wharves of Galveston is within the chartered limits of the city. When the charter granted to the city provides that "the city council shall procure fire engines and other apparatus for the extinguishment of fires," it speaks not in a permissive sense, but in an imperative manner. It does not use the word "may," but "shall." When it speaks of the "extinguishment of fires," it refers to those fires that require engines for their extinguishment, and uses the word "fire" with no reference to its locality. The only boundary line to the fire engines is the boundary of the city, and accessibility. When the city accepted the charter, it accepted it with its requirements; and, when the firemen became such, they also accepted the position as firemen set forth in the charter, with such further conditions as the city council might prescribe. When the ordinances provide for the "assembling of the department in case of a fire, and for the chief engineer to assume control," they virtually require such "assembling" in case of a fire. When the alarm bell rings, whether it be the "market bell." any church or hotel bell, or "any steamboat bell in the harbor," the firemen are not permitted either by the charter or ordinances, or their own honest impulses, to inquire what, but where, the fire is. The very instant the alarm is sounded they

"Skelpit on thro' dub an' mire,
Despising wind an' rain an' fire."

No mercenary motive influences them. Like the Howard Association, the Sisters of Charity, and similar societies, guilds and institutions, scattered over this city,—the more the better,—they desire no other temporal reward than the consciousness of doing good. In thus doing, the service performed, in one sense, is voluntary. But it is voluntary performance in the strict line of their duty. When the crew of a government ship saves an American ship in distress, it is not done contrary to the "voluntas" or will of the sailors; but since the act is done in accordance with their legal duty—that duty which is assumed when they enter the United States service—it is not in a technical sense voluntary, but required, service. When the libellants in this case assumed to act as officers in command of the firemen and fire engines of the city, in doing what the charter of the city says shall be done, they are estopped from denying they are such officers in

the line of duty as prescribed by the charter.

There is another view of the case. Among the quotations from the ordinances hereinbefore stated, there is a distinction between honorary members and active members. The honorary members can be members of the company "without compulsory service." This is a virtual declaration that the firemen's service is not voluntary in a legal sense. But I do not base the decision on this ground; but on the broad principle already stated—that the charter of the city requires and commands the city to procure these fire engines and "have the control thereof." The libellants cannot have control of these engines except as officers of the city. As officers of the city, they used these engines to extinguish this fire, and were paid for their services, and not in their individual capacity; and as such officers can they sue, if at all, and not as individuals. From the fact that there has been an unusually large number of disinterested spectators in attendance upon the trial of this case, it is to be inferred that the case is one of unusual interest. It may be proper, therefore, for me to state that, had it appeared to have been a case of salvage, the libellants would have been entitled to a very small compensation. It is not one of those cases where danger stood threatening on all sides, and where peril of both salvors and their ships used in rescuing property from danger was imminent, which is, in most cases of salvage, a basis for reward. In many cases of salvage the same danger threatens the rescuers that visited the rescued. The only way of comparing such cases with the case before the court is by contrasting them, which we can all do in imagination. It is true, that the libellants allege that the night was cold; but the self-registering thermometer that we all have in our gardens, being the most delicate vegetation, tells us that there has not been a cold day this winter. In fact, simply leading the hose from the engines on the wharf to the ship was the principal labor of the firemen. The engines, under the paid superintendence of the paid engineers, did the work.

Before disposing of this case, I think it advisable to state certain principles by which admiralty courts are governed. Judge Hopkinson says: "We must not teach a salvor that he may stand ready to devour what the ocean may spare; he must not be permitted to believe that he brings in a prize of war and not a friend in distress." Decided in 1829 in Hand v. The Elvira [Case No. 6,015]. Treading on the heels of this decision, both as to time and matter, in 1831, in the case of The Nestor [Id. 10,126], Judge Story says: "No system of jurisprudence purporting to be founded upon moral or religious, or even rational principles, could for a moment tolerate the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit, which would outrage human feelings and disgrace human justice. 1 Sumn. 210 [The Emulous, Case No. 4,480]." In 1856 the supreme court of the United States, in the case of Post v. Jones [19 How. (60 U. S.) 150], referred to this case of 1 Sumn. 210 [supra], and quoted the same approvingly, and also quoted an English case decided by one of the most celebrated of English judges, laying down as the basis of reward for salvage services: 1st. Danger to property. 2nd. Value. 3rd. Risk of life. 4th. Skill. 5th. Labor. 6th. Duration of service. Tested by these principles, there is little doubt but that a voluntary donation by the underwriters and others interested in the ship and cargo to the firemen, would have far exceeded in value what this court would decree, had the fire been subdued by parties in a private capacity, and owners of the engines used. But as it appears that the fire was extinguished by the machinery belonging to the city, operated by men in the employ of the city, and that they were bound by its charter to do this, the libel is dismissed.

Case No. 3,592.

DAVEY et al. v. The MARY FROST.

[2 Woods, 306.][1]

Circuit Court, E. D. Texas. May Term, 1876.[2]

SALVAGE SERVICES BY CITY FIREMEN.

The extinguishment of a fire in a ship lying at the wharf of a city, by its fire department, does not entitle the firemen to salvage, even though there is no city ordinance requiring them to extinguish fires.

[Cited in The Cherokee, 31 Fed. 170; Bowers v. The European, 44 Fed. 487; The Roanoke, 46 Fed. 300; Firemen's Charitable Ass'n v. Ross, 60 Fed. 459.]

[Compare The Huntsville, Case No. 6,916.]

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

This was an attempt of firemen to recover salvage of a vessel for extinguishing a fire which broke out in her while lying at the wharf of Galveston.

Geo. Flournoy and J. Z. H. Scott, for libellants, cited Spencer v. The Ch. Avery [Case No. 13,232]; The Tees, Lush. 505; 2 Pars. Shipp. & Adm. 277; Stevens v. S. W. Downs [Case No. 13,411]; Le Tigre [Id. 8,281],—and claimed that as there was no law or ordinance making it the duty of firemen to put out fires, they were entitled to salvage.

T. N. Waul, for claimants.

BRADLEY, Circuit Justice. This is a libel for salvage. The libellants state that on the

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

[2] [Affirming Case No. 3,591.]

11th of January, 1876, the barkentine Mary Frost was moored at a wharf in Galveston taking in cargo, and already had on board and closely stowed in the hold about 800 bales of cotton; that about 9 o'clock in the evening an alarm of fire was sounded throughout the city and port, and in response thereto the libellants went immediately to the wharf to which the vessel was moored and discovered flames and smoke issuing from her hold and cabin, and that she and her cargo were on fire; that the libellant Davey (who it appears was chief engineer of the fire department of the city of Galveston) called for the master of the vessel and asked him if he could manage the fire; that he answered he could not, and requested Davey to take control and save the vessel; that libellants and their assistants took control of the vessel, and, by means of fire engines and the assistance of firemen present and working under the direction of libellants, proceeded to extinguish the flames, and poured water into the vessel until her burning part sank and became submerged, and the fire became wholly extinct, and the vessel finally rested on the bottom; that the libellants and their assistants remained in charge for the purpose of raising the vessel again, and on the following day procured a steam tug and a barge with which they conveyed an engine alongside and pumped the water out of the vessel, and raised her. The libel goes on to state that the night was cold and that the libellants were subject to great labor and fatigue in saving the vessel. Wherefore they demand salvage. The answer of the master admits the fact of the fire, and the assistance given by the libellants in extinguishing it. He says, that he had obtained assistance from a vessel lying near, and, with a force pump, was keeping the fire in check, when Davey and others, wearing the uniform of the fire department, came to the wharf with fire engines and a company of firemen. He denies that he gave up the command of the ship to Davey, and says that Davey took no other charge than as an officer of the fire department; and that he and those assisting him represented themselves as firemen, and that they extinguished the fire by means of fire engines that belonged to the city of Galveston. He says that the depth of water was only thirteen feet, and that it was not necessary to submerge the vessel, and that she only settled in the water to her deck. He says that he did not need the assistance of any other persons than his crew to pump the water out of the ship on the following day, and that he was actually pumping it out with his own pumps when the libellants came on board and insisted upon pumping out the water; and that he informed them that their services were neither needed nor desired; but that they forcibly proceeded to pump out the water contrary to his express directions. He insists that the libellants belonged to the fire department of Galveston, and that in rendering the assistance they did, they were acting in the strict line of their duty, and are not entitled to any salvage. I have read the evidence, and find that the statements of the claimant are mainly true. Some of the libellants were not firemen; but all acted under the orders and directions of the chief engineer. There are always volunteer helpers at fires. It is an instinct of every good citizen to do all he can to suppress a fire. But the fact that some who were not enrolled in the service aided in putting out the fire does not detract from the truth of the general proposition, that the fire department extinguished this fire. The services of the department were not required on the second day in pumping out the ship; and they were expressly told so. But it seems that the idea of the salvage must have already possessed them, and that they insisted on pumping out the vessel.

I cannot regard this case as any other than the extinguishment of a fire in a ship lying at the wharf of Galveston by the aid of the fire department of that city. The question is, whether it is a case for salvage. In my opinion, it is not. The firemen were merely engaged in the line of their duty. They only did what it was their duty to do. If they did more, it was services that were not necessary, and not required, but expressly declined.

It is said, however, that there is no duty imposed on the fire department of Galveston at all; that there was once an ordinance declaring such duty, but it had been repealed. No duty imposed on a man who unites with a municipal organization, whose only object is to extinguish fires; who wears the uniform of the department; who is supplied with engines, and ladders, and hose, and horses and all the apparatus for extinguishing fires? Do the citizens of Galveston, who furnish this apparatus, understand that the firemen are subject to no duty? The idea is preposterous. Duty does not always arise from express commands It often arises from implied obligations quite as strong as those which are most clearly expressed. It needs no law nor ordinance to make it the duty of firemen to put out fires. Is there any express law that declares it to be the duty of a soldier to kill or capture his enemy in battle? His very profession makes it his duty. So does the profession of a fireman make it his duty to do his utmost to extinguish a fire anywhere in the city. The attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy. Are ships going to frequent a port where they are subject to salvage if they take fire and are aided in its suppression by the local fire department—the origin of the fire due, perhaps to a fire in the city itself? The city

authorities of Galveston did well to repudiate the claim in this case, as the reco.d shows they did; and it is to be hoped that the fire department will nct tarnish the luster which its noble sacrifices have justly earned for it, by repeating a demand of this kind. Libel dismissed.

Case No. 3,593.

The DAVID & CAROLINE.

[5 Blatchf. 266.][1]

Circuit Court, S. D. New York. Oct. Term, 1865.

SHIPPING—BREAKAGE—NEGLIGENT STOWAGE—EXCEPTIONS IN BILL OF LADING.

1. Where a carrier receives fire-clay retorts cased in straw, and not in a proper condition to be shipped with safety for any considerable voyage, he is bound to stow them with reference to their condition, if he chooses to receive them.

2. A memorandum at the foot of a bill of lading, "Not accountable for breakage," cannot excuse negligence and want of skill in stowage, whereby breakage occurs during the voyage.

[Cited in The Delhi, Case No. 3,770; Vaughan v. Six Hundred and Thirty Casks Sherry Wine, Id. 16,900.]

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

This was a libel in rem, filed in the district court, to recover damages for injury to a cargo of fire-clay retorts shipped from Antwerp to New York by the brig David & Caroline. The district court dismissed the libel, and the libellants appealed to this court.

Charles Edwards, for libellants.
Joseph H. Dukes, for claimant.

NELSON, Circuit Justice. The retorts in question are hollow ware, some 24 inches wide, a half circle, and flat at the bottom; external measure, from 28 to 36 inches; height, 20 inches; hollow part, 20 by 12 inches, and from 8 to 9 feet long; weighing from 1,500 to 1,800 pounds each; thickness of the ware, from 2½ to 3 inches.

It is insisted on the part of the libellants, that the damage, which was occasioned by the breaking of the retorts, is attributable to unskillful stowage, which is denied by the claimant. Some of the retorts were cased in wood, some in straps, and others in straw. This, it appears, is the usual way in which these articles are shipped. Most of the retorts broken were cased in straw, and were stowed across and resting upon two transverse beams in the hold of the vessel, the ends projecting over the beams some two feet. They were piled up, three or four tiers, one above the other, on the beams, without any support at the ends or middle, and, as is claimed, were broken by the weight. The preponderance of the proof is, that this was bad stowage, and occasioned the damage complained of. Indeed, the evidence is nearly all one way on this point. But, it is insisted by the claimant, that the retorts cased in straw were not in a proper state or condition to be shipped with safety for any considerable voyage; and that, if they had been cased in wood or strips, the damage, even stowed as they were, would not have occurred. But there are two answers to this objection—first, the carrier should not have received them in this condition, or, if he chose to do so, he should have seen to it that they were stowed with reference to the imperfect state of the covering—and, second, the proofs show that this is not an uncommon or unusual condition in which these articles are shipped.

It is further insisted, that the vessel encountered a severe storm in the course of her voyage, in which she was thrown upon her beam ends, and that the damage was occasioned by a peril of the sea. This would, doubtless, have been a good answer to the allegations of damage, were it not for the proofs of unskillful stowage. That sufficiently accounts for the breakage of the retorts, from the weight of the incumbent tiers, without proper dunnage, upon the transverse beams of the vessel.

It is, also, urged, that a memorandum at the foot of the bill of lading, as follows, "ship not accountable for leakage, breakage, and rust," exempts the carrier from responsibility. But, the answer is, that this cannot excuse negligence and want of skill in the stowage of the retorts.

I think that the court below erred, and that the decree must be reversed, and a decree be entered for the libellants, to recover their damages.

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

Case No. 3,594.

The DAVID E. WOLF.

[7 Int. Rev. Rec. 194.]

District Court, D. Massachusetts. 1867.

FORFEITURES—INTERCOURSE WITH INSURRECTIONARY STATES—CONTRABAND GOODS—CLEARANCE PAPERS—ESTOPPEL.

1. A vessel was chartered in November, 1862, for the purpose of carrying goods to Newbern, North Carolina. It being uncertain whether a permit could be obtained to go to Newbern, a license and a clearance were taken for Beaufort, with the alternative intent, on failure of obtaining a permit at Hatteras Inlet to proceed to Newbern, of landing the goods at Beaufort, and transporting them by rail to Newbern, their destination. The vessel sailed November 14, 1862, and when about two miles down the harbor of Boston was seized, and there were found on board, besides the cargo of ice and other merchandise, three barrels of spirits marked "cider vinegar." *Held*, that under the statute of July 13, 1861 [12 Stat. 257], forbidding all intercourse with the states and parts of states which the president should declare to be in a state of insurrection, and the proclamation of the president dated August 16th, 1861 [12 Stat. 1262], and the regulations of the treasury department established August 28, 1862, the claimants were not estopped by their license and

clearance from showing that the primary destination of the voyage was to Newbern, and that by the setting sail on the voyage which might end at Beaufort with contraband articles on board, the condition of the license was not broken, and the vessel and cargo not forfeited to the United States, although the claimant of the cargo knew the spirits were on board, and had been declared contraband by the secretary of the treasury.

W. A. Field, for libellants.
J. C. Dodge, for claimants.

LOWELL, District Judge. This libel of information, filed November 19, 1862, alleges a forfeiture of the schooner and her cargo for undertaking to carry goods from the state of Massachusetts to the state of North Carolina contrary to section 5, St. July 13, 1861 (12 Stat. 257). The schooner belonged to her master, John E. Dole, who chartered her to Addison, Gage & Co., of Boston, for a voyage to Newbern. The charterers were acting only as agents of one Aaron Gage, who was engaged in business at Newbern, but was present in Boston during most of the time that the schooner was loading, and fitted her with ice and other merchandise, most of which he owned. The quartermaster of the United States also shipped a considerable quantity of potatoes for our troops at Newbern. It being uncertain whether a permit could be obtained to go to Newbern, a license was taken for Beaufort, with the alternative intent, on failure of such permit, to land the goods at that port, and transport them by rail to their destination. The schooner sailed November 14, 1862, and had gone about two miles down the harbor of Boston when she was seized, and it was found that there were three barrels of ardent spirits on board, which were marked "cider vinegar," and so entered on the manifest. The evidence rendered it probable that neither the master nor the charterers were aware of the contents of the three barrels, but that Aaron Gage was aware of it, and was interested in the spirits, either as owner or as consignee. The vessel and cargo, except the spirits, were claimed and released on stipulation, and proceeded to Hatteras Inlet, where, after some delay, a permit was obtained, and the voyage ended at Newbern, as originally contemplated.

The statute of the 13th of July, 1861, forbids all intercourse between the states and parts of states which the president shall declare to be in a state of insurrection, and all other parts of the Union, and forfeits all goods proceeding from one to the other, together with the vessel conveying them; provided that the president may license such intercourse in such articles, etc., as he may consider to be for the public interest to be carried on under regulations to be prescribed by the secretary of the treasury. The president, by his proclamation of August 16, 1861 (12 Stat. 1262), declared several states, including North Carolina, excepting such parts as may from time to time be occupied and controlled by forces of the United States engaged in the dispersion of the insurgents, to be in a state of insurrection.

At the time of this voyage and seizure both Beaufort and Newbern were occupied and controlled by our forces, and had been so for some eight months, together with a considerable part of the surrounding country. The inhabitants of those towns were not enemies, and trading with them was not trading with the enemy. The Venice, 2 Wall. [(69 U. S.) 258]. They were within the exception of the proclamation, and therefore excepted from the prohibition of the statute, which conclusively adopts, in advance, as insurrectionary territory, whatever the proclamation may declare to be such. The libel should have negatived the exceptions of the proclamation, as applied to the particular part of North Carolina to which this vessel was proceeding. I have had occasion lately to examine this point of negative allegation in an indictment, and the rule is not different in such a case as this. It is that, when an exception is so far made a part of the description of the offence that the offence cannot be laid in the language of the statute without referring to the exception, the latter must be referred to and negatived. Such is this case. The proclamation does not say that North Carolina is and shall be considered in a state of insurrection, but that North Carolina, excepting such parts, etc., is and shall be so considered. There is, therefore, a fatal variance between the libel and the proofs, and the objection is one of substance, because, if there be a forfeiture here, it is by reason of a breach of treasury regulations, and not of the statute of July 13. But as the claimants, by their answer, assumed to meet the case of a trading to Beaufort, and no surprise or injury has resulted to them, an amendment might perhaps have been allowed, if moved for at the trial, and may be hereafter, possibly, on appeal; and I will therefore consider the case as it was tried and argued.

The primary destination was to Newbern, as everybody perfectly well knew, and there was no fraud intended or practised in taking the license to Beaufort; and, although the answer sets up a voyage to Beaufort, this was not intended as any concealment. Nor was any distinction known to the claimants, then or afterwards, between the two ports, until I suggested it in court. Under these circumstances, I do not hold the claimants estopped by their license or by their answer from showing the truth of the case in reply to an information which merely alleges a voyage to North Carolina, though, if the libellants amend hereafter, it may be well for the claimants to do so too.

At this time trade to Newbern was governed by regulations established August 28, 1862, by the secretary of the treasury, with the concurrence of the secretaries of war and of the navy, which were printed, and may be presumed to have been known to the traders,

and which provide, among other things, that no permit shall be granted to ship goods to states or parts of states heretofore declared to be in insurrection, or occupied by the military forces of the United States, excepting to persons residing or doing business there, of known loyalty (article 6); that application for a permit may be made to such authorized officer of the customs near the point of destination as may suit the convenience of the shipper (article 11); and that intoxicating drinks shall not be permitted to be shipped to territory occupied by our forces, except upon the written request of the commander of the department (article 8). They also require a full and true description to be given of the merchandise for which a permit is asked (articles 4 and 5), and declare the penalty of forfeiture for any violation of the regulations, or false statement made or deceptive practice in obtaining a permit (article 5).

The fair result of these regulations is that the projectors of this voyage, considered as a voyage to Newbern only, were not bound to procure any permit at Boston, but might properly wait, as they in fact did, at Hatteras Inlet, for permission to go to Newbern. They had prosecuted such a voyage before with the knowledge and by the advice of the officers of the government, and, for aught I see, with entire regularity. Whether they had ardent spirits on board or not is immaterial, because it was at Hatteras Inlet that they were to ask for a permit and make an exhibit of the goods for which they desired it; and a fraud or concealment on that application would be visited with the appropriate penalty. They had no dealings here, and were not bound to have any, relating to their voyage to Newbern; but took here a clearance for Beaufort as an alternative, and in obtaining this clearance the false statement was made. The port of Beaufort was subject to quite another set of rules. That port, together with New Orleans and Port Royal, had been opened by the president's proclamation of May 12, 1862 (12 Stat. 1263), excepting as to contraband of war, and subject to the regulations of the secretary of the treasury annexed to the proclamation, which prescribe that a license must be obtained from his department in each case. In his orders to collectors, dated May 16 and May 23, 1862, he gives them power to grant these licenses in the form which was followed in this case, and orders them to consider ardent spirits contraband of war. All the persons connected with this vessel knew that spirits were not permitted to be shipped, and that they were commonly called contraband by the officers and others. The license was expressed to be on condition that the vessel should carry no persons, property or information, contraband of war, either to or from the said port, and it contained a statement that a violation of any of its conditions would involve the condemnation and forfeiture of the vessel and cargo. The government contend that by setting sail on this voyage, which might end at Beaufort, with contraband articles on board, the condition was broken and the forfeiture incurred. I am of opinion, however, that in constructing so stringent a penal clause it is more just and more consonant to sound principle to take the liberal view contended for by the claimants, that the breach would not be complete until such goods had actually been conveyed to the port; this is the ordinary meaning of the language itself, according to which a mere setting sail for a port is not a conveying goods to it. And it is confirmed by the published order annexed to and making a part of the proclamation which requires the collector at the port of destination to see to it that no violation of the license has been committed. I cannot say that a person who merely intended to go to Beaufort has carried contraband goods to Beaufort, any more than, in any other revenue case, I could hold that a person who left Europe, intending to smuggle goods into this port, had smuggled them as soon as he began his voyage. Still less could I hold this when the destination to Beaufort was only contingent. Decree for claimants.

Case No. 3,595.

The DAVID FAUST.

[1 Ben. 183.][1]

District Court, S. D. New York. May Term, 1867.

SEAMEN'S WAGES — RIGHT OF MINOR TO SUE IN HIS OWN NAME—DISCHARGE OF SEAMAN—TIME TO COMMENCE SUIT FOR WAGES.

1. Where a minor whose parents were both dead, and who had no guardian, and had for five years been providing for himself and making his own contracts, shipped on a vessel for a voyage which was performed, and on her return left the vessel with the assent of the master before the cargo was discharged, and before the ten days after such discharge was completed commenced proceedings to recover his wages, by taking out a summons before a United States commissioner, on the return of which no one appeared, and the commissioner gave a certificate, and thereupon the libel was filed and process issued, whereupon the owners of the vessel moved to dismiss the libel on the ground that the libellant being a minor could not sue, but must bring his suit by guardian or next friend, and that the suit was prematurely brought, the ten days after the discharge of the vessel not having expired, *held*, that admiralty courts allow a minor to recover in his own name wages earned in sea service, when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive them.

[Cited in The Melissa, Case No. 9,400; The Hattie Low, 14 Fed. 880. Followed in The Topsy, 44 Fed. 634.]

2. A suit in admiralty brought to recover wages before the time allowed in the sixth section of the act of 1790 [1 Stat. 133] has elapsed, is prematurely brought, and will be dismissed.

3. The fact of the libellant's discharge from the vessel need not be proved by direct evidence,

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

but might be inferred from circumstances. The circumstances in this case showed that the libellant was discharged from the vessel.

[Cited in The Frank C. Barker, 19 Fed. 333.]

4. Where a seaman is discharged from a vessel, the discharge terminates the contract, and the provision for ten days' delay after the delivery of the cargo is released, and the seaman may proceed at once for his wages. The libellant's proceedings were, therefore, regular.

[Cited in Walsh v. The Louisiana, 4 Fed. 752.]

This case came up on a motion by the claimants of the schooner David Faust, to dismiss a libel against her, which was filed by David Bailey, to recover wages due him for services on board of her on a voyage from New York to Galveston and back. The motion was made and opposed on affidavits, the facts of which sufficiently appear in the opinion of the court.

Beebe, Dean & Donohue, for libellant.
A. J. Heath, for claimants.

BLATCHFORD, District Judge. This is a motion by the claimants to dismiss the libel, which is filed for seaman's wages, on the following grounds: (1) That the libellant is a minor, incapable of suing in this court; (2) that the suit, if maintainable, must be brought in the name of his guardian or next friend; (3) that the libel was filed before the vessel had completed the discharge of her cargo, and before a reasonable time therefor had elapsed.

The first and second objections are not well taken. Admiralty courts allow a minor to recover in his own name wages earned in sea service when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive his earnings. Wicks v. Ellis [Case No. 17,614]; Larra v. The Henry Buck [Id. 8,094]; before Judge Betts, March, 1847. In the present case, it appears that the libellant is a native of Peru; that his parents have both of them been dead for five years; that he has no guardian, next friend or tutor, who has any care or control over him; that for the last five years he has been sailing as a seafaring man, and taking care of and providing for himself, and has during all that time made his own contracts and received his own money, and provided for himself; and that he personally made the contract on which the libel is founded. These facts, which are sworn to by the libellant, are not controverted. He is shown to be eighteen years of age, and, as he has been thus accustomed to transact business for himself, he is not presumed to require the protection of a next friend or guardian to manage the suit.

The objection that the libel was prematurely filed, is founded on the sixth section of the act of July 20, 1790 (1 Stat. 133). That section provides, that "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages," a summons may issue against the master to appear and show cause why process should not issue against the vessel according to the course of admiralty courts, to answer for the wages. If the master does not appear, or appearing does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, then, on a certificate of the officer issuing the summons that there is sufficient cause of complaint whereon to found admiralty process, the clerk is directed to issue process against the vessel, and the suit proceeds and judgment is given according to the course of admiralty courts in such cases. The same section provides that nothing contained in it shall prevent a seaman from maintaining an action at common law for the recovery of his wages, or from having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast. The present case does not fall within the provision for immediate process just recited. The libel avers that the libellant shipped in December, 1866, at New York, for a voyage to Galveston, Texas, and back to New York, as a mariner, at $35 a month, and signed shipping articles; that his service commenced on the 13th of December, 1866; that the vessel, with the libellant on board, went to Galveston and back to New York; that the libellant was discharged from the vessel on the 2d of May, 1867; that he performed his duty; and that a balance of wages of $122.16 is due to him, payment of which is refused by the master. The papers on this motion show that on the 9th of May, 1867, a United States commissioner issued a summons to the master and owners of the vessel requiring them to appear before him on the next day and show cause why process of attachment should not issue from this court against the vessel, according to the course of admiralty courts, to answer the claim of the libellant for mariner's wages. The summons was served by delivering it on the day it was issued to the chief mate on board of the vessel. On the return of the summons and proof of its service, no person appeared for the vessel, and the commissioner thereupon certified that there was sufficient cause of complaint whereon to found admiralty process in the matter. The libel was filed on the 10th of May, and process was issued upon it and served on the same day.

The affidavits on the part of the claimants show, that the vessel began to discharge her

cargo on the 3d of May, and finished on the 11th, and that the discharge was made with all reasonable dispatch. In addition to the averment in the libel as to the discharge of the libellant, he swears, in his affidavit, on this motion, that he was discharged from the vessel before he left her. The master swears that the libellant left the vessel voluntarily on the 2d of May, without being discharged, but with the assent of him, the master.

The construction uniformly given to the sixth section of the act of 1790 has been that a suit in admiralty, commenced before the time limited by that section, is prematurely brought, and will be dismissed. The Martha [Case No. 9,144]. In the present case, it is insisted by the libellant, that the suit was not prematurely brought, for the reason that the libellant was discharged from the vessel, and it is contended that the provision of the statute requiring ten days to elapse after the discharge of the cargo, does not apply to a case where the seaman is discharged from the vessel. The first question, therefore, to be decided is, whether the libellant was discharged. He swears that he was. The master swears that he was not. But the master also swears that the libellant voluntarily left the vessel with the assent of him, the master. The mate merely swears that the libellant left the vessel immediately on her arrival back at New York. On these facts, certainly, the libellant did not leave the vessel without permission, and there is nothing in the affidavits on the part of the claimants to show that the libellant when he so left had not a right to regard himself as discharged. It is not pretended that the period of the libellant's absence was limited by the master, or that the master notified him to return when he left, or expected him to return, or made any provision on board of the vessel or elsewhere for his support until his wages should be payable, as was clearly the duty of the master on the theory that he was not discharged but merely absent on leave. The fact of a discharge need not be proved by direct evidence, but may be inferred from circumstances, and I must hold in this case that the libellant was discharged from the vessel.

It has always been held in this court, that where a seaman is discharged from a vessel after her arrival, either arbitrarily or with his assent, the discharge terminates the contract, and the provision for ten days' delay after the delivery of the cargo is released and the seaman may proceed at once for his wages. Betts' Adm. 61; The Cadmus [Case No. 2,280]. The ship master or ship owner may waive the statutory provision in regard to the ten days' delay, and is held to have done so in case he discharges a seaman without paying him his wages.

The proceedings on the part of the libellant were therefore regular, and the motion must be denied.

Case No. 3,596.

The DAVID MORRIS.

[1 Brown, Adm. 273.][1]

District Court, E. D. Michigan. Feb. Term, 1871.

COLLISION IN ATTEMPTING TO PASS A RAFT—COSTS.

1. A tug, having five vessels in tow, while running down a narrow, crooked channel, at a speed, with the current, of about seven miles an hour, overtook and attempted to pass a raft of timber in tow, moving at the rate of four and a half miles an hour, and occupying about one-half the width of the channel. One of the vessels grounded upon the port bank, and the one next astern ran into and injured her: *Held*, that the tug was in fault (1) for not sooner discovering the raft, and that it was in motion; (2) for attempting to pass it in a narrow channel.

2. The colliding vessel, not being affirmatively shown to have been negligent, cannot be held in fault.

3. Where the libellant claimed $70, and recovered but 30 cents, and the respondents claimed a larger amount of damages than they were able to prove: *Held*, that neither party should recover costs.

Libel for towing. The libel alleged the towing of the bark by libellant's tug, the I. U. Masters, from Lake Huron to Lake Erie, August 30th, 1868, and claimed seventy dollars for that service. The answer of Rufus K. Winslow and others, owners and claimants of the bark, admitted the towing as alleged, but denied that the same was worth the amount claimed, or that there was anything due libellants on account thereof, and claimed a recoupment to the full amount of the value of the service on account of damages alleged to have been suffered by the bark in consequence of unskillful towing. The facts as deduced from the pleadings and evidence, were as follows: The contract as to price was at the usual rate, which was seventy dollars. There were five vessels in the tow, the bark David Morris being the fourth, and the brig Standard the fifth. A raft of square timber, also passing down, in tow of the tug Clark, was overtaken in the narrow channel across the St. Clair flats, in the twilight of the morning of August 30th, 1868. The channel at this point is about three hundred feet wide. The raft was six to eight hundred feet long, and one to two hundred feet wide, and was passing down the channel nearest its starboard bank, but the tail of it was swinging slowly to port. The tug Masters attempted to pass with her tow on the port hand side of the raft. The first two vessels of the tow went clear; but the third being the one next ahead of the bark, fetched up on the port bank of the channel. This made it necessary for the bark to starboard her helm, and fetch up also on the port bank, in order to avoid a collision with the vessel forward of her, which she did. The bark having thus fetched up, the vessel behind her,

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

the Standard, ran into her, hitting her in the stern, and causing damages, to repair which cost the owners of the bark $69.70. The tugs and their tows were moving with the current, which, at that point, was about two and a half miles per hour. The tug Clark, with the raft, was moving through the water about two miles per hour, making her total speed about four and a half miles per hour. The tug Masters, with her tow, was moving through the water about four and a half or five miles per hour, making her total speed about seven or seven and a half miles per hour. The tug Clark was seen by the mate of the Masters when at least two miles distant, and was then taken by him to be a tug aground. It was not ascertained on board the Masters that the Clark was moving and what she had in tow until within about half a mile of her.

H. B. Brown, for libellant.

Wm. A. Moore, for respondents.

LONGYEAR, District Judge. The question is, was the tug in fault for attempting to pass the tug and raft as she did; and were the collision and damage caused thereby? Here was a narrow, crooked channel, the banks of which were submerged on each side by a broad expanse of shoal water, and difficult of navigation even in broad daylight, and navigated safely at any time only by the aid of stakes and other guides. The tug was approaching this channel, with its large tow of five vessels, the entire length of which was not far from 1,800 feet, and moving with the current at a speed of between seven and eight miles an hour. Ahead of her was another tug, just entering the channel with a raft of timber of large dimensions, filling nearly or quite one-half the channel. Without slackening her speed, or waiting for the tug and raft to pass through the channel and into the open water beyond, where there was plenty of room to pass, she overtook the latter, and, at the very narrowest and most difficult part of the channel, attempted to pass, and the catastrophe happened. Surely some good excuse must be made to appear, in order to hold the tug faultless under this state of facts.

It is claimed, in exoneration of the tug: 1. That, when the raft was first seen, the distance was so short that it was impossible for the tug to check down and reduce her speed, so as to allow the raft to pass through and out of the channel ahead of her, without great risk, if not the certainty of the vessels of the tow being thereby caused to run into each other, and that therefore such an emergency existed as demanded a prompt decision of the officer in charge of the tug, and that, although he might not have decided upon the course which may now appear to have been the best, yet, if he was not guilty of negligence in coming to the conclusion he did, there is no liability. The court recognizes this doctrine as a sound one when the emergency is sudden, and the best way out of it is really a question of doubt. But in such a case the vessel charged with fault must be in no way responsible for the emergency. In this case the tug Clark, which had the raft in tow, was seen from the tug Masters long before the emergency happened; and in addition to this the evidence is clear to my mind that, with a proper lookout upon the Masters, the raft could and would have been seen from her long before it is stated by her officers to have been seen. When the tug Clark was first seen from the Masters, it was the duty of those in charge of the latter to keep a close watch upon the movements of the former, and ascertain, at the earliest possible moment, whether she was aground, as at first suspected, or not, and if in motion, whether she had anything and what in tow. The Clark was moving at the rate of four and a half miles per hour; and in the relative position of the two to each other, and to the bends of the river, she must have been moving diagonally across the bows of the Masters, so that, by the exercise of ordinary diligence, it could have been discovered almost immediately that the Clark was in motion, and that she was moving towards the entrance to the narrow channel. The raft had upon it a house some eight or ten feet high, built of boards, for sheltering the men. This was also in motion, of course, and with the commonest care and attention would have been seen almost, if not quite, as soon as the tug which had it in tow. These rafts, with houses on them, are not unusual on these waters, but, on the contrary, are of very common occurrence, and hence there was no difficulty in determining at once what it was the Clark had in tow. This would have afforded ample time for the speed of the Masters to have been checked down to that of the tug and raft, so as to have allowed the latter to pass through the channel first, without any possible danger to the vessels in tow of the Masters. The time and distance would have been so ample as to leave no room for doubt as to the duty of the officer in charge of the Masters to so check her speed. Therefore, if the Masters did find herself in the emergency claimed, in which there was reasonable doubt as to which was her duty, whether to check her speed or go ahead, she is herself responsible for the emergency, and can, of course, claim nothing on account of it.

In this view of the case it is unnecessary to determine whether the emergency claimed really existed or not. But I think if we were to inquire into it we should find it difficult to determine it in favor of the tug. According to the testimony of those on board the tug, the raft was seen when at least half a mile ahead. Some of the witnesses state it less than that, but I think, taking libellant's testimony altogether, that is about the proof. The relative speed of the tug and tow

to that of the tug and raft was about three miles per hour, not to exceed that. The wind was blowing a stiff breeze nearly ahead. The expert testimony is clear to my mind, that in these conditions there would have been no difficulty whatever in checking the speed of the tug and tow down to that of the tug and raft, in ample time, without the least danger to the vessels of the tow, and that when so checked down the speed would still have been ample for steerage way. That it was the duty of the officer in charge of the tug so to check down, if he could with safety, there is no question; that he could have done so with safety, is so evident, not only from the expert testimony but from the nature of the case, that I think there was hardly room for such a doubt in the mind of a competent officer as the court ought to recognize. At all events, the danger of undertaking to pass the raft with such a tow was so much greater than that of attempting to check down, that the tug ought certainly to have made the attempt to do the latter.

2. The second position taken in exoneration of the tug is that the collision was caused solely by the fault of the Standard, in not either starboarding and fetching up also on the bank, or porting and running out into the stream in time, so as by the one manoeuvre or the other to go clear of the bark after she had fetched up, and that therefore whether the tug was in fault or not, for attempting to pass the raft, she is not liable for the damages done by the collision. The difficulty in maintaining this position is the want of proof of fault on the part of the Standard. The tug being in fault for attempting to pass the raft, as already found, the burden was upon her to show that the collision and damage were not caused thereby. The proof shows that the David Morris fetched up about abreast of the tail end of the raft, with insufficient room between for the Standard to pass, rendering it inevitable that if the latter had ported and passed to the starboard of the former, she must have collided with the raft. Hence her only course was to starboard and fetch up on the bank if possible. There is no proof that she did not attempt to do this, or that her failure to do it was on account of an unskillful attempt. Neither does it appear what her condition or situation was when the emergency arose, so as to be able to judge whether she might have effected the manoeuvre in time. It must be remembered that the tug is responsible for the emergency, and that the burden is upon her to show affirmatively and not by inference merely, that the Standard might have avoided the bark. Not having done so, she is not exonerated.

I hold therefore, that the collision and damage to the bark were caused by the fault of the tug in attempting to pass the raft, and that the owners of the bark are entitled to have the expenses incurred for repairs thereby made necessary deducted from the amount due the tug for towage, and that the tug is entitled to a decree for the balance. The right of libellant to be paid for the towage, and the right of claimants to have deducted therefrom expenses for repairs arose at the same time, and therefore interest can be computed only on the balance.

The proof shows that the price of the towage was	$70 00
Expenses of repairs	69 70
Balance due libellant	30

A question was raised as to the costs, and it is contended on behalf of respondents that, under all the circumstances of this case, they should recover costs. As a general rule the allowance of costs in admiralty is the same as at common law, that is, the prevailing party shall recover costs. But in the exercise of its equitable power, admiralty may hold each party to pay his own costs, or even the prevailing party to pay costs. 1 Pars. Shipp. & Adm. 544, and note 2. In this case the real contest has been as to the liability of the tug for the collision and the consequent damage to the bark. Upon that issue the libellant has failed, and, instead of the respectable sum claimed by him, he recovers a merely nominal amount. I think, under these circumstances, it would be inequitable to require the respondents to pay his costs. On the other hand the respondents claimed a larger amount for expenses of repairs than they were entitled to. It may have been, and probably was, by mistake, but this does not help them any on the question here presented. I think they are not entitled to costs. Equity and fair even-handed justice in this case require that each party should be left to pay his own costs. The Boston [Case No. 1,672]; The Nimrod, 24 Eng. Law & Eq. 589; The Cynthia Ann, Id. 579. Decree for libellant.

Case No. 3,597.

The DAVID PRATT.

[1 Ware (495) 509.][1]

District Court, D. Maine. April 10, 1839.

ADMIRALTY PRACTICE—FAILURE TO PLEAD—IGNORANCE AN EXCUSE — INTERROGATORIES — EVIDENCE—SEAMEN'S WAGES—RELEASE—ADVANCES CHARGED ON SHIPPING ARTICLES.

1. Before the defendant can be heard in his defence or introduce evidence in the cause, he must appear and contest the suit either by exceptions to the libel, or by answering it. If he does neither, the court will hear and adjudge the cause ex parte upon the evidence offered by the libellant.

2. But when it appears the defendant has neglected to put in an answer through ignorance of the practice of the court, and is at the time of the hearing absent, the court is not precluded from receiving any evidence which his counsel may offer as amicus curiae.

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

3. Each party in the admiralty has a right to require the personal answers of the other under oath to any interrogatories touching the matter in issue.

[Cited in Jay v. Almy, Case No. 7,236; The Edwin Baxter, 32 Fed. 296.]

4. If the defendant refuses to answer any interrogatory propounded by order of the court, the charge in the libel to which the interrogatory relates will be taken pro confesso. The answers to such special interrogatories are evidence in the cause, as well in favor as against the party answering.

5. An acquittance and release under seal, executed by a seaman on the payment of his wages, does not in the admiralty operate as an estoppel, but is treated as a common receipt. It is prima facie, but not conclusive proof of payment.

[Applied in Leak v. Isaacson, Case No. 8,160. Cited in Dray v. The Rajah, Id. 11,538; Savin v. The Juno, Id. 12,390.]

6. The charges made on the shipping papers of advances to the seamen in the course of the voyage are not evidence until verified by the suppletory oath of the master.

[7. Cited in Jordan v. Williams, Case No. 7,528, to the point tnat a master cannot lawfully imprison a seaman on shore unless he be unable to restrain him on board.]

This case was formerly before the court and was argued on an exception to the libel in the nature of a demurrer. In its original form the libel united a cause of damage for an assault and battery and imprisonment, with a cause of substraction of wages. The ground of exception was that the libel was multifarious, embracing distinct and independent causes of action, which could not be united in the same proceedings. The exception was allowed, and the libel was amended by striking out the allegation founded on the tort [Pratt v. Thomas, Case No. 11,377], and it now stands as a simple suit for wages. No answer was made to the amended libel, but on motion of the proctor, who appeared for the defendant at the former hearing, he was allowed to intervene for the defence as amicus curiae. The shipping paper was produced, from which it appeared that the libellant shipped at Wilmington, in North Carolina, May 22, 1837, for a voyage to St. Thomas, and thence to one or two ports in the West Indies, and thence to her port of discharge in the United States, and thence to Portland, for wages at the rate of fourteen dollars a month. The voyage was performed and the crew discharged August 15th. The libellant claimed a balance due of $27; the defence was that the whole amount of wages had been paid.

Codman & Fox, for libellant.

C. S. Daveis, for defendant.

WARE, District Judge. This case has come on to a hearing under unusual circumstances. Though it has been standing nearly a year and a half on the docket since it was heard upon the exception, and the libel amended, no answer has been put in by the defendant to the amended libel. According to the regular and established rules of practice in the admiralty, before the defendant can be heard in his defence, or make use of any of his proofs, he must enter his appearance and contest the suit either by filing exceptions or answering the libel. For until this is done no issue is formed, and the court cannot see what is in controversy between the parties. In every court exercising a contentious jurisdiction the evidence must be confined to the issue, or the matters in dispute. Each party must lay the foundation for the admission of his proofs by suitable allegations in his pleadings. The defendant having in this case neither excepted to the amended libel nor answered it, has put nothing on the record to which his proof can apply. And further, by the practice of the admiralty each party has a right to extract evidence in support of his case from the personal answers of his adversary. Besides the general answer of the defendant in which the libel is contested, the libellant has a right to require him to answer at the hearing any special interrogatories which he may put touching the matters in issue. Clerke, Praxis Adm. tit. 14; 2 Brown, Civ. & Adm. Law, 416; Gammel v. Skinner [Case No. 5,210]. Several of the printed rules of this court are intended to enforce this right. By the 8th rule, if after the return of the warrant executed, the defendant does not appear, or if after appearing he absents himself, he shall be deemed to be in default and contumacy, and the court will proceed to hear the cause ex parte. By the 20th rule, if the defendant refuses to answer such interrogatories as shall be propounded to him by order of the court, the allegations in the libel to which the interrogatories relate, and which the libellant expects to support by his answers, shall be taken pro confesso, and the court will hear and adjudge the cause ex parte, unless the libellant elects to proceed by attachment to compel an answer. Clerke, Praxis Adm. art. 24. This cause should, therefore, according to the ordinary and regular course of the court, be heard upon the evidence produced upon the part of the libellant only. The defendant has no legal standing in court. He has neither contested the libel affirmatively nor negatively; he has neither denied the allegations of the libel, nor confessed and avoided them; and has therefore laid no foundation for the admission of any evidence. But it is suggested by the counsel who appeared for the defendant and argued the exceptions to the libel, that he has since that time had no opportunity of communicating with his client, that he is most of the time absent at sea, is unacquainted with the course of proceeding in this court, and ignorant of the necessity he is under of putting in a personal answer to the libel. Now although the course of the court is the law of the court, I have no doubt of its authority to waive its own rules, which are established for promoting the cause of justice, so far that

they shall not operate as a surprise upon the ignorance of a party and debar him from making a just and conscientious defence. If the court cannot consistently with its rules admit the counsel to intervene for the defence as the regular proctor of the defendant, it may so far dispense with them as to hear any suggestions he may make, or receive any proper evidence he may offer in the interest of justice as amicus curiae. But in receiving evidence in this irregular way it is to be borne in mind that the defendant has made no answer to the allegations in the libel, and the libellant has had no opportunity to try his conscience by any interrogatories touching the matter complained of.

The evidence then which is offered in support of the defence is a receipt and release under seal. This instrument, which is signed and sealed by all the crew, is attached to the back of the shipping papers by wafers and is in the following terms: "We the undersigned late mariners on board the schooner called the David Pratt, of North Yarmouth, on her late voyage described on the other side of this instrument, and now performed to this place of payment, do each for ourselves with our signatures and seals acknowledge to have received of Timothy Pratt, agent or owner of said schooner David Pratt, the full sum hereunto set against our respective names, it being in full for our services as wages on board said vessel, and in consideration whereof and of one cent to each of us paid, we have released and do hereby release and discharge forever the master, officers, and owners of said vessel, and each of them of and from all suits, claims, and demands for assaults and battery, and imprisonment, and every other matter and thing of whatever name or nature against said schooner David Pratt, the master, owners, and officers, to the day of this date hereunto set against our names." This instrument appears to have been regularly executed by the libellant, and the execution is attested by a subscribing witness. No objection was made to it, though it could not have been received, if the objection had been taken, without calling the subscribing witness. The controversy has been upon its effect and operation. It is without question prima facie proof of payment. If it were a receipt in the common form without a seal, it would be nothing more. It would be no conclusive bar to a suit for the balance of wages, if it were made to appear that they were not paid or otherwise satisfied. Harden v. Gordon [Case No. 6,047]; Thomas v. Lane [Id. 13,902]. A receipt in full is not conclusive at common law, but is always open to explanation by every kind of legal evidence.

Ought this receipt between the present parties to have any greater effect, or be any further conclusive on the rights of the libellant in consequence of having a seal annexed to it? The common law does, it is true, attribute to an acquittance under seal a greater degree of sanctity, and holds it to be a higher kind of evidence than a mere naked acknowledgment of satisfaction in writing, such as is ordinarily given in the common transaction of business upon the payment of a debt. Co. Litt. 352, and Steele v. Adams, 1 Greenl. 1. Usually a party will be estopped from contradicting by parol evidence the terms of his own deed. But whatever effect a court of common law might feel itself compelled to give to an instrument of this kind, it will not follow that a court of admiralty will be precluded from looking into the consideration for which it was given, merely because it is sealed. A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction. Brown v. Lull [Case No. 2,018]; The Fortitudo, 2 Dod. 58; The Cognac, 2 Hagg. Adm. 377. It is particularly fit that it should be free from the artificial and technical rules of the common law in dealing with contracts between seamen and shipowners. They are parties who do not stand, in making their contracts, on even ground. Merchants are shrewd, careful, familiar with the forms of business, watchful and far-sighted in providing for their own interests; while seamen are ignorant, improvident, and necessitous, a most useful and necessary class of persons to a maritime and commercial people both in peace and war, gallant and fearless of personal danger, but wholly unable to defend their rights against the superior knowledge, sagacity, and wealth of their employers. They are therefore wisely, upon principles of public policy, as well as private justice, placed under the protection of the law. They are permitted to sue in forma pauperis because if they were not allowed to come into court in this way, but were required to find security for costs, like other parties, it would amount to a practical denial of justice. Their contracts with shipowners are narrowly watched, and if any unusual stipulations are introduced, departing from the usual terms of the contract and renouncing any advantages which are secured to them by the general principles of the maritime law, they will be set aside unless they are reasonable in themselves and founded on an adequate consideration. The Juliana, 2 Dod. 504; Harden v. Gordon [supra]; The Minerva, 1 Hagg. Adm. 347. If the shield of the law were not thus interposed to protect them from the consequences of their own improvidence, they would be liable from their carelessness, ignorance, and destitution to constant imposition. In the present case the owners who provided this form of a receipt did it, as may fairly be presumed, with a full understanding of the difference in the legal effect of an acquittance and release under seal, from that of a simple discharge by parol, or in writing not under seal. They have

taken care, therefore, to add to it, for a nominal consideration of one cent, a release for all assaults, batteries, and imprisonments, and every other thing. And they may have congratulated themselves in the belief that they had thus, for the paltry sum of five dollars, set up a perpetual bar to any claim which this seaman may have had, however meritorious it might be. But is it to be presumed that this ignorant and uneducated mariner, (for he could not write his name, and he signed both the shipping paper and the release by his mark,) is this court bound to presume that he executed this instrument with a full knowledge of the doctrines of the common law, in regard to estoppels? It would be a presumption directly against fact, for the first thing he did after executing this instrument was to apply to the laws of his country for redress of these very injuries which he had released. There is quite as much reason for holding a settlement and acquittance, after the wages are earned, open to the equitable consideration of the court, as the terms of the contract itself. The same reasons apply with equal, and some of them with augmented force. Seamen are not a class of men who ordinarily make provision against the future. On their return from a voyage they are usually dependent on their wages for present support, and if they are withheld they ordinarily find themselves in a state of entire destitution, not only without present means to provide for their immediate and most pressing necessities, but without credit. If their employers choose to impose upon them hard terms, they are obliged to take what is offered them to meet their immediate wants or forthwith to re-ship in another vessel. They are thus placed too much in the power of the owners to be able to negotiate with them on equal terms. If the owners choose to make use of that power to drive a hard bargain, and compel seamen to a settlement on unjust terms, both public policy and private justice require that such settlements should be open to a re-examination, so that the men should not be deprived of a just remuneration for their services. A receipt, or release of a seaman, I hold to be no bar in the admiralty to a suit for his wages, with whatever parade of seals and attesting witnesses it may be surrounded, provided it is proved that they have not been paid or otherwise satisfied.

If the libellant is not precluded from proving the truth of the case, let us see what evidence is produced to overcome the receipt, as this is beyond doubt proof of payment, until it is falsified either by positive proof or strong and reasonable presumptions. The libel alleges that at the time of the discharge but five dollars were paid for the whole balance of wages due; that deductions were made from the wages, which are not authorized by law; and that a balance of twenty-seven dollars now remains due and unpaid. Two witnesses have been examined in support of this allegation in the libel. The deposition of the first, Orcutt, was taken to support the libel in its original form, and relates principally to that part which has been stricken out. He merely says, at the close of his deposition, that only five dollars was paid Thomas at the time of his discharge, without mentioning any circumstances relating to the payment. The other witness, Adams, whose deposition was taken after the libel was amended, states the same fact and adds, that he was not in the cabin when Thomas was paid, but was within hearing where he could see the master and Thomas through the skylight; that he saw the master give Thomas a five dollar bill, that he heard him say that nothing was due to him after deducting prison expenses and other charges, but that he would make him a present of five dollars. Thomas complained and was dissatisfied; but the master told him, in language not fit to be here repeated, that this was all he would give him, and he might sue if he pleased. The witness saw the bill when Thomas came out of the cabin.

It is said that this is loose and uncertain testimony to control a written and formal receipt. It undoubtedly is so. It is, however, precise and distinct as to the amount paid at that time. It is also distinct to the fact that the master insisted on deducting certain charges for prison expenses, board, and lost time, though the amount is not stated. And in confirmation of the fact that deductions were made for prison expenses, it is to be observed that the libel in its original form particularly set forth an imprisonment at St. Thomas, by order of the master, and claimed damages for the wrong, and the imprisonment is fully proved by the witnesses. Expenses must have been incurred, and it is a fact which has so often been brought to the knowledge of this court, that masters are in the habit of deducting these expenses from wages, that it is not easy to forget it. And I think it can hardly be the duty of the court to be judicially blind to a practice, which is familiarly known to all persons conversant with the usages of owners and masters in their settlements with seamen, and to none better known than to the court itself. This practice cannot indeed be referred to as proof that the deductions were made in this particular case, but it at least adds something, if any thing were wanted, to the credibility of the testimony. If a master imprisons his seamen in a foreign gaol, he always does it at the risk of being called upon to answer for it on his return home. His right to punish his men in that way, except in cases of aggravated misconduct and insubordination, is, to say the least, questionable, and if he does resort to it he is never permitted to charge the expenses upon the men, nor deduct their wages during the time of the imprisonment. Brown v. The Nimrod [Case No. 17,959]; Magee v. The Moss [Id. 8,944]. So is the law,

and the evidence satisfactorily proves that deductions of this kind were made from the libellant's wages. If the evidence is not more full and precise, the fault is not wholly with him. The master took care to have an attesting witness to the receipt. That witness, if he had been produced, and it belonged to the master to produce him, could have stated the facts with precision. Nor is this all. The libellant is entitled to extract evidence from the personal answers of the master to such interrogatories as he may choose to propound. Now I observe that there are at the close of the libel several direct and pointed interrogatories put to the master on this very point, with a prayer that he may be required to answer them on oath; that is, whether five dollars was not all that was paid the libellant at the time of his discharge, whether he was not imprisoned at St. Thomas by the master's order, what were the expenses of the imprisonment, and whether these were not charged upon the libellant and deducted from his wages. The master by answering these interrogatories would make his answers evidence. For though the general answer of the respondent is not properly evidence any further than the charges in the libel, which are equally verified by oath, yet the answers to special interrogatories, which are sometimes subjoined to the libel, and sometimes put at the hearing, are evidence. If he refuses to answer, the reasonable presumption is that he cannot answer them in his own favor, and the court will therefore take the charges in the libel upon which they are founded as confessed. It cannot be exactly said in this case that the master has refused to answer, and the rules of practice have so far been waived in his favor as to receive and hear the evidence in the defence without an answer. But it is the duty of the court to take care that this indulgence to the defendant shall not work injustice to the libellant. He has offered evidence which, uncontrolled by any other testimony, is sufficient to impeach the correctness of the receipt, and as the master neither answers the interrogatories propounded, nor produces the subscribing witness, this evidence is left to press upon the case with its full weight. This evidence is, that the master made deductions from the wages which he was not authorized to do by law, and that only five dollars were paid to Thomas at the time of his discharge. The master has charged Thomas on the shipping paper with fourteen dollars, or one month's wages, advance paid on shipping. The libellant admits but seven dollars, or half a month's advance. One of the witnesses says that he received five or six dollars with some tobacco, but that he received no clothing. The charge of the master on the shipping paper, fortified by his suppletory oath, would be proof. But I do not see that the charge alone, unsupported by oath, is any further evidence than any book charge. The signature of the seaman to the articles is proof only of the contract. It is not an acknowledgment of any charges which the master may enter on the shipping paper against him, either in the course of the voyage or before it commences. Such charges to be raised into evidence require to be verified by oath, and the master, I presume, would be allowed to tender his oath in support of them as a shopkeeper is permitted to swear to his books. It appears by the shipping paper that the libellant shipped the 22d of May, and was discharged the 15th of August. This makes 2 months and 25 days, which at $14 a month amounts to $39.65. Deduct from this $7 paid in advance, and $5 at the end of the voyage, and there remains $27.65, the balance due.

DAVID REEVES, The (HOLLYDAY v.). See Case No. 6,625.

DAVIDS (RILEY v.). See Case No. 11,837.

Case No. 3,598.

In re DAVIDSON.

[2 Ben. 506;[1] 2 N. B. R. 114 (Quarto, 49).]

District Court, E. D. New York. Sept. Term, 1868.

BANKRUPTCY—CONFLICT OF JURISDICTION—TITLE TO PROPERTY—PRACTICE.

1. Where property had been levied on by a sheriff as the property of D., and was duly taken from his possession in a suit of claim and delivery brought in a state court by other parties who claimed to own it, and who gave the usual undertaking for its return, if such return was adjudged, and in due course of such suit it was delivered to the plaintiffs, and a warrant in bankruptcy having been issued in proceedings against D., the marshal, under such warrant, took the property from the plaintiffs' possession and delivered it to the assignee in bankruptcy, and they applied on affidavits for an order directing the assignee to deliver it back to them: *Held*, that the case was not one of any conflict between the marshal and the officers of the state court.

2. The remedy of the parties was by a suit against the marshal or the assignee, or by bill in equity or petition.

3. The motion must be denied, but that the assignee should make no disposal of the property for ten days, to enable the parties to take proceedings to protect themselves.

This was a motion for an order directing the assignee in bankruptcy to surrender the possession of certain coal, held by him as part of the property of one George J. G. Davidson, a bankrupt. It appeared from the papers that the coal in question, when in possession of Davidson, was levied on by the sheriff, by virtue of an execution against Davidson. Subsequently it was taken from the possession of the sheriff by the coroner,

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

by virtue of proceedings for claim and delivery instituted in the supreme court of the state by the parties now moving, who were the original owners of the coal, and who insisted that the title to the coal never passed from them to Davidson for the reason that he obtained possession by reason of fraudulent representation. At the time the coroner took possession of the property, he received from the plaintiffs in replevin an undertaking, as required by the statute, for the return of the property, if return thereof should be adjudged, and for the payment of such sum as might, for any cause, be recovered against the plaintiffs. And no return of the property having been required by the defendant in that action, as might have been done under the statute, the property was delivered by the coroner to the plaintiffs in replevin, from whom it was, however, taken by the marshal of the United States, by virtue of a warrant in bankruptcy, issued out of this court against Davidson. Subsequently, the marshal delivered the property to the assignee in bankruptcy, who held the same as property of the bankrupt, and claimed title thereto by virtue of the assignment in bankruptcy. Upon such a state of facts, the plaintiffs in replevin moved the court, upon affidavits, for a summary order, directing the assignee to deliver them the property.

BENEDICT, District Judge. The facts presented in these papers do not make out a case of conflict between the marshal and the officers of the state court as to the possession of the property in question; nor do they require the interference of the court by its summary order to avoid a conflict of jurisdiction. This property has not been taken by the marshal from the officers of any court, but from private persons, who claim to be the owners of it. No interference with the process of the state court, by any officer of this court, is shown, and no officer of the state court makes application to this court for protection. The remedy of these parties, therefore, is not by an application like the present, but by an action at law against the marshal or the assignee; or, perhaps, by a bill in equity, where all the rights of all parties could be passed on and determined; or by a petition in accordance with the suggestion made by the supreme court, in Buck v. Colbath, 3 Wall. [70 U. S.] 347. It might be that the present proceeding could, without injustice, be treated as such petition; but I forbear to do so, in order to give these parties opportunity to indicate, by a formal petition, a clear intention to submit the question of their title in this property to the determination of the court.

The motion is therefore denied, but the assignee will forbear to make any disposal of the property for the space of ten days, unless by consent of the parties here moving, to enable them to take such proceedings to protect their rights as they may be advised.

Case No. 3,599.

In re DAVIDSON.

[4 Ben. 10;[1] 3 N. B. R. 418 (Quarto, 106).]

District Court, S. D. New York. Jan. Term, 1870.

BANKRUPTCY—VOID JUDGMENT—FORFEITURE OF DEBT—DUTY OF CREDITOR.

1. M. a creditor of D. an insolvent, knowing that he was insolvent, commenced an action against him in a state court, and, without opposition, obtained a judgment against him and issued an execution, under which the sheriff levied on and sold D's. property. A few days after the levy, creditors of D. filed a petition against him in involuntary bankruptcy, on the ground of his having so suffered his property to be taken on legal process, with intent to give a preference to M. D. denied the act of bankruptcy, but, before the matter was tried, he filed a petition to be declared a bankrupt and an adjudication of bankruptcy was made against him. The assignee in bankruptcy, having been chosen, filed a petition to have the judgment in favor of M. against D. set aside, to have M. pay over to the assignee the money which he had received from the sheriff on the execution, and to have the sheriff also pay over the amount remaining in his hands, and to have the proof of debt filed by M. in the bankruptcy proceedings disallowed and stricken out: *Held*, that M. had reasonable cause to believe that D. was insolvent, and that a fraud on the bankruptcy act was intended within the 35th and 39th sections [14 Stat. 534].

[Cited in Re Tonkin, Case No. 14,094; Haskell v. Ingalls, Id. 6,193; Re Hunt, Id. 6,882.]

2. As M. had not availed himself of the locus penitentiae given to him by the 23d section of the act, but had resisted the claim of the assignee, he must pay the penalty imposed by the 39th section of the act.

[Cited in Re Dunkle, Case No. 4,160; Re Reece, Id. 11,633; Re Stephens, Id. 13,365; Re Leland, Id. 8,230; Re Baxter, 25 Fed. 701.]

3. M., after taking possession of the property of D. under his judgment, should have thrown D. into bankruptcy for that act, and then have turned the property over to the assignee.

4. The prayer of the petition must be granted.

G. A. Seixas, for assignee.

J. E. Parsons, for Mowbray.

BLATCHFORD, District Judge. This is a petition by Lionel Moses, assignee of the bankrupt [Charles A. Davidson], praying that a judgment recovered against the bankrupt, in the superior court of the city of New York, on the 21st of July, 1868, by one Oliver Mowbray, for $5,182.80, be set aside and declared void; and that said Mowbray be ordered to pay over to the petitioner the sum of $1,231.50, received by him upon an execution issued on said judgment; and that the sheriff of the city and county of New York, to whom such execution was issued, be ordered to pay over to the petitioner the sum of $2 847.02, now in his hands as assets of said bankrupt, realized on a sale of the property of said bankrupt on said execution; and that the proof of debt against the estate of said bankrupt, filed by said Mowbray, be rejected and

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disallowed and stricken out. The judgment was recovered by default. The execution was issued on the 21st of July, 1868, to the said sheriff. On the same day, the sheriff levied on the personal property of the bankrupt, under the execution, and took it into his possession. He afterwards sold it, under such levy, for $4,078.52. Of this sum $1,231.50 were paid over to Mowbray. The balance now in the hands of the sheriff, less his fees, is $2,380.22. On the 28th of July, 1868, creditors of the bankrupt filed a petition against him in this court, praying that he might be adjudged a bankrupt. The act of bankruptcy alleged in the petition was that, being insolvent, or being in contemplation of insolvency, he procured and suffered his property to be taken on legal process in favor of said Mowbray on said execution, with intent thereby to give a preference to said Mowbray, and with intent, by such disposition of his property, to defeat and delay the operation of the bankrupt act. After a denial of bankruptcy and a trial by the court, the bankrupt was, on the 22d of February, 1869, adjudged a bankrupt, on said petition. On the 29th of December, 1868, the bankrupt filed in this court his voluntary petition to be adjudged a bankrupt, on which he was adjudged a bankrupt on the 15th of January, 1869. At the first meeting of creditors, on the 12th of February, 1869, Moses was elected assignee. The petition now under consideration was filed on the 4th of March, 1869. The ground on which it proceeds, in asking the relief it prays for, is, that, at the time of the entry of the said judgment, and of the levy and sale thereunder, the bankrupt was insolvent; that he suffered and procured his property to be taken on said execution, with intent to give a preference to Mowbray, and with intent, by such disposition of his property, to defeat and delay the operation of the bankruptcy act; and that, at the time of the commission of the said act of bankruptcy by the bankrupt, and at the time Mowbray received such preference, Mowbray had reasonable cause to believe that a fraud on the act was intended, and had reasonable cause to believe, and in fact knew, that the bankrupt was insolvent. On the 24th of February, 1869, Mowbray filed a proof of debt against the estate of the bankrupt, on the said judgment, for its full amount, less such amount realized upon said execution as he might finally be deemed entitled to receive, and the amount already then received thereupon, provided the same should finally be deemed to be a valid payment.

On the answers of Mowbray and of the sheriff to the petition proofs have been taken, and the case comes up now for decision. There is no room for doubt, on the evidence, that, as a matter of fact, the bankrupt was insolvent when he suffered his property to be taken on the execution, and that he suffered such property to be so taken with intent to give a preference to Mowbray, as a creditor of his, and that Mowbray at that time had reasonable cause to believe that the bankrupt was insolvent, and that a fraud on the bankruptcy act was intended, within the 35th and 39th sections thereof.

It is urged, on the part of Mowbray, that, although the bankrupt was insolvent when the levy was made, and although Mowbray had reason to believe so, yet the bankrupt had, prior to that time, committed no act of bankruptcy; that the position of Mowbray was only that of a diligent creditor, to whom no other course was open, using the arm of the law to collect a valid debt; that, if the relief asked for in this case is to be granted, an insolvent debtor who has not committed any act which subjects him to be proceeded against as an involuntary bankrupt, may practically set his creditors at defiance; that the knowledge that such relief as that here asked for will be granted, if the creditor proceeds to take the property of the debtor on legal process, under the circumstances existing in this case, and if the debtor is afterwards adjudged a bankrupt, will deter him from doing so; and that thus, if the debtor does not choose to go into voluntary bankruptcy, no remedy whatever will be open to the creditor. This view is fallacious. The penalty upon the creditor, provided for by the 39th section, of not being allowed to prove his debt in bankruptcy, is enforceable against him only in case he compels the assignee to resort to legal proceedings to recover back the property transferred in violation of the act, and in case such proceedings are successful. If he accepts a preference, having reasonable cause to believe that it was made or given by the debtor contrary to some provision of the act, he cannot prove the debt or claim on account of which the preference was made or given, or receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference. Such is the provision of the 23d section of the act, and it must be construed in connection with the 39th section, in such manner that, if possible, both may stand. The construction which this court has given to these two sections, in respect to the provisions in question,—In re Montgomery [Case No. 9,727],—has been, that the clause in the 39th section, in respect to not allowing the creditor to prove his debt in bankruptcy, applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property; that the creditor who claims to retain the property makes himself conclusively a party to the fraud against the act, by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that where the creditor avails himself of the locus penitentiae given to him by the 23d section, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud, and may prove his debt in bankruptcy

and receive dividends on it. This removes all the embarrassment and difficulty suggested in this case. Mowbray, after taking the property of the bankrupt on legal process, could himself have thrown him into bankruptcy for that act, and could then have voluntarily turned over the property so taken to the assignee. Instead of having done so, he resists the claim of the assignee after others have put the debtor into bankruptcy, and he must now pay the penalty plainly imposed by the 39th section, and which he might easily have avoided.

The prayer of the petition is granted in respect to both Mowbray and the sheriff, and the claim of Mowbray, embraced in his proof of debt, must be rejected.

Case No. 3,600.

DAVIDSON v. ALLIS.

[11 West. Jur. 151; Syllabi, 122; 23 Int. Rev. Rec. 49.]

Circuit Court, D. Minnesota. Feb. 3, 1877.

MORTGAGE FORECLOSURE — INADEQUATE SECURITY — APPOINTMENT OF RECEIVER FOR RENTS AND PROFITS.

1. Where in the foreclosure of a mortgage of real estate, the property mortgaged is insufficient to satisfy the indebtedness secured, and the mortgagor is insolvent, the court has the power independent of any contract lien upon the rents and income of such property, to appoint a receiver for such rents and income, and apply the same upon the indebtedness, as well for the period allowed by law for redemption from the foreclosure sale, as during proceedings pending the sale.

2. The special equity growing out of the inadequacy of security, and insolvency of the mortgagor, is superior to the legal right given by the statute, allowing the mortgagor to remain in possession during the period allowed for redemption.

A receiver of rents and income was appointed, pending the foreclosure of a mortgage on productive real estate. A sale was made June 2, 1876, under a decree and the complainant [William F. Davidson], the mortgagee, was the purchaser, and received a certificate entitling him under the laws of the state of Minnesota to a deed, and the possession of the property at the expiration of one year from the date of the order confirming the sale, unless the premises shall have been previously redeemed. A deficiency remains after application of the proceeds of the sale, which by the terms of the decree Lorenzo Allis was ordered to pay to the complainant. The receiver is not discharged. He has collected $2,111.24 from the rents of the premises, which has been paid into the registry of the court and is deposited to the credit of this suit. Application by petition is made for an order directing this amount to be paid upon such deficiency, which is resisted by the defendant Allis, the mortgagor. It is urged that the rents collected after the sale of the property under the decree cannot be applied on the deficiency, as no equitable lien existed after the sale under the decree.

Bigelow, Flandrau & Clark, for petitioner.
H. J. Horn and Lorenzo Allis, contra.

NELSON, Circuit Justice. The fee of the property was mortgaged, and no contract lien was given upon the rents and income. A receiver of rents and income was appointed, on account of the insufficiency of the fee to satisfy the debt and interests and costs and the inability of the mortgagor in possession, personally liable for the debt, to answer for the deficiency. When the mortgage became due and payable, an equitable right to the rents was created, growing out of the fact of the insolvency of the mortgagor, and the inadequate security. A sale of the property under the decree demonstrates the justice of the order appointing a receiver, for a large deficiency exists. The special equity subjecting the rents to apply upon the deficiency arising upon the sale of the mortgage security, authorizes the receiver to collect the rents and income until possession is delivered over to the purchaser. True the law of Minnesota gives the mortgagor the possession of mortgaged property after sale as before, and until the time for redemption expires; but this does not restrict the power of a court of chancery to take charge of the rents and income and enforce a superior equity. The special equity growing out of the facts, as above stated, is superior to the legal right claimed. Let an order be entered as prayed for.

DAVIDSON (BELL v.). See Case No. 1,248.

Case No. 3,601.

DAVIDSON v. BROWN.

[1 Cranch, C. C. 250.][1]

Circuit Court, District of Columbia. July Term, 1805.

ACTION ON BOND PAYABLE IN INSTALLMENTS—VERDICT.

In an action upon a bond conditioned to pay money by installments, if the verdict be rendered before all the installments are due, the jury must find how much is due upon each installment and when payable, as well those to become payable as those already payable.

Debt, on bond, conditioned to pay $460, on 1st January, 1804; $460, on 1st January, 1805; $460, on 1st January, 1806; and $460, on 1st January, 1807. The writ issued in June, 1804. The trial was in August, 1805. Plea, payment, and issue. See the act of assembly of Maryland, 1785, c. 80, § 13.

Mr. Morsell, for plaintiff.
Mr. Key, for defendant.

THE COURT directed the jury that if no payment was proved they ought to find the

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

issue for the plaintiff, and also find what amount of principal and interest is now due and payable, and what further sum will become payable, and when.

The judgment was entered as follows: Judgment on the verdict, for the penalty and costs, to be released on the payment of $1187.32, with interest thereon from this date till paid. And on the payment of $520.80, with interest thereon from the 1st day of January, 1806, till paid, with liberty to take out execution therefor after that day. And on the payment of $476, with interest thereon from the 1st day of January, 1807, till paid, with liberty to take out execution therefor after that day.

Case No. 3,602.

DAVIDSON v. BURR.

[2 Cranch, C. C. 515.][1]

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

APPEALS FROM JUSTICE OF THE PEACE—APPEALABLE JUDGMENTS.

1. An appeal does not lie to this court from the judgment of a justice of the peace in a cause which has been tried by a jury before the justice.

2. Quaere, whether a justice of the peace in the District of Columbia is a judge of a court of the United States within the meaning of the constitution of the United States, in relation to the tenure of office.

[Cited in Hellrigle v. Dulany, Case No. 6,343.]

This was an appeal from the judgment of a justice of the peace in a case, above the value of $20, which had been tried by a jury before the justice under the act of the 1st of March, 1823 [3 Stat. 743], "to extend the jurisdiction of the justices," &c. It was objected, that a justice of the peace trying causes by a jury, was a judge of an inferior court of the United States, and therefore ought to be appointed quamdiu se bene gesserit; and not having been so appointed, but holding his office only for five years, he was not a competent judge, and had no jurisdiction of the cause. It was also suggested that a cause once tried by a jury could not at common law be tried again by jury in another court; nor could the fact be afterwards tried again by the court.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that the justice had jurisdiction; but that under the 7th amendment of the constitution of the United States, which declares that "in suits at common law," "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," there cannot be a trial by jury in this court of a cause which has been tried by jury before a justice of the peace. This cause has been tried by jury before the justice, and by the rules of the common law it cannot be re-examined by a jury in any other court; nor by the judges without a jury.

And CRANCH, Chief Judge, was of opinion that a writ of error, upon a bill of exceptions, will only lie to a court of record. The proceedings of courts not of record, can, by the common law, only be brought up by certiorari, if brought up at all; and not by appeal.

Upon the question whether the justice had jurisdiction, CRANCH, Chief Judge, was of opinion that if the justice was such a judge of an inferior court of the United States, as is intended by the third article of the constitution of the United States, the same article fixed the tenure of his office, and it could not be altered by an act of congress. And that if he was not such a judge, then the argument from the constitution did not apply to his case.

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

DAVIDSON (DAVIS v.). See Case No. 3,631.

Case No. 3,603.

DAVIDSON v. DONOVAN et al.

[4 Cranch, C. C. 578.][1]

Circuit Court, District of Columbia. March Term, 1835.

ATTACHMENT—SERVICE OF NOTICE TO CORPORATION.

An attachment of credits in the hands of the Chesapeake and Ohio Canal Company is sufficiently served by notice to the clerk of the company.

Mr. Marbury, for garnishees, contended that the service of the attachment by a notice to the clerk of the company was not sufficient, because he was not the proper officer to be summoned; and because not served in the presence of two witnesses. The attachment was also served upon W. Gunton, one of the directors. This was also objected to by Mr. Marbury, who contended that the service should have been upon the president of the company.

Mr. Woodward, the deputy-marshal, testified that he had been in the habit of always serving the process on the president and directors, until they directed him to serve process on their clerk, which they said would be sufficient.

THE COURT (nem. con.) was of opinion that the service of the attachment on the canal company, by giving the notice to Mr. Ingle, their clerk, as the officer, Mr. Woodward, was requested to do by the president and directors, was a sufficient service.

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

Case No. 3,604.

DAVIDSON v. DRAPER.[1]

[5 Int. Rev. Rec. 94.]

Circuit Court, S. D. New York. Feb. 21, 1867.

CUSTOMS DUTIES—CONCLUSIVENESS OF APPRAISAL—PURCHASE IN DEPRECIATED CURRENCY—WOOL.

[Wool imported from the Argentine republic under the act of June 30, 1864 (13 Stat. 206), was purchased as shown by the invoice, in depreciated paper money, at a price which, when reduced to United States money according to the value of gold on the day of purchase, was less than 12 cents per pound. The wool was not shipped for some time after the purchase, the currency fluctuating in the meantime, but the actual value on the day of exportation, calculated according to the value of gold on that day, was also less than 12 cents a pound. If, however, the invoice price were calculated according to the value of gold on the date of shipment, such price exceeded 12 cents. This method was adopted by the appraiser in making the valuation, thus rendering the wool dutiable at 6 instead of 3 cents a pound, under the act of June 30, 1864. *Held*, that this appraisement was not conclusive on the court, although no reappraisement was demanded, and, as the wool was actually worth less than 12 cents at the time and place of shipment, the importer could recover the excess of duty paid.]

In this case suit was brought [by Edward F. Davidson against Simeon Draper, late collector of the port of New York] in the circuit court, for the district of New York, to recover duties exacted upon wool imported from Buenos Ayres in May, 1865. One invoice of 224 bales was purchased there December 9, 1864, and shipped February 1, 1865. The other invoice, of 100 bales, was purchased there January 13, 1865, and shipped February 10, 1865. The purchases were made in the depreciated paper dollar of Buenos Ayres. The consul certified on the back of each invoice the rate of the paper dollar in gold doubloons, both at the date of the purchase and at the date of the exportation, the value having varied during the interval. The wool having also fallen in value during the same time, the importer, on entering the wool, presented the invoice, but stated in his entry the actual value of the wool at the date of shipment. The appraiser, however, reported the value at "over 12 and less than 24 cents per pound," and duty was assessed and collected at the rate of 6 cents per pound instead of 3 cents per pound, which would have been the legal rate if the value of the wool had been less than 12 cents. It appeared on the trial, February 21, 1867, that if the price of the wool when purchased had been reduced to United States currency, valuing the paper dollar at the rate on the day of purchase as certified by the consul, the value would have been less than 12 cents per pound; also, that if the price in paper money, at the date of exportation, had been reduced according to the value of gold at the date of exportation, the value would have been less than 12 cents per pound. The only method of valuing the wool at more than 12 cents per pound was by its cost in paper dollars on the day of purchase, reduced according to the value of gold on the day of exportation. These facts were testified to by the appraiser, who swore that the actual value of the wool, at the date of shipment, was less than 12 cents per pound, and that such would have been his appraisement if he had not supposed he was controlled by the value stated in the invoice, under which impression he made his return, "by taking the value of the invoices and reducing them according to the consular certificate on the day of the shipment." Upon the foregoing facts the judge directed a verdict for the plaintiff; motion was made by the district attorney for a new trial, but after argument, judgment was rendered on the verdict. The question, coming before the treasury department, whether or not the case should be taken to the supreme court on error or appeal, was carefully considered by the collector of New York, the district attorney, the solicitor and the secretary of the treasury, and after full advisement it was decided to pay the amount claimed, and the sum of $10,564.29 was accordingly paid, April 29, 1868.

Extract from brief of Webster & Craig:

Questions respecting the conclusiveness of appraisements have arisen on the importation of wool under the fourth section of the act of congress of June 30, 1864, which provides that the duty on wool, "the value whereof at the last port or place from whence exported to the United States, exclusive of charges in such ports, shall be twelve cents or less per pound, three cents per pound." Under the sixteenth section of the act of 1842 [5 Stat. 563] it is the duty of the appraisers to report the value of the wool at the last port or place. The section concludes as follows: "And it shall, in every such case, be the duty of the appraisers of the United States, and of every one of them, and of every other person who shall act as such appraiser, by all the reasonable ways and means in his or their power, to ascertain, estimate and appraise the true and actual value, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares and merchandise." The seventh section of act of March 3, 1865 [13 Stat. 493], is to be read in association with the section of the act of 1842, just quoted, in order to ascertain what officers make appraisements. It is clear, in respect to wool, that it is made the duty of the appraiser to report, "any invoice or affidavit to the contrary notwithstanding," the true and actual value of the wool, whether it is over or under twelve cents. There is, however, a provision of law, first enacted in 1842, enlarged in 1846, and repeated in subsequent acts, to the effect that

[1] [From collection of "Trials" in the library of the United States supreme court at Washington, D. C. 5 Int. Rev. Rec. 94, contains but a partial report, and the title of Davidson v. Smythe.]

the "duty shall not be assessed upon an amount less than the invoice or entered value, any act of congress to the contrary notwithstanding." The wool provisions of the act of 1864 are clearly a pro tanto repeal of this clause just quoted, in cases where the value of wool may have fallen between the time of purchase or invoice and the date of exportation,—in cases where the invoice price is more, and the value at time of exportation less, than twelve cents per pound. But, on account of a practice of the appraisers, never to return value less than the invoice price, the wool clause before referred to is nullified. This practice of the appraisers grew, it is believed, out of the following department letter:

"Treasury Department, May 8, 1856. Sir: I have examined the question presented in your letter of the 2d instant, in regard to the assessment of duties on an importation of molasses from Trinidad de Cuba, in which the appraisers have returned a value less than that admitted and declared in the entry. The question presented is, which value shall be taken as the dutiable value? I have already stated, in circular 63, the grounds on which I have decided that the proviso to the 8th section of the act of 1846 [9 Stat. 43] is still in force. That proviso prohibits, in any case, duties to be assessed on a less than the invoice value. The party having availed himself, in this case, of the privilege of raising the invoice in his entry, I am of the opinion that under the proviso duties cannot be assessed on less than the invoice value so raised and declared in the entry. The invoice value, when the importer does not choose to raise that value when he makes the entry, in his declaration of the market value at the period of importation, and when he does raise it, the increased value, in his declaration of the market value at the period of exportation; and these declarations of the importer, as to the market value, are the strongest evidence that the market value is not too low that the appraisers can have, and ought never to be departed from by the appraisers, unless they have satisfactory evidence that the market value is greater. I can not comprehend how it is the appraisers can undertake to say that they will disbelieve the importer's own declaration of value when he produces his invoice, and when he adds to his invoice value, and that he, the appraiser, knows better than the importer, and, therefore, disbelieves him and finds the value less than he has declared it to be. The persistence in such a course by the appraisers would prove an obliquity of judgment that it is impossible to comprehend or provide against. The duty cannot be assessed upon less than the increased declared value, no matter what may be the appraised value returned by the appraisers; and you should report all cases where the appraisers undertake thus to set aside the evidence of the importer's declaration of value. Very respectfully, P. G. Washington. To H. J. Redfield, Esq., Collector."

The practical effect of this department letter has been, that few or no appraisers venture to return the dutiable value less than the invoice or entered value. They report, "Invoice correct," or "Invoice sufficient." Such a return, when influenced, guided and controlled by the invoice value, is clearly illegal, because the statute is peremptory that the appraisers are, "by all reasonable ways and means in his or their power, to ascertain, estimate and appraise the true and actual value, any invoice or affidavit thereto to the contrary notwithstanding." This vicious system is one which a re-appraisement cannot cure, because the government re-appraiser feels as much bound by the department letter of May 8, 1856, as do the local appraisers. There is no remedy but in appeal to the courts. Where the local appraisers make an illegal return, the importer has a right to go to the courts on that.

Extract from additional brief:

But it is contended by the defendant that the proviso of the seventh section of the act of March 3, 1865, provides that duty "shall not be assessed upon an amount less than the invoice or entered value, any act of congress to the contrary notwithstanding." This proviso is in substance contained in the proviso to the eighth section of the tariff act of 1846, and contained down through subsequent acts to 1865. We agree with Mr. Justice Woodbury, in Marriott v. Brune, 9 How. [50 U. S.] 639, that the language of the proviso is not artistic or very clear, but that its evident purpose, looking to all the circumstances, is, that the collector, in the case of ad valorem rates, shall not take duty upon less than the invoice price, no matter what the return of the appraisers may be. But it will be seen that, if the proviso is to have the effect contended for in this case by the defendant, it completely nullifies the fourth section of the act of June 30, 1864, in respect to wool, where the language is explicit that the value is to be predicated as of the time of exportation. In a case, therefore, in which the invoice price, as in the present case, differs from the value at the time and period of exportation, and the collector is compelled to be governed by the invoice price, there is such a conflict that the two provisions of law cannot stand together. We are very confident that the proviso of the seventh section cannot have the effect in the present case which is contended for by the defendant. We are satisfied, however, that a proviso, similar to the one in the seventh section, contained in previous cases, has led to all the difficulty in this case. We have before us a letter, dated May 8, 1856, addressed to Collector Redfield, and signed "P. G. Washington, Assistant-Secretary of the Treasury," which explains how it happens that the appraisers never return the value less than the invoice price. (Here fol-

lows the letter.) We cannot think that Mr. Guthrie, who was then secretary of the treasury, and whose great ability can never justly be drawn in question, ever intended to say that, under the provisions of the act of 1842, which directs appraisers "by all reasonable ways and means in his or their power to ascertain, estimate and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding," they were not to report the value as they found it. It may be that the secretary would consider a different report as evidence of error in judgment; but if the judgment of the appraiser was correct in finding the value less than the invoice price, it cannot be possible that the secretary of the treasury would be justified in directing appraisers to be controlled by the invoice in making their return. The true duty of the appraisers is to find the value, and state it accordingly. It is then the duty of the collector, in proper cases, to apply the proviso in question. No better illustration could be had of the error and different proceeding, than the case now at bar.

JUDGE SMALLEY'S DECISION. No formal opinion was ever prepared by Judge SMALLEY. A verdict was taken nisi, and after a careful examination of the questions in the case he ordered judgment upon it for the plaintiff. He was requested to prepare a written opinion, and to aid him in doing so, the plaintiff's last brief was prepared, which is substantially correct; but he did not find time to write any opinion before the action of the treasury department in paying the judgment. The following imperfect statement of Judge SMALLEY'S ruling at the trial is taken from the New York Herald of February 22, 1867:

"The court said that the rights and equity of the case were very clearly with the plaintiff. There was no doubt at all that the government had $10,000 of the plaintiff's money which it had no earthly right to, and which in equity and good conscience it was bound to restore without instituting a suit to recover through the courts. The evidence shows, and the officers themselves show, that the wool in question was worth only three cents as a dutiable article. The defence is purely technical, which, I must say, I regret a great government like ours should ever make. It is not creditable to the government to embarrass merchants in this way; to say to them, 'The merchandise which I have taken by a strong arm, these $10,000 of yours, plaintiff, which I have possessed myself of, I will keep, availing myself of the technicalities of the law, so as to keep it and withhold it from you.' The court must deal with the law as it finds it. The courts do not make the law, nor do they execute it; the courts only administer it as they find it. The law officers of the government—the United States district attorney in this case—are bound to defend these cases arising under these acts, and the courts are bound to adjudicate on them; but it is clear that a great wrong is done in compelling the collectors to bear the brunt of these actions. I will direct a verdict for the plaintiff in the case on the facts, and if the counsel desire it, I will hear arguments on the points of law hereafter."

Verdict accordingly for the plaintiff.

Case No. 3,605.

DAVIDSON v. HENOP.

[1 Cranch, C. C. 280.][1]

Circuit Court, District of Columbia. Dec. Term, 1805.

TRIAL—ORDER OF ARGUMENTS.

If there be only one issue, and the defendant holds the affirmative of that issue, he has a right to open and close the argument.

Assumpsit by James Davidson, for the use of the Bank of the United States, against Daniel Henop, on a promissory note. The defendant pleaded infancy only, upon which the issue was joined.

THE COURT was of opinion that the plaintiff was not obliged to produce the promissory note mentioned in the declaration, but that the defendant held the affirmative of the issue, and had a right to begin and close the argument.

Case No. 3,606.

DAVIDSON v. LEWIS.

[1 MacA. Pat. Cas. 599.]

Circuit Court, District of Columbia. Oct. Term, 1858.

PATENTS—PRIORITY OF INVENTION—EVIDENCE IN INTERFERENCE PROCEEDINGS.

[1. Priority should be adjudged to him who first conceived the idea, and so described it, by words or drawings, as to enable a skillful workman to bring it into useful, practical operation; and if he used due diligence he is entitled to the patent, although another may have first succeeded in perfecting a machine.]

[2. In determining the question of priority, contradictions between two witnesses, whose general character for veracity has not been questioned, should rather be reconciled without imputing improper motives than that their concurrent testimony on another point should be entirely rejected.]

[This was an appeal by Charles H. Davidson from a decision of the commissioner of patents in an interference proceeding awarding priority to one Lewis in respect to the invention of an improvement in "breast shells."]

J. B. Crosby, for appellant.

MORSELL, Circuit Judge. The only matter in controversy in this case is, which of

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

the parties was the first and original inventor of the improved invention of the breast pump, which invention, as stated by the commissioner, lay in adapting the old breast shell to the purpose of being worn equally long as the old breast shell and to be worked as a breast pump by the wearer herself, by drawing out one side of the glass shell into a pipe form, and attaching thereon an India-rubber tubing with a mouth-piece adapted to the further end of the elastic tube. He also states that this improvement appears to have been accomplished by both Lewis and Davidson in a manner precisely similar; so that both the nature and the amount of invention of both parties is identical. The question between the parties was decided by the commissioner upon the evidence submitted by them to him. On the hearing of said case in favor of the claim of Lewis, after noticing the particular parts of the testimony applicable to the various points of the case on the part of Davidson, and stating its insufficiency to sustain the claim for which it was offered, in conclusion, he says: "The office is of opinion that the testimony directed to sustain the invention of Davidson prior to the summer of 1857, and the manufacture of the sample in January, 1858, is neither clear as to the nature of the invention nor concordant with the other testimony adduced by Davidson, and is contradicted by the clearness and distinctness of the testimony adduced in favor of the invention at the dates just recited." To this decision there were thirteen reasons of appeal filed to apply to all the separate parts of the decision, in which the commissioner draws his inferences, deductions, or conclusions from the different parts of the appellant's testimony as erroneous.

The commissioner in his report, after stating his views in relation to the testimony on the part of Lewis in support of his claim, states, on the part of Davidson, the substance of the testimony of Haughton, Curtis, Babcock, and Davidson, and says the evidence so far is distinct and clear to Davidson's completing his invention in idea in July or August, 1857, and the manufacture of samples on the 1st of January, 1858. And were the evidence to rest here, the case would be plain; but Davidson brings forward other parties to show that early in October, 1856, he was engaged in perfecting his idea, and that it was complete and made on the last of June, 1857. (The commissioner's statement of the testimony follows, and his report concludes:) "It is believed, therefore, on a close examination of the testimony, that the evidence of Burdick and of Essex have no reference to this exact invention, but to one closely resembling it, and that of Brewer chiefly refers to plans and conversations, and not to the completion of an invention. The testimony of these three ought to be set aside. Omitting such evidence, the case stands thus: Lewis perfected his model 20th of March, 1857. The instrument was made in the glass works November, 1857. Davidson engaged in making his model June, 1857. Samples were made in the glass works 1st of January, 1858. From the aforegoing it would appear that the completion of the idea of the instrument by Lewis was certainly three months anterior to the same occurrence by Davidson, and the perfect instrument made by Lewis nearly two months anterior to the same act of Davidson. As priority of invention is therefore clearly made out by Lewis, it is recommended that a patent be issued to him as the original and the first inventor." This report was adopted and confirmed by the commissioner 6th of August, 1858.

In this state of the case, (due notice of the time and place of hearing this appeal having been first given,) the commissioner caused to be laid before me his report, with the decision and reasons of appeal, together with the evidence and all the original papers; and the parties hereto by their respective attorneys appeared and filed their arguments in writing, and therewith submitted the case.

It will be observed that the only question involved in the issue between the parties in this case is "priority of invention"—to which of the parties, from the evidence in the case, it ought to be awarded. The consideration of the case will be relieved of much of the apparent difficulty in duly appreciating the application of the testimony to the precise question, by not mixing and confounding what is the invention with the mere mechanical part of the machine, and by inverting the order in which the testimony has been taken up by the commissioner, beginning with the witnesses who testify to a knowledge of the earliest period at which there were manifestations of the discovery or invention. It must be borne in mind that it is not so much he who made and perfected the first machine or instrument as he who may appear from the evidence to have been the first who conceived the idea, and so described it by words or drawings as to have been sufficient to enable a skillful workman to bring it into useful, practical operation; for such a person shall be said to have made the first claim, and will be protected against the claim of any subsequent inventor who may have been first in adapting a machine or instrument to the invention, provided such first discoverer has been using due diligence in effecting the same end, and that, although he may have been unsuccessful in some of his experiments, if by following them up he at length succeeds. Such being the well-established rule of patent law, I will proceed to consider the evidence. The commissioner thinks that the testimony of Burdick, Essex, and Brewer (Davidson's witnesses, who testify to the disclosure of the invention in 1856) ought to be set aside for the reasons stated in his report just recited. (A resumé of the depositions follows.)

I have stated the testimony of Burdick,

Brewer, and Essex more at large than the commissioner, from which it will appear that the commissioner, in his statement, has inadvertently omitted several facts contained in that testimony which, according to the view which I have taken of this case, are considered very material. The first which will be noticed is Burdick's. He says, in the interview which he had with Davidson in 1856, Davidson exhibited to him "a plan of something he had got drawn out, and explained it to him;" that he afterwards marked it out on the counter. The description witness gives of this thing, in all the essential features, corresponds with the invention as shown in the machine of the 1st of January, 1858. The commissioner omits also to state another fact in Essex's testimony, who says that "in his first interview with Davidson, which was in October, 1856, he (Davidson) told me (Essex) that he was getting up a breast pump and nipple shell, and he went on and gave a description of it," which this witness recites in more precise terms than Burdick, and at the time showed him a plan of it on paper and explained it. This is confirmatory of Burdick, and appears to me to be a perfect description of the invention in the present controversy. Here, then, are two witnesses agreeing substantially in description and drawings of the thing as having been discovered by Davidson in the month of October, 1856. If they are to be believed, Davidson's claim as to the question of priority, even if it be admitted that he failed in his experiments to construct a perfect machine or instrument adapted to the invention until January, 1858, if he had been in the meantime using due diligence to effect the same, and had done it—then his title will have relation back to the inception of his claim. "The invention itself is an intellectual process or operation, and, like all other expressions of thought, can in many cases scarcely be made known except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words a month or even a year before it can be embodied in any visible form." Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. Again: "His (the patentee's) conversations and declarations stating that he had made an invention, and describing its details and explaining its operation, are properly to be deemed an assertion of his right at that time as an inventor, to the extent of the facts and details which he then makes known." (Ib.) In this case there was more than mere verbal description; the invention was drawn out and explained.

It appears that the ground upon which the testimony of Burdick, Essex, and Brewer has been thrown out of the case as inapplicable is not because of any material variance as to the descriptions and drawings of an instrument in accordance with the principles of the invention in this case, plainly showing the purpose, object, and device of the inventor, but because of conflictions as to certain specimens of the mechanical instrument made in June, 1857—the one which Burdick received not being (to use his own language) "the exact instrument, but so like it that a general description would embrace both varieties." The commissioner seems to confound the idea of the invention itself with the mere mechanical machine or instrument. Suppose it be true, as stated by the commissioner, it would not be a sufficient objection to defeat the appellant's claim to priority of invention. The rule of patent law applicable to this point is stated in Curtis on Patents, 355, referring to Reed v. Cutter [Case No. 11,645]: "As to the case of two independent inventors, * * * it will be a good defense to an action upon such a patent (to the subsequent inventor) if it can be shown that the same thing was first invented by another, although not actually perfected, provided the first inventor was at the time using reasonable diligence in adapting and perfecting the thing invented. It thus gives full effect to the well-known maxim that he has the better right who is prior in point of time, namely, in making the discovery or invention." Reed v. Cutter [supra]: "The law gives the right to the first and true inventor, and to him only." I am aware of the occasion on which Judge Story stated the above principle, and of the decision of Judge Cranch in the case of Perry v. Cornell [Case No. 11,001]. There is nothing in either to show it to be inapplicable for the purpose I have used it here—being applicable as a rule of general patent law to repel the presumption of laches, independently of the provision in the fifteenth section of the act of 1836. Again, Reed v. Cutter is to the same effect: "He who invents first shall have the prior right if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact first perfected the same and reduced the same to practice in a positive form." But, in point of fact, has there not been more weight allowed to the circumstances supposed to show inconsistencies than they are entitled to? In the absence of corruption, are they not, according to the humane principles of law on this branch of evidence, to be reconciled without imputing improper motives? If so, it ought to be done, rather than to entirely overthrow the direct testimony of at least two witnesses to the same point of fact, neither of whose general character for veracity has been questioned. The witnesses whose testimony is supposed to show it are Haughton, Curtis, H. E. Davidson, and Babcock, of Davidson's own witnesses, and Slocum, one of Lewis' witnesses. They all show that Davidson was industriously laboring to construct an instrument that would be suitably adapted to the invention, and it is admitted by all that he at length succeeded. That he had in a short time after October, 1856, undertaken himself from time to time to construct an instrument adapted to his improvement, must be consid-

ered an undeniable fact. Babcock proves his determination as early as December, 1856, and in April, succeeding, he had made a drill for him and assisted him to make a hole in a shell. Mrs. Curtis says she assisted him in June in boring a hole, &c. It must be remarked as to her testimony, also, that it has not been stated correctly. It is truly stated that she says "he did not succeed;" but that is not all; she says he said "that he did not succeed as he wished." He did succeed, she says, in boring the hole and in inserting an ivory tube, and said he wished to attach a rubber pipe. This testimony shows that he was laboring to make the instrument, and that he did make an imperfect one. In the first week in January, 1857, Teesdale is shown Davidson's said plan, which he says was the invention represented by Exhibit "A;" and from what he says of his occupation for so many years, it must be supposed that he was a pretty good judge. Brewer proves him at work on this shell pump in the summer of 1857, after the first of June. He says that he was making them of different patterns—patterns of different materials—some with ivory tubes, some with wood, some with glass tubes, tubes blown in the glass or attached to the glass, some cut through the glass to run the tube through.

Thus, it seems to me that the proof is undeniably conclusive as to the fact of the description, both orally and by drawings, in October, 1856, of the invention in all its details, and the further fact of the diligent working and experimenting by Davidson in endeavoring to perfect an instrument adapted to his improved invention until January, 1858, when, as before said, it is admitted by all he succeeded in presenting a perfect instrument. The principal matter which seems to be relied on as showing the inconsistencies stated as the ground of the rejection is in relation to the two specimen breast pumps, the one of which was given to Essex and the other sent to Burdick at New York, and by him received, as he says, some time in July, 1857. The proof relied on to sustain the allegation is the testimony of Slocum, who says that Davidson, in the summer of 1857, (he cannot state the particular time,) brought with him to the glass house of the Bay State Glass Company an article (similar to what he wanted made) of sheet-copper—one side of it was oval and one was flat—about the size of a nipple shell, and much the same shape; and witness thinks he also had an article of a similar shape, with a groove turned round the edge made out of wood. He thinks Davidson said he was going to have a valve at the top of it—either top or side, he is not certain which. His impression was that he was going to get up a breast pump. Witness' impression is that he (Davidson) told him (witness) that it was very doubtful whether they could at all valve the article he wanted made in the way he proposed from glass, so as to make it useful. There was an instrument lying on the table in the counter room—a breast pump—made similar to the way the French nipple shell used to be made. He says that he cannot be certain, but he thinks, and his impression is, that Davidson took one of them up in his hands, and his impression is that he told him that it was to be used as a breast pump. This witness in many parts of his testimony speaks very doubtfully; and according to his impressions and belief; these parts having been objected to, cannot be considered as admissible testimony in evidence. As to the commissioner's conclusions from the portions that are evidence, (relating to the models, one in copper and the other in wood, and the desire of Davidson to have the one in copper molded in glass, with a valve arrangement about it, and which it was thought doubtful whether it could make to be useful,) and his conclusion from the further fact that if Davidson had desired an article to be molded, adapted to the true invention in this case, it could have been done at said factory; and his conclusion that the presumption thence arises that Davidson was then ignorant of the true instrument, and that the specimens which Essex and Burdick had in June and July could scarcely have been the exact instrument, although nearly resembling it; and his conclusion that the said specimen instruments were not made at either of said glass houses, and that, therefore, the testimony is inconsistent, and that the invention had not been discovered as testified to,—these conclusions, I think, are incorrect. In point of fact the witnesses prove that previous to the time stated by Slocum, he (Davidson) had been seen endeavoring to construct the machine or instrument himself. It is shown that he succeeded in making at least two of them. As to the character of the models shown to Slocum, there is no evidence to prove that he designed them for the invention claimed by him in this case, and his design in them might have been for an additional improvement, to obviate the doubt suggested by Burdick as to the entire sufficiency of the invention. But however that fact may be, it by no means destroys the evidence of the exact invention being discovered by Davidson in October, 1856, and of his having adapted a perfect instrument in January, 1858.

As to the inference drawn from Davidson's omitting to state to his brother the whole of his plan, it is equally untenable. It seems to me to be a forced inference. The doctor was himself at that time engaged in endeavoring to improve the breast pump; and, therefore, it is rather to be wondered at that he communicated as much as he did, instead of not saying more. I think, therefore, that the testimony amounts to satisfactory proof that the said appellant Davidson was the first and original inventor

of the invention in issue in this case; that priority ought to have been awarded to him, and that a patent ought to issue accordingly.

[NOTE. A patent was accordingly issued, November 9, 1858, to the appellant, Charles H. Davidson, being No. 22,018.]

Case No. 3,607.

DAVIDSON v. PHOENIX INS. CO.

[4 Sawy. 594].[1]

Circuit Court, N. D. California. June Term, 1866.

LIMITATION OF TIME TO COMMENCE SUIT ON INSURANCE POLICY.

A condition in a policy of insurance to the effect that no suit for a loss shall be maintained upon it, unless such suit be commenced within twelve months next after the loss, is valid and will be enforced.

[Cited in Spare v. Home Mut. Ins. Co., 17 Fed. 570; Thompson v. Phoenix Ins. Co., 25 Fed. 298; Steel v. Phenix Ins. Co., 47 Fed. 864.]

This was a suit on the equity side of the court, to reform a policy of insurance, effected by the Phoenix Insurance Company, of Hartford, Connecticut, upon property of plaintiff [Mayer Davidson], and to compel the payment of the amount for which the policy was issued.

It was heard on demurrer to the bill at the June term of 1867.

William H. L. Barnes, for complainant.

William Barber, for defendant.

FIELD, Circuit Justice. The bill alleges in substance, that on the nineteenth of September, 1864, in consideration of the payment of a premium of $196, the defendant, by its authorized agents, executed and delivered to the plaintiff a policy of insurance against loss by fire, to the amount of $7,500, upon a building and property contained in the building belonging to him at Mokelumne Hill, in this state; that on the twenty-sixth of February, 1865, before the expiration of the policy, the building and contents were destroyed by fire; that the plaintiff, within the time required, gave the defendant written notice and proof of the fire and loss, and demanded payment of the amount of the insurance money; but that such payment was refused upon the alleged ground of over-valuation of the building in the application for the insurance. The over-valuation is admitted, and consisted in the statement that the building was worth $12,000, whereas, in fact, it was only worth one-half of that sum. The bill avers that this statement was the result of an error committed by the agent of the insurance company in filling up the blanks in a printed form of application, and not by the plaintiff himself; that the building was estimated by the plaintiff, and stated by him to be of the value of $6,000; and the entire property insured—building and contents—was estimated and stated by him to be of the value of $12,000; but the agent of the company, by mistake, applied the estimate of the value of the entire property to that of the building alone; that the plaintiff, believing that the valuation, as verbally given by him, was correctly inserted, signed the application without examination; that by its terms he is erroneously represented as having at the time agreed and warranted that the valuation of the building was the sum specified therein; that the agent was not aware of the error in the statement until after the loss by the fire, nor was the plaintiff aware of it until after he had presented his claim for the insurance money, and the company had refused to pay the same on the ground mentioned. The bill concludes with a prayer that the policy be reformed by striking out $12,000 as the valuation of the building, and inserting $6,000 in lieu thereof, so as to conform to the true intent of the parties at the time; and that the defendant be adjudged to pay the amount of the insurance named in the policy.

To the bill the defendant has interposed both a demurrer and a plea. The demurrer is to so much of the bill as prays, by way of relief, a decree for the amount of the insurance money, on the ground that the court, in the exercise of its equitable jurisdiction, is not competent to grant such relief; but that the remedy of the plaintiff, if he have any, must be sought in a court of law; and also that by the terms of the ninth condition of the policy which is annexed to and made a part of the bill, the plaintiff has lost the right (if any he ever had) to demand such relief.

It is not necessary to pass upon the sufficiency of the first ground of the demurrer, for the view we take of the second ground disposes of the case. The ninth condition of the policy provides that no suit against the company for the recovery of any claim by virtue of the policy shall be sustained in any court of law or chancery, unless such suit be commenced within twelve months next after the loss shall occur; and that should any suit be commenced after that period, the lapse of time shall be deemed conclusive evidence against the validity of the claim. The loss in this case occurred on the twenty-sixth day of February, 1865, and the present suit was not instituted until the seventh of July, 1867, more than fifteen months afterward. If this condition be valid there can be no occasion for any reformation of the policy; for, if reformed, the policy would not support any claim for the insurance money. And that the condition is valid there can be no reasonable doubt. There is nothing in it against law or public policy. It rests upon the same ground as other conditions, such as require notice of losses and a detailed statement of the particulars. Its object is not to deprive the legal tribunals of their proper jurisdiction, but to

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

compel an early resort to them when claims for losses are disputed, or an abandonment of the claims. It may in many instances be of great importance to the company that such claims be prosecuted as speedily as possible, whilst the facts are fresh in the recollection of witnesses, and their testimony can be readily obtained. The greater the delay the greater will be the difficulty of detecting frauds on the part of the insured, or of ascertaining the actual extent of the losses incurred.

But whether it be important or not to the company that claims should be thus prosecuted in any case, it is certainly competent for the parties to stipulate that the right of the insured to indemnity shall depend, in case his claim is resisted, upon his seeking his remedy within the given period. They are free to stipulate the terms upon which the risk shall be taken, and the losses paid, and this may as well be one of them as any of the others specified. Cray v. Hartford Fire Ins. Co. [Case No. 3,375]; Amesburg v. Bowditch Mut. Fire Ins. Co., 6 Gray, 596; Fullam v. New York Union Ins. Co., 7 Gray, 61.

The demurrer must be sustained and the bill be dismissed; and it is so ordered.

Case No. 3,608.

DAVIDSON v. SMITH.

[1 Biss 346;[1] 9 Am. Law Reg. 217; 2 West. Law Month. 566; 8 Pittsb. Leg. J. 266.]

District Court, D. Wisconsin. Aug., 1860.

STATE INSOLVENT LAWS—EFFECT IN ANOTHER STATE.

1. A non-resident plaintiff who has brought suit in the courts of the state where the defendant resides has subjected himself to the jurisdiction of that state, and is bound by discharge afterwards granted under the insolvent laws of that state.

2. By obtaining a judgment in the circuit court of the United States for another state, upon a record of the judgment of the state court, the plaintiff has not changed his position. A satisfaction of the judgment in the state court would operate as a satisfaction of that in the United States court; and whatever would bar the former would also bar the latter.

3. Although a state insolvent law has no force or validity outside of the state, except such as may be given it by comity, the principle of the constitution of the United States, that full faith and credit shall be given in each state, to the judicial proceedings of every other state, requires that judgments when sued on in another state shall be considered of the same force and effect as in the state wherein they were originally rendered.

This action was founded on a record of a judgment rendered in the circuit court of the United States, for the northern district of Illinois, July term, 1855, against the defendant, as a citizen of the state of Wisconsin, and in favor of the plaintiffs as citizens of Illinois. That suit was upon a record of a judgment in favor of the plaintiffs against the defendant rendered in September, 1854, in the supreme court of the state of New York, for the county of Chautauqua.

The defendant pleads in bar, that the judgment of the court of the state of New York, was founded on his promissory note, made to one Oliver Patch, or order, in the state of New York, and payable in the city of New York, and by Patch indorsed to the plaintiffs; that at the time of making the note and of the rendition of the first judgment, he, the defendant, and Patch were inhabitants and residents of the state of New York; that in the month of March, 1857, the defendant presented his petition to the county court of the county of Wyoming, in the state of New York, for his discharge as an insolvent debtor, in pursuance of the statute law of that state, upon which he was discharged; and that he made an assignment by order of the court, in the month of May following. In his schedules, he returned these plaintiffs, as living in the city of Chicago, state of Illinois, creditors by a judgment rendered in the circuit court of the United States for the northern district of Illinois, on a judgment rendered in the court of Chautauqua county, in the state of New York, upon his note to Oliver Patch, of New York, and payable in that state. The judgment in the declaration mentioned was rendered prior to the discharge. To the plea, the plaintiffs demurred, in which the defendant joined.

H. K. Whiton, for plaintiffs.

Knowlton, Pritchard & Jackson, for defendant.

MILLER, District Judge. [The original debt was contracted by a promissory note, between parties in the state of New York, and payable in that state. The indorsees of the note recovered a judgment against the maker in a court of that state; and in a suit on that judgment record they, as citizens of the state of Illinois, recovered a judgment in the circuit court of the United States, in Illinois, against the defendant, who was afterwards discharged, and made an assignment as an insolvent debtor, as a resident of the state of New York, under a law of that state, returning in the schedule the plaintiffs as residents of the state of Illinois.][2] In the absence of uniform laws on the subject of bankruptcy, throughout the United States, under the constitution, the effect to be given discharges under insolvent laws of the states, is a question of embarrassment to the courts, and of interest to parties. The courts of the several states uniformly carry out their own laws, and between some of the states a comity is observed. For these reasons, decisions of the courts of the states in regard to their own laws, or in observance of existing comity, afford but little aid in the determination of the question presented by

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

[2] [From 9 Am. Law Reg. 217.]

the pleadings. Decisions of the courts of the United States must be my guide, if I can ascertain them with sufficient certainty. The subject under consideration appropriately belongs to those courts, as it relates to the rights of citizens of different states.

It is understood that, by the insolvent laws of the state of New York, a debt is discharged where the contract was made within the state; or where the contract was to be performed within the state; or where the creditor, at the time of the first publication of notice, was a resident of the state. Under that law, the supreme court of the state held, that the discharge of a defendant from the payment of his debts is an absolute bar to a recovery upon a contract made and to be executed within the state, although the creditor be a non-resident of the state, and neither united in the application for the discharge, nor accepted a dividend of the assets. And if such discharge be granted after a judgment on the contract, the debtor will be relieved on motion, and a perpetual stay of proceeding on the judgment will be granted, the plaintiff being at the time a resident of another state. Parkinson v. Scoville, 19 Wend. 150. That decision literally carried out the statute law of the state. There is no question but that, if the note had been held by the payee, or if these plaintiffs had resided in the state of New York at the date of the discharge, and had not previously obtained a judgment in the circuit court of the United States, in Illinois, the defendant would have been released from the debt. The release of the debt by the insolvent discharge is the only matter for consideration; the question of lien of either of the judgments is not in the case. The plaintiffs sue upon the judgment record simply as an evidence of debt.

In the case of Burt v. Smith, which was a suit upon a judgment record from a court of this state, founded on a judgment record from the state of New York, this court adjudged the discharge binding on the plaintiff, as he was, at the date of the discharge, a resident of the state of New York, and, as creditor, had joined in the petition to the court for the discharge. In Clay v. Smith, 3 Pet. [28 U. S.] 411, the plaintiff, a non-resident of the state where the discharge was ordered, having received from the assignee a dividend of the assets, it was held that he was thereby concluded.

In Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, it is decided, that an insolvent law of a state, which discharges a party from his debts subsequently contracted, does not impair the obligation of future contracts between its citizens; but it cannot affect the rights of creditors, who are citizens of other states. The question in that case, as determined by the court was, whether a discharge of a debtor under a state law, was valid against a creditor, a citizen of another state who had never voluntarily subjected himself to the state laws otherwise than by the origin of the contract. The debt had been contracted in the state of New York, where Ogden was discharged, the plaintiff residing in the state of Kentucky. Since the decision of that case, the constitutionality of state insolvent laws as to future debts has not been questioned in the supreme court of the United States; and the principle there decided as to non-resident creditors, has been steadily maintained. In Boyle v. Zacharie, 6 Pet. [31 U. S.] 635, the debt was a contract of the state of Louisiana, and Zacharie, the creditor, resided in that state. Boyle, the debtor, resided in the state of Maryland, and was discharged under the insolvent laws of that state. It was held that the discharge in the state of Maryland did not affect this creditor. In Clark v. Von Reimsdyke, 9 Cranch [13 U. S.] 153, it is decided that a discharge under the law of Rhode Island, will not protect a debtor against a debt contracted in a foreign country. And in Cook v. Moffit, 5 How. [46 U. S.] 295, the supreme court adhere to their previous decisions, and decide that a contract made or to be performed in the state of New York, with a resident of that state, is not affected by a discharge of the debtor in the state of Maryland, where the debtor resided. That case was decided in the circuit court of the United States, for the district of Maryland, the state in which the insolvent discharge was made; and the judgment was affirmed in the supreme court. Taney, C. J., in his opinion, says that he ruled the case in the circuit court, in obedience to the decisions of the supreme court; and he remarks:—"I cannot see how such laws can be regarded as a violation of the constitution of the United States. For bankrupt laws, in the nature of things, can have no force, or operation beyond the limits of the state or nation by which they were passed, except by the comity of other states or nations. According to established principles of jurisprudence such laws have always been held valid and binding within the territorial limits of the state by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation. And they have never been considered, on that account, an infringement of the rights of other nations or their citizens. But beyond the limits of the state they have no force except such as may be given them by comity. If therefore, a state may pass a bankrupt law, in the fair and ordinary exercise of such a power, it would seem to follow that it would be valid and binding, not only upon the courts of the state, but also upon the courts of the United States, when sitting in the state and administering justice according to its laws, and that in the tribunals of other states it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other." From these remarks it is apparent that the chief justice in the circuit court for Maryland would have

considered the insolvent discharge in that state effectual against the non-resident creditor, if he had not been bound by the adjudications of the supreme court of the United States. In that case Mr. Justice Daniel and Mr. Justice Woodbury held that the bankrupt law of a state is a law of the contract and enters into it; and that the lex loci contractus, must govern. The position of Justice Woodbury is that "such laws are to be regarded as if part of the subsequent contract, incorporated into it; and hence that the contract, being construed according to the lex loci contractus should be discharged by a certificate of bankruptcy given to the obligor in the state where the contract was made and was to be performed. And this, whether the action on it is brought in that state or another, or in the courts of the United States, or those of the states, and whether the obligee resides in that state or elsewhere. Considered as a part of the contract itself, it is inseparable from it and follows it into all hands and all places." Justice Story in Le Roy v. Crowninshield [Case No. 8,269], and in Story's Conflict of Laws, § 351, seems to approve this position. If this position were tenable, I should not have much difficulty in disposing of the question under consideration; but I am not disposed to adopt it as a controlling principle. These several positions of Chief Justice Taney, and Justices Daniel and Woodbury are merely cited as modern principles, in regard to discharges under state insolvent laws. And in the reports of the supreme court of the United States, it will appear that the justices from time to time varied in their opinions of these laws, from considering them as laws impairing the obligation of contracts in the sense of the constitution of the United States, to the extreme positions above cited. But, however they may have differed in their opinions, the law of the court is, that an action of a non-resident plaintiff is not barred by a plea of discharge under a state insolvent law, unless he has abandoned his exterritorial immunity, by voluntarily subjecting himself to the state laws, otherwise than by the origin of the contract. The question now to be considered is, whether these plaintiffs abandoned this immunity by obtaining the judgment against the defendant in the state of New York.

A judgment is the sentence of the law, pronounced by a court, upon the matter contained in the record. It is a debt of record; and in many respects, is distinguished from a contract. The omission of a joint debtor, in a suit on contract, must be taken advantage of by a plea in abatement; but in a suit on a judgment record, such omission may be demurred to. Gilman v. Rives, 10 Pet. [35 U. S.] 298. A suit on a judgment record is considered as in the nature of a scire facias to revive a judgment. A judgment record is not evidence of a new contract, but is a debt of record founded on the original contract. At common law a judgment in a personal action could only be revived by a suit, until the scire facias was allowed by the statute of 2 Westminster, c. 45. Debt lies on a judgment record, upon the principle of a contract implied in law. Nul tiel record is the only plea of the general issue; but payment, or release, in fact or law, may be specially pleaded, the same as to a scire facias. The action of debt on a foreign judgment is an original and independent action; but the defense is the same as to a suit on a domestic judgment, or to a scire facias to revive a judgment.

The judgment in the circuit court of the United States for the northern district of Illinois, was no satisfaction of the judgment in the county of Chautauqua, in the state of New York. Mumford v. Stocker, 1 Cow. 178. But satisfaction of the judgment in New York would authorize the circuit court in Illinois, either to order a satisfaction of their judgment, or to order a stay of further proceedings. If either order were made and certified here, there could be no further proceedings in this court. If the defendant had paid the debt, interest and costs of the judgment in New York, on proof of such payment he would be entitled to have satisfaction of the judgment in Illinois entered upon the payment of costs.

Upon the principle of the constitution of the United States, and acts of congress, that full faith and credit shall be given in each state, to the judicial proceedings of every other state, an action on the New York judgment could not be maintained against a plea of discharge under the insolvent laws of that state. Judgments when sued on in another state are to be considered of the same force and validity as in the state wherein they were originally rendered.

The plaintiffs voluntarily subjected themselves to the jurisdiction of the state of New York. Their judgment was subject to the judicial authority of that state; and they, in regard to their judgment as an evidence of debt, were bound by the subsequent action of the courts of the state, whether they resided in the state or not. And from the practice and proceedings of the courts in that state, after the discharge of the defendant as an insolvent debtor, it was competent for the court of Chautauqua county, upon motion, to order that no further proceedings be had on the judgment. Whether that order has been made or not does not appear; but we consider it as made. The supreme court of Pennsylvania in Merchants' Ins. Co. v. De Wolf, 9 Casey [33 Pa. St.] 45, decided, that a suit would lie on a record of a judgment in the state of New York, that had been appealed from, but not superseded; leaving the judgment to be set aside or stayed by audita querela or a writ of error coram nobis, on a certificate of reversal of the original judgment. The re-

versal of that judgment was uncertain, and the court proceeded, until the fact of reversal should be certified. In this case the extinguishment of the original judgment as a debt of record is reduced to a certainty.

Chief Justice Nelson in the case of Van Hook v. Whitloch, 26 Wend. 43, remarks on page 54: "I am not aware that it has been distinctly determined by any case, in the supreme court of the United States, that the discharge would not have been a bar against a citizen of another state, where the suit is brought in the court of the state, in which it was granted; and upon a contract made therein posterior to the law." Neither am I aware of any such decision in the supreme court of the United States. But we now see that the court of the state of New York has so decided; and as the plaintiffs would be barred of a suit in that state, this court has no right to question the position of the court of that state, that the judgment in the county of Chautauqua, into which the note merged, is extinguished as evidence of a subsisting debt. I think the plaintiffs are as much bound by the insolvent discharge of the defendant in the state of New York, as if they had consented to the discharge, and had received a dividend of the assets of the insolvent estate.

The judgment in the United States circuit court in Illinois, was founded upon, and, as I have shown, is dependent upon the satisfaction or extinguishment of the judgment in New York. That judgment being rendered before the insolvent discharge of the defendant, cannot be interposed, to deprive the defendant of the legal benefit of his discharge. Such being the legal consequence of that discharge, in regard to the judgments in New York and Illinois, it follows that the plaintiffs cannot maintain this suit, and that the demurrer must be overruled, and judgment entered for the defendant on the plea.

See Green v. Sarmiento [Case No. 5,760]; Bank of Alabama v. Dalton, 9 How. [50 U. S.] 522; Hampton v. McConnell, 3 Wheat. [16 U. S.] 234; Mills v. Duryee, 7 Cranch [11 U. S.] 481; Warren Manuf'g Co. v. Etna Ins. Co. [Case No. 17,206]; Steel v. Smith, 7 Watts & S. 447.

Case No. 3,609.

DAVIDSON v. SMYTHE.

[The case reported under above title in 5 Int. Rev. Rec. 94, is the same as Case No. 3,604.]

DAVIDSON (TAYLOE v.). See Case No. 13,769.

DAVIDSON (UNITED STATES v.). See Case No. 14,922.

Case No. 3,609a.

DAVIDSON et al. v. WHEELOCK et al.

Circuit Court, D. Minnesota. May Term, 1866.

[See 27 Fed. 61.]

DAVIDSON (YOUNG v.). See Case No. 18,157.

DAVIDSON, The CLARA. See Case No. 2,791.

DAVIDSON COUNTY (BEVERLY v.). See Case No. 1,377.

Case No. 3,610.

DAVIE v. HATCHER.

[1 Woods, 456;[1] 10 Am. Law Reg. (N. S.) 519.]

Circuit Court, S. D. Georgia. April Term, 1871.

WAR—SUSPENSION OF STATUTES OF LIMITATION—RETROACTIVE LAWS—FEDERAL COURTS FOLLOWING STATE DECISIONS—DISCHARGE OF SURETIES.

1. The statute of Georgia, of the 14th of December, 1861, suspending the statutes of limitation then in force during the then existing war, and suspending the statutes in cases where they had commenced to run, until peace should be declared; and the ordinance passed by the convention of the people on the 31st of October, 1865, suspending the statutes of limitation in all cases, civil and criminal, from the 19th of January, 1861, until civil government should be restored or the legislature should otherwise direct, however defective they may have been in point of original authority, were ratified by the constitution of the state, of 1868.

2. The act of the 16th of March, 1869, passed by the general assembly established under the constitution of 1868, declaring that all acts of the legislature of the state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, and which are retroactive in their character relative to the statutes of limitation, should be held null and void in all cases in which the statute had fully run before the passage of said retroactive legislation, does not control or modify the operation of those suspensory laws of 1861 and 1865, except in cases where the statute had fully run before their passage respectively.

3. The decision of the state courts that the statute passed in 1826, and re-enacted in 1831, by which the surety or indorser of a promissory note, after it has become due, may require the holder to proceed to collect the same, and if he does not proceed so to do within three months after such requisition, the indorser or surety shall be no longer liable, does not apply where the principal does not reside in the state —that he cannot be compelled to go out of the state to sue the principal, is binding on this court.

4. The omission of the holder of a promissory note to sue the maker, who resides in another state, can, under no circumstances, as between him and the surety on the note, make the holder chargeable with gross negligence.

This cause was heard upon a motion for a new trial made by defendant.

Andrew Sloan and L. S. Downing, for the motion.

W. U. Garrard, contra.

BRADLEY, Circuit Justice. This was an action of assumpsit commenced on the 31st of December, 1869, on a promissory note, dated at Columbus, Ga., December 30, 1858, given by Reuben Allison as principal, and Samuel J. Hatcher as surety, to P. J. Phillips, executor of H. H. Lowe, or bearer, for the

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

sum of $1,125, payable on the 1st of January, 1860, at the agency of the Bank of Savannah, in Columbus, with interest from date if not punctually paid. The surety indorsed a waiver of protest at the maturity of the note. The action is brought by Davie, as bearer, against the defendant as executrix of the surety. It is apparent that it was not brought for nearly ten years after the note became due, and the statute of limitations for such demands in Georgia is six years.

The principal question in the case is, whether the laws and ordinances passed since the note became due have prevented the operation of the statute upon the cause of action arising thereon. The case was tried in December last, and the judge presiding ruled that the statute of limitations had been suspended so as to save the action. By an act of the legislature of Georgia passed in December, 1860, the several statutes of limitation were suspended for one year. The ordinance of secession was passed January 19, 1861, and a new constitution was adopted in March and ratified in July following. By an act passed December 14, 1861, the statutes of limitation then in force were suspended during the then existing war, and where the statute had commenced to run, it was suspended until peace should be declared. After the war the convention of the people of Georgia, assembled by the provisional governor, in pursuance of President Johnson's proclamation of June 17, 1865, met at Milledgeville, and on the 31st day of October, 1865, passed an ordinance which, amongst other things, ordained that the statutes of limitation in all cases, civil and criminal, should be suspended from the 19th of January, 1861, until civil government should be fully restored, or the legislature should otherwise direct. Besides a constitution of the state, other ordinances were passed by said convention in the form of laws, which were observed as such for several years. By the third section of article eleven of the constitution of 1868, adopted by the convention, assembled under the reconstruction acts of congress, it was declared, amongst other things, "that all acts passed by any legislative body, sitting in this state as such, since the 19th day of January, 1861, except such as were inconsistent with the constitution of the United States, or this constitution, or as may have been passed in aid of the late Rebellion," etc., should be of force in this state, but that the general assembly might alter or repeal the same, if not otherwise prohibited by the constitution. By the fifth section of the same article it was declared that all rights, privileges and immunities which might have vested in or accrued to, any person or persons under any act of any legislative body, sitting as such, or any decree, judgment or order of any court sitting in this state under the laws then of force and operation therein and recognized by the people as a court of competent jurisdiction, since the 19th of January, 1861, should be held inviolate, unless attacked for fraud or otherwise declared invalid by or according to this constitution. The general assembly, established under this constitution by an act passed March 16, 1869, declared that all acts of the legislature of this state, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character relative to the statutes of limitation, should be held to be null and void, in all cases in which the statute had fully run, before the passage of said retroactive legislation. This review of the legislation which has taken place leads to the following conclusions: 1st. That the suspensory laws of 1865 and 1861, however defective they may have been in point of original authority, were ratified by the constitution of 1868. 2d. That the act of 1869 does not control or modify their operation, except as to cases in which the statute had fully run, before their passage "respectively." These points being established, the case does not present the slightest difficulty.

The ordinary statute in this case did not commence to run till January 4, 1860, and would not have fully run till January 3, 1866. It was suspended, therefore, both by the act of 1861, during the whole continuance of the war, and by the ordinance of 1865, from the 19th of January, 1861, until civil government should be fully restored. Deduct this period of suspension from the time that elapsed before the commencement of this suit, and it will be found to have commenced within six years from the maturity of the note. I have been referred to the case of Calhoun v. Kellogg, 41 Ga. 231, to show that the supreme court of this state has held that the ordinance of 1865 was not in legal operation until the constitution of 1868 made it so. I do not so understand the case. The court did decide, however, that if the statute had fully run before the passage of the ordinance of 1865, though not until after the act of 1861, the cause of action was not revived. If that decision should be regarded as decisive of the law of Georgia, still it does not affect this case. But with the highest respect for the court by which it was made, it seems to me that the dissenting views of Justice Warner are founded on the better reason, and that they are sustained by the previous decision of the same court in Brian v. Banks, 38 Ga. 300. That, however, is a question of local law which it does not become necessary to decide.

Another point was made on the trial, which it becomes necessary for me to notice. It arises under the statute of this state, passed in 1826, and re-enacted in 1831, by which the security or indorser of any promissory note or other instrument, after the same has become due, may require the holder to proceed to collect the same, and if he does not proceed to do so within three months after such notice or requisition, the indorser or surety shall be no longer liable. Such a notice was

given in this case in December, 1861 [or January, 1862],[3] by the executrix to the payee of the note, who then held the same. But it is admitted that the principal resided and still resides in Alabama. By repeated decisions of the courts of this state it has been held, that if the principal does not reside in this state, the holder of the note is not bound by the law. He cannot be compelled to go out of the state to sue the principal. Those decisions are binding on this court. It was also contended on the trial, and made a point here, that on general principles of law, if the surety require the creditor to collect the money of the principal, and he neglects doing so when he can, and the principal afterwards becomes insolvent, the surety will be discharged. I do not so understand the law. The contract between the parties is this: If A. does not pay the debt, I., the surety, will pay it. To make it read, if A. does not pay the debt, I. will pay it, if you prosecute A. when I. request it, is to introduce a new term into the contract. Who is guilty of laches, the creditor, or the surety after the principal fails to pay the debt at maturity? Is it not the duty of the surety by his contract to pay it, and not subject the creditor to the necessity of bringing a suit? There may be equitable considerations which would make it extremely hard and unjust for the creditor to refuse to prosecute the principal. But when they arise, they belong strictly to equity, and a court of equity is the proper tribunal to consider them. Mr. Parsons in his work on Contracts, after reviewing some of the cases, says: "A surety is discharged where the creditor, after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity." Volume 2, pp. 22–25. How can a surety be said to have lost his security by the negligence of the creditor to sue, when by paying the debt himself, as was his duty to do, he could at any moment have instituted suit against the principal? In this case the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence.

The motion for a new trial is denied.

Case No. 3,611.

DAVIES et al. v. ARTHUR.

[13 Blatchf. 34;[1] 21 Int. Rev. Rec. 205.]

Circuit Court, S. D. New York. June Term, 1875.[2]

CUSTOMS DUTIES—CLASSIFICATION—SUFFICIENCY OF PROTEST—"SILK TIES."

D. entered imported merchandise as "silk ties." The collector exacted a duty of 60 per cent. ad valorem thereon, as "silk scarfs," under section 8 of the act of June 30, 1864 (13 Stat. 210). D. protested against paying such duty, on the ground that the merchandise was "articles worn by men, women and children, and wearing apparel, and should only pay duty at 35 per cent. ad valorem," and was "neither scarfs nor ready-made clothing in fact, or as known in trade or commerce." The merchandise was in fact dutiable at 50 per cent. ad valorem, as a manufacture of silk, not otherwise provided for, under the concluding clause of said section 8. D. brought this suit to recover back the 10 per cent, excess of duty paid, as having been paid under protest: *Held*, that the protest was insufficient, because it did not set forth "distinctly and specifically" the grounds of the objection to the amount claimed, as required by section 14 of the act of June 30, 1864 (13 Stat. 215), and failed to state the true ground of objection to the duty exacted.

[Action by John M. Davies and others against Chester A. Arthur, collector of the port of New York, to recover exces ive duties levied by defendant on certa.n articles imported by plaintiffs.]

Edward Hartley, for plaintiffs.

Thomas Simons, Asst. Dist. Atty., for defendant.

WALLACE, District Judge. Upon the importation by the plaintiffs, of merchandise entered by them as "silk ties," the defendant, as collector of the port of New York, exacted a duty of 60 per centum ad valorem, upon the assumption that the articles should be classified as "silk scarfs," under section 8 of the act of June 30, 1864 (13 Stat. 210). The plaintiffs protested against the payment of such duty, on the ground that the merchandise was "articles worn by men, women and children, and wearing app rel, and should only pay duty at 35 per centum ad valorem, under section 22, Act March 2, 1861 [12 Stat. 190], and section 13, Act July 14, 1862 [12 Stat. 555], and are neither scarfs nor ready-made clothing in fact, or as known in trade or commerce." It now appears, that the merchandise should have been classified as "a manufacture of silk, not otherwise provided for," under the concluding clause of section 8 of the act of June 30, 1864, and was dutiable at 50 per centum ad valorem. The plaintiffs now seek to recover the difference of 10 per centum between the proper duty and the duty exacted by the defendant; and the only question for consideration is, whether they are permitted to do so under their protest.

Unless the protest sets forth "distinctly and specifically" the grounds of the objection to the amount claimed, it fails to meet the requirements of the statute,—Act June 30, 1864 (13 Stat. 215, § 14),—and there can be no recovery. Although, in one sense, the articles imported may have been "silk ties," or "wearing apparel," or "articles worn by men," as claimed by the plaintiffs, or "silk scarfs," as claimed by the defendant, they were not such within the meaning of the laws, imposing duties, but were "a manufacture of silk, not otherwise provided for," and the

[3] [From 10 Am. Law Reg. 519.]

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

[2] [Affirmed in 96 U. S. 148.]

plaintiffs, therefore, failed to state the true ground of objection to the duty exacted. The office of the protest is to point out to the officers of the government the precise errors of fact or of law which render the exaction of the duty unauthorized. Thomson v. Maxwell [Case No. 13,983]; Curtis' Adm'x v. Fiedler, 2 Black [67 U. S.] 461. The plaintiffs can only be heard to allege, now, the objections distinctly and specifically stated in their protest. Norcross v. Greely [Case No. 10,294]; Swanston v. Morton [Id. 13,677]; Kriesler v. Morton [Id. 7,933;] Warren v. Peaslee [Id. 17,198]. They are precluded, therefore, from insisting that their importation was a manufacture of silk, not otherwise provided for, and subject to a duty of 50 per centum, instead of 60, as exacted, when, by their protest, they allege it to be "wearing apparel," &c., subject to a duty of 35 per centum.

It is urged that the protest described the merchandise with sufficient accuracy to inform the collector of the character of the articles, by designating them as "silk ties," and was not vitiated by an error of law in classifying them as "wearing apparel," &c., subject to a duty of 35 per centum. The argument is, that the collector is presumed to have known the law, and could not have been misled by the error. If the error was one of law, it was this only that could have misled the collector. If he could not have been misled because theoretically he knew the law, there was no necessity for any protest; and the argument would prove too much, because it would lead to the conclusion that a protest is never necessary when the officers of the government exact illegal duties upon an erroneous construction of the law. There is no reason for any distinction in the requirements of a protest, when predicated on errors of law on the part of the officers of the government, and when upon errors of fact. The construction of the law is equally open to both parties, but the burden is imposed upon the importer to state the grounds of his objection, and to state them distinctly and specifically.

It is also insisted, on behalf of the plaintiffs, that, inasmuch as the collector claimed that the articles imported were "silk scarfs," and the protest stated that they were not "scarfs in fact, or as known in trade and commerce," it sufficiently stated the ground of the objection. This statement was merely a challenge of the collector's position, a denial that the articles were what he claimed them to be. Such a statement is not distinct and specific, for nothing can be more indefinite than a general denial. The collector can not fail to know that his position is challenged when the importer insists that the duty exacted is excessive; and, if a mere negation is the specific statement of objection contemplated by the statute, it would seem that the statute is a piece of very useless legislation.

The protest must be held insufficient, and judgment is ordered for the defendant.

[NOTE. Plaintiffs took a writ of error to the supreme court of the United States, which affirmed the judgment on the ground of the insufficiency of the protest. Davies v. Arthur, 96 U. S. 148.]

Case No. 3,612.

DAVIES v. DAVIES.

[2 Cranch, C. C. 105.][1]

Circuit Court, District of Columbia. Nov. Term, 1814.

BONDS—PROOF OF SIGNATURE—COMPETENCY OF WITNESSES.

1. When the subscribing witnesses to a bond reside in a foreign country, evidence of the handwriting of the obligor and subscribing witnesses, will be left to the jury as prima facie, but not conclusive proof, upon the issue of non est factum.

[Cited in Craig v. Reintzel, Case No. 3,336.]

2. A surety in the defendant's administration bond, is a competent witness for the defendant.

Debt on bond. Plea non est factum, and issue.

Mr. Taylor, for plaintiff [John Davies], offered a deposition of the plaintiff's son, to prove the handwriting of the obligor and subscribing witnesses, who resided in London, and were not proved to be dead.

C. Lee, for defendant [Benjamin Davies' executrix], contended that this was not sufficient evidence of the execution of a bond. That it is only in commercial causes that the rule has been relaxed. The subscribing witnesses are supposed to be living, and a commission might issue to take their depositions. There ought at least to be some evidence that the obligor acknowledged the debt. It is certainly not conclusive evidence of the execution of the bond. The delivery is not proved. It is only the opinion of the witness that the signatures of the obligor and subscribing witnesses are genuine.

Mr. Taylor, contra, cited Adam v. Kers, 1 Bos. & P. 360, and Barnes v. Trompowsky, 7 Term R. 265.

THE COURT (THRUSTON, Circuit Judge, absent) permitted the evidence to go to the jury, not as conclusive, but primâ facie evidence of the execution of the bond.

THE COURT also permitted Isaac Entwirtle to be examined as a witness for the defendant, although he was her surety in her administration bond; on the authority of the case in Esp. N. P. 163, and the case of Carter v. Pearce, 1 Term R. 163. See, also, Craig v. Reintzel [Case No. 3,336].

DAVIES (EMERSON v.). See Cases Nos. 4,436 and 4,437.

DAVIES COUNTY (OGDEN v.). See Case No. 10,455.

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

Case No. 3,613.

Ex parte DAVIS.

[14 Law Rep. 301; 9 West. Law J. 14.]

District Court, N. D. New York. Aug. 17-29, 1851.

FUGITIVE SLAVE LAW — COMMISSIONER'S CERTIFICATE—RETROACTIVE OPERATION — HABEAS CORPUS.

1. The provisions of the 6th section of the fugitive slave act [9 Stat. 463], that "the certificate of the commissioner shall be conclusive, &c., and shall prevent all molestation, &c., by any process issued by any court, judge, magistrate, or other person whatsoever," applies only to a certificate which appears on its face to be granted, or by a reasonable interpretation of its language might have been granted, in conformity with the act, and in pursuance of the authority thereby conferred, by a person having power to grant it, and proceeding in a manner warranted by the act.

2. The provisions of the 10th section of the fugitive slave act, "that when any person held to labor," &c., "shall escape," are clearly prospective, and inapplicable to the case of an escape occurring before the passage of the act.

3. Where it appears from the face of the certificate that the adjudication was made without evidence, the error can be corrected on habeas corpus.

4. By the common law of England and this country, the writ of habeas corpus is not granted of mere course, nor without probable cause shown.

On the 17th August an application was made to Judge CONKLING, in behalf of the petitioner [John Davis], for a writ of habeas corpus ad subjiciendum, to be directed to Mr. George B. Gates, one of the deputy marshals of this district, in whose custody the petitioner was alleged to be, at the city of Buffalo. The petition alleged that the petitioner was restrained of his liberty in the custody of the above-mentioned officer, under pretence that he was a fugitive from labor, and in virtue of a warrant, a copy of which was annexed to the petition; wherefore he prayed a writ of habeas corpus to discharge him from custody, on the ground that, as he was advised by his counsel, and believed, his imprisonment was illegal, that he was a free man, and that the commissioner, by whom the warrant was issued, had no jurisdiction to issue the same. Annexed to the petition, was a copy of a warrant issued by H. K. Smith, Esq., a commissioner of the circuit court of the United States, purporting to have been granted on the application of Benjamin S. Rust, the duly authorized agent and attorney of George J. Moore, of Louisville, in the state of Kentucky, alleging that the petitioner owed labor and service to the said Moore, and that he was a fugitive therefrom. By an indorsement on the warrant, it appeared that the same had been executed and returned and that the deputy marshal had the petitioner in custody, in virtue thereof. The petition contained no allegation of irregularity in the proceedings before the commissioner, nor was it alleged in the petition, or by the counsel for the petitioner, that there was any insufficiency in the warrant, apparent upon its face. This application was denied by the judge, on the ground of want of probable cause; it being, as he stated, a settled rule both in England, and, in the absence of any statute injunction to the contrary, in this country also, that the writ of habeas corpus was not grantable of mere course, nor without probable cause shown. It was an extraordinary remedy for unlawful restraint of personal liberty, and no court or judge had authority to allow it, except in cases apparently of this nature. It was not enough for the petitioner to allege, in general terms, that his confinement was illegal; he was required to show that it probably was so in fact. In the case before him, conceding the validity of the statute under which the commissioner had acted, not only had the petitioner failed to fulfill this requirement, but, on the contrary, it expressly appeared that the commissioner, in causing his arrest and detention, had only discharged an imperative duty enjoined upon him by law; and with regard to the act, the judge said he did not consider himself at liberty to treat its constitutionality as any longer an open question. Nearly a year had elapsed since it received the sanction of the two houses of congress, and, in accordance with the official opinion of the attorney general of the United States, the approval of the president. No act of the national government had ever more strongly arrested the attention of the American people, or been more closely scrutinized. It had been repeatedly brought under discussion and consideration before the judges and judicial tribunals of the country, both state and national, and in every instance its constitutionality had been unequivocally asserted and maintained. Among those by whom this opinion had either directly or indirectly been declared, are, at least, three of the judges of the supreme court of the United States, all of whom, moreover, are citizens of states in which slavery does not exist. Under these circumstances, Judge CONKLING said, it was, in his judgment, wholly unnecessary, and would be scarcely decorous, for him to enter upon the examination of the question at all. At an earlier period it would have been his duty to do so, and to be governed by his own independent conclusions; and this duty, he should not, for a moment, have hesitated to perform.

The motion for a habeas corpus, having for these reasons been denied, a second petition was presented on the 19th, on which the motion was renewed. The petitioner states that he is still restrained of his liberty, in the custody of Mr. Gates, the deputy marshal; that after his arrest, in virtue of the warrant mentioned in his first petition, having been brought before the said commissioner, he, the said commissioner, made out a certificate, di-

recting the petitioner to be taken to the state of Kentucky, whence, as it was alleged, he had escaped, and where he still owed service. The petitioner further alleges that as he is advised by counsel, and verily believes, the proceedings before the commissioner are null and void, for want of jurisdiction in the said commissioner to make the said certificate, because there was no evidence before him that he, the petitioner, was a slave, but that, on the contrary, the proof, as the petitioner was further advised, established his freedom; that the said proceedings were founded upon an alleged record of the county court of Jefferson county, in the state of Kentucky, which record is not exemplified under the seal of the said court, in pursuance of the act of congress in such case made and provided, wherefore, as the petitioner is further advised, the said pretended record is void, and the commissioner acquired no jurisdiction under the same; that there was no other proof before the commissioner, aside from such pretended record, that the petitioner owed service to the claimant, Moore, but, on the contrary, there was proof that the claimant brought and permitted the petitioner to come to Cincinnati, in the state of Ohio, whereby, as he is further advised, and believes, he acquired his freedom. And the petitioner further states that, to the best of his knowledge and belief, there was not before the commissioner any evidence, except the same pretended record of the fact of his escape from Kentucky; and lastly, that, to the best of his knowledge and belief, he is not detained for any other cause. The petition, for reasons stated in the affidavit, is verified by the oath of Mr. Love, acting as the counsel of the petitioner. On this petition, Judge CONKLING granted an order nisi, returnable on the 26th day of August. On that, and the following day, the case was ably argued by Mr. Talcott for the petitioner, and Mr. Foster for the claimant.

In opposition to the rule, the counsel for the claimant read an affidavit made by Mr. Gates, the deputy marshal, setting forth the proceedings before the commissioner, and incorporating the certificate granted by him. Appended to the certificate, as forming a part thereof, was the petition of the claimant's agent and attorney, and the power of attorney under which he acted; the warrant of arrest; the transcript of a record of the county court of Jefferson county, in the state of Kentucky, authenticated by the attestation of the clerk, and an impression of the seal of the court thereon, stating it had been proved to the satisfaction of that court, by the affidavits of two persons therein named, that the petitioner owed service to the claimant, and that he had, on or about the 25th day of August, 1850, escaped therefrom into the state of Ohio, which record was referred to, in the certificate, as the evidence by which the facts therein stated were established before the commissioner; and the affidavit of the agent, of his apprehension of a rescue. At the close of the argument, on Wednesday, the 27th of August, Judge CONKLING said he did not believe he should be able to decide the case before the morning of the second day thereafter, but that he should endeavor to do it at that time, which he accordingly did, by delivering the following judgment:

CONKLING, District Judge. An order nisi having been granted by me several days ago, for a writ of habeas corpus ad subjiciendum, to bring before me the body of John Davis, for the purpose of inquiring into the legality of his confinement, in the custody of one of the deputy marshals of this district, and the case having been fully argued by counsel, and considered by me, I am now to declare my opinion of the law thereupon.

The case is one in its nature, calculated, as we know, by recent experience, to arouse the passions and prejudices of men in this part of the Union; and this tendency, in the present instance, has been unhappily inflamed by an extraordinary incident reported to have attended the original arrest of the petitioner. But the circumstances to which I have alluded, however deplorable, it is scarcely necessary to observe, can have no legitimate influence whatever upon the decision of the question before me, and are to be remembered, if at all, only for the purpose of inspiring a deeper sense of judicial duty, and greater caution in its discharge. If the prisoner is entitled by law to the privilege of the writ of habeas corpus, it must be awarded; if not, it must be withheld; and in neither event can the result afford any just ground for dissatisfaction, still less any apology for the indulgence of a spirit of insubordination to the laws of the land. It is proper, at the outset, to observe that, as I hoped and expected, when the order nisi was made, the merits of the case are now as fully before me as they could be on the return of a writ of habeas corpus, should one be granted. The real question to be decided, therefore, is, whether the petitioner is entitled to his discharge; for it is an obvious as well as an established rule that when, upon an application for a habeas corpus, it appears that it would be fruitless to the petitioner if allowed, it is not to be granted.

Before proceeding to an examination of the merits of this application, it may not be amiss to advert to the source of the power which I am called upon to exercise. The government of the United States is one of expressly delegated powers, and its functionaries can exercise no authority except such as, either in terms or by reasonable intendment, has been conferred by the constitution, or by laws passed in accordance therewith. To guard against possible restrictions of the great privilege of habeas corpus, it was deemed expedient, by an express provi-

sion of the constitution, to forbid its suspension, unless when, in case of rebellion or invasion, the public safety might require it. With this exception, it was left, as one of the elements or incidents of the judicial power, to be regulated by law; and in order to give it vitality, it was necessary for congress to confer the power to grant it, and to designate the functionaries by whom this power should be exercised. This was done by the 14th section of the judiciary act of 1789, which, as it has been authoritatively interpreted, invests all the courts of the United States, and the several judges thereof, with the power to issue this writ, "for the purpose of inquiring into the cause of commitment." The act does not prescribe the cases in which this form of remedy may be resorted to, nor does it define the power of the court or judge in cases where it lies. Recourse for these purposes must therefore be had to the common law, and especially to the celebrated habeas corpus act of 31 Car. II., designed to correct and effectually guard against the scandalous evasions and abuses by which the practical efficacy of the writ of habeas corpus had become in a great degree destroyed during the arbitrary reign of the Stuarts. 3 Bl. Comm. 130–138; Ex parte Bollman, 4 Cranch [8 U. S.] 75; 2 Cond. Eng. Ch. 33; Ex parte Watkins, 3 Pet. [28 U. S.] 193, 201, 202. His honor examined at length the authorities cited at the argument, and especially the cases Ex parte Kearney, 7 Wheat. [20 U. S.] 38, and Ex parte Watkins, 3 Pet. [28 U. S.] 193, —"the latter being mainly relied on by the counsel for the claimant,"—and which establish the principle that when, by a court of competent jurisdiction, a judgment, in its nature final, has once been pronounced, it cannot be reviewed on habeas corpus; and he then proceeded as follows:

It is upon this principle that the claimant relies, and the question is, whether or not it furnishes the rule of decision for the present case. For the purpose of determining this question, it is proper to examine into the nature of the adjudication which it is proposed to bring under review. The adjudication was made by one of the commissioners of the United States, for this judicial district. The office of commissioner was created by an act of congress, passed in 1812 [2 Stat. 679], by which the several circuit courts were authorized to appoint suitable presons to take acknowledgments of bail and affidavits, in civil causes depending in such courts; and by an act passed a few years later, the persons so appointed were authorized to perform the like services in causes in the district courts. By this latter act, and other acts, subsequently passed, other powers were successively conferred upon these officers; and lastly, by the first section of the act of September 18, 1850, known as the "Fugitive Slave Act," they are "authorized and required to exercise and discharge all the powers and duties conferred by this act." The fourth section further declares that the commissioners "shall have concurrent jurisdiction with the judges of the circuit and district courts of the United States, in their respective circuits and districts." By the sixth section it is also enacted that the certificates to be granted under the act "shall be conclusive of the right of the person in whose favor granted, to remove such fugitive to the state or territory from which he escaped, and shall prevent an molestation of such person or persons, by any process issued by any court, judge, magistrate, or other person whatsoever." Now whatever ground for doubt, if any, might have existed, independently of this enactment, concerning the legal force and effect of these certificates, it may, I think, be safely assumed that it was intended by congress to place them, in this respect, substantially on the footing of judgments rendered by judicial tribunals, in cases within their jurisdiction. But, notwithstanding the wide scope of the doctrine laid down by the supreme court in the Watkins Case, I am also of opinion, and indeed this was distinctly admitted by the learned and able counsel who appeared for the claimant, that this conclusive effect can be ascribed to a certificate only when it appears on its face that it was granted, or, at least, according to some reasonable interpretation of its language, might have been granted, in conformity with the act, and in pursuance of the authority thereby conferred. Unquestionably it should appear to have been granted by a person having power to grant it, and proceeding in a manner warranted by the act. It is only to such certificates that the principle of law relied on by the counsel for the claimant can be applied, and such only can congress be presumed to have had in view. I regret that the circumstances of the case, and my own indispensable engagements, requirin my immediate departure to a remote part of the district, preclude me from fortifying and elucidating this proposition, and reconciling it with the case Ex parte Watkins, by a reference to authorities. But I shall assume it as unquestionable. The counsel for the petitioner denies that the certificate now in question is of this character. One of the objections to its sufficiency is that the person by whom it was granted is therein described as "a commissioner appointed by the second circuit court," and as "a commissioner appointed by the circuit court for the second circuit," when in truth there is no such court, and, of course, no such commissioner. The objection is true in point of fact, and if there was not another, of a more serious nature, this would, at least, require consideration. But it is further objected that the case of the petitioner is not embraced by the act, or rather by that part of it under which the proceeding was entertained, and by which alone

it could have been authorized. It is due to the highly respectable gentleman, by whom the certificate was granted, to observe that this objection appears not to have been made before him, and probably it was not thought of by him, or, until afterwards, by the counsel for the petitioner. The claimant saw fit to avail himself of the provisions of the 10th section of the act, by which the owner of a fugitive slave is permitted to make proof of the main facts of title and escape before a court of record, or some judge thereof, in the state whence the escape was made; and having obtained a transcript of the record, which such court is required to make, of the matters so proved, to exhibit the same to the judge or commissioner, to whom application shall be made, in the state where the fugitive shall be found, as conclusive evidence of the facts therein stated. Such a record was produced before the commissioner, in the present case, and is distinctly stated, in the certificate, to have formed the basis of his action in the premises.

It was suggested at the argument, though apparently with no great confidence, that the commissioner might, by possibility, have had other competent evidence before him; but I am clearly of opinion that no such supposition is admissible. There is not, in the papers before me, the slightest intimation to this effect, but, on the contrary, the transcript is exclusively referred to throughout as the evidence by which the title of the claimant and the fact of escape were established. But the escape is also throughout alleged to have occurred "on or about the 25th day of August, 1850," whereas, the act was not passed until the 18th of September following; and it is upon these dates that the objection is founded. The language of the 10th section of the act is this: "And be it further enacted, that when any person held to labor or service, in any state or territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor is due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof," &c. Now it is insisted that this provision is clearly prospective, and therefore inapplicable to the case of an escape from labor or service, occurring before the passage of the act; and such, I am constrained to say, appears to me to be the plain sense of the enactment. It was argued by the counsel for the claimant that, this being a remedial act, it is to be so construed as to suppress the mischief, and advance the remedy; and that, if it can be reasonably inferred from its whole tenor that the provision in question was designed to act retrospectively, it is to be so interpreted. But when the language of a statute is unambiguous, and leads to no absurdity or palpable injustice, it is to be interpreted according to its natural import. It may be conceded that the legislative intent imported by the words used might have been more explicitly declared, by the addition, immediately after the word "shall," of the word "hereafter," or of the words "after the passage of this act;" but it cannot, I think, be maintained that this intent is not unequivocally expressed by the word "shall" alone. If I were permitted, however, to look beyond the terms of the provision itself, and to speculate upon its probable design, I am unable to perceive that the result would be varied. The only other part of the act specifically referred to by the counsel for the claimant, for the purpose of shedding light upon that under consideration, is the beginning of the sixth section, which provides for a different mode of establishing the facts of title and escape. The words here are: "That if a person held to service or labor in any state or territory of the United States, has heretofore, or shall hereafter escape," &c. The argument is that it is manifest from this language that congress intended to provide for cases of prior as well as subsequent escape. There can be no doubt of this, so far as the provisions of this section are concerned. But it is to be considered that the 10th section introduced a most important innovation upon the law as it was before the passage of the act. It authorizes an ex parte application to a court or judge, to be selected by the claimant, in the absence of, and without notice to, the party to be affected by the proceedings, to determine questions of fact, involving his freedom or servitude for life, and declares the decisions of such court or judge to be full and conclusive evidence of the facts decided, and therefore binding upon the judgment and conscience of the court, judge, or commissioner in any other state, before whom the alleged fugitive may be reclaimed. It is not my province to express any opinion upon the reasonableness of this great innovation. It must be conceded that there were not wanting strong and justifiable motives for its enactment, and it is sufficient, for those whose duty is is to execute it, that congress have seen fit to adopt it. But it may, I think, well be supposed, that in deference to the spirit of the great principle of natural justice and constitutional law, which forbids the enactment of ex post facto laws, it was intentionally limited to cases of escape from servitude, thereafter to occur; and this inference, I am of opinion, is rather strengthened than weakened by the retroactive phraseology employed in the 6th section. The liability of this provision to abuse is too obvious to escape notice, and it is worthy of observation that in the present case, as it appears by the record of the Kentucky court, instead of requiring the personal attendance of the witnesses of the claimant, the court

saw fit, in the discharge of the grave and responsible duty imposed upon it by the act, to receive affidavits, and to act upon them alone, although the deponents are described as residents of the city of Louisville, where the court was held. It may well be that these witnesses were credible persons, able, from their own knowledge, to attest to all the facts requisite fully to warrant the decisions of the court, and that a careful cross-examination would have elicited no other facts favorable to the petitioner; but conceding that the evidence before the court might lawfully be held by it to constitute the "satisfactory proof" required by the act, the opposite course of procedure would, to say the least, have been more consonant with the established, and, as I had supposed, universally recognized principles of enlightened jurisprudence. I am, therefore, also of opinion that it is my duty to apply to this enactment the same rule of construction that is applicable to penal statutes. "It was," says Professor Christian, "one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favor of natural right and liberty; or, in other words, the decision shall be according to the strict letter in favor of the subject. And though the judges, in such cases, may frequently raise and solve difficulties contrary to the intention of the legislature, yet no further inconvenience can result, than that the law remains as it was before the statute. And it is more consonant to principles of liberty that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity." 1 Bl. Comm. 88, note 19.

The result of this examination then is that, though the evidence on which alone the commissioner founded his adjudication would have been sufficient and conclusive in a case arising after the passage of the act, it was wholly inapplicable to a case like the present, arising before the passage of the act. In other words, as appears on the face of the certificate itself, the adjudication was made without evidence, and the only question is whether this great error, arising, I have no doubt, from inadvertence, can be corrected on habeas corpus. I think it may, and that it is my duty to do it. If, as has been said, "A good warrant is a good cause of detention," the converse of the proposition is not less true. I shall accordingly allow the writ, but it must be made returnable before me at the court-house, in Buffalo, at two o'clock p. m., to-morrow.

Case No. 3,614.

In re DAVIS et al.

[1 N. B. R. 120;[1] Bankr. Reg. Supp. 26; 7 Am. Law Reg. (N. S.) 30; 6 Int. Rev. Rec. 149; 15 Pittsb. Leg. J. 103.]

District Court, N. D. Ohio. 1867.

BANKRUPTCY—ELECTION OF ASSIGNEE — SECURED CREDITORS.

A creditor of a bankrupt holding a claim wholly or partially secured, may prove the same in bankruptcy, but cannot vote for assignee.

[Cited in Re Hunt, Case No. 6,884.]

[On certificate of register in bankruptcy.]

The question arose in this case before the register whether a creditor holding a claim fully or partially secured should be allowed to vote for an assignee. The question was certified to Judge SHERMAN, as follows, by Myron R. Keith, one of the registers of said court in bankruptcy:

"In the course of proceedings in said matter before me, the following questions arose pertinent to said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: J. M. Jones, who appears for the bankrupt, and Payne & Wade, who appear for the creditors of said bankrupt. The facts are: A. C. Gardner, a creditor of said bankrupt, has proved his claim before the register, as a claim secured by mortgage on real estate, and the question arising is this: Under the provisions of the bankrupt act [of 1867 (14 Stat. 522)], should a creditor, holding a claim fully or partially secured, be allowed to vote at the first meeting of creditors in the election of an assignee? Section 13 provides that the creditors shall, at the first meeting held after due notice from the messenger, in the presence of a register designated by the court, choose one or more assignees of the estate of the debtor, the choice to be made by the greater part in value and in number of the creditors who have proved their debts. Section 23 provides that the court shall allow all debts duly proved, and shall cause a list thereof to be made and duly certified by one of the registers. Section 20 provides that when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement between him and the assignee or by a sale thereof to be made in such manner as the court shall direct. Section 13, above referred to, allows all creditors who have proved their debts to participate in the choice of an assignee. The certified list of creditors required by section 23, is for the purpose of spreading upon the record a statement of the names of all admitted as cred-

[1] [Reprinted from 1 N. B. R. 120, by permission.]

itors, and the amount due to each. Section 20, in my opinion, so far as voting for assignee is concerned, limits the creditors to those who are not secured, for it provides that creditors holding security shall be admitted as creditors only for the balance of their debts, after deducting the value of the security, and that value can only be determined by agreement between him and the assignee, or by sale of the property which cannot be agreed on between them, or ascertained by sale until after the assignee is chosen. I am therefore of the opinion that a creditor holding security, although he has proved his debt as provided in the 22d section of the bankrupt act, cannot vote in the election of assignee. And the said parties requested that the same should be certified to the judge for his opinion thereon."

SHERMAN, District Judge. I concur with the register in the opinion by him given, on the question above stated, and approve the same.

Case No. 3,615.

In re DAVIS.

[3 Ben. 482;[1] 3 N. B. R. 339 (Quarto, 89).]

District Court, S. D. New York. Nov. Term, 1869.

INVOLUNTARY BANKRUPTCY — ARREST ON MESNE PROCESS—CONSTRUCTION OF STATUTE —FRAUDULENT SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

1. A statute must be so construed, if possible, without doing violence to language, as to give force and meaning and effect to every part of it.

2. A debtor was arrested on August 24th, 1869, under an order of arrest issued out of the superior court of the city of New York, in an action founded on a promissory note for more than $100. He immediately gave bail and was not lodged in jail. The order of arrest remained in force at the time of the filing of a petition in involuntary bankruptcy against him, on September 20th, 1869: *Held*, that, as the debtor was not actually imprisoned for more than seven days on the order of arrest, he was not liable to be adjudged a bankrupt, under the 39th section of the bankruptcy act [of 1867 (14 Stat. 536)], by reason of what occurred under the order of arrest.

3. Proof, that a merchant has suspended payment of commercial paper and has not resumed payment of it within a period of fourteen days, is not sufficient to authorize an adjudication of bankruptcy against him under the 39th section of the bankruptcy act. The creditor must show that the stoppage or suspension was fraudulent.

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Soc., Id. 6,402.]

This was a hearing on a petition for involuntary bankruptcy before the court without a jury. The first act of bankruptcy alleged in the petition, which was sworn to on the 17th of September, 1869, and filed on the 20th of September, 1869, was, that the debtor [John Davis] "has been arrested and held in custody under and by virtue of mesne process issued out of the superior court of the city of New York in the state of New York, within which the debtor has property, founded upon a demand in its nature provable against the bankrupt's estate, under said act, and for a sum exceeding one hundred dollars, and that such process is remaining in force and not discharged by payment, or in any other manner provided by the laws of such state applicable thereto, for the period of seven days." The proof showed, that the debtor was, on the 24th of August, 1869, at the city of New York, in which city he then resided, arrested and held in custody by the sheriff of the city and county of New York, under an order of arrest issued out of the superior court of the city of New York; that the debtor, on his arrest, immediately gave bail, and was not lodged in jail, and was discharged from close custody by the sheriff; that the order of arrest was issued in a civil action, founded on a promissory note for a sum exceeding one hundred dollars, made by the debtor, and which was a demand in its nature provable against the bankrupt's estate under the bankruptcy act; and that the said order of arrest, at the time of making oath to said petition, still remained in force and had not been discharged by payment, or in any other manner provided by the law of the state of New York applicable thereto. The second act of bankruptcy alleged was, that the debtor, "on the 24th day of August, 1869, being a merchant or trader, has fraudulently stopped and suspended payment of his commercial paper and has not resumed within a period of fourteen days, to wit, a certain promissory note," specifying its particulars.

Hawes & Wardell, for creditor.

Morrison, Lauterbach & Spingarn, for debtor.

BLATCHFORD, District Judge. The 39th section of the bankruptcy act specifies, as an act of bankruptcy, that the debtor "has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any state, district or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such state, district or territory applicable thereto, for a period of seven days." The same section, in the clause immediately following the one just cited, specifies, as an act of bankruptcy, that the debtor "has been actually imprisoned for more than seven days, in a civil action, founded on contract, for the sum of one hundred dollars or upward." The order of arrest in this case was issued in a civil action, founded on contract, for a sum exceeding one hundred dollars. It was mesne process issued out of a court of the state in

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

which the debtor resided, and was founded on a demand in its nature provable against a bankrupt's estate under the act, and such process remained in force and was not, when the petition was filed, discharged by payment or in any other manner provided by the law of such state applicable thereto. The debtor was arrested under the process, and immediately gave bail, and was not lodged in jail, and was discharged from close custody. Assuming that he was held in custody for a period of seven days under the process, he was not actually imprisoned on it for more than seven days. This case, therefore, does not fall within the second clause cited, although it may fall within the first clause. The question to be determined is, whether, under those circumstances, he can be adjudged a bankrupt. I think not. The statute evidently intended to draw a distinction between being actually imprisoned for more than seven days, and being held in custody for a period of seven days. It confined the former to a civil action founded on contract, while it extended the latter to an action founded on any demand in its nature provable against a bankrupt's estate. Not only are claims founded on contract provable in bankruptcy, but, by section 19, all demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him, are provable, as debts, to the amount of the value of the property so taken or withheld, with interest. Such demands are not claims founded on contract. There are, therefore, claims or demands which would fall within the first clause and not within the second clause. The first clause has, therefore, a field for operation over which the second clause does not extend. This being so, and there being a distinction evidently intended by the statute between actual imprisonment, and mere arresting and holding in custody, a person actually imprisoned being held in custody, although a person held in custody is not necessarily actually imprisoned, full effect must be given to the second clause. This cannot be done if it be held that a person arrested in a civil action founded on contract may be adjudged a bankrupt although he has not been actually imprisoned for more than seven days. If it be so held, on the ground that a claim founded on contract is a demand in its nature provable against a bankrupt's estate under the act, and that it is sufficient, under the first clause, that the debtor be arrested and held in custody under mesne process founded on such demand, for a period of seven days, then no cases exist which would not fall within the first clause, and the second clause would become inoperative and might as well have been left out of the statute. A statute must be so construed, if possible, without doing violence to language, as to give force and meaning and effect to every part of it. In this case there is no affirmative repugnancy between the two clauses. The only question is, whether it shall be held to be the intention of the legislature that cases falling within the second clause shall be governed wholly by the second clause, although, if the second clause had been omitted from the section, they would fall under the first clause. I think that that is the sound construction to be given. Even if the two clauses were repugnant to each other, in a broader sense than they are, the second clause would control, as being the later expression of the will of the law makers. Powers v. Barney [Case No. 11,361].

I must, therefore, hold that, inasmuch as the debtor was not actually imprisoned for more than seven days on the order of arrest issued against him, he is not liable to be adjudged a bankrupt by reason of any thing alleged in the petition to have occurred under and by virtue of such mesne process.

The 39th section of the act makes it an act of bankruptcy, that the debtor "being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days." The evidence shows that the debtor was a merchant or trader doing business in the city of New York; that the promissory note mentioned in the petition was commercial paper, by having been made and delivered by the debtor in the regular course of his business, for goods sold and delivered to him; and that the note had, at the time the petition was filed, remained unpaid for a period exceeding fourteen days. This is not sufficient. Something must be shown from which the court can draw the conclusion that the stoppage or suspension of payment of the note was fraudulent. The mere non-payment of the note does not warrant such conclusion. It was not intended by the act that the mere stoppage or suspension, followed by nonresumption for fourteen days, should throw on the debtor the burden of showing that there was no fraud in the stoppage or suspension. It is for the creditor to show that the stoppage or suspension was fraudulent. That is not shown by showing nothing but stoppage or suspension, continued for fourteen days. There may be many reasons for stoppage falling short of fraud. If the legislature had intended that mere stoppage or suspension without resumption within fourteen days should be an act of bankruptcy, it would have said so plainly. It has unmistakably said that that shall not be an act of bankruptcy, unless the stoppage or suspension is fraudulent. The creditor must, therefore, show the fraud which he has alleged in his petition. As he has failed to do so, from misapprehension, an opportunity will be afforded to him to supply the defect, if he can, by further proof.

Case No. 3,616.

In re DAVIS.

[1 Hask. 232.][1]

District Court, D. Maine. Oct. Term, 1869.

BANKRUPTCY—PREVIOUS ATTACHMENT—FEES AND EXPENSES NOT ALLOWABLE.

1. An assignee in bankruptcy takes a free and unincumbered title to property of the bankrupt, attached on a suit against him within four months of the commencement of bankruptcy proceedings.

2. The expenses of an attachment, so made by a creditor for the sole purpose of securing his debt, cannot be allowed from the bankrupt's estate.

3. Neither the plaintiff, nor the officer, have a lien upon the property so attached to secure the officer's fees of attachment or his expenses in keeping the property.

In bankruptcy. Petition by attaching creditor to be allowed his expenses of attachment from the bankrupt's estate. The assignee objected. The attachment was made within four months of the commencement of bankruptcy proceedings and thereby dissolved.

FOX, District Judge. Kaler, Bowen & Merrill set forth in their petition, "That on the 17th of June last, with a view of compelling the bankrupt to commence proceedings in bankruptcy, or to secure their demand against her, they caused an attachment to be made on their demand of her stock in trade, and that within four months she filed her petition in bankruptcy, and has been adjudged a bankrupt; that in making such attachment they incurred expenses to the amount of $117.83; that the same were for the benefit of all the creditors, and they therefore ask, that such amount may be repaid to them by the assignee from the assets in his hands."

In some cases, when the attachment of a debtor's estate has been made in aid of involuntary proceedings in bankruptcy, instituted by creditors against a party subsequently adjudged a bankrupt, I have allowed the costs attending the attachment to be paid from the assets of the estate, as the same were incurred by common consent for the general benefit, and the estate has thereby been prevented from waste and secured for the assignee. In the present case, there is no evidence, and it is not pretended, that the attachment was made by the petitioners with any other object or purpose than thereby to secure their own debt. No proceedings in bankruptcy were instituted by them or any other creditor; and it is quite manifest that the present is the usual ordinary case of an attachment obtained by a creditor for his own exclusive advantage, which was dissolved and defeated by the debtor availing herself of the benefit of the bankrupt act, within four months of the time of the attachment.

The 14th section of the bankrupt act [of 1867 (14 Stat. 522)] declares, that the assignment shall date back to the commencement of the proceedings in bankruptcy, and that the title to all the property and estate of the bankrupt, shall vest in the assignee, "although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." By this provision the present attachment was dissolved, and no rights or interests remained to the creditors secured or protected by force of it. There is nothing in any portion of the act, which in terms creates or saves any rights of the attaching creditor under the attachment when made within the four months next preceding the petition, and the whole spirit and purpose of the act is in direct opposition to any claim against the bankrupt's estate, for payment of expenses attending such an attachment.

By another provision of the act, preferences to creditors within four months are declared to be invalid, and the great aim and purpose of the law appears to have been, to defeat all attempts to obtain a preference, whether procured by the joint action of the parties, or by the creditor alone, by legal process and attachment of the debtor's estate; all such proceedings are deemed to be a fraud on the law, when transacted within four months of the petition, and if for this cause the creditor is compelled to abandon his attachment and share with the other creditors pro rata in the proceeds of the estate, it is quite apparent that the law never contemplated, that a party should be indemnified and relieved from the expenses he may have incurred, in attempting to obtain an undue preference by his race of diligence against all the other creditors. Any other construction would be an offer of a reward to a creditor who should attempt to secure his demand by an attachment; for if proceedings in bankruptcy were not instituted within four months, his demand would be thereby secured; if proceedings should be commenced within that time, his security would be defeated at the cost and expense of the estate, and it must be burdened with the charges of an attempt to evade and overreach the purpose and design of the act, an equal distribution of the debtor's estate.

The bankrupt act declaring that the estate shall vest in the assignee, and that an attachment made within four months shall be dissolved, I am of opinion that the assignee takes a free and unincumbered title to the property as though it had never been attached, and that the expenses of the attachment by right should and did fall upon the party, who would have derived all the benefit from it, if it had remained in full force.

It is claimed that the officer, by virtue of the attachment he has made, acquired a lien upon the property attached, and that whilst

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he continues to retain the possession, he may by virtue and force of such lien withhold the estate from the assignee until payment of his charges, and that if the same are paid by the creditor, he is subrogated to the officer's rights by force of his lien.

In Re Housberger [Case No. 6,734], Judge Blatchford decided that a sheriff had a lien on property attached by him for his fees which accrued prior to the filing of the petition; this I understand to be founded on the law of New York, and not a construction of any provision of the bankrupt law, and that learned judge in that case holds that under the law of New York, a sheriff has a lien on the property attached for security of his fees. I am quite certain that in this state a lien does not exist in such a case. An attachment at most creates but an imperfect, incomplete lien, as security to the plaintiff for the judgment he may recover, but the attachment is by law dissolved when final judgment is rendered for defendant, and also upon his decease, and a representation of insolvency properly pleaded; and it has never been understood, so far as I am advised, that in such cases, the sheriff has a right to retain the attached property as security for his expenses; but it has always been considered that the defendant, on a dissolution of the attachment, is entitled to the immediate return of his property, and if refused may maintain trover or replevin therefor. Nothing is to be found in the reports to sustain any contrary views, and in Felker v. Emerson, 17 Vt. 101, I find it to have been expressly decided, that when an attachment of personal property is dissolved, the officer has no further lien on the property attached, and has no right to retain it as security for his fees.

If this petition had been presented by the sheriff, instead of the creditor who has paid him or is liable for the expenses attending the attachment, it must have been denied, and the petitioners certainly have no greater right to indemnity than the sheriff. Petition denied.

Case No. 3,617.

In re DAVIS.

[1 MacA. Pat. Cas. 628.]

Circuit Court, District of Columbia. April Term, 1859.

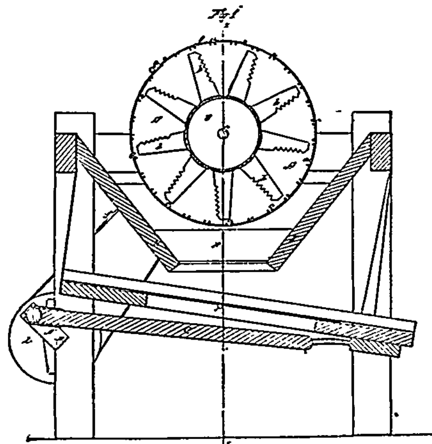
PATENTS—REJECTION OF CLAIMS—WANT OF PARTICULARITY.

[A claim is properly rejected when it does not set forth particularly and specifically the points of novelty relied on to distinguish the machine from prior ones, but merely claims the whole combination, with the manner of operating it.]

[This was an appeal by William Davis from a decision of the commissioner of patents refusing to grant him a patent for an improvement in hominy machines.

[In his specifications the appellant describes his invention as follows:]

"Fig. 1, being a vertical section of a hominy machine, constructed and arranged in my improved manner," etc. "I employ two revolving cylinders, A and B, which are mounted in a suitable frame, and are constructed, arranged and operated in relation to each other, and for the purpose, substantially as herein specified. The outer cylinder, A, is hollow and receives the corn to be made into hominy, in batches introduced through a door, D, or in any other convenient manner. The periphery of this cylinder is perforated with numerous holes, or apertures, a, a, &c, on all sides. These apertures are usually punched from the outside, through the sheet-iron of which the cylinder is generally made, and thus furnish burrs on the inner surface to assist somewhat in the process of removing the hulls from the corn; but this mode of punching is not essential. The apertures are all of uniform size, and such as to allow the pieces of hominy to pass through them and escape from the cylinder, as soon as reduced to the desired size,—generally to half or quarter grains. This feature is important, essential to the proper working of the machine, and is the only feature claimed as new, in the construction of the outer cylinder. It serves both the ordinary purpose of allowing the hulls to escape, and of discharging the hominy as fast as reduced to the desired degree of fineness, thereby attaining the double desideratum of preventing the reduction of the grains below the proper size, and to irregular sizes, and also of not impeding by their presence the action of the beaters of the inner cylinder, in reducing the remaining, unbroken grains. The cylinder is provided with a pulley, E, or its equivalent, whereby a slowly revolving motion is imparted to it, in either direction, so as to discharge the hulls and hominy as fast as produced, through the apertures, a, a, &c., and to continually present different grains to the action of the beaters of the inner cylinder.



"The inner cylinder, B, is much smaller in diameter than the outer cylinder, say, of about one third of the diameter thereof. Its length is nearly the same, but such as to allow it to be located within said outer cylinder, concentric therewith. Its shaft, C, extends outward through the hollow journals, d, d, of the outer cylinder; and on one end of said shaft are secured two pulleys, G, H, or their equivalents, through which rapid, revolving motion is communicated to the cylinder from any suitable motive power. These pulleys have diameters nearly in the ratio of 3 to 5, one to the other, so that, by connecting one or the other with the motive power, moving at a uniform velocity, the same ratio of speeds may be produced on the cylinder, B, for the purpose hereinafter set forth. It is obvious that any other means by which the said relative speed of the cylinder may be produced, would be the equivalent of this arrangement of pulleys. And small variations of the speed required, may be obtained by varying the speed of the motive power, in any convenient way. Serrated or other equivalent sharpened or roughened arms, b, b, &c., project radially from the cylinder, B, on all sides, nearly but not quite to the inner surface of the outer cylinder, A, substantially as represented. The cylinder, B, is driven in the proper direction to cause the serrated edges (if only one edge of each arm is serrated, or roughened) to precede, and act on the corn.

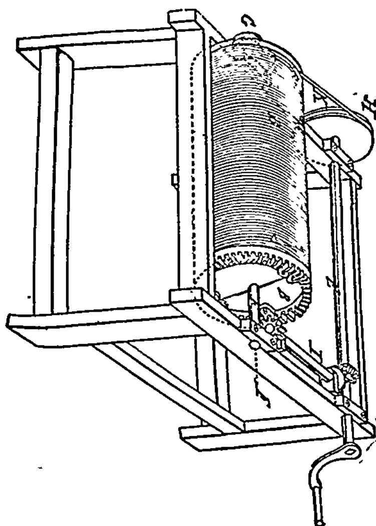
"The cylinders being thus constructed and arranged, their operation is to be substantially as follows: A batch of corn is put into the outer cylinder,—as much as can be conveniently worked at one time, or any amount less than that quantity. The two cylinders, A and B, are then set in motion, the former turning quite slowly, but not requiring any determinate speed; but the cylinder, B, is first driven at about the speed of 300 revolutions a minute, by running the driving band over the larger pulley, G. This velocity may vary somewhat, according to the size of the machine, and to the kind and condition of the corn, say within the limits of 250 revolutions and 350 revolutions a minute. But I believe 300 revolutions a minute to be about the best average speed; and the proper speed is always readily determined by observing whether the hulls pass freely out without being mixed with broken pieces of corn. If the hulls do not come out plentifully, (as they should in a minute or so,) the speed is to be increased till such an effect is obtained; but if broken grains, in any considerable number, come out with the hulls, the motion is too rapid and should be diminished, till only hulls appear. Thus the operator has always an unerring guide to the proper velocity. As soon as the hulls are removed, which process is usually terminated in about 10 or 12 minutes, and is indicated by the hulls ceasing to escape from the apertures of the outer cylinders, the band is shifted to the smaller pulley, H, and a speed of about 500 revolutions a minute is communicated to the inner cylinder, B, or say within the limits of 450 and 550 revolutions a minute, according to various sizes of machines, or to the kind and condition of corn. This velocity quickly breaks the corn into hominy, which immediately escapes through the apertures, a, a, &c., as fast as reduced to the determinate size, leaving the remainder unimpeded thereby. The proper speed is indicated by the escape of hominy. If it escapes continually and rapidly, the proper speed is attained; if not, the speed is to be increased; a greater speed than sufficient for the purpose wastes power, and also wastes the corn by beating it into fine particles. This part of the process is continued till the whole batch is reduced to hominy.

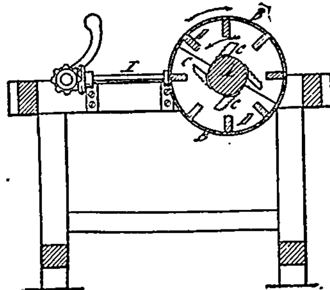
"The above change and determination of velocities given to the inner cylinder, in connection with the gauging apertures of the outer cylinder. as described, are absolutely essential to the manufacture of good hominy, for these reasons: The hulls cannot be completely removed, except before the grains are broken, since the broken pieces are too light to offer sufficient resistance for the purpose. Hence a proper speed to remove the hulls must precede the breaking of the grains. which only can be accomplished by a subsequent increase of speed. And the gauging apertures are necessary, so as to discharge the hominy as fast as reduced to the determinate size; for if it remains longer in the machine, it must necessarily be broken to fine pieces. Hominy, to cook well and evenly, should be of uniform size; and this has heretofore only been attained by screening the irregularly broken grains into different grades of sizes; whereas, by this machine, no such screening is necessary. Other revolving machines merely remove the hulls, and that imperfectly. They leave most of the grains unbroken,—what are broken are imperfectly hulled."

[The claim reads as follows:] "The hulling and breaking cylinder, B, provided with the serrated arms, b, b, or their equivalent, and driven at the different speeds, as herein specified, in combination with the containing cylinder, A, constructed and operating substantially as described."

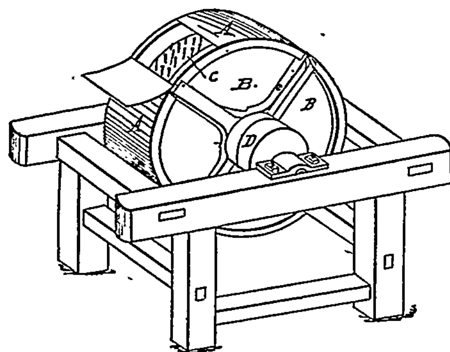
[This claim was rejected upon a reference to the patents of S. Null, No. 8,972, of May 25, 1852, and the patent to Andrews and Piper, No. 1,894, of December 10, 1840.

[The Null machine, like that of the applicant, has two cylinders, one within the other, which revolve in opposite directions. A wire gauze covers the outer cylinder, having meshes sufficiently large to let the hulls through, but not the broken corn. The inner cylinder has serrated beater arms, and revolves faster than the outer one, but the two are so geared together that their relative speed cannot be changed.





Null Machine.



Andrews and Piper Machine.

[The Andrews and Piper patent is for a barley huller. It also has two concentric cylinders, but they revolve in the same direction, —the outer faster than the inner one.

[The report of the board of examiners on appeal was adopted by the commissioner as his decision. It is as follows:]

"Commissioner's decision: The main feature of the alleged invention consists in accelerating the speed of the hulling or breaking wheel after the machine has been in operation a short time. This change of speed is claimed in connection with certain peculiarities of construction, &c. The applicant does not, however, limit himself to any particular mode of changing the speed of the breaking wheel, nor does he undertake to fix or define the speed at which the breaking wheel should be run when of any particular size, but leaves the whole matter to be determined by experiments and practical trials on the part of the operator. As it regards the machine used by the applicant, we do not perceive that it differs materially from those to which reference has been made, and consequently, so far as we can discover, it presents no point of novelty on which to base a patent. Great stress, however, is laid on the fact that the speed of the breaking wheel is to be changed during the process of hulling, &c., and that by such change of speed great and important results are produced. This may be true; but, when viewed in this light, it must be regarded in the nature of a process, and as such (no particular machinery or speed of machinery being relied on) it ought to have been claimed. We do not wish, however, to be understood as expressing an opinion favorable to the renewing of the application in a different form, since we entertain very great doubt whether even a very limited claim to the process could be allowed in view of the cases cited. If, however, the case should be presented in this light, an examination might disclose the fact that the same thing has been done by various other persons, and that, too, long prior to the alleged invention and discovery thereof by the applicant. It may also be observed in this connection that a claim to accelerating the speed of the hulling or breaking wheel was refused to the applicant on an appeal to the commissioner in 1856. The claim in the present application seems to differ from the one then refused, in this: In the 1856 application the claim seems to be based on the change of speed alone, while in the present application the change of speed is claimed in connection with certain alleged peculiarities of construction, &c. The model is the same one, however, which was furnished in the former application. Now, whether the change of the claim be regarded as merely an attempt to avoid the force of the commissioner's decision in the 1856 application or not, is immaterial, since we do not find anything in the machine on which to base or allow a patent; and we must therefore recommend that this application be finally rejected."

Reasons of appeal: That the commissioner of patents is in error, in that he declares that the inventor does not "undertake to fix or define the speed at which the breaking wheel should be run when of any particular size, but leaves the whole matter to be determined by experiments and practical trials on the part of the operator." Second. That the

commissioner of patents has failed to comprehend the nature of the invention, wherein he says: "As it regards the machine used by the applicant," he does "not perceive that it differs materially from those to which reference has been made, and consequently," so far as he can discover, "it presents no point of novelty on which to base a patent;" and therefore erred in rejecting the application from such imperfect knowledge and comprehension of the invention. Third. That the commissioner of patents erred in his conclusion from the statement in the specification concerning the importance of the change of speed given to the breaking cylinder during the act of making hominy; that "this may be true, but, when viewed in this light, it must be regarded in the nature of a process, and as such (no particular machinery or speed of machinery being relied on) it ought to have been claimed." Fourth. That the commissioner of patents is in error, in that he does "not find anything in the machine on which to base or allow a patent."

MERRICK, Circuit Judge. The applicant having in his specification described the improved machine in all its parts and the manner in which it should be operated, defines his claim of novelty as follows: "What I claim as my invention, and desire to secure by letters-patent, is the hulling and breaking cylinder, B, provided with the serrated arms, b, b, or their equivalents, and driven at the different speeds, as herein specified, in combination with the containing cylinder, A, constructed and operating substantially as described." The patent law makes especial requisition for clearness and definiteness of claim in the specifications for machines, by declaring that the applicant shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions, and shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery. It would be difficult, with this rule prescribed by the statute, to conclude, from reading the specification and claim of the applicant in this case, that the only points of novelty asserted by him for his improved machine are the adjustment of the size of the holes of the outer cylinder so as to permit the due escape of the hominy, when in the progress of the operation the grains of corn are successively broken to the requisite size, and the change, by means of the requisite adjustment of parts of the machinery, of the velocity of movement of his cylinder from one certain rate of revolution to another certain rate of revolution, at proper stages in the process of manufacture. These points of novelty are not set forth and claimed particularly and specifically as the matter of his discovery, but his claim is for the whole combination of the machinery and manner of operating it at different degrees of velocity. The claim is therefore too broad, and was properly rejected by the office as disclosing no novelty upon the references given to Null's machine and the barley-hauling machine of Andrews and Piper. Considering, therefore, that the second reason of appeal cannot be sustained, in view of the references given, and that the first and third do not present proper matter of inquiry upon a specification framed in such general terms, and not making claim of novelty for that upon which these supposed errors are assigned, and the fourth reason being identical with the second, I am of opinion, and accordingly certify to the Hon. S. F. Shugert, commissioner of patents, that there is no error in the decision of the office upon the claim in the shape in which it is now submitted. Whether it may be so amended as to present patentable novelty, is a question upon which I cannot pass judgment upon the present appeal; and I further, therefore, certify that the judgment of the commissioner is affirmed, and the application for a patent must be denied.

[NOTE. After the rendition of the foregoing opinion, Davis filed a new application, and on May 24, 1859, patent No. 24,104 was granted to him, with the following claim: "What I claim as my invention, and desire to secure by letters-patent, is providing the outer cylinder, A, with apertures, a, a, gauged to such a size as, while serving to discharge the hulls, also to perform the additional function of discharging the hominy as soon as reduced to the desired degree of fineness, in combination with the inner cylinder, B, when the same is driven at the specific speeds, as herein described, for the purposes specified."]

Case No. 3,618.

In re DAVIS.

[2 N. B. R. (1874) 391 (Quarto, 125);[1] 2 Am. Law T. Rep. Bankr. 52; 1 Chi. Leg. News, 171.]

District Court, E. D. Missouri.

BANKRUPTCY—SECURED CREDITORS—RIGHT TO SELL SECURITIES.

1. A creditor of a bankrupt, holding the security of a deed of trust in the nature of a mortgage, with a power of sale in a third party as trustee, must prove his debt as a creditor holding a security, and obtain the permission of the court to have the security sold. If he direct a sale without this permission, the court, upon application of the assignee, will set aside the sale.

[Cited in Re Bloss, Case No. 1,562; Re Frizelle, Id. 5,133; Markson v. Heaney, Id. 9,098; Re Haake, Id. 5,883; Re Brinkman, Id. 1,884; Re Jaycox, Id. 7,242; Phelps v. Sellick, Id. 11,079; Re Hufnagel, Id. 6,837.]

2. Quaere: If the trustee sell without the authority of the court, does any title pass to the purchaser?

Demurrer to bill in equity to set aside sale under deed of trust of certain real estate aft-

[1] [Reprinted from 2 N. B. R. 391 (Quarto 125), by permission.]

er the bankruptcy of Bittel, without having proved the debt of the cestui que trust, under the bankrupt act [of 1867 (14 Stat. 517)]. The facts were that [Joseph] Bittel filed petition for bankruptcy on the 21st day of February. In his schedule, he mentions the debt due Mrs. Octavia Boyce, for about ten thousand dollars, secured by deed of trust on some eight hundred arpents of land situated near Creve Cour lake. [James M.] Carpenter, the trustee under the deed, advertised and sold the land on the 10th day of April, to one John O. F. Delaney, son of the cestui que trust, for the sum of fourteen hundred dollars. The bill alleges the property to have been worth twenty thousand dollars. To the bill was filed a general demurrer, which came up for argument on Thursday of last week.

Musser & Decker, for assignee.
Glover & Shepley, for Carpenter.

TREAT, District Judge, proceeded to say that it presented the question whether sales made under deeds of trust, after the bankruptcy of the grantor in the deed, were void, and could be set aside upon the application of the assignee of the bankrupt, and whether a United States court would review the action of trustees, representing secured creditors of bankrupts in the matter of such sales. The assignee has a right when a sale has been made to bring the trustee into court and have him examined. He has a right under the bankrupt law to redeem any mortgaged property, or to sell the equity of redemption, which was in the bankrupt at the time of the adjudication. The fact that a creditor has a lien does not put him in position better than an unsecured creditor, in reference to the necessity of proving his debt against the bankrupt's estate. The bankrupt law clearly states what the schedule of the bankrupt shall contain. He shall make a correct list of all his property, and of the debts due him and by him, secured and unsecured. Here the learned judge cited the sections of the law upon this subject, as also the fourteenth and fifteenth sections of the bankrupt law, which define the rights and duties of assignees. "And that the assignee takes all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patents and patent-rights, copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, or for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of the injury to the property of the bankrupt, and all his rights of redeeming such property or estate," &c., &c., and that the bankrupt's assignee shall take, hold, sue for and recover the property of the bankrupt, &c. The statement of the debt in the schedule is not proof of it. It may be stated in fraud and may not exist. The bankrupt may have made payments, or may have counter-claims and offsets. The debt must be proved by the oath of the creditor. (Here the oath was recited from the law.) This applies to a lien creditor as well as to an unsecured creditor. It was the duty of the assignee to see that the general creditors of a bankrupt's estate are protected against such frauds as might grow out of the collusion between the bankrupt and a secured claimant. But if the secured creditor shall choose to sell the mortgaged property and pocket the money, without proving his debt against the estate, what is the assignee to do? He had his choice—to disregard the creditor's acts and commence proceedings in ejectment, for possession of the mortgaged land; or, begin suit by bill in equity to set aside the sale. He has done right in adopting the latter plan. This court is clothed with full powers to preserve the rights of all parties, and will review the action of the creditor. The lien creditor under the law has notice of the bankruptcy as well as others. For what purpose is notice sent him? It is for the purpose of having him prove his claim. The law provides that the conveyance to the assignee, after the bankrupt's surrender of all the property of such estate, relates back to the time of the adjudication. The assignee is clothed with the power to pay off all claims against the bankrupt, and if secured creditors come forward and prove their liens, their rights will be respected. How is the assignee to perform his trust if the creditors fail to prove their claims? How is he to judge of the bona fides of the transaction, and of the merits of the creditor's claim, except upon the proof?

It may be that a case under section nineteen of the bankrupt law may happen, viz.: "All debts existing (at the time of the adjudication) but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the said estate." Deeds of trust sometimes contain clauses, that if any one of the notes secured by the deed should fall due and remain unpaid, all the other notes should be deemed due. Suppose the assignee chooses to come forward and pay the notes with a rebate of interest, can the trustee deprive the creditors of the advantage of it? And, again, under the twentieth section, suppose a case of mutual debts and mutual credits between the parties—where the law requires an account between them to be stated, and one debt set off against the other, and the balance allowed and paid to the creditor—how is the assignee to ascertain the facts constituting the creditor's claim if he refuses to comply with the law and prove his debt? Suppose a lien creditor, after the sale has been made, and the proceeds applied to the payment of the claim, without the knowledge of the assignee, after the creditor has applied the mortgaged property to his own use, should

come before the register and prove up a claim for the balance unpaid. Would it not be the duty of the register to reject his claim and refuse to allow him to prove? It may be, on the other hand, that the mortgaged property brings largely over the amount of the debt. The overplus then becomes payable to the assignee of the bankrupt. There may then arise a necessity for proceedings to find out the overplus. The act contemplates that all these matters shall be done in connection with the assignee, and that the fact that anything is due the creditor shall be ascertained under the provisions of this law.

Let us see further in reference to another class of liens, judgments, attachments, &c. "No creditor proving his claim shall be allowed to maintain any suit in law or equity therefor; and no creditor whose debt is provable under the bankrupt law, shall be allowed to prosecute to final judgment any suit in law or equity therefor against the bankrupt, till the question of his final discharge shall have been determined, and every such suit, upon the application of the bankrupt, shall be stayed. Attachments are to be dissolved after the bankruptcy," &c. There is no distinction in the law between one kind of a lien creditor and another, whether the lien is an unsatisfied judgment or mortgage on real or personal property. The twenty-second section of the law was here cited, and its provisions relative to the form and manner of proving claims against bankrupt estates. Why those provisions, if a person having a secured claim may proceed independently of the bankrupt law? Those provisions apply to claims secured by mortgage of personalty or realty, as well as to claims unsecured. (Here the judge cited the provisions of the twenty-fifth section of the law.) Any other theory than that the lien creditor must apply to the court and prove up his claim against the estate of the bankrupt, is entirely irreconcilable with the provisions of the act. All the rights of the lien creditor are preserved in the United States courts, but he must apply under and in accordance with the law. Without going any more into detail, it suffices that in all sales under deed of trust outstanding, when such deeds have been given by bankrupts, the party holding claims secured by deeds of trust must come in and prove his claim. If he does not do so it is the assignee's privilege and his duty to cite the party into court, and the court will review the case. The decision is, a bill in equity will lie to review all sales made under deeds of trust subsequent to bankruptcy. This, at the same time that it preserves the interest of the estate, is no disadvantage to the creditor. The defendant's counsel, in offering the demurrer, objects that the bill does not allege a want of knowledge on the part of the assignee of the sale by the trustee. The proper notice to the assignee is by proof of claim before a register.

Case No. 3,619.

In re DAVIS.

[See Case No. 3,620.]

Case No. 3,620.

In re DAVIS.

[1 Sawy. 260;[1] 4 N. B. R. 715; 8 N. B. R. 167.]

District Court, D. California. Aug. 13, 1870.

BANKRUPTCY—JURISDICTION OF ORDINARY TRIBUNALS.

The ordinary tribunals are not deprived, by mere force of an adjudication in bankruptcy, of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the bankruptcy court, when necessary for the purposes of justice; but in the absence of such interference, the jurisdiction of the ordinary tribunals remains unimpaired and their judgments are valid.

[Cited in Hudson v. Schwab, Case No. 6,835; Kimberling v. Hartly, 1 Fed. 575.]

[In bankruptcy. In the matter of Irwin Davis.]

Thompson & Wilson, for bankrupt.

Hambleton & Gordon, for assignee.

W. W. Cope, for respondent.

HOFFMAN, District Judge. In this case, a temporary injunction was granted, on the petition of the assignee, against certain creditors of the bankrupt, restraining them from prosecuting a suit commenced by them in the fifteenth district court, to foreclose a mortgage held by them as security for a debt. A rule was also entered, requiring them to show cause why a perpetual injunction should not issue as prayed for by the assignee. On the return day of this rule the parties appeared, and the questions presented by the case were elaborately argued.

The ground on which the assignee desires the interposition of the court is, that it will be for the interest of the estate that the mortgaged property be sold at private sale, subject to the mortgage, and that by this means the sum of $1,500, stipulated in the mortgage, to be paid as attorney's fees, in case of foreclosure, may be saved. It is suggested, on the other hand, that the property is subject to various liens subsequent to that of the mortgage—that these liens are held by parties absent from the state, and not within reach of the process of this court; and that, to foreclose and cut off these liens and make a clear title to the purchaser, they must be brought in by publication and constructive service, as provided for by the laws of this state. The amount of the debt and the validity of the lien of the mortgage are not contested; nor is it suggested that any unfair advantage is sought by the proceedings in the state court.

The right of the mortgagees to the benefit of their security being thus undisputed, and

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

no application being made to compel the creditors to come into this court to enforce the claims, there would seem no reason for staying the proceedings in the state court unless the property is about to be immediately sold at a sacrifice. But of this there is no apprehension. The notices, etc., by publication will require at least six weeks, and the defaults of absent parties and a decree of foreclosure, order of sale, etc., cannot probably be entered in less than two months. During all this time the proceedings will be under the control of this court, and if the assignee finds an opportunity to make an advantageous sale, he can apply to the court for leave to do so. If the sale be really advantageous the creditors will have no motive to resist it, their only object being to collect their debt.

It will perhaps be found better for the interests of the estate to suffer the foreclosure suit to proceed in any event. For the proposed purchaser could bid at the sale, receive a clear title from the sheriff, disencumbered of all junior liens in the hands of all persons properly made parties to the suit; and the assignee, and even the mortgagees, if desired, might unite in the deed. The title being thus made perfect, it is to be presumed that the largest possible price would be obtained.

But whatever course it may hereafter be deemed advisable to adopt, I see no reason for now arresting the proceedings of the creditors.

The temporary injunction heretofore issued will therefore be dissolved—but with the reservation to this court of full power and authority to interfere, and to control or arrest the proceeding whenever it shall appear expedient for the interests of all concerned that it should exercise the power given to it by law, to assume the exclusive administration of this portion of the bankrupt's estate.

As this disposition of the matter is understood to be satisfactory to the assignee, it is perhaps unnecessary to consider the question raised at the hearing. But as the counsel have argued those questions at length, and have requested of the court an expression of its opinion, I shall proceed to state the conclusions at which I have arrived.

It is contended that the court of bankruptcy has not only complete jurisdiction over the estate of the bankrupt, and the authority to determine all cases and controversies between the bankrupt and his creditors, to ascertain, liquidate and enforce liens, to adjust priorities and conflicting interests of all parties, to marshal and dispose of and distribute, assets, etc., etc., but that this authority is exclusive, and that the adjudication in bankruptcy, proprio vigore, divests the ordinary tribunals of all jurisdiction over the bankrupt or his estate, and that all further proceedings before those tribunals are coram non judice, and void, notwithstanding that the court of bankruptcy has refused to enjoin the parties from further proceeding in them, and notwithstanding that it may clearly be most just, convenient and for the interests of all parties that the suit before the ordinary tribunals should be prosecuted to a final judgment.

I am clearly of opinion that this view cannot be sustained, and that it is not the intention of the act to deprive the court of the right to avail itself of the aid of the ordinary tribunals, whenever convenience and the interests of the parties may require.

There is, unquestionably, much force in the criticisms contained in the dissenting opinion of Mr. Justice Catron, in the cases of Ex parte Christy, 3 How. [44 U. S.] 322, and Norton's Assignee v. Boyd, Id. 437.

In the former case, the supreme court sustained the jurisdiction of the district court to entertain a bill to set aside a sale under a decree of foreclosure rendered in the state court before the adjudication in bankruptcy.

Mr. Justice Catron contends that such a proceeding could only be sustained on the ground that the sale under the decree of foreclosure was absolutely void—and that the mortgage lien on which the decree was entered could be enforced only in the bankruptcy court. If this be the true construction of the opinion of the supreme court, it would go far to sustain the proposition contended for in this case, viz.: that the adjudication in bankruptcy absolutely divests the ordinary tribunals of jurisdiction over all matters cognizable in the bankrupt court. But the succeeding case of Norton's Assignee v. Boyd, clearly shows that the court did not intend so to decide. In that case, as in the former, a decree of foreclosure had been obtained, and execution issued and levy made, before the adjudication in bankruptcy. The sale took place after the adjudication. The assignee filed his bill to set aside this sale on the ground that the district court of the United States was by the bankrupt law vested with exclusive jurisdiction over all matters pertaining to the settlement of the affairs of the bankrupt, and that the sale made by the state court had transferred no legal title to the property, which still remained that of the bankrupt or his assignee, to be sold or otherwise disposed of under the orders of the district court.

It will be perceived that the question was thus distinctly raised, whether after the adjudication the proceedings in a state court to enforce a lien, were void, and whether the jurisdiction of the bankrupt court was exclusive.

The circuit court dismissed the bill for want of equity, and the supreme court, on appeal, affirmed the decision. In the opinion of the circuit court, which is approved and adopted by the supreme court, the opinion is expressed that on grounds of expediency the jurisdiction of the bankruptcy court should be exclusive, so as to take away from the state court any

jurisdiction in such cases. As to this, the supreme court says: "Upon this subject it is not our province to decide, and we have no desire to express an opinion upon it."

Mr. Justice Catron contends that this decision is inconsistent with the previous decision in Ex parte Christy [supra]. However this may be, the case is a direct authority for the position that a sale made after an adjudication in bankruptcy, under a decree of a state court to enforce a lien, is not void—and to be treated as such in all cases by the bankruptcy court. And, further, that the supreme court declines to express an opinion whether on grounds of expediency the jurisdiction of the district court should have been made by laws exclusive. That such was the understanding of the court in Ex parte Christy, appears from the language of Mr. Justice Story, in delivering the opinion of the court:

"It is further objected that if the jurisdiction of the district court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates, or may operate, to suspend or control all proceedings in the state courts, either then pending or thereafter to be brought by any creditor or person having an adverse interest to enforce his rights or to obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that under the provisions of the sixth section of the act [of 1841 (5 Stat. 445)], the district court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity, upon due application made by the assignee and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the court for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in contemplation of congress as indispensable to the practical working of the bankrupt system. But because the district court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the district court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of fraud or injustice on the part of the plaintiffs in those suits. The act itself contemplates that such suits may be prosecuted and further proceedings had in the state courts, for the assignee is, by the third section, authorized to sue for and defend the property vested in him under the bankruptcy, subject to the orders and directions of the district court, and all suits at law and in equity then pending in which such bankrupt is a party, may be prosecuted and defended by such assignee to a final conclusion in the same way and manner, and with the same effect as they might have been by the bankrupt." "So that here the prosecution and defense of any such suits in the state courts is obviously intended to be placed under the discretionary authority of the district court, and in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the state courts at the time of the bankruptcy, ever have been interfered with, and never unless some equity intervened which required the interposition of the district court to sustain or protect it."

The act of 1867 gave a legislative sanction to this exposition of the duties and jurisdiction of the district courts in bankruptcy, and the language of the supreme court is adopted and embodied in the act.

Congress must also have been aware of the suggestion of the circuit judge, in Norton's Assignee v. Boyd [supra], that on grounds of expediency the jurisdiction of the district court ought to be exclusive, a suggestion which the supreme court declined to approve. But the act contains no provision to the effect suggested by the circuit judge, and it is evident that it was intended to leave the jurisdiction as it stood under the act of 1841, as expounded by the supreme court.

The provision in the fourteenth section, which authorizes the assignee to prosecute and defend all suits pending at the time of the adjudication in which the bankrupt is a party, is inconsistent with the idea that, by the adjudication, the ordinary tribunals are divested of all jurisdiction over the bankrupt or his estate—while to attribute such an effect to the adjudication would be productive of extreme hardship and injury to the bankrupt, or it might to strangers in no way connected with him.

At the time of the bankruptcy, suits may be pending to determine the title to land, to enforce trusts, to foreclose mortgages, to effect partitions, to take accounts of partnerships, to remove clouds from titles, etc., etc., to which the bankrupt was a necessary or indispensable party. The litigations may have been protracted and expensive. To hold that by the fact of adjudication, all power of the ordinary tribunals to bind the bankrupt or his estate by a final judgment or decree in any such suits is taken away,

would be to subject the parties to an intolerable hardship, for no conceivable object. Nor is it clear what relief could be afforded by the bankruptcy court, for the property in litigation might be in another district and beyond the jurisdiction of the court, and the parties might have no connection with the bankrupt either as debtors or creditors, and thus be in no way concerned in the bankruptcy proceedings.

In the case of Sedgwick v. Menck [Case No. 12,616], where the bankrupt had, long previously to the passage of the act, made an alleged fraudulent assignment of his property and creditors had filed bills to set aside the assignment, which suits were pending at the time of the bankruptcy, Judge Nelson refused to interfere, observing, that the question involving "the right to the property is in the state court, where it belongs, and the decision of that court will be conclusive upon the right. If in affirmance of the judgment of the court below, the property will be applied to the satisfaction of the judgments on the creditors' bill; if in favor of the validity of the assignment, it will take the direction of the trusts created in the assignment. The right to this property attached long before the assignment in bankruptcy, and before even the passage of the bankrupt law." This case affords a striking illustration of the injustice and inconvenience of an opposite doctrine.

The provision in the twenty-first section, that no creditor whose debt is provable under the act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, was evidently intended merely to subject such suits to the control of the bankruptcy court, and to enable that court to stay them "whenever required, to prevent mischief or wrong to other creditors or waste or misapplication of assets." But it was not intended to declare, that the adjudication in bankruptcy proprio vigore should divest the ordinary tribunals of jurisdiction, and that all subsequent proceedings should be coram non judice and void, even when taken with the assent of the bankruptcy court and when clearly necessary to protect and enforce the rights of third parties.

The provision, that the suit shall be stayed by the bankruptcy court until the determination of the question of discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, that if the amount due the creditor is in dispute, the suit may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due, clearly indicate that congress did not intend to divest, in all cases, the ordinary tribunals of jurisdiction, after an adjudication in bankruptcy; and the provision authorizing the assignee to defend all suits pending against the bankrupt, shows that it was contemplated that such suits might be continued and carried to judgment after the adjudication and the appointment of an assignee.

On the whole, my opinion is, that the jurisdiction of the ordinary tribunals over suits to which the bankrupt is a party, is not taken away by mere force of the adjudication; that the bankruptcy court has jurisdiction to suspend or control such proceedings, by acting on the parties; but that, in the absence of such interference, the jurisdiction of the state courts remains unimpaired and their decrees and judgments are valid and effectual.

Case No. 3,621.

In re DAVIS.

[2 Sawy. 255;[1] 3 Bench & Bar (N. S.) 151.]

District Court, D. California. Oct. 20, 1872.

EXEMPTION IN BANKRUPTCY.

The bankrupt is entitled, under the proviso to the fourteenth section of the bankrupt act [of 1867 (14 Stat. 522)], to retain all his necessary household and kitchen furniture, of the kind and to the amount exempted by the law of the state from forced sale.

[In bankruptcy. In the matter of Erwin Davis.]

R. Thompson, for bankrupt.

H. C. Hyde, for assignee.

HOFFMAN, District Judge. Exceptions to the report of the register, designating and setting apart certain household and kitchen furniture for the use of the bankrupt. The question presented by the exceptions, is whether the necessary household and kitchen furniture to be set apart for the use of the bankrupt, under the proviso to the fourteenth section of the bankrupt act, is not to exceed in value the sum of five hundred dollars, or whether by a just construction of the proviso, there is excepted from the operation of the assignment, all necessary household and kitchen furniture, which, by the law of the state, is exempted from levy and sale on execution.

The language of the proviso is as follows: "Provided, however, that there shall be excepted from the operation of this section: The necessary household and kitchen furniture, and other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children; and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the review

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

of the United States; and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four."

Under these provisions, it is insisted by the bankrupt, that he is entitled to retain all the property which, by the state laws, is exempt from levy and sale upon execution, and that as by the state law, all necessary household and kitchen furniture, without limitation of value, is so exempted, he is entitled to have set apart for him, all the articles set forth in his schedule, provided they are necessary household and kitchen furniture within the meaning of the state law.

On the part of the assignee, it is urged that the fourteenth section of the act provides for the exemption of household and kitchen furniture; that it limits the value of the furniture so exempted, to the sum of $500; and that the subsequent clause which adopts the exemption laws of the states, applies by its terms to "other property not included in the foregoing exceptions," i. e., to property other than household and kitchen furniture, which is included in, and is the subject of the exceptions referred to.

The general policy and intent of the bankrupt law indicated by the provisions above cited are obvious. The exemptions allowed by state laws are recognized and adopted, and the bankrupt is required to surrender to the assignee for equal distribution among his creditors such property and effects only as are by the law of his domicile liable for his debts. The framers of the law appear to have thought that the states were better able to determine each for itself what property of its citizens should be applicable by law to the payment of their debts, than congress was to prescribe an invariable and universal rule.

There seems to be no good reason why creditors, when their debtor has become either a voluntary or involuntary bankrupt, should claim under the assignment which resembles, as Mr. Justice Cadwalader says, in Re Ruth [Case No. 12,172], a general execution for the equal benefit of them all, any other property than could by the law of the state be reached by an execution in favor of any one of them. Whatever doubts may have been entertained as to whether the adoption by congress of the various state exemption laws did not deprive the system of that uniformity which it was bound to establish, the intention of congress to adopt those laws has never, to my knowledge, been questioned.

By the law of this state there is exempted not only necessary household and kitchen furniture, but provisions for family use for three months, two cows with their sucking calves, and food for such cows for one month. There are also exempted, the farming utensils of the farmer, the tools of the mechanic, the instruments of the surgeon, dentist, surveyor and professor of music, and the libraries of physicians, attorneys, ministers of the gospel, editors, school-teachers and professors of music. All these exemptions are to be allowed irrespective of the value of the property.

It will be observed that the first clause of the proviso above cited does not refer exclusively to household and kitchen furniture. The property excepted is "necessary household and kitchen furniture, and such other articles and necessaries as the assignee shall designate, not exceeding in value five hundred dollars." If, therefore, the furniture exempted by state law is not to be allowed to the bankrupt because it is not "property other than and not included in the foregoing exceptions," almost all the other articles specifically exempted by the state law must also be disallowed, for they would fall within the description in the proviso of "other articles and necessaries." The state law would thus become practically inoperative, except as to personal property not exceeding five hundred dollars in value, and the manifest policy and intent of the act be defeated.

The construction of the act suggested by the bankrupt is therefore the only one which will give effect to its obvious intent, and at the same time do no violence to its language. The words "other property not included in the foregoing exceptions," may well be taken to mean property other than and not included among the articles set apart by the assignee under the first clause, and they will embrace all property, whether of the same or a different kind, which is by state law exempted from forced sales. Both clauses of the proviso thus receive a natural and consistent interpretation, and are allowed their appropriate effect.

My opinion, therefore, is that the bankrupt in the present case is entitled to retain all his necessary household and kitchen furniture of the kind, and to the amount exempted by the state law from forced sale. As the question whether all the articles enumerated in the schedule of the bankrupt are exempted by the law of the state from forced sale, was not argued by the assignee, an opportunity will be given him to file such exceptions to their allowance as he may be advised.

Case No. 3,621a.

Case of DAVIS.

[Chase, 1; 3 Am. Law Rev. 368.][1]

Circuit Court, D. Virginia. 1867–1871.

CIVIL COURTS DURING PERIOD OF MARTIAL LAW—CIRCUIT JUSTICES—TREASON BAILABLE — PRACTICE— EFFECT OF FOURTEENTH AMENDMENT ON PRIOR TREASONS.

[1. Neither the chief justice nor any of the associate justices of the United States, exercising, as they do, the highest judicial authority of the nation, can, with propriety, join in holding a circuit court in a region which is subject to martial law, and in which, consequently, the civil courts, both state and federal, must act under the supervision of the military authorities. Nor should such justice, acting as a single judge, exercise any jurisdiction in such district, even to the extent of hearing an application to admit a prisoner to bail.]

[2. Where a prisoner is in the custody of the military power in a region subject to martial law, the judge of a civil court cannot hear an application to admit the prisoner to bail until the legality of the military custody has been inquired into, by means of an application for a writ of habeas corpus.]

[3. The fact that congress, by the act of July 17, 1862, gave the courts authority, in their discretion, to impose fines and imprisonment, instead of death, as the punishment for treason, removed all doubt as to the offense being a bailable one.]

[4. On a motion to quash an indictment for treason, *held* that defendant's counsel would be required to file with the clerk a formal statement of the grounds upon which the motion was based.]

[5. The circuit justice and the district judge holding the court differed in opinion on the question whether the provision of the fourteenth amendment, disqualifying from holding certain offices any persons who engaged in rebellion after having taken an oath to support the constitution of the United States, operated to exempt a person so offending from subsequent prosecution for treason, the circuit justice being of the opinion that the provision did so operate. The question was accordingly certified to the supreme court.]

[Proceedings in reference to the prosecution of Jefferson Davis for treason against the United States.]

The city of Richmond, the capital of the Confederate States, having been evacuated by the military forces of that government on the second and third days of April, 1865, the Honorable Jefferson Davis, the president of the Confederate States, left that city, with his cabinet, and proceeded to Danville, Virginia. He remained at this place endeavoring to reorganize resistance to the armies of the United States, when the surrender of General Lee on the nineteenth of April, at Appomattox Court House, destroyed all hopes of present success in Virginia; and on the eleventh he proceeded to Greensboro, in North Carolina, fifty miles distant, whither he summoned Generals Johnston and Beauregard, then commanding the Confederate troops in North Carolina, which were facing and falling back before the armies of General Sherman. While here the pressure of military necessities forced Johnston into negotiation with Sherman for a general pacification of the states of the south, forming the Confederate States, on the basis of a return of states and citizens to their positions as members of the United States, and an absolute cessation of all resistance to the laws of the United States. These negotiations did not meet with the approbation of Mr. Davis, and he left Greensboro while they were pending, accompanied by his cabinet and a cavalry escort of detachments from Ferguson's and Dibbrell's brigades of Wheeler's division. He journeyed at easy stages of twenty miles a day, and halted at Charlotte, ninety miles distant from Greensboro, to learn the result of the memorandum, or basis of agreement for a peace, which had been signed by Johnston and Sherman on the eighteenth, four days after his departure from Greensboro. The president of the United States disapproved the memorandum of the eighteenth of April, just referred to, and Johnston, on the twenty-sixth, entered into and executed a military convention with Sherman, by which his whole command, comprising all troops east of the Chattahoochee, were bound to lay down their arms on condition of being paroled to remain unmolested while they obeyed the laws, the officers being allowed to retain their side-arms. As soon, however, as Mr. Davis learned of the failure of the memorandum of the eighteenth, he proceeded with his escort through Abbeville, South Carolina, to Washington, Georgia, which place he reached on the second of May. On the fourth he dismissed his escort, and on taking leave of its commander said: "I expected to cut my way through to a place of safety, with the two detachments of cavalry along with me, but they have become so much demoralized by the reports of stragglers and deserters from Johnston's army, that I can no longer rely on them in case we should encounter the enemy. I have therefore determined to disband them and try to make my escape, as a small body of men can elude the vigilance of the enemy easier than a larger number. They will make every effort in their power to capture me, and it behooves us to face these dangers as men. We will go to Mississippi, and there rally on Forrest, if he is in a state of organization, and it is to be hoped that he is; if not, we will cross the Mississippi river and join Kirby Smith, and there we can carry on the war forever. Meet me south of the Chattahoochee, as this department has been surrendered without my knowledge or consent." Leaving Washington he proceeded, with the officers with him, and his family, westward through Georgia, when on the tenth he was captured with his whole party at Irwinsville, Wilkinson county, by Lieutenant-Colonel Pritchard of the 4th Michigan cavalry, and a part of his command, belonging to Wilson's corps. With him were John H. Reagan, late governor of

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 3 Am. Law. Rev. 368, contains only a partial report.]

Texas, and subsequently postmaster-general of the Confederate States, Colonel Burton N. Harrison, private secretary of the president, Stephen R. Mallory, secretary of the navy, and others, with a train of five wagons and three ambulances. He was taken to Savannah and thence by steamer to Fortress Monroe, in Virginia, where he was confined in one of the casements of the fortification until the thirteenth day of May, 1867, when he was released on bail, in the manner and under the circumstances which it is the purpose of this statement to record.

During the time between the surrender of General Lee on the ninth of April, and the arrival of Mr. Davis at Washington, Georgia, on the second of May, momentous events were transpiring elsewhere. The president of the United States was assassinated at a theatre in Washington on the night of April fourteenth. Andrew Johnson, vice-president, immediately took the official oath and assumed the duties of president, and the whole country was thrown into a paroxysm of excitement. On the second of May, the day the president of the Confederate States reached Washington, Georgia, the president of the United States issued the following proclamation: "Whereas, it appears from evidence in the bureau of military justice, that the atrocious murder of the late president, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, secretary of state, were incited, concerted, and procured by and between Jefferson Davis, late of Richmond, Virginia, and Jacob Thompson, Clement C. Clay, Beverly Tucker, George N. Sanders, W. C. Cleary, and other rebels and traitors against the government of the United States, harbored in Canada: Now, therefore, to the end that justice may be done, I, Andrew Johnson, president of the United States, do offer and promise for the arrest of said persons, or either of them, within the limits of the United States, so that they can be brought to trial, the following rewards: one hundred thousand dollars for the arrest of Jefferson Davis; twenty-five thousand dollars for the arrest of Jacob Thompson, late of Mississippi; twenty-five thousand dollars for the arrest of George N. Sanders; twenty-five thousand dollars for the arrest of Beverly Tucker; and ten thousand dollars for the arrest of William C. Cleary, late clerk of Clement C. Clay. The provost-marshal general of the United States, is directed to cause a description of said persons, with notice of the above rewards, to be published."

The attorney-general of the United States, the Honorable James Speed, of Kentucky, had on the previous day given his official opinion in writing to the president of the United States, "that persons implicated in the murder of the late President Lincoln, and the attempted assassination of the Honorable William H. Seward, secretary of state, and an alleged conspiracy to assassinate other officers of the federal government at Washington City, and their aiders and abettors, are subject to the jurisdiction of and legally triable before a military commission." On the first day of May therefore, the president of the United States, issued his order, reciting this opinion of his attorney-general, and directing the assistant adjutant-general to detail nine competent military officers to serve as a commission for the trial of said parties, and that the judge advocate-general proceed to prefer charges against said parties for their alleged offenses. The proclamation offering the reward for Mr. Davis on its "appearing from evidence in the bureau of military justice" was made the next day, May second, and it is clear, therefore, it was the intention of the government of the United States at that time to try him before a military commission on the charge of having procured the assassination of Mr. Lincoln. He was captured, as we have seen, by Lieutenant-Colonel Pritchard and a detachment of cavalry, on the tenth of May. As soon as he was in custody at Fortress Monroe, preparations were made to try him. Notwithstanding the proclamation of May second, offering a reward for his apprehension as an incitor in the murder of Mr. Lincoln, the government at once resolved to prosecute him for treason. About the same time the president of the United States sent the Hon. Preston King, of New York, to Judge John C. Underwood, judge of the United States district court for the district of Virginia, to request the latter to wait upon him at the executive mansion in Washington. The consultation between the president and the judge was had at once, the subject of it being the prompt initiation of legal proceedings against the leaders of the civil war (on the losing side of course), some of whom they thought especially responsible for the late assassination. The president learned, on inquiry, that a court was to be held in Norfolk during the month of May, and that the grand jury had been already summoned. He and Mr. King expressed the desire, and believed it to be the duty of the court, to present to the grand jury the views of the supreme court of the United States, as expressed by Mr. Justice Greer, that the late civil war was a rebellion, and that those who had been engaged in it were, not only enemies to the United States, but were also guilty of treason, and that the more prominent and guilty leaders ought to be indicted for their conduct, resulting, as they thought, and culminating in the assassination of Mr. Lincoln. Although Judge Underwood had previously taken the position that the great conflict had outgrown the character of a rebellion, and had assumed the dimensions of a civil war, and that sound policy and humanity demanded that the technical treason of its beginning should be ignored, and that it should be treated only as a civil war, and those engaged in it only as enemies, he says that under the overwhelming excitement of the times, he for a

time distrusted his own judgment, thinking, perhaps, that his education in the principles of the Society of Friends and his former hostility to capital punishment had misled him, and he consented to charge the jury as they advised. (Memorandum furnished by Judge Underwood.) After this interview he proceeded to Norfolk, opened the court there, and did charge the jury in the precise language suggested by the president and Mr. King, with the limitation that it would be improper to include in their presentments any but the most influential and guilty, naming no one. Upon this the grand jury found an indictment against Mr. Davis and others for treason, but the motion of the district-attorney for bench warrants was refused, the court taking the ground that in no event would bench warrants be issued against those who had surrendered to commanding generals on parole, and who had kept the faith on which the parole was granted. This indictment has been lost from the records of the court during the summer of 1865. The case of Mr. Davis was specially considered in the cabinet, and the question discussed whether he should be prosecuted in Virginia, Maryland, Pennsylvania, or the District of Columbia, acts of war having been committed within each of those jurisdictions by the armies of the Confederate States, of which Mr. Davis was president and constitutional commander-in-chief.

An indictment was found in the District of Columbia, but no process was ever issued on it, and matters remained thus until the twenty-first of September, 1865, when the senate of the United States, by resolution, called upon the president for information on the subject of the trial. In response to this inquiry the following reports were submitted from the secretary of war, Honorable Edwin M. Stanton, and the Honorable James Speed, attorney-general:

"War Department, January 7, 1866. Sir: To the annexed senate resolution, passed on the twenty-first day of December, 1865, referred to me by you for report, I have the honor to state: 1. That Jefferson Davis was captured by the United States troops in the state of Georgia, on or about the tenth day of May, 1865, and by order of this department has been, and now is confined at Fortress Monroe, to await such action as may be taken by the proper authorities of the United States government. 2. That he has not been arraigned upon any indictment or formal charge of crime, but has been indicted for the crime of high treason by the grand jury of the District of Columbia, which indictment is now pending in the supreme court of said district. He is also charged with the crime of inciting the assassination of Abraham Lincoln, and the murder of Union prisoners of war, and other barbarous and cruel treatment toward them. 3. The president deeming it expedient that Jefferson Davis should be put upon his trial before a competent court and jury for the crime of treason, he was advised by the law officer of the government that the proper place for such trial was in the state of Virginia. That state is within the judicial circuit assigned to the chief justice of the supreme court, who has held no court there since the apprehension of Davis, and who declines for an indefinite period to hold any court there. The matters above stated are, so far as I am informed, the reasons for holding Jefferson Davis in confinement, and why he has not been tried."

The then attorney-general enters into an argument to show that, although originally captured by the military, Jefferson Davis and other parties alluded to are, after a cessation of hostilities, subject to trial only by the civil courts. The following are his official conclusions: "I have ever thought that trials for high treason can not be had before a military tribunal. The civil courts have alone jurisdiction of that crime. The question then arises: Where and when must the trial thereof be held? . . . It follows, from what I have said, that I am of opinion that Jefferson Davis and others of the insurgents ought to be tried in some one of the states or districts in which they in person respectively committed the crimes with which they may be charged. . . . When the courts are open, and the laws can be peacefully administered and enforced in those states whose people rebelled against the government—when thus peace shall have come, in fact and in law, the persons now held in military custody as prisoners of war, and who have not been tried and convicted for offenses against the laws of war, should be transferred into the custody of the civil authorities of the proper districts, to be tried for such high crimes and misdemeanors as may be alleged against them."

On the sixteenth day of January, 1866, the senate called upon the president for the correspondence between himself and Chief Justice Chase. On the second day of February the president responded, enclosing the following correspondence between himself and the chief justice:

"Executive Mansion, Washington, D. C., October 2d, 1865. Dear Sir: It may become necessary that the government prosecute some high crimes and misdemeanors committed against the United States within the district of Virginia. Permit me to inquire whether the circuit court of the United States for that district is so far organized and in condition to exercise its functions that yourself, or either of the associate justices of the supreme court, will hold a term of the circuit court there during the autumn or early winter, for the trial of causes? Very respectfully, Andrew Johnson.

"Hon. S. P. Chase, Chief Justice Supreme Court."

"Washington, Thursday Evening, Oct. 12, 1865. Dear Sir: Your letter of the second, directed to Cleveland, and forwarded to Sandusky, reached me there night before last.

I left for Washington yesterday morning, and am just arrived. To your inquiry, whether a term of the circuit court of the United States for the district of Virginia will be held by myself or one of the associate justices of the supreme court during the autumn or early winter, I respectfully reply in the negative. Under ordinary circumstances, the regular term authorized by congress would be held on the fourth Monday of November, which, this year, will be the twenty-seventh. Only a week will intervene between that day and the commencement of the annual term of the supreme court, when all the judges are required to be in attendance at Washington. The time is too short for the transaction of any very important business. Were this otherwise, I so much doubt the propriety of holding circuit courts of the United States in states which have been declared by the executive and legislative departments of the national government to be in rebellion, and therefore subjected to martial law, before the complete restoration of their broken relations with the nation, and the supersedure of the military by the civil administration, that I am unwilling to hold such courts in any such states within my circuit, which includes Virginia, until congress shall have had an opportunity to consider and act on the whole subject. A civil court in a district under martial law can only act by the sanction and under the supervision of the military power; and I can not think it becomes the justices of the supreme court to exercise jurisdiction under such conditions. In this view, it is proper to say that Mr. Justice Wayne, whose whole circuit is in the rebel states, concurs with me. I have had no opportunity of consulting the other justices, but the supreme court has hitherto declined to consider cases brought before it by appeal or writ of error from circuit or district courts in the rebel portion of the country. No very reliable inference, it is true, can be drawn from this action, for circumstances have greatly changed since the court adjourned; but, so far as it goes, it favors the conclusion of myself and Mr. Justice Wayne. With great respect, yours very truly, S. P. Chase."

While these efforts were being made to procure a trial of Mr. Davis on the charge of treason, the official allegation of his complicity in the assassination of Mr. Lincoln was crushed out under the common, general, and uncontroverted belief in its utter falsity, absurdity, and groundlessness. It was never made the basis of any action save the proclamation of the second day of May, 1865, when it was generally believed in the north that he had escaped from the country; and at the very moment that the assertion of the belief of the government of the United States in his criminality as charged, was being telegraphed wherever there was electrical wire, he was journeying quietly with his cabinet, family, and train of wagons and ambulances through the state of Georgia. This terrible charge, so publicly made, was abandoned, because utterly without foundation or excuse, but it never was withdrawn. In the meantime the southern states, lately constituting the Confederate States, through their state legislatures, asked the federal government to release him and declare a general amnesty, and at the same time efforts, equally unavailing, were being made on the part of distinguished men in the north to procure his release on bail or parole. A statement of these efforts, as communicated to the reporter by counsel (the Honorable Charles O'Conor), is deemed a fit part of this report.

Had Jefferson Davis, or his party with his assent, raised the black flag, denied quarter to prisoners, or otherwise placed themselves, as combatants, beyond the pale of those rules which govern in war, he might have been shot without trial or ceremony, immediately upon his capture, or thereafter, at the captor's convenience. But he never occupied that position, and the government, if inclined, could not have signalized its triumph by ordering a military execution without provoking censures that few are willing to encounter. Probably no such inclination ever existed in any controlling mind.

When traitors and rebels oppose their government by open violence, and are summarily put down, those not slain in the combat may fairly be tried for treason in the civil courts and dealt with as ordinary criminals. The transaction constitutes only a species of riot. But far different results ensue when rebellion maintains itself so long and so effectively as to compel between itself, its people and their territory, on the one hand, and the lawful government on the other, an institution and acceptance of the rules and usages which obtain in regular wars between independent nations. Amongst men claiming to have attained a high civilization, war is recognized as a state or condition governed by law. In its conduct or at its close, morality and justice are not lost sight of. If successful, the rebels acquire the power of establishing an independent state, which all men regard as not only legitimate but honorable in its origin; if they fail, the victor may be as indulgent as he will, or as far as he dare may consecrate to his revenge the field of their ruin. Whatever severity can be justified at the bar of public opinion, may be practiced; and certainly no more should be exercised. To the latter proposition every magnanimous spirit will assent. Washington might have failed: Kosciuszko did fail. Trials for treason in the civil courts are not remedies adapted to the close of a great civil war. Honor forbids a resort to them after combatants in open war have recognized each other as soldiers and gentlemen engaged in a legitimate conflict. After they have established truces, exchanged prisoners, and thus made applicable to

their hostile intercourse, the laws of chivalry, based upon an acknowledgment of mutual confidence and respect, the rules and usages of war can not in any event be departed from by either. It would be shockingly indecorous for the ultimate victor in such a conflict to send his vanquished opponent before the civil magistrate to be tried as if he were a mere thief or rioter. No soldier imbued with true sentiments of honor could ever consent to such an act. What honor forbids in an individual, policy prohibits in a government. There would be something inexpressibly revolting and contemptible in the subsequent resort of a great power to measures of resentment on this small, mean scale which it actually feared to employ during the conflict. Other considerations also apply. The civil tribunals have really no functions suitable to such cases. This is manifest as to the chiefs of the rebellion, and it is an exceedingly rare thing as well as a malignant folly ever to prosecute any others. According to the philosophy of government all punishments are inflicted by the executive. The judiciary investigates, ascertains guilt or innocence, and advises the executive of the fact. The latter then discharges the accused from bonds or inflicts punishment as the case may require. Strictly speaking, the judicial power, as a branch of the government, has no office in any criminal proceeding except to advise as to the law, and to inform the executive concerning facts not previously known. The facts requiring ascertainment are of course those only which may be deemed private until developed in proof before the investigating tribunals. Concerning acts which have reached such a measure of notoriety that they can not lawfully be gainsaid, judicial investigation or trial is impossible. It is obvious that every material fact in the action of Jefferson Davis against the government was of this public nature. It was known and officially recognized by the government in all its departments, that the war existed and that it had become substantially international in its character, thereby involving consequences of deep moment directly affecting every citizen of the republic. That Jefferson Davis was executive chief of the hostile belligerent, was a fact of similar publicity and in like manner known and acknowledged. All courts were bound to recognize these facts and to declare them. The judges could not have submitted them to a jury, nor could they lawfully have admitted any evidence in denial of them. Pari ratione, they could not have permitted them to be affirmatively proven by the government. Whenever such circumstances must attend them, trial and judgment can only be regarded as a mockery. Neither can be had without a palpable violation of fundamental principles. No reasonable man can deny that courts and juries are instituted only for the normal state of society. They are the civil police, and their functions are adapted only to the transactions, good and evil, of that condition. When battle is the recognized order of things, the crimes of vanquished combatants are to be condoned or punished according to the law that governs combats. After an open territorial war of this kind had existed for four years, it might be thought by some that the rebels were still simply criminal violators of the municipal law; and that they ought to be dealt with as such. By way of reasoning it might be urged that the extent of their operations merely intensified their guilt, and should not in any way affect the question. But this reasoning, if such it may be called, proves too much. On the fall of a rebellious state, after sustaining a belligerent attitude for one hundred years, its chiefs and leaders might, with equal propriety, be brought to trial as traitors in civil courts, although they and their ancestors had for several generations, been uniformly regarded and treated as public enemies carrying on against the ultimate victor a regular national war. This can not be admitted. The law of nature forbids it; and there are broad and comprehensive doctrines deducible from the universal practice of nations which forbid it. And these doctrines are founded in necessity as well as in reason and justice.

Taking, under positive written law, the narrowest technical view of the subject, one is led to a like result. "Treason," says the constitution, "shall consist only in levying war against the United States or in adhering to their enemies." The latter word means the public enemy, and such enemy himself can not be the traitor. The characters are incompatible. This is a thoroughly established construction; and, consequently, in order to charge the southern confederates with treason under the municipal law it would have been necessary to establish that they were not public enemies in the judicial sense of that phrase, and also that they had levied war against the United States. Neither fact could have been truly asserted. Levying war means setting it on foot. Waging war is quite a different thing. It is only in the original conspiracy and in adapting its means to the purposes of active resistance that war can be levied. The offense of treason by levying war, as defined in the constitution, stops there. Subsequent acts may, indeed, sometimes serve to show that this offense has been committed; but those subsequent acts can not have that effect if in themselves they amount to waging a formal regular war by a public enemy and are accepted as such by the government. Practically a contrary conclusion results. Once the lawful government acknowledges the actual existence of public territorial belligerency, and exercises the rights consequent thereon, including the conversion of the opposite party into a public enemy whose acts, as those of a sovereign de facto, are imputable to all within his terri-

tory however innocent, thus impressing upon such persons a hostile character, the preliminary action which may have been treason when it occurred, is divested of that character, and is no longer judicially cognizable as such. It is no longer susceptible of a separate consideration and must thenceforth be regarded only as an introductory step which has become part and parcel of the supervening war thus regularly instituted. Technically it is regarded as an incident merged in the principal transaction. A conflict marked by the features alluded to, is to be deemed a regular and formal public war, because it has been clothed with that character by the government itself. The acts of recognition producing this effect must be imputed to free consent, for a government can not set up duress in avoidance of its deliberate act. Marvellously destitute of self-respect must be the state that could offer such a plea. From the time when actual war has been thus instituted, by mutual consent and recognition, Mars, not Themis, presides over all intercourse between the parties. As before stated, the behests of justice need not remain unfulfilled. The ultimate victor may use his power without ceremony, and inflict upon the vanquished any punishment their faults may merit. His own conception of duty to himself as a responsible member of civilized society is the only restraint upon his will. In drawing the line between a war levied and a war waged, narrow views may lead to the suggestion of some difficulties. Doubtless such might arise but they are not insuperable; nor are great principles, essential to the orderly action of civilized states, to be impugned for such reasons. Peculiar and abnormal cases, whether actually occurring or merely fancied as possible, are never allowed to confound just distinctions. Besides, the southern insurrection presented no such difficulties. It was a clearly defined and officially acknowledged public territorial war. These views induced a belief that Jefferson Davis could not be lawfully convicted of treason, and that to compass his death by means of a civil trial, judgment, and execution, would be disgraceful to those who administered the government and discreditable to our people. Therefore, gentlemen at the north entertaining strong opinions against the right and the act of secession, united in requesting counsel to interpose a defense should anything of the kind be attempted.

On or immediately prior to the thirty-first of May, 1865, it was rumored that Jefferson Davis had been removed from Fortress Monroe to Washington, and was to be there tried upon an indictment for treason. An application to the war department having eventuated in leave to that effect, an open letter tendering professional aid was sent to Mr. Davis. His unsealed reply was regarded as containing some objectionable matter, and was returned to him for correction. He did not alter it; so the tender remained unanswered; and an application by his counsel for an interview was refused on the ground that he was not in civil custody. The next step in the business was a written application by counsel to President Johnson for the discharge of Mr. Davis on bail or on his parol. The letter was properly referred to the attorney-general; but no formal answer to it was ever given. It was subsequently suggested that tendering as sureties some leading men who, during the struggle just closed, had been active and zealous supporters of the government, might facilitate a release on bail. In this exigency, Mr. Greeley consented to become a bondsman. On his suggestion, and, in part at least, by his agency, Commodore Vanderbilt and Mr. Gerrit Smith were induced to unite in the responsibility. At all times subsequently, until Mr. Davis' release, these three gentlemen held themselves in readiness to perform this service.

On the eighth of May, 1866, the circuit court of the United States for Virginia met at Norfolk, UNDERWOOD [District Judge] presiding, and a grand jury was sworn, which presented the following indictment:

"The United States of America, District of Virginia, to wit: In the Circuit Court of the United States of America in and for the District of Virginia, at Norfolk; May Term, 1866. The grand jurors of the United States of America, in and for the district of Virginia, upon their oaths and affirmations respectively, do present that Jefferson Davis, late of the city of Richmond, in the county of Henrico, in the district of Virginia, aforesaid, yeoman, being an inhabitant of, and residing within, the United States of America, and owing allegiance and fidelity to the said United States of America, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, and wickedly devising, intending the peace and tranquillity of the said United States of America to disturb, and the government of the said United States of America to subvert, and to stir, move, and incite insurrection, rebellion and war against the said United States of America on the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the city of Richmond, in the county of Henrico, in the district of Virginia aforesaid, and within the jurisdiction of the circuit court of the United States for the fourth circuit in and for the district of Virginia aforesaid, with force and arms, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise, levy, and carry on war, insurrection, and rebellion against the said United States of America, and in order to fulfill and bring to effect the said traitorous compassings, imaginations, and intentions of him, the said Jefferson Davis, afterwards, to wit, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county

of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the circuit court of the United States for the fourth circuit in and for the said district of Virginia, with a great multitude of persons whose names to the jurors aforesaid are at present unknown, to the number of five hundred persons and upward, armed and arrayed in a warlike manner, that is to say, with cannon, muskets, pistols, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States of America, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States of America, and then and there, that is to say, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the said circuit court of the United States for the fourth circuit in and for the said district of Virginia, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Jefferson Davis, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in the manner aforesaid, most wickedly, maliciously, and traitorously, did ordain, prepare, levy, and carry on war against the said United States of America, contrary to the duty, allegiance, and fidelity of the said Jefferson Davis, against the constitution, government, peace and dignity of the said United States of America, and against the form of the statute of the said United States of America, in such case made and provided. This indictment, founded on testimony of James F. Milligan, George P. Scarbury, John Good, Jr., J. Hardy Hendren, and Patrick O'Brien, sworn in open court and sent for by the grand jury. L. H. Chandler, United States Attorney for the District of Virginia."

On the fifth of June, Messrs. James T. Brady, William B. Reed, James Lyons, and Robert Ould, were present at the opening of the court in Richmond as counsel for Mr. Davis. After the usual preliminaries, William B. Reed, Esq., of Philadelphia, then addressed the court as follows: May it please your honor, I beg to present myself in conjunction with my colleagues as the counsel of Jefferson Davis, now a prisoner of state at Fortress Monroe, and under indictment in your honor's court for high treason. We find in the records of your honor's court an indictment charging Mr. Davis with this high offense, and it seemed to us due to the cause of justice, due to this tribunal, due to the feeling of one sort or another, which may be described as crystallizing around the unfortunate man, that we should come at the earliest day to this tribunal and ask of your honor, or more properly, the gentlemen who represent the United States, the simple question, What is to be done with this indictment? Is it to be tried? This is a question, perhaps, which I have no right to ask. Is it to be withdrawn or is it to be suspended? If it is to be tried, may it please your honor, speaking for my colleagues and for myself, and for the absent client, I say with emphasis, and I say it with earnestness, we come here prepared instantly to try that case, and we shall ask for no delay at your honor's hands further than is necessary to bring the prisoner to face the court and enable him, under the statute in such case made and provided, to examine the bill of indictment against him. Is it to be withdrawn? If so, justice and humanity seem to us to prompt that we should know it. Is it to be suspended or postponed? If so, may it please the court, with all respect to your honor and the gentlemen who conduct the business here, your honor must understand us as entering our most earnest protest. We ask a speedy trial on any charge that may be brought against Mr. Davis, here or in any other civil tribunal in the land. We may be now here representing, may it please the court, a dying man. For thirteen months he has been in prison. The constitution of the United States guarantees to him not only an impartial trial, which I am sure he will have, but a speedy trial. And we have come no slight distance; we have come in all sincerity; we have come with all respect to your honor. We have come with strong sympathies with our client, professionally and personally; we have come here simply to ask that question. I address it to the district attorney, or I address it to your honor, as may be the more appropriate—What disposition is proposed to be made with the bill of indictment against Jefferson Davis now pending for high treason?

Major J. S. Hennessey, assistant United States district attorney, said that he had been entirely unaware of the nature of the application just made, and in the absence of the district attorney, Mr. Chandler, he was not prepared to answer the question, but would immediately telegraph to that gentleman the fact of such application having been made. Mr Chandler would probably arrive in Richmond this evening; if he failed to arrive, Major Hennessey stated that he would himself be prepared to answer the question to-morrow morning.

Judge UNDERWOOD (addressing the counsel for Mr. Davis). I am to understand that will be satisfactory?

Mr. Reed. Entirely so.

The court then adjourned.

On the assembling of the court the next day, Judge UNDERWOOD, addressing the assistant district attorney, said: Mr. Hennessey, we are ready to hear from you, whenever it suits your convenience.

Major Hennessey. May it please your honor: As the answer of the government to the questions propounded by Mr. Reed on yesterday are considered of some importance, I have written them out, and propose to read them to the court. May it please your honor, yesterday, Mr. Reed, one of the counsel for Jefferson Davis, propounded certain questions to the court and to me, which, in the absence of Mr. Chandler, I at that time declined to answer. Mr. Chandler is still absent, being, I regret to say, entirely prostrated by a recent domestic calamity, and, as I promised, I to-day proceed to reply to the questions of the learned gentleman. That gentleman correctly says that an indictment has been found in this court against his client, Mr. Davis, and asks if it is to be tried, if it is to be dropped, or is it to be suspended? So far as I am instructed, I believe it is to be tried; but it will not be possible to do so at present, for a variety of reasons, some of which I proceed to give: In the first place, Mr. Davis, although indicted in this court for high treason, is not now, and never has been in the custody of this court, but is held by the United States government, as a state prisoner, at Fortress Monroe, under the order of the president, signed by the secretary of war. In the second place, even if Mr. Davis were in the custody of this court, it would not be possible for the attorney-general, in view of his numerous and pressing engagements at the close of the season, to come here now and try this case—which is a case of great national importance—which he would be expected to do. In the third place, if Mr. Davis is in the delicate state of health suggested by Mr. Reed, it would be nothing less than cruel, at this hot and unhealthy season, to expose him to the unavoidable fatigues of a protracted trial, which appears to be an inevitable result from the array of counsel, present and prospective, engaged for his defense. Neither this court nor any of its officers has any present control over the person of Mr. Davis, and until they have, it becomes impossible for the district attorney to say when he will be tried; but this I assure the gentlemen who represent him here, that the hour Mr. Davis comes into the custody of this court, they shall have full and prompt notice when it is intended to try him, and so far as the district attorney and his associates are concerned, they may be assured their case will have a just and speedy trial, without further let or hindrance. This I say for the special department of the court which I represent; but what the intentions of the government are, with regard to the disposition of Mr. Davis, I am no further instructed than I have said. I now move, may it please your honor, that this court, as soon as the business before it is disposed of, do adjourn until the first Monday of October next. By that time the heat of the summer will have passed away, the weather will be cool and pleasant, and should we have the pleasure of seeing these gentlemen here again, they will be more fitted for the arduous labor which their profession constantly imposes upon them. In the meantime, the crystallization process, referred to by the learned gentleman yesterday, will be going on, and his client will be enjoying the cool breezes of the sea at Fortress Monroe, instead of inhaling the heated and fetid atmosphere of a crowded courtroom.

James T. Brady, Esq., of New York, one of the counsel for Mr. Davis, then said: If your honor please, I did not expect to say one word this morning in reference to the case of Mr. Davis. but some of the suggestions contained in what my learned friend has just read, make it proper for me to state that if Mr. Davis be not technically subject to your honor's jurisdiction, it is only because no copy of this indictment, so far as I am advised, has been served upon him, nor any list of witnesses, nor any act done of those which are required by the statute. It may be true, that in this technical sense he can not now be, and never has been amenable to your authority; but my brother counsel, Mr. Reed, stated that Mr. Davis was not claiming the benefit of any of those wants of forms, but that on the contrary he was here to express, from his own lips, speaking through us, his ardent desire for an immediate trial. Although it may be very hot in Richmond, it is infinitely worse where he is, and so far as the convenience of the counsel is concerned, they care nothing for that convenience, impelled as they are by a sense of duty. From my own experience in the city of Richmond, whose hospitality I have enjoyed certainly, I would be happy to remain here through the heats of summer or the frosts of winter. We can only say that we are entirely ready. We know that we can not control the action of the district attorney. We thank him for his polite response to our questions, and of course we leave the question for such action as the government may think proper to take.

Judge UNDERWOOD. It only remains for the court to say that the district attorney has correctly represented the views of the government upon this matter. The chief justice, who is expected to preside on the trial, has named the first Tuesday in October as the time that will be most convenient for him. The attorney-general has indicated that it would be utterly impossible for him, under the pressure of his many duties, now greatly increased by troubles on the northern frontier, on so short a notice, to give that attention to this great question which it demands. Under all circumstances the court is disposed to grant the motion of the said district attorney, and I think I may say to the counsel that Mr. Davis will in all probability at that time be brought before the court, unless his case shall in the meantime be disposed of by the government, which is altogether possible. It is within the power of the president of the United States to do what he pleases in

these matters, and I presume the counsel for Mr. Davis would probably find it for the interest of their client to make application directly to the government at Washington, but this court would not feel justified in denying at this time the application both of the chief justice and attorney-general. When the court adjourns, it will adjourn not until the next term, which is in November, but until the first Tuesday in October next, as it is supposed from the array of counsel on both sides that have been named it will be a long term, in which great political and constitutional questions are to be discussed and settled, probably taking two months. It would, undoubtedly, be much more comfortable for the counsel as well as Mr. Davis himself, to have these months in the fall rather than in the summer, because it is in every way more comfortable in Richmond at that time than in the summer. I think the counsel is mistaken in supposing that Fortress Monroe is not as comfortable a place in the summer, as Richmond. When I have been there in the summer, I have found the sea breeze very refreshing.

Mr. Brady (to the court). But very limited society.

THE COURT. The society is limited. However, the government is disposed to extend every reasonable privilege, and I am happy to know that the wife of the prisoner is permitted to be with him, and that his friends are permitted to see him. The motion of the district attorney, is therefore granted. This court will adjourn, not until November, but until the first Tuesday in October, which time is preferred by the chief justice and attorney-general. The case will then, if not before disposed of, be taken up.

On the seventh of June the Honorable Charles O'Conor of New York, and Honorable Thomas G. Pratt, ex-governor of Maryland, representing Mr. Davis, and the Honorable James Speed, attorney-general of the United States, waited upon Chief Justice Chase at his residence in the city of Washington to ascertain whether he would entertain an application to release Mr. Davis on bail. On this interview the chief justice furnished the reporter with the following statement:

Mr. O'Conor suggested that such an application might be properly made at chambers in Washington, although out of the district of Virginia in which the indictment had been found, and expressed the hope that it would be entertained, and that bail would be taken.

The attorney-general did not consent to the hearing of the application, but remarked that, if the chief justice was willing to hear it, he would appear on behalf of the government. The chief justice said that whenever it should become apparent, either by the proclamation of the president or by the legislation of congress, or by clear evidence from other sources, that martial law was abrogated and the writ of habeas corpus fully restored in Virginia, he should unite with the district judge in holding the courts in that district. At present, the federal as well as the state courts must act in a quasi-military character, subject to such control by the president and by congress as might be deemed essential to complete pacification and restoration. Such action by a subordinate court might be proper; and the district and circuit courts of the United States for the district of Virginia, could be held by the district judge, subject to such military supervision as should be found needful. He had been, however, of the opinion that neither the chief justice nor any of the justices of the supreme court, exercising, as they did, the highest judicial authority of the nation, could properly join in holding the circuit courts under such circumstances. He was still of this opinion. The president, it was true, had issued a peace proclamation which, in the absence of any action requiring a different interpretation, would probably have warranted the inference that the habeas corpus was fully restored and martial law abrogated in all the states recently in arms against the Union, except Texas. But the proclamation has been followed by other orders from the president through the war department, inconsistent with this interpretation; and in such a matter as this, the executive construction of an executive act ought to be followed. If he were to hold the circuit court in the district of Virginia in the same manner as in the districts in other states,—as, for example, in the districts of Maryland and Delaware,—it would be his duty to issue a writ of habeas corpus on application in behalf of any person in custody within the district, under or by color of authority of the United States, and examine the question of the lawfulness of such custody. If, therefore, an application should be made for that writ in behalf of Jefferson Davis, held as everybody knows in such custody within the district, it would be his duty to issue it. What would be the consequences? If martial law is at an end, the custody is clearly illegal, and the prisoner must be discharged, or admitted to bail, or committed to the state jail or prison of Virginia, under the acts of congress relating to the custody of prisoners. It was manifestly improper, the chief justice thought, for him to interpose in that way with a custody which, upon the supposition that martial law yet exists in Virginia, is purely a matter of military discretion with the president. Under these circumstances the chief justice said he could not, at present, depart from the line of action he had prescribed himself. He could not, consistently with his views of public duty, hold a quasi-military court; nor could he hold a court in any district in a state lately in rebellion, until all semblance of military control over federal courts and their process and proceedings had been removed by the action of the political departments of the government. He did not question, but on the contrary approved, the action of the district

court in holding such courts. Such a court was now being held in Virginia by the district judge. An application to discharge Mr. Davis on bail might very properly be addressed to him: and there was no reason to doubt that, if the government should consent such an order might be made. The district judge, sitting as he did, might carry out the views of the executive made known through the attorney-general. For himself, the same reasons which would restrain him from holding the court, would restrain him even more powerfully from exercising any jurisdiction as a single judge within the district of Virginia; and he must, therefore, decline to entertain the application to admit Mr. Davis to bail.

There was another consideration which would control his present action, even if he felt himself warranted in holding the court. Mr. Davis is now a military prisoner, and not in any sense in the custody of the court. Before an application to discharge on bail could be considered, it would be necessary to inquire into the legality of the military custody, by habeas corpus. An application for that writ, therefore, its allowance and an adjudication that the present custody was illegal, would be indispensable preliminary proceedings; and no application for that writ had been made. He mentioned this objection to the action desired in behalf of Mr. Davis, without thinking it of much importance, for under ordinary circumstances, no doubt, the objection could be easily removed by an application for the writ, and proper proceedings under it. At present the same considerations which would restrain him from acting on an application to discharge on bail, would equally restrain him from the allowance of a writ of habeas corpus.

After these observations, Messrs. O'Conor and Pratt, with the attorney-general, withdrew. No application to admit to bail was made. Although no formal application was made at this time to the chief justice, as appears by his own note of the interview between himself and counsel, such application was made to the government, to know if bail would be received, and the offer of bail was unlimited in amount. Both the president and Mr. Speed evinced favor to the object, and their sincerity can not be fairly questioned. The objection of the chief justice towards exercising judicial functions in territory where military law was superior to civil law, making it out of the question for him to act in the case at that time, Hon. Charles O'Conor and Geo. Shea, Esq., of New York, made a formal motion for bail, before Judge UNDERWOOD, which was heard in the attorney-general's office at Washington, on the eleventh of June, and were replied to by the attorney-general, and on that motion Judge UNDERWOOD delivered the following decision:

I have considered the application made by Mr. Shea, of counsel, to admit Jefferson Davis to bail. Under the circumstances the application might have been more properly made to me when recently holding the circuit court at Richmond. Under the law, it may doubtless be made also in vacation, and I will briefly state my views of it and my conclusions.

In the states which were lately in active rebellion, military jurisdiction is still exercised, and martial law enforced. The civil authorities, state and federal, have been required or permitted to resume partially their respective functions; but the president, as commander-in-chief, still controls their action so far as he thinks such control necessary to pacification and restoration. In holding the district and circuit courts of Virginia, I have uniformly recognized this condition.

Jefferson Davis was arrested under a proclamation of the president, charging him with complicity in the assassination of the late President Lincoln. He has been held ever since, and is now held, as a military prisoner. He is not, and never has been, in the custody of the marshal for the district of Virginia, and he is not, therefore, within the power of the court. While this condition remains, no proposition for bail can be properly entertained, and I do not wish to indicate any probable action under the circumstances.

On the tenth of April, 1866, a resolution had been introduced by Mr. Boutwell, of Massachusetts, instructing the judiciary committee of the house of representatives to inquire whether there is probable cause to believe in the criminality alleged against Davis and others, and whether any legislation is necessary to bring them to a speedy and impartial trial. This committee had the case under investigation until they made their report, with the following conclusions:

"When the committee entered upon this investigation in April last, the evidence in the war department, if accepted as true, was conclusive as to the guilt of Jefferson Davis. The judge-advocate-general had taken the affidavits of several persons who professed to have been in the service of the rebel government, and who had been present at an interview between Surratt, Davis, and Benjamin. Those affidavits were taken by the judge-advocate-general in good faith, and in the full belief that the affiants were stating that only which was true. The statements made by those witnesses harmonize in every important particular with facts derived from documents and other trustworthy sources. The committee, however, thought it wise to see and examine some of the persons whose affidavits had been taken by Judge Holt. Several of the witnesses when brought before the committee retracted entirely the statements which they had made in their affidavits, and declared that their testimony, as given originally, was false in every particular. They failed, however, to state to the committee any inducement or consideration

which seemed to the committee a reasonable explanation for the course they had pursued. And the committee are not at this time able to say, as the result of the investigations they have made, whether the original statements of these witnesses are true or false, but the retraction made by some of them deprives them of all claim to credit, and their statements so far impeached or thrown out upon the evidence given by other witnesses whose affidavits were taken by Judge Holt, that the committee, in the investigations they have made and in the report, have disregarded entirely the testimony of all those persons whose standing has been so impeached. The committee are of opinion that it is the duty of the executive department of the government, for a reasonable time, and by the proper means, to pursue the investigations for the purpose of ascertaining the truth. If Davis and his associates are innocent of the great crime of which they were charged in the president's proclamation, it is due to them that a thorough investigation should be made, that they may be relieved from the suspicion that now rests upon them. If, on the other hand, they are guilty, it is due to justice, to the country, and to the memory of him who was the victim of a foul conspiracy, that the originators should suffer the just penalty of the law. The committee are of the opinion that the work of investigation should be further prosecuted; and, therefore, in conclusion, they recommend the adoption of the following resolutions: 'Resolved, that there is no defect or insufficiency in the present state of the law to prevent or interfere with the trial of Jefferson Davis for the crime of treason, or any other crime for which there may be probable ground for arraigning him before the tribunals of the country. Resolved, further, that it is the duty of the executive department of the government to proceed with the investigation of the facts connected with the assassination of the late President Abraham Lincoln without unnecessary delay, that Jefferson Davis and others named in the proclamation of President Johnson, of May second, 1865, may be put upon trial and properly punished if guilty, or relieved from the charges if found to be innocent.' "

No action having taken place, the following correspondence ensued:

"Executive Mansion, Washington, D. C., October 6th, 1866. Sir: A special term of the circuit court of the United States was appointed for the first Tuesday of October, 1866, at Richmond, Va., for the trial of Jefferson Davis on the charge of treason. It now appears that there will be no session of that court at Richmond during the present month, and doubts are expressed whether the regular term (which by law should commence on the fourth Monday of November next) will be held. In view of this obstruction, and the consequent delay in the proceeding with the trial of Jefferson Davis under the prosecution for treason, now pending in that court, and there being, so far as the president is informed, no good reason why the civil courts of the United States are not competent to exercise adequate jurisdiction within the district or circuit in which the state of Virginia is included, I deem it proper to request your opinion as to what further steps, if any, should be taken by the executive with a view to a speedy, public, and impartial trial of the accused, according to the constitution and laws of the United States. I am sir, very respectfully, yours, Andrew Johnson. To the Hon. Henry Stanbery, Attorney-General."

Reply of the attorney-general:

"Attorney-General's Office, Oct. 12, 1866. The President—Sir: I have the honor to state my opinion, on the question propounded in your letter of the 6th, as to what further may be proper or expedient to be done by the executive, in reference to the custody of Mr. Davis, and the prosecution for treason now pending against him in the circuit court of the United States for Virginia. I am clearly of opinion, that there is nothing in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts. The actual state of things, and your several proclamations of peace and of the restoration of civil order, guarantee to the civil authorities, federal and state, immunity against military control or interference. It seems to me, that in this particular there is no necessity for further action on the part of the executive, in the way of proclamation, especially as congress, at the late session, required the circuit court of the United States to be held at Richmond, on the first Monday of May, and the fourth Monday of November in each year, and authorized special or adjourned terms of that court to be ordered by the chief justice of the supreme court, at such time and place, and on such notice, as he might prescribe, with the same power and jurisdiction as at regular terms. This is an explicit recognition by congress, that the state of things in Virginia admits the holding of the United States courts in that state. The obstructions you refer to, it seems to me, can not be removed by any executive order, so far as I am advised. It arises as follows: Congress, on May 22, 1866, passed an act providing that the circuit court of the United States for the state of Virginia should be held at Richmond, on the first Monday of May, and on the fourth Monday of November in each year; and further providing that all suits, and other proceedings which stand continued to any other time and place, should be deemed continued to the time and place prescribed by the act. The special or adjourned session which was ordered by the court to be holden at Richmond, in the present month of October, was considered as abrogated by force of this act. This left the regular term to be holden on the fourth Monday of November, and if there had been no further legislation by congress, no doubt could exist

as to the competency of the chief justice and the district judge of that court then to try Mr. Davis. But on the twenty-third of July, 1866, congress passed an act to fix the number of judges of the supreme court of the United States, and to change certain judicial circuits. [14 Stat. 209.] Among other changes in the circuits made by this act, is a change of the fourth circuit, to which the chief justice has been allotted. As this circuit stood prior to this act, when allotted to the chief justice, it embraced Delaware, Maryland, Virginia, North Carolina, and West Virginia. It was changed by this act by excluding Delaware and adding South Carolina. It is understood that doubts exist whether the change in the states composing the circuit, will not require a new allotment. Whether these doubts are well founded or not, it is certain that the executive can not interfere, for although, under peculiar circumstances, the executive has power to make an allotment of the judges of the supreme court, yet these circumstances do not exist in this case. A new allotment, if necessary, can only be made by the judges of the supreme court, or by congress—perhaps only by congress. Mr. Davis remained in custody at Fortress Monroe, precisely as he was held in January last, when, in answer to a resolution of congress, you reported communications from the secretary of war and the attorney-general, showing that he was held to await trial in the civil courts. No action was then taken by congress in reference to the place of custody. No demand has since been made for his transfer into civil custody. The district attorney of the United States for the district of Virginia, where Mr. Davis stands indicted for treason, has been notified that the prisoner would be surrendered to the United States marshal upon a certain capias under the indictment, but the district attorney declines to have the capias issued, because there is no other place within the district where the prisoner could be kept, or where his personal comfort and health could be so well provided for. No application has been made within my knowledge by the counsel for Mr. Davis for a transfer of the prisoner to civil custody. Recently an application was made by his counsel for his transfer from Fortress Monroe to Fort Lafayette, on the ground of sanitary consideration. A reference was promptly made to a board of surgeons, whose report was decidedly averse to change, on the score of health and personal comfort. I am unable to see what further action can be taken on the part of the executive to bring the prisoner to trial. Mr. Davis must for the present remain where he is, until the court which has jurisdiction to try him shall be ready to act, or until his custody is demanded under lawful process of the federal courts. I would suggest that, to avoid any misunderstanding on the subject, an order be issued to the commandant of Fortress Monroe to surrender the prisoner to civil custody, whenever demanded by the United States marshal, upon process from the federal courts. I send herewith a copy of a letter from the United States district attorney for Virginia, to which I beg to call your attention. I have the honor to be, &c., Henry Stanbery, Attorney-General."

"Office United States District Attorney for Virginia. Norfolk, October 8th, 1866. Honorable Henry Stanbery, Attorney-General of the United States: Sir: In compliance with your request, I submit herewith the substance of the verbal statement I made you a few days since in answer to your question, 'Why no demand has been made upon the military authorities for the surrender of Jefferson Davis, in order that he might be tried upon the indictment found against him in the United States circuit court at the term held at Norfolk in May last.' Two reasons have influenced me in not taking any steps for removing him from their custody. The one relates to the safe keeping; the other to his own personal comfort and health. I have never had any doubt but that he would be delivered to the United States marshal of the district, whenever he should have demanded him on a capias or other civil process. But you can readily understand that so soon as he goes into the hands of that officer, upon any action had by me, his place of confinement would be one of the state jails of Virginia. At Fortress Monroe all necessary precautions can be and are taken to prevent his escape. Over the internal police of a state jail the marshal has no authority, and the safe custody of the prisoner could not be secured save at a very great expense. Mr. Davis is now in as comfortable quarters as the most of those occupied by the army officers at the fort. The location is a healthy one. His family have free access to him. He has full opportunity for exercise in the open air. If his health be feeble, remove him to one of the state jails, and his condition, instead of becoming better, would in all these respects be much for the worse. His counsel probably understood all this, and I think, will not be likely to take any steps which would decrease the personal comforts or endanger the life of their client. I have the honor to be, most respectfully, your obedient servant, L. H. Chandler, United States District Attorney for Virginia."

In June, 1866, Mr. Greeley visited Washington, and also Judge Underwood at Richmond, and actively co-operated in the effort then made, but it was unsuccessful; the cause can only be conjectured.

In August, 1866, Mr. Davis' counsel solicited his removal to some northern prison as a measure calculated to benefit his health, which was then precarious. An investigation at Fortress Monroe by two army surgeons specially selected and sent from Washington for the purpose, resulted in a report that the removal was inexpedient. If allowed, it might have led to an early release of Mr. Davis on

bail. Up to this time there seemed some influence—some "power behind the throne"—that kept its eye upon Mr. Davis and vetoed all attempts in his favor. Nine months more elapsed before his release. That event occurred May thirteenth, 1867. Mr. Greeley and Mr. Smith then attended in person at Richmond. Together with Commodore Vanderbilt, they signed the recognizance. Though no direct promise was ever made, Mr. Stanbery, the attorney-general, and Mr. Evarts, his associate, intimated shortly prior to this May circuit at Richmond, that the government would accept bail. Mr. Evarts attended at Richmond on behalf of the prosecution and assented accordingly. Why bail was not accepted in June, 1866, or earlier, and was accepted in May, 1867, is not known. The same persons were offered on both occasions. In 1866, Mr. Davis was ready to give bail in one million dollars; or more, if required; in 1867, bail was not demanded for even one-tenth of that sum. Mr. Greeley's frank liberality in becoming one of the sureties, and procuring other influential persons to unite with him, was most praiseworthy. In subsequently advising a general amnesty, and actively following it up by an immediate discontinuance of all pending prosecutions, Mr. Attorney-General Evarts entitled himself to the applause of all good men.

The events detailed above, thus spread themselves over nearly the whole of the year, in efforts by his friends to procure a prompt trial or release of Mr. Davis, or inquiries of the executive as to why he had not been or was not about to be tried, or investigations by the congress of the United States, as to whether the charges against him had any foundation, and why they were not subjected to the test of judicial investigation. The controversy raged as to whether the war had ended, and whether the laws in the southern states were superior to the military arm of the government. The president and the supreme court held or clearly intimated that peace prevailed in all those regions recently within the belligerent lines of the Confederacy, and that therefore law was and must be supreme. Congress held that the status of war still remained, and by a series of legislative acts, assumed command of the army, and through it exercised military law over all those states and people. It placed states under the command of its generals, who were authorized to execute the laws, and who assumed and exercised the power to make them; who suspended, extended, amended, and repealed laws at their will and pleasure, by general orders issued by their adjutants-general, and appointed their own staff officers to act as judges of state courts, paying them salaries out of the state treasury, which the law provides alone for independent judges, while such officers also received their regular pay, as part of the army of these United States. These generals commanding, not only made the laws and appointed their own subordinates to interpret, apply, and execute them, but in many instances they directed in special orders what decisions should be made, and what judgments rendered in specific cases. They were the executive, the legislative, and the judicial departments of government concentrated into one hand, under what is known historically as the "reconstruction measures of congress." In Virginia the president judge of the supreme court of appeals was a staff officer of the general commanding, assigned to that duty; and another one of the judges of that court was an officer of the federal army, receiving his appointment from the same source.

While affairs were in this condition, Chief-Justice Chase refused to sit within the jurisdiction in which a soldier was the ultimate arbiter, and a bayonet the sole symbol of law. The circuit court of the United States for Virginia was however held, having had a brief term in November, 1866, and in May, 1867, the district judge (UNDERWOOD) opened its regular term at Richmond. On the first day of the court and of the month, the following petition was presented to him:

"To the Honorable the Judges of the Circuit Court of the United States for the District of Virginia. The petition of Jefferson Davis, by George Shea, his attorney in fact in this behalf, respectfully showeth: That he is, and ever since the nineteenth day of May in the year 1865, has been restrained of his liberty, and held in close custody as a prisoner in jail in that certain strong place of, and belonging to the government of the United States, called Fortress Monroe, within the said district of Virginia, and that Brigadier-General Henry S. Burton is now the commander of said Fort Monroe, and as such holds petitioner in his custody. That no ground of detention is alleged to the knowledge of your petitioner, or his said attorney, in fact, unless it be a certain indictment presented against your petitioner at the May term of the above entitled court, held in the year 1866, of which a copy is hereunto annexed, marked A. Your petitioner further shows that the May term was adjourned to meet at Richmond on the fourth day of June, in the year last aforesaid. That at said adjourned term your petitioner appeared by his counsel and urged a trial at said adjourned term, offering to proceed without delay, but that the government declined to proceed on said indictment. Your petitioner shows that at the subsequent term of this court your petitioner appeared in like manner, but the government did not bring on the trial. Your petitioner further shows that his imprisonment aforesaid has greatly impaired his health, and that the continuance thereof through the ensuing summer would involve serious danger to his life, as your petitioner believes. Your petitioner further says that ample sureties for his appearance to abide judgment on said indictment can be given, if your peti-

tioner shall be admitted to bail. Your petitioner further shows that his detention, imprisonment, and custody aforesaid, always have been and are exclusively under or by color of the authority of the United States, and that he has reason to apprehend that the government may not proceed to the trial on said indictment at the next ensuing term of said court, which is to be held in Richmond on the first Monday of May, 1867. Whereupon your petitioner prays that a writ of habeas corpus may issue from this honorable court to be directed to Brigadier-General Henry S. Burton aforesaid, and whomsoever may hold your petitioner in custody, commanding him or them to have the body of your petitioner before the circuit court of the United States for the district of Virginia, on the first Monday of May, 1867, at the opening of court on that day, or at such other time as in the said writ may be specified, for the purpose of inquiring into the cause of the commitment and detention of your petitioner, and to do and abide such order as this court may make in the premises. And your petitioner will ever pray. Jefferson Davis, by George Shea, his attorney in fact.

"United States of America, District of Columbia, ss.: George Shea, being duly sworn, says that he is attorney in fact for the petitioner in the preceding petition named; that he is acquainted with the said petitioner, and saw him in close custody, as a prisoner, in Fort Monroe, in the month of March last; that he, this deponent, has a general knowledge of the facts in the above petition stated, and that he verily believes the said petition to be in all respects true. George Shea.

"Subscribed and sworn before me, this first day of May, 1867, at Alexandria, Va. John C. Underwood, District Judge."

And thereupon the following writ was granted:

"The President of the United States to Brigadier-General Henry S. Burton, and to any person or persons having the custody of Jefferson Davis, greeting: We command that you have the body of Jefferson Davis, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatsoever name the said Jefferson Davis may be called, or charged, before our circuit court of the United States for the district of Virginia, at the next term thereof at Richmond, in said district, on the second Monday in May, 1867, at the opening of the court on that day, and so do and receive what shall then and there be considered concerning the said Jefferson Davis. Witness, Salmon P. Chase, our Chief Justice of the Supreme Court of the United States, this first day of May, 1867. W. H. Barry, Clerk of the Circuit Court of the United States, District of Virginia."

By order of the president, the following order was issued:

"War Department, Washington, D. C., May 8, 1867. Brevet Brigadier-General H. S. Burton, United States Army, Commanding Officer at Fortress Monroe: The president of the United States directs that you surrender Jefferson Davis, now held confined under military authority at Fortress Monroe, to the United States marshal or his deputies, upon any process which may issue from any federal court in the state of Virginia. You will report the action taken by you on this order, and forward a copy of the process served upon you to this office. By order of the president: E. D. Townsend, Assistant Adjutant-General."

On the tenth day of May the writ was served on General Burton by the marshal, and, in obedience to the command thereof, he took Mr. Davis to Richmond, and on the 13th made the following return of the writ, producing at the same time the body in court:

"In obedience to the exigency of the within writ I now here produce before the within named circuit court of the United States for the district of Virginia, the body of Jefferson Davis, at the time of the service of the writ held by me in imprisonment at Fortress Monroe, to the military authority of the United States subject, and surrender of the said Jefferson Davis to the custody, jurisdiction, and control of the said court, as I am directed to do by the order of the president of the United States, under date of May 8, 1867. H. S. Burton, Colonel and Brevet Brigadier-General of the United States Army."

Mr. Chandler, for the government, said: General Burton, comes into court to present his return, produces the body of Jefferson Davis, hitherto held by the military authorities, and hereby submits him to the control and authority of this court, as he had been commanded to by the president of the United States.

Mr. O'Conor said: On this return, may it please your honor, no question arises as to the legality of the former imprisonment. We are advised that there is an indictment against the prisoner in this district, and that your honor will take such course as may be proper in the case.

THE COURT replied: The return is explicit and satisfactory. General Burton receives the thanks of the court for his prompt and graceful obedience to its writ. General Burton is now honorably relieved of the custody of the prisoner, who passes into the custody of the court, under the protection of American republican law. The marshal will now serve on the prisoner the writ on the indictment now in this court.

Deputy-Marshal Duncan advanced and handed a paper to Mr. Davis, who arose and handed it to Mr. O'Conor.

Mr. O'Conor said: We hope that the court will now order such proper course as justice may require. No further action could be asked by the counsel of Mr. Davis, and it remaining with the court to institute regular civil proceedings, he would acknowledge to have received a copy of the indictment, and

would wish to know what further steps would be taken.

Judge UNDERWOOD said: The court would be pleased to hear from the representatives of the government.

Mr. Evarts. I deem it proper to say that I represent the government on this occasion and in this prosecution, in association with my learned friend the district attorney, Mr. Chandler. Mr. Davis having passed from military imprisonment to the control and custody of this court, and as an indictment is pending against him and he is now under arrest, it only remains for me in behalf of the government to say, it is not its intention to prosecute the trial of the prisoner at the present term of the court.

Mr. O'Conor. The condition of the case throws upon us the duty of presenting to your honor's consideration some of the circumstances attending it. Jefferson Davis has been imprisoned and in the power of the government, so that any steps thought expedient, just, and consistent with sound policy, might have been taken against him a very long time ago. His imprisonment commenced on the 19th of April, 1865. In this court an indictment was presented against him in May, 1866. Mr. Davis has been at all times since his imprisonment, and particularly during the last year or more of that imprisonment, exceedingly anxious to meet the questions arising on any indictment which might be presented. He was exceedingly anxious to receive the advantages, and enjoy the rights which your honor has so eloquently and justly eulogized in the address made with reference to General Burton—the blessings and advantages of a just, equal, fair, and I may say, benign (for that becomes the occasion) administration of law. No particular civil procedure has been on foot since the indictment was presented, and although the whole period of two years has elapsed since the commencement of his imprisonment, an application of obvious general principles and policy was properly made to the court, while, at the same time, securing due responsibility to aw and the ends of justice, to mitigate somewhat the prisoner's condition; for all imprisonment, and the holding of the accused for trial, are adopted for the purpose of securing an answer and the personal appearance of the accused when the question of his guilt or innocence comes fairly before the court. This is ample reason on general grounds. The constitution of the United States, which we all profess to reverence, assures a speedy trial. But I do not come here to assert that a speedy trial means instantly, nor to assert that the government has not on this, as on all other occasions, had a reasonable time to prepare for trial. I do not assert that considerations of policy and convenience may not have had their full weight, although they may bear oppressively on the individual. I do not complain that the government has failed to prosecute last year, or deferred action until the present year. I have no such purpose, because we are bound to respect the authority of the president, the attorney-general, and their associates and advisers, and only suppose there are public considerations for not proceeding with the trial immediately. But, if your honor please, it is a fact that a gentleman, not very young, and not very remarkable for constitutional vigor—whatever may be said of his mental vigor, has already suffered two years of imprisonment, and it is a fact that, as far as human guarantees can be given for any man, I might say any amount of security for the appearance of the prisoner can be furnished. We can furnish such pledges from gentlemen in every part of the country, of every party, and representing every shade of opinion; gentlemen who, becoming security for him, would profess but one sentiment, and that not for him personally, who are averse to the political views which have distinguished his life in every respect, but who, nevertheless, feel a great interest in the honor and dignity of the American people, and in the American republic, and fear that the punishment of death, in the absence of a trial, would result from his longer imprisonment. I say, then, this kind of assurance can be given; and as that class who differ so widely in opinion are willing to give this security, in order to show their respect for him personally, it furnishes the best proof that they believe he will appear before you whenever required. To this they are willing to pledge their whole estates. These remarks are to express to your honor that we are ready to give bail that at a future day Mr. Davis will be ready to appear, without in the meantime being held a prisoner. Fair, reasonable bail, such as may be exacted in ordinary cases, we are now ready to furnish. As the trial must lie over the ensuing summer—as the prisoner has not necessarily to be examined or defended in any way—he is now subject to judicial control, and the question for your honor is, whether the prisoner shall be let to bail, as the learned gentleman proposes. If your honor so determines, then the question arises as to the amount, and the terms, and the division, if desired, on which the security may have been much reduced by imprisonment. I move your honor to accept bail for him. This you will of course do, either on your own judgment or on consultation with other officers of the government as to the amount. I have spoken on the pains of imprisonment. Every freeman will understand that any imprisonment of a freeborn American must carry oppression with it, so far as there was a long period of imprisonment. Certainly, during the time Mr. Davis was under the direction and custody of that gallant officer to whom you paid so just a compliment, that imprisonment has had as few pains and as little suffering as could be expected under the circumstances. He was

in the hands of a soldier and a gentleman. I do not allude to other times, but speak as to what is before us. Jefferson Davis is now here, under your exclusive direction, and I ask that he have the liberty of free locomotion until you are prepared to try him.

THE COURT said it would like to hear from the other side.

Mr. Evarts. The imprisonment was under the military authority and jurisdiction of the United States. Its duration, or the circumstances attending it, are to be taken. The indictment, I am informed, is under a recent act of congress prescribing the punishment for treason, passed in 1862, and which, for the first time in our legislation, has made it proper for the court to inflict less than the death penalty for the crime. Undoubtedly the government, in saying to your honor that they do not propose proceeding against the prisoner during the present term, have presented a proper case for the motion of his counsel; and it is for your honor to determine on the usual terms, in the discretion of the court, considering all the circumstances of the case as to the propriety of receiving bail. The court has nothing to do with the characters or motives of the sureties; it could only look to what the law requires with regard to pecuniary responsibility, and for insuring the presence of the accused. I do not know that there will be any indisposition on the part of the prisoner's counsel to meet the amount of bail your honor or the district attorney may think suitable. Indeed, from the remarks of the prisoner's counsel, they have the ability and disposition to furnish the requisite security. As to the question of amount, it is for your honor to say what was the proper sum in order to the proper administration of justice.

Mr. Chandler, Dist.-Attorney. The question now presented is, whether the prisoner shall be admitted to bail. The judiciary act of 1789 provides that the supreme court or a judge of a district court of the United States, may, in any case, even in capital punishment, taking into consideration all the circumstances, admit to bail, exercising a sound discretion. If an indictment was found against the prisoner under a law by which he could not be punished with death, then, as a matter of right, he could give bail. I will state what I think to be a fair amount of bail, and do so the more freely because there has been some consultation in this matter. I believe the learned counsel associated with me will agree to ask bail in the sum of one hundred thousand dollars. I presume there will be no question as to the amount of bail; it would be as easy a question to determine on that amount as on ten thousand dollars. Something has been said about gentlemen from all parts of the country, representing all shades of politics, willing to enter surety for the appearance of the prisoner at the next term. So far as suretyship is concerned, we have no objection to take them, but I feel I owe a duty to the government in asking, in addition to gentlemen residing outside of this district, that gentlemen residing in this district shall also enter into security, in order to secure the attendance of the prisoner at the next term.

Mr. O'Conor. We can meet that question as to bail.

Mr. Chandler. That is in the discretion of the court. I may remark, in order to avoid embarrassment in the future, that the government would run no risk by requiring some of the sureties to be residents of this district; while, on the contrary, we would be certain, in case of non-attendance, without having to enter suit in a different jurisdiction, to hold the sureties responsible for the non-appearance of the prisoner.

Mr. O'Conor. On a question of residence there need be no difficulty. We will give those who will respect their obligations.

Mr. Evarts. We have no objections, provided the surety is adequate.

Mr. O'Conor. There are ten gentlemen willing to go security ten thousand dollars each.

UNDERWOOD, [District] Judge. The question is whether the offense is bailable. It is a little remarkable that in the midst of a gigantic civil war, the congress of the United States changed the punishment of an offense from death, to fine and imprisonment [Act July 17, 1862]; but under the circumstances it was very honorable to the government of the United States, and exhibited clemency and moderation. This is a fact which relieves the present case of every doubt as to its being bailable, and it is also in my judgment eminently proper that the motion should be treated with favor, as the defendant has been ready for a year to submit his case to the courts of the country. It is true the prisoner has not until to-day been in the custody of this court. I think, however, no person acquainted with the circumstances of the country, would suppose the fact reflected on the justice of the government, considering the national effect of a great war, which lashed all elements of society into a fury. It was not to be expected the passions and prejudices aroused would be subdued in a moment, and it is in consequence of the prevalence of the disturbance and tumult which have been abroad in the community, that the government felt that it was not safe to proceed with the case. After consultation with higher judicial officers, it was thought best to omit the trial last fall, but fortunately we have a more agreeable aspect at the present time. We may now hope for restored confidence, and that we may not be disturbed by violence and commotion. I think there are reasonable assurances in the indications around us, that we are about to enter on a peace more permanent than ever existed before. I ought, perhaps, to state the fact that this court expects to be in session all this week;

and I have received a letter from Chief Justice Chase, intimating his intention to come to this city if any important cases are likely to be tried. I ought, perhaps, also to say, in justice to the district attorney, that he expected to dispose of this case during the present term. I believe he was fully prepared for the final disposition of it at this time, but I have no doubt that the grave considerations have induced the government to take a different course. So it seems the responsibility of the trial is with the government, and not with the court, or the district attorney, and no doubt for good and proper reasons. The government can not complain, since the delay is its own. I am glad counsel have agreed on the amount of bail. It meets with the approbation of the court, which will not confine the sureties to the district of Virginia. It would no doubt be satisfactory if about one half of the sureties be confined to the state of Virginia. There is no objection to having the remainder of the bail from other portions of the United States. I would inquire of the counsel for the prisoner, whether his sureties are present to enter into cognizances to-day.

Mr. O'Conor. They are all prepared.

THE COURT. The gentlemen proposing to offer themselves will please come forward.

The names of the sureties were severally called, and they repaired to the clerk's desk and signed the following paper:

"Be it remembered that, on this second day of May, A. D. 1868, before the honorable the circuit court of the United States for the district of Virginia, at the court-house in Richmond, in the said district, came Jefferson Davis and acknowledged himself to owe to the United States of America the sum of one hundred thousand dollars, lawful money of the said United States, and Gerrit Smith, Horace Greeley, and Cornelius Vanderbilt, each of whom acknowledged himself to owe to the United States of America the sum of twenty-five thousand dollars each, of like lawful money, and William H. McFarland, Isaac Davenport, Jr., Abraham Warwick, Gustavus A. Myers, William W. Crump, James Lyons, John A. Meredith, James Thomas, Jr., Thomas R. Price, and Thomas W. Boswell, each of whom acknowledged himself to owe to the said United States of America, the sum of twenty-five hundred dollars each, of like lawful money. The said several sums to be made to the use of the said United States of the goods, chattels, lands, and tenements of the said parties respectively. The condition of this recognizance is such that if the said Jefferson Davis shall in proper person, well and truly appear at the circuit court of the United States for the district of Virginia, to be held at Richmond, in the said district on the fourth Monday of November next, at the opening of the court on that day, and then and there appear from day to day, and stand to abide and perform whatever shall be then and there ordered and adjudged in respect to him with said court, and not depart from the said court without leave of the said court in that behalf first had and obtained, then the said recognizance to become void, otherwise to remain in full force. Taken and acknowledged this thirteenth day of May, 1867. Jefferson Davis. Horace Greeley, New York. Augustus Schell, New York. Aristidus Welsh, Philadelphia. David K. Jackman, Philadelphia. W. H. McFarland, Richmond. Richard Barton Haxall, Richmond. Isaac Davenport, Richmond. Abraham Warwick, Richmond. Gustavus A. Myers, Richmond. William W. Crump, Richmond. James Lyons, Richmond. John A. Meredith, Richmond. William H. Lyons, Richmond. John Minor Botts, Virginia. Thomas W. Boswell, Virginia. James Thomas, Jr., Richmond."

THE COURT. The marshal will discharge the prisoner.

The marshal did so, when deafening applause followed.

The November term of the court commenced on the 26th day of November, where, after the swearing in of the grand jury, and the charge of the court to them, Judge UNDERWOOD indicating a desire to hear from the gentlemen of the bar any motion they might have to make,

Mr. Evarts, of New York, on behalf of the government, said: If the court please, the case of the United States against Jefferson Davis, which was called at the last term of the court, when the accused was put under recognizance for the attendance at this term, is now to be brought to your honor's notice. I observe the counsel of Mr. Davis in attendance; and I understand that the prisoner is obedient to the requisitions of the court at any time. The intention of the government in regard to that case is to proceed with the trial of it at some time during the present term of the court, and the considerations upon which the day would be fixed would be but twofold: First, as to the readiness of the government in regard to the production of their proofs, and the attendance of witnesses, which, however, would not require any considerable postponement of the trial from the present day. But there is another consideration, and that is, at what time during the present term the public duties of the chief justice of the United States supreme court would permit of his presiding with his honor, the district judge, at the trial in this circuit. It is understood that his public duties at Washington during the session, which is to commence on next Monday, will preclude his attendance at this trial, and the government propose, therefore, to name a day which will be in the expected order of business in the supreme court of the United States, after the adjournment of that court, and then to proceed with the trial. As the counsel are in

attendance, and as the prisoner is in attendance upon the orders of the court, it is proper that they should both be relieved from any unnecessary inconvenience, and that the counsel of the government should also understand what call will be made upon them for attendance here. I propose, therefore, if your honor please, that some day, say the third Wednesday of March, be assigned for the trial.

Judge UNDERWOOD. Do I understand that that is the assent for the counsel for the defense?

Mr. Evarts. I understand that they have no objection to that course, but the counsel will speak for themselves.

Mr. O'Conor, on behalf of the counsel for Mr. Davis, replied, that they were in attendance, and had no desire to express with reference to the ordinary progress of business, except that it should be conducted in that manner most likely to be attended with the least embarrassment and inconvenience to the defendant and his numerous friends, and to his counsel. They felt themselves bound to render such assistance as might be necessary in securing to him a fair, full hearing. Their personal wishes and convenience would have been greatly promoted by a trial when Mr. Davis was first brought before the court, in May last; and in a great er degree was it true that their personal wishes and convenience would be consulted by proceeding at this time. He was apprehensive that the term of the supreme court might continue beyond the time now indicated for the trial, and that, as a consequence, it would be impracticable for the chief justice to be here. In that contingency, the defendant and his counsel would be subjected to a renewal of the inconvenience which they had been compelled to suffer, and had suffered uncomplainingly on two occasions. However, he found no fault with the government in its disinclination to proceed in the absence of the chief justice. It was undoubtedly desirable, in view of all the interests involved, that two judges should preside when the case is heard. He conceded that the higher duty, so to speak, of the chief justice to be present in the supreme court of the United States, and there to preside, prevented him from being present and giving his attendance to this case at this time. He would have been pleased, as would also his associates, in this doubtful state of affairs, to have renewed the recognizance of his client for an appearance in the month of May, when the chief justice could certainly attend; but, not having any control over the matter, the defense had only to ask that a formal order be entered to the effect that Mr. Davis was relieved from attendance, and had leave to depart from the court until the day named.

Mr. Evarts remarked that it would be quite as inconvenient for the government and its counsel to be unable to proceed at the adjourned day, as it could be to the prisoner and his advisers. He suggested, that by being able to form a timely anticipation as to whether the day named would be such, in view of the actual course of the business of the supreme court, as to permit of the attendance of the chief justice here, the danger of the result which had been indicated might be guarded against. If circumstances then appearing should render it unsuitable for the chief justice to be expected here in time to go on with the trial, it could very easily be arranged that the attendance of Mr. Davis at a still later day in the present term should coincide with the commencement of the new term of the court, so as not to make any practicable difference. But he anticipated that the government would be able to proceed, and that the chief justice would be able to attend in time to dispose of the case at the present term of the court. It would, moreover, probably better suit the convenience of all parties to be present in the early spring for a somewhat prolonged period, than during mid-summer, if it should be a protracted trial.

Judge UNDERWOOD expressed entire acquiescence in the arrangement proposed on the part of the government, as the presence of the chief justice in the trial of the cause was essential upon various grounds. He approved of the suggestion of the counsel, looking to an understanding by which an attendance of witnesses and counsel might not be required until the trial was to proceed on the day appointed. He believed it to be due to the defendant that two judges should preside at the trial, as in that case the defendant would have the advantage of appeal to the higher court, in case of a disagreement between the judges upon any important question. The proposition on the part of the government, and assented to by defendant's counsel, was agreeable to the court, and the order proposed by defendant's counsel would be entered.

Some further remarks were made by counsel in regard to the possible necessity of the removal of the leave of absence given to Mr. Davis, and his being held on his recognizance, in the event of the trial of the cause being informally postponed from the time fixed to a more distant day.

Mr. Evarts said that if, for instance, on the tenth of March, it should be known that the supreme court would prolong its session into April, then if this court, on the motion of the district attorney, and with the attendance of Mr. Davis' counsel resident in Richmond, would make another order, that the defendant attend on the tenth day of May, for instance, all would be regular, the recognizance would be binding, and no inconvenience would arise.

Judge UNDERWOOD replied that the court would take care of the rights of the defendant, and suggested that the necessary order in the case should be drawn by the counsel.

The following order of the court was then agreed upon by the counsel on both sides: "The United States v. Jefferson Davis. The counsel having been heard in this case for the United States and for the defendant, it is now ordered that defendant have leave to depart hence until the fourth Wednesday of March next, at ten o'clock in the forenoon of that day, at which day and hour he is required personally to be and to appear in this court, according to the conditions of his recognizance."

At the March term, 1868, of the court on the twenty-sixth day of the month, a new bill was found against Mr. Davis as follows: "Circuit Court of the United States of America, and the District of Virginia. At a stated term of the circuit court, of the United States of America, for the district of Virginia, in the fourth circuit, begun and holden at the city of Richmond, within and for the district and circuit aforesaid, on the fourth Monday of November, and on the twenty-fifth day of the said month, in the year of our Lord one thousand eight hundred and sixty-seven, and continued by adjournment to the twenty-sixth day of March, one thousand eight hundred and sixty-eight.

"The grand jurors of the United States of America, in and for the district of Virginia, upon their oaths and affirmations respectively do find and present, that Jefferson Davis, late of the city of Richmond in the county of Henrico, and district of Virginia, gentleman, being a citizen and inhabitant of and residing within the said United States, under the protection of the laws of the said United States, and owing allegiance and fidelity to the said United States, not being mindful of his said duty of allegiance, and wickedly devising and intending the peace of the United States to disturb, and to excite and levy war against the said United States, on the first day of June, in the year one thousand eight hundred and sixty-one, at Richmond aforesaid, did unlawfully and traitorously collect and assist in collecting, great numbers of persons armed, equipped, and organized as military forces, for the purpose of levying war against the said United States, and did assume the command-in-chief of said forces, and with the said forces did unlawfully and traitorously take forcible possession of said city of Richmond, and said county of Henrico, and did by force of arms exclude therefrom all authority of said United States, and all persons acting under the same, and did, with said forces, occupy the said city and county and exclude therefrom the armed forces of the United States, sent by the government of the said United States to maintain the authority of the same in said city and county. And the grand jurors aforesaid, on their oaths and affirmations aforesaid, do say, that the said Jefferson Davis, on the said first day of June, in the year of our Lord one thousand eight hundred and sixty-one, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit this crime of treason against the said United States, against the peace and dignity of the United States of America, contrary to the form of the statute respecting the crime of treason, approved on the thirteenth day of April, in the year one thousand seven hundred and ninety.

"And the grand jurors aforesaid do further find and present, that Jefferson Davis, late of Richmond aforesaid, gentleman, an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, did, on the first day of June, in the year one thousand eight hundred and sixty-one, maliciously and traitorously collect, and assist in collecting great numbers of persons armed and equipped, and organized as military forces, for the purpose of levying war against the said United States, and did assume the command-in-chief of said forces, and with the said forces did unlawfully and traitorously take forcible possession of said Richmond, and said county of Henrico, and did by force of arms exclude therefrom all authority of said United States, and all persons acting under the same, and with said forces occupy the said city and county and exclude therefrom the armed forces of the United States, sent by the government of the United States to maintain the authority of the same in said city and county. And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of June, in the year one thousand eight hundred and sixty-one, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the peace and dignity of the United States of America, and contrary to the form of the statute respecting the crime of treason, approved on the seventh day of June, in the year one thousand eight hundred and sixty-two.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, a great many persons whose names are to the grand jurors unknown, to the number of one hundred thousand and more, were assembled, armed and equipped, and organized as military forces, with the usual weapons of war, and were maliciously and traitorously engaged in levying war against the said United States, in said Richmond, in said county of Henrico, and in the district of Virginia aforesaid, and in several states, to wit, the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee, and Missouri. And that the said Jefferson Davis, at Richmond aforesaid, on the said first day of August, being an inhabitant of, and residing within, and

owing allegiance to the said United States, well knowing that the said military forces, organized as aforesaid, were engaged maliciously and traitorously in levying war against the said United States, did send to and procure for the said forces, munitions of war, provisions, and clothing, and did give to said forces information, counsel, and advice, maliciously and traitorously to assist them in levying war as aforesaid. And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of August, at Richmond aforesaid, did maliciously and traitorously levy war against the United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that at a place called Manassas, in the said district of Virginia, on the twenty-first day of July, in the year one thousand eight hundred and sixty-one, a great number of persons, whose names to the grand jurors are unknown, to the number of fifty thousand, and more, were assembled, armed, and equipped, and organized as military forces, with the usual weapons of war, and were maliciously and traitorously fighting against, killing, wounding and capturing officers and soldiers of the army of the United States, and destroying and capturing munitions and materials of war, being the property of the United States, and were then and there maliciously and traitorously levying war against the said United States, and that the said Jefferson Davis, at said Manassas, on the said twenty-first day of July, maliciously and traitorously did join himself to, and take part and assist by direction, advice and encouragement, the said military forces, then and there levying war against the said United States, as aforesaid, and so the grand jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said twenty-first day of July, at Manassas aforesaid, did maliciously and traitorously levy war against the United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute respecting the crime of treason approved on the thirtieth day of April, in the year one thousand seven hundred and ninety.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that the said Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of, and residing within the said United States of America, and owing allegiance and fidelity to the said United States, did at Richmond aforesaid, on the twenty-fifth day of May, in the year one thousand eight hundred and sixty-one, conspire and unite with Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, and with other persons whose names are to the grand jurors unknown, to the number of one hundred thousand, to levy war against the said United States, and that then and thereafter, in pursuance thereof, there were assembled and collected together a great number of persons including the said Jefferson Davis, and the said Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, and the other persons whose names are to the grand jurors aforesaid unknown, armed, equipped, and organized as military forces with the usual weapons of war, maliciously and traitorously levying war in the said district of Virginia, and in the state of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee and Missouri, and that the said Jefferson Davis was selected and appointed by the persons aforesaid as commander-in-chief of the forces aforesaid, and was by the said forces recognized and obeyed as commander-in-chief as aforesaid, and that the said Jefferson Davis, of the city of Richmond aforesaid, on the said twenty-fifth day of May, well knowing that the said military forces were so levying war against the United States, did accept the office of commander-in-chief of the said forces engaged in levying war as aforesaid, and did then and there direct, counsel, assist, and encourage the said forces, and did maliciously and traitorously act as such commander-in-chief of said military forces in the levying of war against the said United States, as aforesaid, and so the grand jurors aforesaid, on their oaths and affirmations as aforesaid, do say that the said Jefferson Davis, on the said twenty-fifth day of May, at said city of Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, against the peace and dignity of said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that on the second day of August, in the year one thousand eight hun-

dred and sixty-four, there were collected and gathered together a great many persons whose names are to the grand jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as military forces, and as such engaged maliciously and traitorously in levying war against the said United States, and that Jefferson Davis, at Richmond aforesaid, on the said second day of August, being an inhabitant of, and residing within the United States of America, and owing allegiance to the said United States, and well knowing that the said military forces were engaged in levying war against the said United States, as aforesaid, did act as commander of said forces in their levying of war, and did, then and there, appoint one Girardi then acting as captain in said forces, to act as commander of a brigade of said forces so levying war as aforesaid, and did maliciously and traitorously appoint one Mahoney to be major-general of said forces, so levying war as aforesaid, and did direct one James A. Seddon to examine into the position of certain of said forces, to wit, a regiment of infantry commanded by one William Butler, and to ascertain whether the said Butler could be spared from his said regiment without injury to the service of levying war against the said United States, and so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of August, at said Richmond, being a person owing allegiance to said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that, on the ninth day of February, in the year one thousand eight hundred and sixty-four, at Richmond aforesaid, there were collected and gathered together a great many persons whose names are to the grand jury unknown, armed, equipped, and organized as military forces, of the number of one hundred thousand, and as such forces engaged maliciously and traitorously in levying war against the said United States, and that the said forces were then generally known by the name of the armies of the Confederate States, and that the said Jefferson Davis, on the said ninth day of February, being an inhabitant of, and residing within the United States of America, and owing allegiance to said United States, and well knowing that the said forces were levying war against said United States, was acting as commander-in-chief of said forces, and did then and there maliciously and traitorously, as such commander-in-chief, issue an address to the said forces, in the words and figures following, to wit: 'Adjutant and Inspector-General's Office, Richmond, February 10, 1864. General Orders, No. 19. The following address of the president is published for the information of the army: Soldiers of the armies of the Confederate States, in the long and bloody war in which your country is engaged, you have achieved many noble triumphs, you have won glorious victories over vastly more numerous hosts, you have cheerfully borne privations and toils to which you were unused, you have readily submitted to restraints upon your individual will, that the citizen might better perform the duty of the state as a soldier. To all these you have lately added another triumph, the noblest of human conquests—a victory over yourselves. As the time drew near when you who first entered the service might well have claimed relief from your arduous labors and restoration to the endearments of home, you have heeded only the call of your suffering country. Again you come to tender your service for the public defense—a free offering which only such patriotism as yours could make—a triumph worthy of you, and of the cause to which you are devoted. I would in vain attempt adequately to express the emotion with which I received the testimonials of confidence and regard which you have recently addressed to me. To some of these separate acknowledgments were returned. But it is now apparent that a like generous enthusiasm pervades the whole army, and that the only exception to such magnanimous tender will be of those who, having originally entered for the war, can not display anew their zeal for the public service. It is, therefore, deemed appropriate, and it is hoped will be generally accepted, to make a general acknowledgment, instead of successive special responses. Would that it were possible to render my thanks to you in person, and in the name of our common country, as well as in my own, while pressing the hand of each war-worn veteran. I recognize his title to our love, gratitude, and admiration. Soldiers! by your will (for you and the people are but one) I have been placed in a position which debars me from sharing your danger, your suffering, and your privations in the field. With pride and affection my heart has accompanied you in every march; with solicitude it has sought to minister to your every want; with exultation it has marked your every heroic achievement; yet, never in the toilsome march, nor in the weary watching, nor in the desperate assault, have you rendered a service so decisive in results as in this last display of the highest qualities of devotion and self-sacrifice which can adorn the character of the war patriot. Already the pulse of the whole people beats in union with yours. Already they compare your spontaneous and unanimous offer of your lives for the defense of your country, with the halting and reluctant service of the mercenaries

who are purchased by the enemy at the price of higher bounties than have hitherto been known in war. Animated by the contrast, they exhibit cheerful confidence and more resolute bearing. Even the murmurs of the weak and timid, who shrink from the trials which make stronger and firmer your noble natures, are shamed into silence by the spectacle which you present. Your brave battlecry will ring loud and clear through the land of the enemy, as well as our own; will silence the vain-glorious boasting of the corrupt partisans and their pensioned press; and will do justice to the calumny by which they seek to persuade a deluded people that you are ready to purchase dishonorable safety by degrading submission. Soldiers! the coming spring campaign will open under auspices well calculated to sustain your hopes. Your resolution needed nothing to fortify it. With ranks replenished under the influence of your example, and by the aid of your representatives, who give earnest of their purpose to add by legislation largely to your strength, you may welcome the invader with a confidence justified by the memory of past victories. On the other hand, debt, taxation, repetition of heavy drafts, dissensions occasioned by the strife for power, by the pursuit of the spoils of office, by the thirst for plunder of the public treasury, and, above all, the consciousness of a bad cause, must fall with fearful force upon the over-strained energies of the enemy. His campaign in 1864 must, from the exhaustion of his resources, both in men and in money, be far less formidable than those of the last two years, when unimpaired means were used with boundless prodigality, and with results which are suggested by the mention of the glorious names of Shiloh, and Perryville, and Murfreesboro, and Chickamauga, and the Chickahominy, and Manassas, and Fredericksburg, and Chancellorsville. Soldiers! assured success awaits us in our holy struggle for liberty and independence, and for the preservation of all that renders life desirable to honorable men. When that success shall be reached, to you,—your country's hope and pride,—under divine Providence, will it be due. The fruits of that success will not be reaped by you alone, but by your children, and your children's children, in long generations to come, will enjoy blessings derived from you that will preserve your memory ever-living in their hearts. Citizens—defenders of the homes, the liberties, and the altars of the Confederacy!—that the God whom we all humbly worship may shield you with His fatherly care, and preserve you for a safe return to the peaceful enjoyment of your friends and the association of those you most love, is the earnest prayer of your commander-in-chief. Jefferson Davis. Richmond, 9th February, 1864. By order: S. Cooper, Adjutant and Inspector-General,'—encouraging, conniving and advising the said forces to continue levying war against the said United States.

"And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said ninth day of February, at said Richmond, being a person owing allegiance to said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations, do further find and present that, on the fifth day of January, in the year eighteen hundred and sixty-four, there were collected and gathered together a great many persons whose names are to the grand jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as military forces, with the usual weapons of war, and as such forces engaged maliciously and traitorously in levying war against the United States in the district of Virginia, and in the states of Georgia and South Carolina, and that the said Jefferson Davis, at Richmond, in the district of Virginia, on the said fifth day of January, being an inhabitant of, and residing within the United States of America, and owing allegiance to said United States, and well knowing that the said forces were levying war as aforesaid, did maliciously and traitorously direct that a large number of said forces, to wit, fifteen thousand men, known as the 'Local Defense Men,' should be sent to defend the country and railroads between Charleston, in said South Carolina, and Savannah, in said Georgia, against the authorities and armies of said United States, and did maliciously and traitorously direct that certain other of said forces, so levying war. as aforesaid, should continue to defend said Charleston against said authorities and armies of said United States, he, the said Davis, at that time acting as commander-in-chief of said forces.

"And so the said grand jurors, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fifth day of January, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that, on the fourth day of January, in the year eighteen hundred and sixty-four, there were collected and assembled a great many persons whose names are to the grand jurors unknown, and of the number of one hundred thousand, armed, equipped, and organized as military

forces, and as such engaged maliciously and traitorously in levying war against the said United States, in the said district of Virginia, and in the state of North Carolina, and within other places within the United States, and that the said Jefferson Davis, at Richmond aforesaid, on the said fourth day of January, being an inhabitant of, and residing within the said United States, and well knowing that the said military forces were engaged in levying war against said United States, as aforesaid, did act as commander-in-chief of said forces in their said levying of war, and did then and there direct that a brigade of said forces should be sent to a place called Goldsboro, in the said state of North Carolina, maliciously and traitorously the said brigade then and there to fight against, kill, wound, and capture the officers and soldiers of the armies of the United States, there employed by the government of the said United States in upholding its authority.

"And as the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fourth day of January, at Richmond aforesaid, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States; against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to the said United States, did on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at Richmond aforesaid, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons, to the number of one thousand, whose names to the grand jurors aforesaid are unknown, also owing allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against the said United States, with the intent then and there to subvert the power thereof, and the said Robert E. Lee, together with the said other persons unknown to the grand jurors aforesaid, and the said Jefferson Davis, did then and there so unlawfully, falsely, wickedly, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against the said United States of America, and the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the grand jurors aforesaid, confederates in pursuance of said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large armies, constituting together one hundred thousand men and more, to levy and carry on war against the said United States. And the said Jefferson Davis, then and there falsely, wickedly, maliciously, and traitorously, and unlawfully commanded to make and carry on war upon and against the said United States, and the said armies did then and there, in obedience to the said command of the said Jefferson Davis, levy and carry on war upon and against the said United States, and the said Jefferson Davis then and there, to wit, on the said twenty-fifth day of March, did order, direct, and command the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the grand jurors aforesaid, to assault, fight, wound and capture, and kill the said officers and soldiers in the military service of the said United States, the said officers and soldiers being then in a fortification and fort known as and called Fort Steadman, which said fortification and fort was at and near the city of Petersburg, in the district of Virginia, within the jurisdiction of the court, and then was in the possession and occupancy of the said United States; and the said Robert E. Lee, and the said other persons known as well as said persons unknown to the grand jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the military service of the said United States, in the said fortification and fort.

"And so the grand jurors aforesaid, upon their oaths and affirmations, do say that the said Jefferson Davis, on the said twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance to the said United States, did, contrary to the duty of said allegiance, unlawfully, wickedly, falsely, maliciously, and traitorously levy war against the said United States, as aforesaid, and did then and there so commit one and more overt acts of treason against the said United States, as aforesaid, against the peace and dignity of said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the said United States, and owing allegiance and fidelity to the said United States, did, at the city of Richmond aforesaid, on the thirty-first day of March, one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, and maliciously and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons to the number of one thousand, whose names are to the grand jurors aforesaid unknown, also owing allegiance to said United States, in and there and then falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent then and there to subvert the power thereof; and the said Robert E. Lee, together with the said other persons known as well as the said other persons unknown to said grand jurors, and the said Jefferson Davis, did then and there so unlawfully, falsely, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against said United States, and the said Jefferson Davis, and the said Robert E. Lee, and the said persons known as well as said persons unknown to the grand jurors aforesaid, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there called large armies constituting together one hundred thousand men and more, to levy and carry on war against said United States. And the said Jefferson Davis, then and there falsely, wickedly, and maliciously and traitorously commanded armies to levy, make, and carry on war against said United States, and the said armies did then and there, in obedience to said command of said Jefferson Davis, levy and carry on war against said United States, and the said Jefferson Davis, then and there, to wit, on the said thirty-first day of March, did order, direct, and command said Robert E. Lee, and the said other persons known as well as said persons unknown to the said grand jurors aforesaid, to assault, wound, capture, and kill the officers and soldiers of said United States, then being in martial array at and near Dinwiddie Court-House, in the county of Dinwiddie, and district of Virginia aforesaid, and within the jurisdiction of the court; and the said armies so collected by the said Jefferson Davis as aforesaid, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the said military service of the said United States, and so the grand jurors aforesaid, upon their respective oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said thirty-first day of March, one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance to said United States, did, contrary to his duty of his said allegiance, unlawfully, falsely, wickedly, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and aid them, and did then and there, so become, and was guilty of treason against the United States aforesaid, against the peace of the said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to said United States, did, at the city of Richmond aforesaid, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United States, and divers other persons to the number of one thousand, whose names to the grand jurors aforesaid are unknown, also owing allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent then and there to subvert the power thereof, and the said Robert E. Lee, together with said other persons known as well as those unknown to the grand jurors aforesaid, and the said Jefferson Davis, did then and there, so unlawfully, falsely, traitorously, maliciously, combine and confederate together for the purpose of making war against said United States, and did then and there levy war against the United States as aforesaid. And the said Jefferson Davis, and the said

Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large armies, constituting one hundred thousand men and more, to levy and carry on war against said United States. And the said Jefferson Davis, then and there, to wit, on the said first day of April, did order, direct, and command said Robert E. Lee, and the said persons known as well as said persons unknown to the grand jurors aforesaid, to assault, wound, fight, capture, and kill the officers and soldiers in the military service of said United States, then being in martial array for the defense of the authority of said United States, at and near a place known and called the Five Forks, in the district of Virginia aforesaid, and within the jurisdiction of this court, and the said armies so collected by the said Robert E. Lee, and said other persons known as well as said other persons unknown to the grand jurors aforesaid, in obedience to the command of the said Jefferson Davis, did then and there assault, fight, capture, and kill the said officers and soldiers in the said military service of said United States.

"And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of April, one thousand eight hundred and sixty-five, at the said city of Richmond, within the jurisdiction of this court, being a person owing allegiance to the said United States, did, contrary to his duty of said allegiance, unlawfully, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and did then and there so become, and was guilty of treason against said United States, as aforesaid, against the peace of said United States, in contempt of the laws and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, and at the city of Richmond aforesaid, on the second day of April, in the year of our Lord one thousand eight hundred and sixty-five, did unlawfully, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United States, and divers other persons owing allegiance to said United States, to the number of one hundred thousand, whose names are to the grand jurors unknown as aforesaid, in and to, then and there unlawfully, falsely, maliciously, and traitorously combining, confederating together to levy war against said United States, with intent then and there to subvert the power thereof, and the said Robert E. Lee, together with said other persons known as well as the said other persons unknown to said grand jurors, and the said Jefferson Davis, did, then and there, so unlawfully, falsely, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against said United States. And the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the grand jurors aforesaid, confederates, in pursuance of the said unlawful, false, and malicious and traitorous combination and confederation, then and there collected large armies, constituting one hundred thousand men and more, to levy and carry on war against said United States, and the said armies did then and there, in obedience to the said command of said Jefferson Davis, levy and carry on war upon and against said United States, and that the said Jefferson Davis, then and there, to wit, on the said second day of April, did order, direct, and command said Robert E. Lee, and said other persons known as well as said other persons unknown to the grand jurors aforesaid, to assault, capture, and kill the said officers and soldiers of said military service of said United States, then being in martial array for the defense and authority of said United States, at and near the city of Petersburg, in the said district of Virginia, and within the jurisdiction of this court. And the said armies so collected by the said Jefferson Davis, and by the said Robert E. Lee, and by the said other persons known as well as the said other persons unknown to the grand jurors aforesaid. in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, capture, and kill the said officers and soldiers in said military service of said United States.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of April, one thousand eight hundred and sixty-five, did, at the said city of Richmond, and within the jurisdiction of this court, being a person owing allegiance to said United States, contrary to his duty of allegiance, unlawfully, falsely, and maliciously and traitorously levy and carry on war against said United States as aforesaid. and did, then and there become guilty of the crime of treason against said United States, in contempt of the laws, and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

"And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that the said Jefferson Davis, on the twenty-fifth day of May, in the year eighteen hundred and sixty-one, and continuous thereafter until the tenth day of May, in the year eighteen hundred and sixty-five, was a person fleeing from justice within the intent and meaning of the statute of the United States of America in such case made and provided; and that on the twenty-fifth day of May, eighteen hundred and sixty-one, there was a rebellion against the said United States, which continued for several years, to wit, until the tenth day of May, eighteen hundred and sixty-five, and that during the whole period of said rebellion by reason of the resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings, process for the commencement of any action, civil or criminal, against the said Jefferson Davis, or for his arrest, could not be served, and the said Jefferson Davis could not, by reason of such resistance of the laws, and such interruption of such judicial proceedings be arrested, or served with process for the commencement of any action, civil or criminal, within the intent and meaning of the statute of the United States in such case made and provided.

"March 26th, 1868.

"L. H. Chandler,

"United States District Attorney for Virginia.

"This indictment found on testimony of: Robert E. Lee, Lexington, Rockbridge county, Va. James A. Seddon, Dover Neighborhood, Goochland county, Va. Charles B. Duffield, Duke street, city of Norfolk. John Letcher, Lexington, Rockland county, Va. George Wythe, Munford, near Gloucester Court House, Gloucester County, Va. John B. Baldwin, city of Stanton, Va. Charles E. Wortham, 110 Fifth street, Richmond, Va. Thomas S. Hayward, Cary street, between First and Second, Richmond, Va."

At the same term an order was entered continuing his recognizance until Saturday, the second day of May next, and on that day a new one was entered into by the same parties, in the same amount, for his appearance on the first Monday in May, the day after but one, it having been set by agreement to be tried at a special session of that term, to be held in June. On the twenty-eighth of May this agreement was filed in the cause:

"Circuit Court of the United States for the District of Virginia. The United States against Jefferson Davis. This case will not be called for trial on the third day of June next, but counsel will then appear on behalf of the United States, and also on behalf of the defendant, and an order will then be entered by consent in the form heretofore used in this case, giving the defendant time to appear until such day in the month of October next as may be agreeable to the court. New York, May 28, 1868. Wm. M. Evarts, of Counsel for the United States. Ch. O'Conor, of Counsel for Defendant."

Accordingly, on the twenty-third day of June, an order of continuance was entered, and a new recognizance in the same amount, by the same parties, was given conditioned for the appearance of Mr. Davis on the fourth Monday of next November, at the term of the court then to be held.

While these various proceedings were being had, the congress of the United States had amended the constitution of the United States by forcing the late Confederate States to accept certain amendments proposed by it, refusing to allow them any rights under the laws until they had so agreed to the propositions submitted to them. In this way congress secured the vote of states sufficient to accept constitutional amendments, and thus actually changed the organic law for states which had always adhered to the Union, and which protested against the change, by the votes of states held under martial law, and which were made at the point of the bayonet to repeat the words required of them. Thus the lately loyal states made the constitution for the states always loyal. Among these amendments was the one imposing perpetual disfranchisement for aiding in rebellion, after having held certain offices. As soon as this amendment was declared adopted in the ambiguous language of the proclamation announcing the fact, or the hypothetical fact (it declared that if the votes of the late Confederate States were to be considered binding, and if the other states had no right to retract their ratification of the amendment, then it was ratified and adopted—otherwise not) the counsel for Mr. Davis prepared to attack the prosecution pending against him on the grounds disclosed in the following proceedings, which the reporter understands were inspired and suggested from the highest official source—not the president of the United States. It was arranged that the chief justice should attend the court at the November term, 1868, and hear the argument on the motion to quash or dismiss the prosecution. On the thirtieth day of that month, Robert Ould, Esq., one of Mr. Davis' counsel, filed the following affidavit: "On this thirtieth day of November, 1868, Robert Ould personally appeared in open court, and, being sworn, made oath that defendant, Jefferson Davis, was in the year 1845, previous to the alleged commission of the offenses set forth and charged in said indictment, a member of the congress of the United States, to wit, a member of the house of representatives of the United States from the state of Mississippi in said congress, and as such the said Jefferson Davis did, on the eighth day of December, 1845, take an oath to support the constitution of the United States."

On filing the above affidavit, the counsel of Mr. Davis obtained a rule on the attorney

for the United States, to show cause why the indictment should not be quashed. On Thursday, December 3d, a hearing was had on this rule. Robert Ould, Esq., of Richmond, Charles O'Conor, Esq., of New York, Hon. William B. Reed, of Philadelphia, and James Lyons, Esq., of Richmond, appeared for the defendant. District-Attorney S. Ferguson Beach, Richard H. Dana, Jr., Esq., of Boston, and General H. H. Wells, represented the government of the United States. The court-room was filled with auditors, among whom were General Stoneman, other federal officials, and many ladies.

When the case was called, Mr. Beach stated to the court that a pressure of official duties rendered it impossible for the attorney-general to be present. He asked that a written statement be filed specifying the grounds upon which the motion to quash was based. His own connection with the case was slight and recent, and the special counsel for the government having had short notice, had given it little attention. It was probable that after the defense had opened the argument, it might be necessary for him self and learned associates to ask time to prepare their reply.

Mr. O'Conor assumed that there was no necessity of making any formal reply. The counsel for the government had been fully informed by his associate, Judge Ould, of the grounds relied upon.

THE CHIEF JUSTICE said the suggestion of the district attorney was that no formal statement of the reasons for the motion had been filed with the clerk. The court had supposed that such a statement was filed; and certainly it should have been done.

Mr. O'Conor thought the affidavit on file contained all that was necessary to advise counsel of the grounds assumed by the defense. All the material facts were stated therein, to wit, that Jefferson Davis had been a member of the senate, had taken the prescribed official oath to support the constitution of the United States, and had afterwards engaged in the rebellion. They clearly indicated the grounds of the motion. The moment Mr. Davis' counsel determined to make the motion, the attorney-general was informed of the fact by a note addressed to him, the point to be made being concisely stated; and a due apology was also tendered for the shortness of the notice. That note was received on Friday last, and was duly acknowledged on behalf of the government by Mr. Evarts, the special counsel in the case. He then made no complaint of any insufficiency in the notice in any respect. A single point was presented, and that rested on facts admitting of no prolixity in statement. In fact the attorney-general had had notice which though informal was satisfactory to him, several days before the matter was first mentioned in court.

Mr. Dana did not understand for what purpose the learned counsel had just addressed the court, if he did not object to the suggestion made by the district attorney. On Monday last he had been first informed by telegram that his presence here was desired, to show cause why the indictment against Mr. Davis should not be quashed. When he reached Richmond he had inquired for the ground of the motion, and found only an affidavit setting forth that Jefferson Davis had been a member of the congress of the United States, in 1845; and in that capacity had taken an oath to support the constitution of the United States. He did not see that this had anything to do with the indictment, yet the motion to quash must be founded on the indictment. If the defense wished the benefit of the facts stated in the affidavit, they must be either proved or conceded, and then the defense must avail themselves of them by a plea in abatement. The government had no doubt of the facts alleged, and stood ready to admit them, but he insisted that there should be a written statement of the grounds upon which the motion was made, so that the case should be put upon a basis of which counsel should not be ashamed. If any new fact is imparted, we must agree to it, and then be informed what use the defense intend to make of it. In conclusion, Mr. Dana protested that he did not wish any unnecessary delay.

Mr. O'Conor said that the propriety of bringing this matter up by affidavit instead of by special pleading, was a question to come up hereafter on the merits. But the defense would not object to placing the grounds of their motion on record. Having every desire to accommodate, he would draw up the statement, whilst his learned associate (Judge Ould) opened the case.

The District Attorney (Mr. Beach) expressed a wish that this should be done before the argument commenced.

THE CHIEF JUSTICE said that the court would like to get through with the matter as soon as possible, inasmuch as the supreme court was to meet on Monday, and he (the chief justice) ought to be in Washington a day or two before that time. The demand, however, for a brief statement of the point made was not unreasonable, and the paper had better be prepared at once.

After a short recess, Mr. O'Conor presented the following statement, and motion:

"Circuit Court of the United States for the District of Virginia. The United States v. Jefferson Davis. The indictments in these cases were framed on the alleged fact that the defendant had engaged in the insurrection and rebellion against the United States, known to the court and to the several departments of the government as having existed at the several times mentioned in the said indictment in the state of Virginia and elsewhere, and thereby given aid and comfort to the enemies of the United States engaged in said insurrection and re-

bellion. And the defendant alleges that prior to such insurrection and rebellion, and in the year 1845 he, the said defendant, was a member of the congress of the United States, and as such member took, in said year, an oath to support the constitution of the United States in the usual manner, and as required by law in such case. And the defendant alleges in bar of any proceedings upon said indictments, or either of them, the penalties and disabilities denounced against and inflicted on him for his said alleged offense by the third section of the fourteenth article of the constitution of the United States, forming an amendment to such constitution. And he insists that any judicial proceeding to inflict any other or further pain, penalty, or punishment upon him for such alleged offense is not admissible by the constitution and the laws of the United States. Wherefore he, the said defendant, moves the court now here to quash and set aside the said indictments, or to dismiss the same and the prosecution thereon, or to render such other relief in that nature as the aforesaid facts and circumstances shall require, and as may seem proper. Charles O'Conor. William B. Reed. Robert Ould. James Lyons."

Thereupon Mr. Beach submitted the following reply on behalf of the government:

"United States v. Jefferson Davis. To enable the court at once to consider and pass upon the question of dismissing this case under the motion above made, with the benefit of facts necessary to such consideration, and which do not appear on the record, inasmuch as the counsel for the United States believe these facts to exist and to be provable, they waive the regular process of plea, and agree that the court may assume as facts, for the purpose of this motion, that Jefferson Davis, in the year 1845, and previous to the alleged commission of the offenses set forth in the indictment, did take an oath as a member of congress of the United States to support the constitution of the United States, and that this agreement shall also be of effect in case the above motion shall be considered by the supreme court of the United States. S. F. Beach, United States District Attorney. December 3, 1868."

THE CHIEF JUSTICE. Both the papers may be filed.

Judge Ould then commenced the argument for the defendant on the motion to quash. He said it was now a concession in the cause brought properly to the notice of the court that Jefferson Davis was in 1845 a member of the United States congress, and in that capacity took an oath to support the constitution of the United States. As had been supposed by the learned counsel on the other side, the affidavit filed by the defendant bears an intimate relation to the third section of the fourteenth constitutional amendment, which provides that every person who, having taken an oath to support the constitution of the United States, afterwards engaged in rebellion, shall be disqualified from holding certain state and federal offices. Whether this section be of the nature of a bill of pains and penalties, or in the form of a beneficent act of amnesty, it will be agreed that it executes itself, acting proprio vigore. It needs no legislation on the part of congress to give it effect. From the very date of its ratification by a sufficient number of states it begins to have all the effect that its tenor gives it. If its provisions inflict punishment, the punishment begins at once. If it pardons, the pardon dates from the day of its official promulgation. It does not say that congress shall, in its discretion, prescribe the punishment for persons who swore they would support the authority of the United States and then engaged in rebellion against that authority, but itself pronounces the penalty and inflicts the punishment. For this declaration there is the authority of the supreme court as laid down in Ex parte Garland [4 Wall. (71 U. S.) 333], and in Cummings v. State of Missouri, Id. 321. A majority of the court there held that deprivation from office, in one form or another, couched in civil law or criminal proceedings, is punishment for an offense. Id. The theory of political security rests upon the fact that mankind are endowed with certain inalienable rights,—life, liberty, and the pursuit of happiness,—and any deprivation or suspension of those rights is a punishment, and can be no otherwise defined. This same doctrine is laid down in Ex parte Garland, Id. 344, and in the argument of that case counsel referred to numerous authorities to prove the fact that disqualification from office-holding is punishment. Judge Goldthwaite—[Ex parte Dorsey] 7 Port. [Ala.] 298—held this ground, and questioned whether any ingenuity could devise a punishment more calculated to operate on the public mind. Spencer, C. J., had remarked that the disfranchisement of a citizen is no unusual punishment for treason. So the very law under which the indictment against Mr. Davis is framed, expressly excludes from federal offices those who engaged in the rebellion or insurrection. It might, then, be taken for granted that the third section of the fourteenth amendment does inflict punishment for certain offenses set forth on its face, to wit, having engaged in rebellion after taking an oath to support the constitution of the United States. The act of 1862 [12 Stat. 590] had prohibited those who had committed this offense from holding federal offices, and this constitutional amendment went still further. It prescribed disqualification from holding state offices; and there is no fact or count in that indictment that is not embraced in the terms of the third section of this constitutional amendment. The question then arises, is this punishment set forth in section three exclusive or cumulative? The defendant's counsel hold that it is exclusive, and affords the only rule of punishment in the

case of Mr. Davis, who is at this moment suffering under that penalty. The gentlemen on the other side will hardly deny that such a rule of construction must be adopted as will place the amendment in harmony with other parts of the constitution. Can the third section of this amendment be so construed, without straining it, as to take away from it the sting of being an ex post facto law? If there was one construction that would make it an ex post facto law, and another that would not, the court should undoubtedly embrace the latter: the construction which makes it beneficent, and makes it harmonize with other provisions of the constitution. If it be construed that this provision is cumulative, or prescribes penalties in addition to those laid down in the acts of 1790 and 1862 [1 Stat. 117; 12 Stat. 590], then by every rule of construction it is made an ex post facto law. This third section, unlike the others, refers only to past transactions; it has no force whatever upon the participators in any future rebellion. In [Cummings v. State of Missouri] 4 Wall. [71 U. S.] 328, an ex post facto law is defined to be one that prescribes additional punishment for crimes committed before its passage. The conclusion is irresistible that if the punishment prescribed is cumulative, this is an ex post facto law. But if the punishment is exclusive,—the last expression of the national will on the subject,—it gives the whole punishment, and nullifies all conflicting acts. Then the conclusion that it is ex post facto is escaped. For although punishment may be inflicted by a new law for offenses already committed, if the new law prescribes a lighter punishment it is not an ex post facto law. Otherwise, it is a bill of attainder, or at least a bill of pains and penalties, which is a legislative declaration by which a higher punishment is fixed for an offense already committed. Now, if this section is construed exclusively, the sting of a bill of attainder is taken away, and it is a matter of mercy instead of a matter of wrath. He asked the court to put the beneficent construction upon it. True, there is no distinct provision in the constitution that no man shall be punished twice for the same offense; but there is a principle in the Anglo-Saxon heart, and acknowledged everywhere, which forbids such a monstrous thing. It is not less than a constitutional provision. However slight the punishment may be, when a man receives that he goes free. Jefferson Davis has been punished, and is now undergoing punishment. The law under which he is punished is its own interpreter and executioner, and the district attorney has nothing to do with it. The punishment, he repeated, is now being inflicted by the voice of the American people, who have tried him and pronounced the sentence that he shall be disqualified from holding any office, state or federal. Further, this law is a special provision, and supersedes all general provisions with reference to a general object. Before this combination all general statutes, whatever they are, must pass away and not be considered. It is also a constitutional provision. These other enactments are statutes at large made under the constitution; this is a specific provision of the constitution itself. If there is any discrepancy between this and the general act, or if both meet the case, but in a different manner, the statute goes down and the constitution prevails. It says that the punishment shall be deprivation from office; the statute says imprisonment. If you enforce the statute you go further than the constitution provides. But if he was wrong in all this, and if the constitutional amendment is to be degraded into a statute and stripped of its force, he would insist still, that being the last legislative expression of the will of the people, it should prevail. He quoted Rex v. Davis, 1 Leach, 271, to prove that where a statute makes an offense punishable as a felony, and another inflicts a milder punishment, the latter must prevail. Again, every statute repeals all statutes repugnant thereto without a repealing clause. Com. v. Kimball, 21 Pick. 373; Nichols v. Squire, 5 Pick. 168. Another position taken was, that it was the design of the law-makers to make disqualification from office the only punishment for engaging in the late Rebellion. Nobody even suggested the punishment of any but the leaders, and very few of them. In the language of Burke, "You cannot bring an indictment against a nation." If all who engaged in the rebellion were tried, where could a jury be found? How could a man be convicted without perjury? Everybody was on either one side or the other. How, then, could impartiality be secured? All this was seen, and the plan of selecting for punishment those who had enjoyed the confidence of the people, and led them into rebellion, was settled upon. In this view it was a beneficent enactment; otherwise it was monstrous.

When Judge Ould concluded, Mr. Dana inquired what course the court would take in reference to the session.

THE CHIEF JUSTICE said there would be no recess. The court would sit until half-past 3 o'clock, and then adjourn until to-morrow.

Mr. Dana said, the counsel for the United States had had no opportunity to confer, and as the motion had been on a point unexpected to them, and probably to the court, they desired time to look over authorities. This was an entirely new proposition in law, for which there is no precedent. Such a case could not arise under any but a written constitution. It was natural, under these circumstances, that time should be desired for reflection.

THE CHIEF JUSTICE inquired about what agreement had been made in regard to the number of speeches on either side.

Mr. O'Conor said that Judge Ould and himself were the only speakers on the side of Mr. Davis.

Mr. Beach asked that he and Governor Wells might be heard for the government that afternoon, and Mr. Dana to-day. This proposition was acceded to, and the court took a recess for an hour.

Before the recess THE CHIEF JUSTICE thought proper to say that the court had not been surprised, as intimated by Mr. Dana, at the ground taken by the defendant. The course of the argument was anticipated, as it was expected that the point to be urged was the common principle of constructive repeal.

Mr. Beach opened the argument in opposition to the motion. Quoting the terms of the third section of the amendment, and adverting to the defendant as being among the persons designated in the section, he proceeded to combat the essential proposition on which the motion was founded. This proposition was, that the third section of the amendment had repealed the act under which the indictment was framed. If the act had been repealed, no prosecution, of course, could be maintained under it, but he denied that there had been any such repeal, either in terms, or by implication or upon any justifiable theory as to the purpose and object of the amendment. There was clearly no express repeal—and having stated the rules and cited the authorities by which the courts are governed on the question of an implied repeal, he maintained that under none of these rules, and on none of these authorities, could the act be regarded as repealed by implication. There was no conflict whatever between the act and the constitutional provision—no repugnancy, no inconsistency, much less that degree of either essential to an implied repeal. The amendment prescribed no new or different punishment for having engaged in insurrection or rebellion. To prescribe punishment for crime was not its purpose—was no part of its purpose. It was directed, in the section under consideration, to the end of securing the administration of the government, state and national, in the hands of those who had never been in insurrection against it, and although disabilities were thereby imposed upon the individuals described in the section, this was but the incidental consequence—not the substantive purpose of the amendment. Surely it was competent for the nation—without thereby declaring impunity for their offenses—to provide, by constitutional enactment, that men who had waged a great but unsuccessful war for its destruction, should not be afterwards admitted to its councils. Adverting to the history of the period, he argued to show that no such consequence as that assumed was in the mind either of the congress which proposed, or of the legislatures which ratified the amendment. The number of persons falling within the category of the third section was a very small one, embracing, however, the originators and prominent actors in the great civil strife—among them, the accused, who was its head and front; was it to be supposed that this class had been singled out by the nation as objects of special and peculiar favor, and that the design was to exempt them wholly from criminal responsibility, while the great crowd of humbler offenders, who had but followed the lead of these, their chiefs, were to be left exposed to fines, forfeitures, and imprisonments? The ground of the present motion was, that just this discrimination was intended—a discrimination which proclaimed amnesty to the leaders, and denounced pains and punishments upon the rank and file of the Rebellion. Such a theory of the amendment was in direct reversal of the known national sentiment in this regard—was repugnant both to the instinctive and deliberate promptings of an enlightened people, and could have no adequate support, except in terms which should admit of no other. Brought to the test of any standard, whether to the narrower and more technical one to be found in the established rules for the construction of the written law, or to the broader one to be found in the recognized principles which guide and determine the conduct of civilized communities under circumstances like those which brought about the adoption of the constitutional amendment, the proposition on which the motion rested, and the motion itself, must fail.

General H. H. Wells, with the district attorney.

This motion to quash, separated from what is manifestly irrelevant, rests upon the assumption that the third section of the fourteenth amendment of the constitution repeals the former laws punishing treason and rebellion. The repeal is not, however, supposed to be contained in any expressly repealing clause or language, but it is claimed that the language of this third section repeals the old law by implication. How this repeal by implication arises does not appear very clear, even to the acute perception of the learned counsel who opened this discussion. We are justified in saying so, because he builds chiefly, not on the language employed, nor upon any manifest repugnancy between the old law and the new one, but finds it necessary, if we understood his argument, to establish these propositions, and in about this order: 1st. That the third section of the fourteenth amendment is, as to the accused, either a bill of penalties or a pardon. 2d. That whichever it be, it executes itself, it takes effect from its date, and needs no legislative action to give it effect or force. 3d. Whether it is the one or the other is simply a matter of legal construction. 4th. That the court should give

the language employed such a construction as will, if possible, harmonize the old and the new law, such construction should also be given as will render the last provision or enactment free from the objection of being ex post facto. 5th. The constitutional provision is inconsistent and incompatible with the old law, and therefore it, by implication, repeals the former enactment.

In discussing only the question of repeal as is my duty on this occasion, I am at the outset greatly inclined to doubt the correctness of the conclusion arrived at by the counsel, because the repeal he has undertaken to establish is not the clear, natural, or inevitable result and consequence that must follow, because the two enactments are so utterly incompatible that they can not stand together; but it is, on the other hand, the doubtful result of an involved, complicated argument, founded upon many premises, the failure of any one of which is absolutely fatal to all that follows. Clearly, the section of the constitution which is referred to, is a bill of penalties, and it is as certainly not a pardon. That it is not a pardon is manifest, because it declares or imposes a disability as the consequence, or as a punishment for doing the act mentioned, and it authorizes a remission of the penalty by congress—a method of restoration lacking all the distinctive features of a pardon. That it is not a pardon of the offense of which Mr. Davis stands indicted is evident, because the offense described in the third section is not the same as that for which he is indicted. The offense there named is "engaging in insurrection or rebellion against the United States, or giving aid or comfort to the enemies thereof." He is indicted for treason in levying war against the United States. The offenses are not only totally unlike, but the persons against whom the penalties are declared are not the same. Any citizen who levies and carries on actual war against the United States is guilty of treason, but the pains of the third section are directed only against those who, having previously taken an oath as a member of congress, an officer of the United States, a member of a state legislature, or as an executive or judicial officer of any state to support the constitution of the United States, afterwards engaged in insurrection or rebellion. How, then, can it, for the purposes of this discussion, be material whether or not this constitutional provision executes itself? How would an admission of the fact, either way, touch the question of repeal of the old law? It certainly can not be material either that the true intent and meaning of the statute is arrived at by construction, instead of standing out clearly upon the face of the law. Of this section it is enough to say, that to every man's comprehension it punishes a new offense, and a different class of persons. From the old law ordinarily the language used in the constitution is, "congress shall have power," for instance, to punish counterfeiting. Here the constitution declares the penalty, and authorizes congress to relieve from it, who? not those who have been tried and found guilty of treason, but those who, deeming themselves disabled from holding office, ask to have their disabilities removed. It is difficult to disbelieve that this third proposition is not stated mainly to afford an opportunity conveniently to enunciate the one which follows it. It is the scaffolding which was designed to support something else, that would not stand by itself. What need is there for raising either of them, for after all the whole substance of the matter is embraced in the fifth statement, to wit, that the third section of the fourteenth amendment is incompatible with the old law, and therefore the latter must yield to it. The only pertinent inquiry is, Are they incompatible? If there is no such incompatibility the discussion is at an end—both the law and the constitution stand.

The substantial questions of law presented here, are by no means novel or difficult, and would perhaps, be agreed to by us all—they may be conveniently stated thus: An indictment can not be sustained upon a statute which has already been repealed, unless the repealing act contains a saving clause. That the declaring of a less penalty for the same offense, operates as a repeal of the old penalty. To both of these propositions I certainly cordially assent—and they are in fact abundantly supported by the highest authority, and the soundest reason. It is, however, only necessary in their support to say that, in the very nature of things, no person can be punished for a statutory offense, unless, at the very moment when sentence is pronounced upon him, the statute itself exists in full force and vigor. On the other hand, it is also as evident that the statute under which the accused stands charged has not been repealed in terms, but if repealed at all it is by implication only. That the repeal of statutes by implication is not favored. There must be a positive repugnance between the provisions of the new law and the old to work a repeal by implication. [Wood v. U. S.] 16 Pet. [41 U. S.] 342; Wilson v. Rousseau [Case No. 17,832]; Foote v. Silsby [Id. 4,916]; Aspden's Estate [Id. 589]; Vandever v. Tilghman [Id. 16,846;] U. S. v. Twenty-five Cases of Cloths [Id. 16,563]; [Taylor v. U. S.] 3 How. [44 U. S.] 197; Morlot v. Lawrence [Case No. 9,815]; Sedg. St. & Const. Law, 123 et seq.; Norris v. Crocker, 13 How. [54 U. S.] 429. We maintain confidently that between the statutes under which this indictment was found, and the third section of the fourteenth amendment, there is no repugnance—nor could there be any, by any possible construction of the two, Because; 1st. The offenses are not the same. One is treason requiring an overt act of levying war to constitute it; the other is insurrection or rebellion, which may be committed by simply

giving counsel to enemies or others raising insurrection. 2nd. The third section of the amendment only deprives one class of persons—those who for a certain purpose, have taken a certain oath—of one privilege, that of office-holding.

It not unfrequently occurs that by the doing of one act two offenses are created; for instance, burglary and larceny—would it be maintained that a statute which repealed a former statute punishing such a burglary, as a burglary, would also by implication repeal the other statute that defined and punished the larceny as a larceny? The truth is, that the two offenses are perfectly distinct. A person might be guilty of one, and not guilty of the other—or the same acts may constitute both offenses, as where one who had, after taking an oath as a member of congress to support the constitution, afterwards engaged in insurrection and rebellion, and in doing so, had also levied war against the United States, and thus committed treason. He would thereby be guilty of two offenses, punishable one capitally, and the other by a political disability. In such a case—and it is this case—the two statutes stand well together, and there is neither inconsistency nor incompatibility. The constitutional provision does not repeal the old law.

Richard H. Dana, Jr., for the United States.

The defendant is indicted for treason by "levying war" against the United States. By the constitution (article 3, § 3), treason can be committed in but two ways—one, the actually levying war against the United States; and the other, the adhering to their enemies, "giving them aid and comfort." Since the case of U. S. v. Chenoweth [Case No. 14,792], it has been assumed that giving aid and comfort to rebels in arms against the government in a civil war, does not come within the second branch of treason, and the defendant is not indicted for anything less than the actual levying of war. Nothing, therefore, can be a defense to this indictment, unless it is a denial of the levying of war, or is a bar to proceedings against the defendant for that exact offense.

The pleadings and arguments before the court established the fact, for the purposes of the opinion of the court, that Jefferson Davis had taken the oath as a member of congress, and, while such member, "engaged in insurrection and rebellion," against the United States. It is contended that article 14, § 3, of the amendments of the constitution is a bar to any further proceedings against the defendant on this indictment for treason. The position taken by the defendant's counsel is that by the effect of this amendment, the defendant has already suffered punishment or a penalty for the act charged in the indictment. The part of the amendment relied upon is as follows: "No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress or as an officer of the United States, &c. * * * to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability." The fifth section of the article of amendment is as follows: "The congress shall have power to enforce, by appropriate legislation, the provisions of this article." It is conceded by the counsel for the defendant, that congress has not provided any method of proceeding against a person under section three of this amendment, or of ascertaining or declaring any disability affecting any individual thereunder; and, of course, it is further conceded that there have been no proceedings against the defendant of any character whatsoever—judicial, legislative, or executive—under that section. On such a concession there is no position left to the defendant except to argue that the amendment of the constitution executes itself by the mere fact of its existence on every person who may come within its scope. But even this is not enough. It is further necessary for the defendant to contend, and his counsel does contend, that the adoption of that amendment by the people is a repeal of the statutes against treason in force when it was adopted, as to all persons who come within its terms.

Upon this statement it appears that there are two questions for the court:—First, does amendment 14 inflict a punishment or penalty, in the sense of the criminal law, so as to come within the category of criminal statutes? Second, if it does inflict a punishment in that sense, is it for the offense of treason by levying war, so as to repeal the penalties in the statute against treason?

First. The fourteenth amendment is not a mere provision of a criminal law to punish individuals for offenses. It is a permanent addition to our organic political system, for the purpose of securing fidelity in the administration of office. It is highly improbable that the people would put into the constitution mere punishments and penalties on individuals, to take effect by the force of the constitution itself, without judicial proceedings, for the purpose of ascertaining the guilt of the party. It is far more probable that the purpose of a constitutional provision would be a general permanent provision respecting classes of persons entitled to hold office. The constitution establishes many disqualifications for office, as of age, foreign birth, &c., showing that the whole people are not willing to leave the selection of offices entirely to the discretion of a majority of voters in a locality, as to the particulars specified. Disqualifications have also been established by congress, as in the case of a

person attempting to corrupt a judge, or guilty of certain frauds upon the revenue. The act of 1862, c. 195 (12 Stat. 590), provides that every person guilty of either of the offenses described in that act shall be forever disqualified to hold any office under the United States; and the offenses specified are treason, and rebellion or insurrection; and for each offense the usual criminal punishments—death, imprisonment, and fine—are provided. Suppose that by one act of congress certain high crimes of a political character were declared, and specific punishments provided for each, as death or imprisonment. Suppose a subsequent statute should provide that no persons convicted of any of those crimes should hold certain political offices specified. Could it be seriously contended that the latter statute repealed all the penalties of the prior statute? Suppose a statute should now be passed that no person guilty of pecuniary frauds in office should be qualified to hold any office of pecuniary trust, for a certain time. Would any court decide that the statute repealed all penalties for pecuniary frauds by officers? Would it not be far more reasonable to hold that the statutes declaring disqualifications were political, and not criminal? But the argument is far stronger in the case of a provision in the constitution, permanent in its character, claimed to operate by its own force. There are some things in the language of the amendment which should be considered. The phraseology is not that of penal or criminal law. It does not say that persons guilty or convicted of certain offenses shall be disqualified. The phraseology is that of a general provision of public policy—"No person shall be a senator, &c. * * * who, having previously taken an oath as a member of congress, &c. * * * shall have engaged in insurrection or rebellion." Moreover, not only is there no word of criminal or penal law used, as "guilty" or "convicted," but the amendment denominates its consequences a "disability." "Congress may, by a vote of two-thirds of each house, remove such disability. If, then, the court will consider, first, the probabilities arising from the fact that this provision is found in the organic law; second, the necessity of providing in the organic law for qualifications for office; and lastly, the phraseology of the amendment, we respectfully submit that it can come to no other conclusion than that the amendment, in this respect, establishes certain disqualifications for certain offices as part of our political system, and was not intended by the people to interfere with existing criminal and penal provisions of the statutes. Probably nothing would more surprise the people of the United States than to learn that, by adopting amendment 14, they had repealed all the penalties against treason, insurrection, or rebellion.

The construction contended for by the defendant is made extremely improbable by another consideration. Its effect would be to relieve persons holding high office. and therefore the more guilty, from the penalties of death or imprisonment, and leave those penalties in full force against all persons engaged in a rebellion who did not at the time hold public office. It is in the highest degree improbable that the people have established a discrimination so unjust and absurd. It will also be observed that there is nothing in the amendment making it solely retroactive. On the contrary, it is clearly a permanent provision, prospective as well as retrospective. The effect of the construction contended for would be that, in all future rebellions or insurrections, no office holders under a state or the nation could be punished in any other way than by disqualification for holding certain offices, while all persons not holding office when they engaged in the rebellion would be left subject to any penalties provided, or that might afterwards be provided, for such crimes. It is also worthy of consideration by the court that while the constitution confers the power of granting pardons for offenses against the United States solely upon the president, the "disqualification" proposed by this amendment, is left to be "removed" by a vote of congress.

It has been contended that disqualification for office is a punishment in the sense of the criminal law. In support of that position the counsel have cited Ex parte Garland, 4 Wall. [71 U. S.] 333, and Cummings v. State of Missouri, Id. 277. But in those cases the court said nothing inconsistent with our position. On the contrary, the opinions seem to assume that disqualifications touching merely the tenure of public office are not necessarily penal, and the court held that the disqualifications in those cases were penal, because they affected men in the ordinary pursuits of life as private citizens. Indeed, disqualifications for office have no necessary connection with crimes or penalties. The accidents of birth or age impose disqualifications as serious as those which result from fault. It is entirely competent for the people to declare that persons found in certain predicaments shall be deemed unfit to hold certain offices. Public good may require such a provision, whether the person's being in the given predicament is or is not the result of misconduct; and, if it be the result of misconduct, there is no reason why the guilty person should not also be punished by the usual criminal penalties. Another objection is that if the amendment inflicts a criminal punishment, and operates upon this defendant, it is ex post facto; and, as there are no judicial proceedings, it is subject to the objections which exist against bills of attainder, and bills of pains and penalties. It is not to be presumed that the people made provisions of that character.

Second. Assuming that amendment 14 does

inflict a criminal penalty retroactively and by its own force—the question remains whether it necessarily touches the crime of treason by levying war, so as to repeal penalties for that offense. There is no constructive repeal of penalties unless the offense is identical, and there is a positive repugnance between the last and the former penalties, or they are irreconcilably inconsistent. Repeals by implication are not favored, and new provisions of law are presumed to be cumulative, auxiliary or otherwise, and not to operate as repeals. Wood v. U. S., 16 Pet. [41 U. S.] 342, 362; In re Aspden's Estate, 2 Wall. [69 U. S.] 368; Davies v. Fairbank, 3 How. [44 U. S.] 636; McCool v. Smith, 1 Black [66 U. S.] 459; Harden v. Gordon [Case No. 6,047]; Harford v. U. S., 8 Cranch [12 U. S.] 109; Sedg. St. & Const. Law, 127; 1 Bish. Cr. Law, § 197 et seq. But the amendment 14 and the statutes against treason do not relate to the same offense. The words "treason," "levying war," are among the most ancient phrases of political criminal law, introduced into our system at the beginning, and having an established judicial and legislative construction. The amendment avoids both those phrases, ex industria, and selects other phrases the construction of which is equally well settled, viz., "insurrection or rebellion," and "giving aid and comfort to the enemies."

Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war. The act of 1793, c. 36 (1 Stat. 424), assumes that parties may be in a state of insurrection, and be treated as insurgents, before the president can issue a proclamation requiring them to retire to their homes before a time named; and it is only after disobedience to that proclamation that he can use the militia or land or naval forces against them. In the Prize Causes, 2 Black [67 U. S.] 635, it was decided that in the case of an instant levying of war, where the parties did not rest at the stage of mere insurrection or rebellion, the president might use the land or naval forces at once. In the same case, it was decided that, if the acts of the parties concerned amounted, in extent and character, to a levying of war against the United States, the government, in all its branches, might resort to blockade, and the search of neutral vessels on the high seas, as in the case of a war inter gentes; and this levying of war was fully recognized by the nations of Europe as establishing a status of belligerency on the high seas. It can not be supposed that all these powers would be developed, and all these rights exist, from the mere fact that the acts of parties amounted in law to "insurrection or rebellion," if they did not advance to the stage of actual levying of war. Nor is the levying of war any less treason, or to be regarded by the judiciary as anything else than treason, because its first developments may have been rebellious and insurrectionary in their character. The acts of 1861 and 1862 (12 Stat. 284, 589) recognized the distinction in the most complete manner; and for treason, which requires a levying of war to exact the penalty of death, or of imprisonment not less than five years, and fine not less than ten thousand dollars; while engaging in "insurrection or rebellion" is punished by imprisonment not exceeding ten years, or fine not exceeding ten thousand dollars, or both. The judicial department of the government has recognized this distinction, and has treated several cases of insurrection with armed force as not cases of "levying war." U. S. v. Hoxie [Case No. 15,407]; U. S. v. Hanway [Id. 15,299]; and Grier, J., in the Prize Causes, 2 Black [67 U. S.] 635. There is another respect in which the amendment and the statutes against levying war are diverso intuitu. The offense to which the amendment refers is the breach of the official oath and duty, by the engaging in rebellious acts after taking the oath of office. The oath and the holding are of the essence of the offense. The statutes against levying war have no reference to official duty, and the indictment in this case does aver that the defendant held an office, or had taken an oath of office.

On the whole, we respectfully submit that the true construction of the fourteenth amendment is, that the people of the United States have, as a part of their political system, established a rule that certain offices shall not be filled by persons who, having once filled them, have broken their oaths by joining an insurrection or rebellion, whether they have or have not actually levied war against the United States, in the sense of the criminal law; and that this general provision of a political and organic character is not inconsistent with, and does not repeal criminal and penal statutes respecting treason by the levying of war.

Mr. Dana was followed by Mr. O'Conor, who closed the argument for the defendant. He said:

This motion has been met in a manner which reflects credit upon the government, its officers, and their associates. No facts are denied; no forms or special pleadings are insisted upon, nor are any technical impediments whatever interposed. By their consent a great judicial question is withdrawn from the inappropriate forum to which misconceptions had attempted to consign it. It was presented to the proper tribunal at a time and place, and under circumstances well calculated to secure a just solution. This tribunal is the highest which could take cognizance of the case, and its presidency is occupied by the foremost of our judicial magistracy. These facts unite with cherished reminiscences to dignify the occasion. This state gave birth to Washington, the father of our republic; and here in its capital city, and in this very court, sat in judgment the most

renowned and revered of our past chief justices, when as an oracle to guide his own and succeeding times, he gave the first practical illustrations of American law concerning treason. In these aspects the venue is fortunate, whilst in any other it would have been most unfit. Some who are wholly incompetent to deal with such questions, or to comprehend the necessities of a transaction greatly peculiar and exceptional, would not have allowed the forensic debate now in progress. They would fain have enacted here an absurdly grotesque drama. They would have impanelled twelve Virginians as a jury for the investigation of disputable facts, requiring them to hear proofs, attentively to consider arguments thereon, and gravely to respond on oath to the inquiry whether Jefferson Davis had participated in the great territorial civil war recently pending in the state, of which he was the known and acknowledged chief. When it is considered that the hostile territory embraced the entire length and breadth of the state, and impressed upon all its inhabitants for the time, including the jury themselves, the character of public enemies to the government, no commendation can be deemed too high for the enlightened resolve which has rescued our jurisprudence from the stigma of tolerating such a procedure. That resolve on the part of the government's law advisers is itself a concession that such indictments as those before you are not sustainable, It is persuasive evidence that the constitutional amendment now under consideration was framed with intent to prevent the further employment of such instrumentalities in spreading vexation, terror, and annoyance amongst the vanquished people of the south.

When military resistance and every other form of organized opposition to the government had ceased, the congress, the states, and the people, properly turned their attention to the restoration of tranquillity, and no measure could have been adopted more conducive to that end than this third section of the new fourteenth article, provided it shall here receive the benign and politic construction for which we contend. It enacts in substance that no person shall hold any office, civil or military, under the federal government, or under any state, who, having previously taken an official oath to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. The first proposition of my associate, Judge Ould, is that, whatever may be its effect, this constitutional provision executes itself, and requires for its complete enforcement no judicial action. This is too manifest for denial, and seems to be conceded. In the second place, he claimed that it inflicts a punishment. This is denied; and on me devolves no further duty than that of sustaining his argument in this respect against the objections made to it. No more need be done, for if that point can be sustained the indictments must be quashed.

And from all inquiry into merely technical interpretations, common sense could not fail to discern that disqualification to hold office is a punishment. The persons upon whom the sentence here operates are those who have already held official station, and been accustomed to the honor and distinctions which flow from the possession of political power. They are, and have long been the elite of their section. They have been reverenced as its guides and leaders throughout whatever of good or evil has marked its history in their day. In the defeat of their enterprise, the slaughter of friends in the field, the loss of fortune, and the ruin and desolation consequent upon these things, there are entailed upon them woes that might satiate any ordinary thirst for vengeance: all that, however, relates merely to the past. But in stamping upon such men the dishonorable brand of perpetual incapacity for public trust, is it possible to maintain that no punishment is inflicted? Most other penal inflictions touch only the person; this wounds the mind. It condemns the proud-spirited leader of his countrymen in peace and war, henceforth to walk his native soil in a rank far below the humblest of his former servants—a moral leper stigmatized in the constitutional law as unworthy of any trust, however trifling. In case of a foreign invasion he is indeed allowed to bare his bosom on the field in his country's defense, but this must be done, if at all, in the ranks as a private. Though among the bravest of the brave, and endowed with great ability to lead or otherwise execute the duties of a soldier, he may not be able to serve in the ranks, for physical strength is not always an accompaniment of intellectual excellence. In such a case the glorious privilege of contending for his country, and surrendering life, if needful, in her behalf, is virtually denied him. And this for what reason? Why, because he is a proclaimed traitor and quasi perjurer. It is because untried and unheard he has been condemned as utterly unworthy of trust or confidence. Seclusion from the paths of duty, honor, and renown, by an irreversible conviction for asserted perjury is surely an infliction, and as against the class in question is the severest that human ingenuity could have devised. It was not only of the severest nature, but according to the conception entertained of the offenders by those who devised it, the most poignantly afflictive. It touched precisely the offending part. Their crime was deemed the offspring of a lawless ambition, and by this disfranchisement, self-respect was incurably wounded—any future indulgence of ambitious aims was rendered impossible. This view of the subject has been treated almost scornfully. Suggesting, with truth, that the erring multitude who never held office are not, according to our views, within the scope of this amendment, the

learned counsel for the government pronounces the construction unreasonable. The leaders have, as he expresses it, added perjury to treason, and he accounts it unjust to visit them with no other penalty than a disqualification to hold office, leaving subject to indictment and the halter that less culpable class who were misled by their arts and contrivances. A practical discrimination of this kind might indeed seem objectionable; but the idea is altogether fanciful. Amongst civilized nations it has never been thought admissible or possible to prosecute the multitude. The undistinguished individual members of a rebellious state have never been thus dealt with. No great civil war was ever followed by an attempt to inflict punishment upon the masses through proceedings in the civil tribunals. Even when such forms have been dispensed with, and summary military executions resorted to, none but the most barbarous nations have ever gone so far as a decimation of the vanquished. There never was any danger or any possibility of such a course in respect to the people of the southern states. Great as is the number interested in advising prosecutions, practice illustrates the truth of these remarks. Throughout the south nearly every man and woman, nay, almost every child capable of participation, gave aid or comfort in some form to the cause of their section during some part of the recent conflict, yet now, after the lapse of three years from its termination, not one single private individual of this great multitude has been prosecuted. The many have not been indicted, nor is there any disposition or intent to indict them. The counsel may, therefore, relinquish his fears in their behalf: they can dispense with his sympathy: they are safe in their numbers and their obscurity, so far, at least, as respects the danger of indictments for treason. Not a single prosecution of the kind has been instituted except against persons of the very classes named in this amendment. Of these not more than a dozen have been prosecuted; and the government, to its great credit, has never attempted to bring one of these to trial. No man who fought in the Confederate ranks, or otherwise served the insurrection in a private capacity, has been indicted. Thus, the actual practice in this instance is shown to be in conformity with the experience of other times and countries in dealing with rebellions. In this fact is found a full answer to that argument against us which, it must be confessed, might strike an unreflecting person as plausible. Indictments, trials, and formal execution on the scaffold for political action deemed criminal in the peremptory judgment of the victor, are honors reserved for the chiefs only; and, therefore, in substituting another punishment it was quite natural that the framers of this amendment should have taken no notice of the many. An immutable state policy provided amply for their protection. An assurance to them that peace was restored, was indeed advisable. As a measure of statesmanship, it was dictated by wisdom, by humanity, by patriotism, and no form of giving expression to that assurance could have been more discreet on the one side, and more satisfactory on the other, than an irreversible prohibition of all future prosecutions against the leaders. Such was the true intent and aim of this amendment. General amnesties are appropriate to the termination of a civil war. If the construction contended for imparts in practical effect that character to the clause, the court should not be the less willing to accept it. Benignity toward the vanquished has been practiced even by monarchical power; it is eminently worthy of a republic. For proof of this I refer to 12 Car. II. c. 2, § 23.

Judge UNDERWOOD. How long after the restoration was that?

Mr. O'Conor. One year.

CHIEF JUSTICE. That was not a well executed amnesty, except by the execution of many whom it amnestied.

Mr. O'Conor proceeded:

In the reason of the thing, and according to the authorities cited by my associate, Judge Ould, disqualification to hold office is a punishment, but the constitution itself affords positive proof that it is so considered. The entire constitution, including all its amendments, is to be regarded as one instrument, and each of its provisions is to be construed in harmony with all others contained in it. The first article provides in its third section that "judgment in cases of impeachment shall not extend further than removal from, and disqualification to hold office." It then superadds, that nevertheless "the party convicted shall be liable to indictment, trial, judgment, conviction, and punishment according to law." If disqualification to hold office was not regarded by the framers of the constitution as a punishment, this additional provision would not have been necessary or proper; and from its insertion an irresistible implication arises that within the true intent and meaning of the fundamental law, such a disqualification is a punishment inflicted upon the individual against whom it is denounced or adjudged. The punishment in the section just referred to, is there called a "disqualification;" the penalty denounced in the amendment which we are considering, is called a "disability." No jurist will deny that these two words as employed in those provisions are perfectly and strictly synonymous. The new fourteenth article is but a supplement of the constitution, and it can not be supposed to employ similar language in a sense different from that which governed in framing the original instrument. If it was not intended to make the disability denounced in the amendment, and inflicted by it, a substitute for any criminal or other prosecution to which the persons thus punished might have been before liable, a declaration to that effect would certainly have been added, as in the

clause concerning impeachments. It is not necessary to deny that preventing the appointment or election to public office of persons deemed unworthy, was an object of this amendment. That motive might well co-exist with the design to punish. Both certainly governed in framing the first branch of the impeachment clause. The second branch proves it. Indeed the primary object of all criminal law is to protect society by remedies for existing or anticipated evils. The object is not to wreak vengeance on the individual. Still, if the remedy resorted to be in itself punitory, a second punishment can not be inflicted as of course. The express sanction of some paramount law is needed to authorize such a departure from general principles.

The counsel for the government, assuming the provision to be prospective, contends that our construction would make it hold out a standing invitation to every artful man having treasonable objects in view to obtain office if practicable, and take an oath to support the constitution as a preliminary step in crime. It is asked whether one who had thus sworn to support the constitution would thenceforth stand privileged to engage in rebellion against the government, without danger of any more serious penalty than disfranchisement, whilst the comparatively venial offender who had never been confided with a public trust, and had not forsworn himself, might be hanged for a similar offense? This argument loses all force, and the illustration becomes pointless, the moment it is perceived that the provision is retrospective only. Penalties and punishments denounced by positive law are prima facie prospective only: the ordinary legislator is rarely empowered to give them a retrospect. But the sovereign authority from which this provision emanated was under no other than moral restraints in that respect; and it will be conceded that the disqualification is denounced for offenses previously committed. That intent can not be denied, and the words employed are adequate to express it. But they are wholly incompetent to include both past and future delinquents. To reach the latter other words would clearly have been necessary: we therefore respectfully insist that pre-existing offenses only are within the scope of this provision. But if it is to be deemed capable of embracing also future offenders, still its operation as to them would be very different. Both the statutory punishment and this constitutional disqualification being enacted previously to the offense, no principle would be violated by imposing both penalties. But so far as this clause affects precedent offenses, unless it be taken as substitutionary, it would violate natural justice. In that case it would, contrary to recognized principles, add after the offense a new penalty to those which existed at the time of its commission.

The counsel now representing the government are evidently themselves convinced that the motion must prevail if a disability to hold office denounced against alleged offenders for their acts shall be deemed by this court the infliction of a penalty or punishment. Clearly it is in fact, and was deemed a penalty; it is impossible to avoid that conclusion. No one can suppose that an additional punishment for previous offenses was intended, leaving the offenders subject to those previously existing. Indeed the government counsel do not contend for that position: they content themselves with persistently denying, contrary to the manifest fact. that the clause is at all punitory. We trust this point will be determined against them. It is required by principles of natural justice, which have been recognized from the earliest times. They are older indeed than any of our written laws. At the close of the Rebellion there were controlling reasons of policy in favor of adopting disfranchisement for participating in the Rebellion as a substituted punishment in lieu of the pains and penalties denounced in the crimes acts. A state of things existed which rendered criminal prosecutions under these acts inexpedient if not absolutely impracticable, yet it was difficult to argue successfully against a prevailing and irrational outcry for experiments in that direction. Many disturbers urged them. These persons were not prepared to hear, much less to acquiesce in the reasons which justified a refusal to keep up a war of indictments against the southern leaders. Sound minds having influence in public affairs therefore devised this amendment as a method of extricating the administration from a perplexing dilemma. The construction for which we contend can alone give it this effect. Such was, undoubtedly, the intent of its framers; and, if so expounded by the courts, its operation will be as benign as its conception was just, wise, and politic. That insuperable difficulties lie in the way of maintaining indictments for treason against the chiefs of the late insurrection is obvious. That any difficulty, even the slightest, can be encountered in such prosecutions is, to be sure, utterly incomprehensible to a certain narrow-minded class. The latter view the transaction precisely as they would the riotous action of a few school-boys during part of a summer afternoon. This court will entertain a larger and truer conception of its nature and consequences. When an insurrection has reached the dimensions of a territorial civil war, and has upheld its dominion over a territory and people for a considerable period, the authority of the lawful government is suspended in fact, and its municipal laws are suspended for the time, except so far as the rebels adopt and act upon them as their own. Consequently, belligerent rights arise. The lawful government is unable in fact to extend any protection to the peaceful inhabitants within the rebel lines; and, as a matter of policy, it outlaws them all, the most innocent and loyal in common with

the most guilty and disloyal. Women, children, idiots, lunatics, and all who from mental or physical imbecility are unable to leave the country, are denounced as enemies. Not only is protection withheld from them, but their property, wherever found, is seized upon as lawful prey and prize by the government forces. The supreme court decided that the Rebellion in the southern states reached such dimensions and acquired such permanency as to impress upon the Confederate territory and all the people within it, these hostile and essentially foreign relations toward the government of the United States. This state of things having existed for several years, and over a widely extended territory containing millions of inhabitants, it would be manifestly inconvenient and oppressive if, at the close of the conflict, the municipal law of the rightful government could at once come into full operation in respect to all intermediate belligerent acts, and be administered precisely as if no such interregnum had existed. The Rebellion in this expanded form, with all the attributes de facto which belong to an independent state, lasted four years; it might have lasted forty years, or a hundred years. The same principles of law would apply in each of these cases; and it would be a novelty in jurisprudence if courts were to disregard as utterly inconsequential such a long exercise of independent power. Such ideas can not be practically enforced. Let us imagine a century of successful resistance, and the Southern Confederacy at last stricken down by the power of the government. If the war wrought no change during its existence in the duties of the people and the rights of the government, the laws and tribunals of the United States would immediately resume their sway, all intermediate acts would be treated as if the country was, during the whole interval, in its normal condition. The great grandson of Jefferson Davis, born in a nation de facto maintaining open and acknowledged war with the United States, and whose ancestors for two or three generations had stood in that same relation to our government, might be at once tried and executed as a common rebel and traitor. The argument for the prosecution in that case would be as direct and simple as it is in the present. The United States having claimed sovereignty over the land of his birth at all times from the inception of hostilities, had at last maintained its claim by the ultima ratio. He was a citizen born; his long and successful resistance would avail not. It would be deemed merely an aggravation of his imputed crime. The argument would be brief, and it might be thought unanswerable; the indictment could be put in due form; and if, as some short-sighted people suppose, such a thing is practicable in this case, conviction and execution might promptly follow in that case. But such a procedure would outrage the moral sense of all civilized nations, and cover the perpetrators with infamy; yet, if the municipal law of the rightful government be not, in some degree at least, displaced by the state of belligerency between it and the rebels, such an indictment, conviction, and slaughter would be juridically unexceptionable.

Even in respect to civil controversy, such a civil war must work important changes. It can not be regarded as in all respects a mere riot. It is familiar doctrine that every member of a co-operating party engaged in violently executing an unlawful enterprise, is responsible for all injuries done by his associates. If the existence of our civil war worked no change in the application of this rule, any loyal citizen or soldier who suffered wounds or other injury during the late struggle, no matter where or how, could maintain a civil action for damages against any one or all of the thousands who served in the Confederate army. The common judgment of all our people that no such action would lie, is proven by the fact that no such action was ever brought. Occasions for it have been numberless, and a taste for litigation is not rare. Common sense has dictated to common minds that an open recognized civil war does work a very important change in this respect. The reluctance of the government to prosecute their criminal cases is also strong evidence of similar views in high places. From these and other considerations that might be offered we assert as an undoubtedly sound proposition of law, that belligerent acts upon the rebel side performed in the due and orderly prosecution of a recognized civil war are not proper subjects of criminal prosecution during the conflict or after its close. This doctrine might not satisfy the demands of justice if there were no other method of punishing gross delinquency in maintaining a rebellion; but the methods are ample. The war which displaces the municipal law, furnishes its own remedies The very defeat of the rebels carries with it a multitude of inflictions; and if by conducting the war in an inhuman, cruel, or improper manner, they actually merit severe punishment, it may be inflicted without a resort to the civil tribunals. In such a case the leaders may be executed after or without a summary trial by court martial; the privates may be decimated or quarter wholly refused to them. There is no law capable of being enforced which enjoins upon the victor in war an obligation to spare his vanquished adversary. In the absence of compassionate feelings on his own part, he is under no restraint, except his respect for the common sentiment of mankind, and his unwillingness to incur the just censure of future ages.

When the vanquished in any such case have conducted themselves in so criminal a way as to deserve extreme severity, it may be employed against them with entire impunity. When they have not thus offended it ought not to be employed. It will, therefore, be seen that there is no occasion for

resorting to the civil magistrate at the close of a civil war. His powers by indictments and trials by jury are not necessary to the just punishment of wicked rebels for warring against the government. But one motive could induce a victorious general, at the close of the civil war, to deliver his conquered adversary to the civil magistrate as a traitor; and that is a cowardly reluctance to confront the judgment of mankind on his own act in condemning the prisoner to a military execution. To be employed in thus shielding from responsibility a cruel and revengeful spirit would be a mean office. It is greatly to be regretted if, under any circumstances, the judges of the law could be compelled to perform it. But in the very nature of things, and by the fundamental principles of jurisprudence, they are necessarily exempted from it. In cases of civil war the right to prosecute the multitude in the ordinary course of law never was desired by any government, and as against the leaders it is upon general principles impossible. Their acts are public, open, and notorious. They do not form a legitimate subject of proof or disproof in a court of justice. Known to the government in all its departments, they are also actually and officially known to the judges. A demurrer to the plea of not guilty would seem a very fitting step for the prosecutor. A plea which the pleader would not be permitted to prove by witnesses could hardly be allowed as a bar. So much for the evident impracticability of employing the courts in such proceedings. This is an obstacle arising out of the very nature of things. But the sixth amendment to the constitution contains by implication, or at least by its necessary effect, a prohibition of such prosecutions. It is as follows: "In all criminal prosecutions the accused shall enjoy the right of a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law." An impartial jury in the present case is an impossibility. To obtain one in any similar case that may possibly hereafter arise, will be alike impossible. The trial is required to take place in the very seat and hotbed of the Rebellion, where the jurors themselves must have actual personal knowledge of the principal facts which, upon an indictment and plea, would be formally put in issue. However fit to serve as witnesses, or to stand in the dock as prisoners, the inhabitants of the rebel district can never be competent jurors. Submitting to a jury of the county of Henrico the question whether an open and public war against the United States was here maintained and waged, and whether Jefferson Davis was the leader of it, would be not only a mockery and a farce, but a plain violation of the constitutional requisite that the jury shall be impartial. It is quite apparent that such a jury never can by any human possibility be found in the identical state or district in which such a public territorial war as that under consideration shall have been prosecuted. Taking this into view, and seeing that the constitution requires a speedy trial, and forbids it to be had elsewhere, there results by obvious necessity a practical prohibition of indictments for treason in such cases. What the constitution renders practically impossible it in effect forbids to be done. There can be no reasonable doubt that such was the intent of the Revolutionary fathers. We find in the history of the times an adequate stimulant and incentive. It was in 1745, whilst many of those who subsequently participated in the Revolution and in forming the constitution were yet in their early youth, and glowing with the compassionate sentiments which are then most active, that precisely such cruelties as this sixth amendment forbids were perpetrated in the mother country. No doubt they excited a thrill of horror and indignation throughout the colonies. The so-called Scotch rebels supported the Stuart, whom, not without some show of reason, they sincerely believed to be their legitimate sovereign. An honest if misguided loyalty animated their devotion to his cause, but superior force prevailed, and they were conquered. After their defeat the leaders were subjected to civil prosecutions for treason. They were not tried by or among their own countrymen; conviction there might have been impossible. They were dragged from their mountain homes to the county of Surrey, and there tried before special commissioners and English juries, to whom impartiality could not have been imputed. They were generally convicted and executed with all the attendant horrors enumerated in the barbarous treason sentence. They were hanged, drawn, and quartered. Many of the cases are stated in Sir Michael Foster's Treatise on Crown Law. This work, first published in 1761, soon found its way across the Atlantic; and just about the time when "the troubles in America," as they were called, began to unsettle British authority here. The harsh treatment and cruel fate of these true-hearted people were thus fully described and made known to our people. One of the most thrilling of these scenes was the subject of Shenstone's touching ballad, "Jemmy Dawson." It can not be doubted that the feelings excited by these cruel prosecutions induced the adoption of this sixth amendment. It was intended that no such transactions should ever stain the judicial annals of our country. It is fairly supposable that the far-seeing men who guided popular action in those days intended to render utterly impracticable such governmental measures at the close of any civil war that might perchance occur as a set of indictments for treason. They intended to let civil war, if it should arise, apply its own remedies for whatever of wrong might be committed in its progress. To harass a vanquished district with indictments for political offenses

was not in their eyes a judicious policy. Honorable combat in the field should never be followed by a sordid persecution of the vanquished brave in criminal courts through the vile agency of spies and informers. It can not be said that civil wars were not contemplated as possible or probable. In the Federalist (letter No. 28), Alexander Hamilton himself portrayed in vivid colors as a possible future event, armed resistance of the federal government by a state or several states acting in concert and acting very effectively. The possibility of such events as have recently transpired in the south was foreseen. The sixth amendment was framed expressly to prevent this precise mischief in case they should occur, and the third section of the fourteenth article was framed in the same spirit. We respectfully insist that the court should interpret it accordingly, and by dismissing these vexatious prosecutions, give an assurance to the whole country that in all its forms the late unhappy conflict is ended. All honest admirers of that universal suffrage which has been established through this great civil war, earnestly desire that it should be accompanied by an amnesty as nearly perfect as possible of all political offenses committed during the struggle. Good men of all parties must entertain similar wishes.

On Saturday morning, December 5th, THE CHIEF JUSTICE announced that the court had failed to agree upon a decision in regard to the motion made to quash the indictments against Mr. Jefferson Davis.

The counsel for the defendant then asked that the fact of the disagreement be certified to the supreme court of the United States.

THE COURT signified its acquiescence, and thereupon the following paper was entered upon the record:

"At this term of the court, begun and held at Richmond, in the said district, on the 23d day of November, 1868, and continued until this day, a motion was made on behalf of the defendant to quash or set aside the said indictment, and to dismiss the same and the prosecution thereof. And upon that motion it appeared that the said Jefferson Davis, having previously to the offenses charged in the said indictment taken an oath as a member of congress to support the constitution of the United States, the question arose whether, by the operation and effect of the third clause of the fourteenth amendment to the constitution of the United States, the defendant is exempted from indictment or prosecution for treason in levying war and participating or engaging in the late Rebellion. And upon that question the opinions of the judges were opposed. And thereupon the said point is upon the request of the said defendant, stated under the direction of the said judges, and certified under the seal of the said circuit court to the supreme court of the United States at its next session."

After this certificate had been filed the district attorney (Beach) said the only thing now necessary to be disposed of, was the appointment of the day for the trial. As counsel were anxious for a full bench on the occasion, he suggested the naming of some day after the adjournment of the supreme court before the close of the present term of the court.

THE CHIEF JUSTICE. The difficulty is in fixing a day when there will be a full bench, as it is impossible to tell how long the supreme court may remain in session.

Mr. O'Conor. In order that counsel may be definite in their appointments, he was rather inclined to ask that the recognizance of Mr. Davis be renewed for the May term.

THE CHIEF JUSTICE. Well, the recognizance may be renewed at any time during the present term. It is quite probable, however, that the court will adjourn before Christmas. The recognizance must, of course, be renewed before that time.

Mr. O'Conor. It will be renewed immediately, to-day or on Monday.

THE CHIEF JUSTICE. Very well. The certificate of disagreement has been made, as requested by the defendant. It may be filed, and a copy forwarded immediately to Washington.

Whereupon the court adjourned.

No further proceedings were had in the cause. The proclamation of general amnesty by the president of the United States at the end of December, 1868, effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the supreme court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the circuit court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.

THE CHIEF JUSTICE instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the fourteenth amendment to the constitution of the United States.

Case No. 3,622.

DAVIS v. ABBOTT et al.

[2 McLean, 29.] [1]

Circuit Court, D. Michigan. Oct. Term, 1839.

PARTNERSHIP NOTE—ACTION ON—PLEADING.

1. Where a note was given by Abbott and Layton, it is unnecessary, in the declaration, to aver a partnership.

2. The instrument shows a joint liability; and the declaration states the names of the defendants in full, and alleges that they, by the name and description of Abbott and Layton, executed the note. This, though not very technical, is sufficient.

[Action by Thomas A. Davis against Charles H. Abbott and Sedurcy M. Layton.]

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

OPINION OF THE COURT. This action is founded upon a promissory note. The declaration states, that on the 22d October, 1838, the defendants, by the name and description of Abbott and Layton, made and signed their promissory note for the payment of six hundred sixty nine dollars and thirty two cents, &c. The defendants demurred to this count in the declaration, and for cause of demurrer stated, that in the count it is averred the defendants made the note in the name and description of Abbott and Layton, without stating a partnership, &c. The averment of a partnership, where the instrument, on which the action is founded, shows a joint liability, is unnecessary. The defendants assumed the name of Abbott and Layton; and the declaration avers that the note was thus executed by them; and if the proof shall sustain this averment, it will show a right of recovery in the plaintiff. The suit is not brought against Abbott and Layton without any further designation, but the Christian names of the defendants are stated, and the averment is, that these persons, so named, gave the instrument in the name and description of Abbott and Layton. This averment, we think, is sufficient. It may not be very technical, but it leads to no uncertainty, and is substantially good. Why need a partnership be alleged when the instrument shows it, and the declaration, also, states the names of the defendants in full? Whether a partnership could be proved, under this averment, and then that one of the partners signed the name of the firm, does not arise, because, the proof offered is, that both defendants acknowledged that the signatures to the note were their own proper signatures. The demurrer to the first count is overruled.

Case No. 3,623.

DAVIS v. ANDERSON et al.

[6 N. B. R. 145.] [1]

District Court, E. D. Missouri. 1872.

BANKRUPTCY—SECURED CREDITORS — EXECUTION SALE OF LANDS—JURISDICTION OF BANKRUPTCY COURT — RECORDING REGISTER'S ASSIGNMENT—LIMITATIONS — SALE FREE OF INCUMBRANCES—CREDITOR'S RIGHTS.

1. Creditors of bankrupt having security, whether by judgment, mortgage or otherwise, must prove their debts against the bankrupt and foreclose their liens under the authority of the court in bankruptcy, or they may not only be barred of their debt, but may also lose the benefit of their securities.

[Applied in Re Anderson, 23 Fed. 500.]

2. A sale of the debtor's land by virtue of an execution issued and levied after the filing of the petition in bankruptcy, will not pass the title to the land as against the assignee, although the judgment was entered and the lien created prior to the bankruptcy.

[Cited in Re Hufnagel, Case No. 6,837; Pickett v. McGavick, Id. 11,126.]

3. After the commencement of the proceedings in bankruptcy, all the property and assets of the bankrupt are in custodia legis, within the control of the bankrupt court only, and no other tribunal can interfere with its process.

4. It is not essential to the title of the assignee that the assignment to him by the register should be recorded within six months from its date. The title of the assignee takes effect by relation from the commencement of the proceedings in bankruptcy, and the recording is not required for the mere purpose of giving notice to purchasers.

5. The limitation of two years in section two of the bankrupt act [of 1867 (14 Stat. 518)] applies only to property held adversely to the bankrupt and his assignee.

[Cited in Re Brinkman, Case No. 1,884; Smith v. Crawford, Id. 13,030; Andrews v. Dole, Id. 373; Taylor v. Irwin, 20 Fed. 617.]

6. Where the bankrupt fraudulently conveyed his lands to avoid a judgment, a purchaser under the judgment and a sale made under execution after proceedings in bankruptcy commenced, cannot defend on the ground that the assignee did not commence suit to set aside the execution sale and deed within two years after the assignment. No cause of action accrued to the assignee against such purchaser until he acquired his title under the judgment and execution sale.

7. The bankrupt court may order a sale of the bankrupt's property free and clear of encumbrances, and the secured creditor will then have his remedy only against the fund in court. If the secured creditor fails to prove his debt and proceeds against the fund, he does so at his peril.

[Cited in Phelps v. Sellick, Case No. 11,079; Sutherland v. Lake Superior Ship Canal R. & I. Co., Id. 13,643; Re Hufnagel, Id. 6,837. Quoted in Re Brunquest, Id. 2,055.]

TREAT, District Judge. This is a bill to set aside certain sheriff's deeds for bankrupt's property, the levy, sale and deeds having been made after adjudication had in bankruptcy. On the fourth of April, eighteen hundred and sixty-seven, six judgments were rendered in the circuit court of Scott county in favor of said county against Archibald P. Lane and others. On the first of February, eighteen hundred and sixty-eight, Lane filed his petition and was adjudicated a bankrupt. On the twenty-sixth of March following, the plaintiff was appointed assignee. On March thirteenth, eighteen hundred and sixty-eight, executions were issued on said judgments, and a levy made on a portion of bankrupt's real estate; and on April ninth, eighteen hundred and sixty-eight, the sale thereof was made to Joseph T. Anderson and William B. Anderson, and the deed therefor executed and delivered October sixth, eighteen hundred and sixty-eight. On September fifteenth, eighteen hundred and sixty-eight, a levy was made on another portion of bankrupt's real estate, and a sale had thereunder October seventh, eighteen hundred and sixty-eight, to said Anderson, to whom the sheriff's deed therefor was made and delivered November thirteenth, eighteen hundred and sixty-eight. On March nineteenth, eighteen hundred and sixty-nine, another levy was made under said judgments, and a sale on April ninth, eighteen hundred and sixty-nine, of another portion of the bankrupt's real es-

[1] [Reprinted by permission.]

tate, was made to Joseph T. Anderson, and a deed therefor delivered. The price paid at the first sale was twenty-five dollars; at the second fifty-five dollars, and at the third twelve dollars. Said property is worth from five to eight thousand dollars. At the time of each of said sales, said Andersons were copartners in business, and on dissolution of their partnership, February fourteenth, eighteen hundred and seventy, Joseph T. conveyed to William B. all his interest in said real estate. The assignee did not record in Scott county the register's assignment to him within six months from the date thereof, nor until the sheriff's sale had been recorded. The several judgment debts were duly scheduled and notice of bankruptcy, &c. sent to the judgment creditor in February, eighteen hundred and sixty-eight; but he has never appeared to prove his demand or obtain any order of the court with reference thereto. Said Joseph T. Anderson was also scheduled as a creditor, and duly notified of said proceedings in bankruptcy in February, eighteen hundred and sixty-eight.

This suit was commenced November seventh, eighteen hundred and seventy. It appears that soon after said judgments were rendered against him, the bankrupt entered into a fraudulent scheme to conceal his property from his creditors. By deed dated May first, eighteen hundred and sixty-seven, he conveyed for the pretended consideration of five thousand dollars, all the real estate in question to one Goodin, and on September seventeenth, eighteen hundred and sixty-seven, Goodin executed a deed of trust thereon to secure a fictitious note in favor of Schwank; and October seventeenth, eighteen hundred and sixty-seven, the trustee sold the property to Schwank for default in the payment of said note. That contrivance was suggested to Lane by an attorney, in order to enable Lane to escape payment of his surety debts—the other parties agreeing to aid in the scheme for covering the property for the benefit of Lane. None of the facts concerning that fraud became known to the assignee until about November seventh, eighteen hundred and seventy, when a bill was filed against the parties thereto to have said deeds adjudged void, which decree has been rendered. On the same day as above stated, this suit was brought. Lane received his discharge in eighteen hundred and sixty-eight, there being no assets reported.

The principal questions of law which arise on the foregoing facts relate to the duties of judgment debtors and assignees, and to the effect of the limitation of two years prescribed by section two of the bankrupt act. Under the Missouri statutes, the judgments mentioned were a lien upon Lane's real estate in Scott county. The judgment creditor seems to have supposed that no necessity existed for proving his demand in the bankruptcy court, or for invoking the aid of that court. Although the judgments had been obtained in April, eighteen hundred and sixty-seven, no execution or levy was made until Lane had been adjudged bankrupt, when it was probably deemed necessary to enforce the lien through executions from the state court.

Under the bankrupt act all subsisting liens are fully protected, but all lien creditors are required to prove their debts, however evidenced. This is apparent from section twenty-two of the act, and from various other provisions thereof. Section twenty-two requires the creditor to prove his demand and disclose "whether any and what securities" he holds, and the act rests in the court "the ascertainment and liquidation of the liens and other specific claims." Secured debts may be paid, or the secured creditor may relinquish his security, or he may become a general creditor "for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct;" or the assignee may, if the value of the property exceeds the debt, release to the secured creditor the equity of redemption on receiving the excess; or he may sell the property subject to the secured creditor's claim. Section twenty-two further provides that "in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." It must be observed that the creditor referred to is "a creditor who has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt." In Buckingham v. McLean, 13 How. [54 U. S.] 167, it was held that "whenever by the local law a judgment or an execution operates to make a lien on the property, it is to be decreed a security." That was a decision under the bankrupt act of eighteen hundred and forty-one, and the act of eighteen hundred and sixty-seven is still fuller and more explicit as to secured creditors. Hence a judgment creditor's demand is scheduled, and he must prove his demand in bankruptcy, and may elect which of the many modes contemplated with reference thereto he will adopt. While his lien may be enforced in any of the prescribed modes, it must be enforced through the bankrupt court under whose control the bankrupt's property and rights of property pass. All of his property is held to be in custodia legis, subject to the order of the bankrupt court; and if so, the principles laid down in Taylor v. Carryl, 20 How. [61 U. S.] 583, apply and are decisive. See authorities cited post. The supreme court of Illinois in Cole v. Duncan [58 Ill. 176], held that the mortgagee might foreclose the mortgage in a state court, after the mortgagor was adjudged

bankrupt, without reference in any way to the bankrupt court. It is said that the supreme court of Pennsylvania has intimated similar views. That was a suit to foreclose a mortgage and the mortgagor appeared and pleaded his discharge in bankruptcy. His plea was held bad, for the reason that his personal discharge did not divest the lien; and the court directed an amendment of the bill to bring in the assignee. It also held that the mortgagee was not bound to prove his lien demand in the bankrupt court. The case seems not to have been well considered, and certainly is not in accord with the provisions of the bankrupt act and the decisions of the United States courts.

The bankrupt act does not divest the lien either of a mortgage or judgment, but provides the means of enforcing them through the bankrupt court. The assignee has vested in him all the property interests of the bankrupt, legal or equitable, for the benefit of all creditors, whether secured or unsecured. The administration of the estate demands that he should be a party to all proceedings affecting it in any way. Under section twenty, as has been seen, he may, under direction of the bankrupt court, redeem from a mortgage or release the mortgagee. If the mortgagee can foreclose in a state court without reference to the assignee's rights and duties under the bankrupt act, then many of the mischiefs intended to be guarded against will prevail without serious "let or hindrance." A fraudulent cover of the bankrupt's property in the form of a mortgage can readily be made effective; for when mortgagor and mortgagee combine, and the assignee as representing the creditors is not made a party to the suit of foreclosure, how is the fraudulent scheme likely to be defeated? The act contemplates that all suits affecting the bankrupt's estate shall be prosecuted in the proper United States court, unless the United States court in charge of the estate otherwise direct. If this was not so, it would be very easy to devour the estate with unnecessary costs and delay its final settlement by uncontrolled litigation in the various state courts of the country. Whatever reason exists for compelling unsecured demands to be litigated in the bankrupt court is as potential with respect to secured claims—nay, is often more cogent. The various statutory provisions to defeat preferences and frauds would be unavailing, if the validity of a pretended mortgage debt could not be investigated, nor the validity of a judgment fraudulently obtained. If a mortgagee, without proof of the mortgage debt before a bankrupt court, or if a judgment creditor, without proving his judgment debt, can, despite the bankrupt court, proceed to swallow up the bankrupt's estate, then there would exist no uniform system, and no adequate protection for the general rights of creditors.

The first inquiry is, whether a mortgage debt really and honestly exists. Who is to ascertain its existence? Is there any distinction in this respect between such a debt or any other, or any reason why a creditor of one kind should ignore the bankrupt court rather than another and interfere with property in its custody? But it is not necessary to elaborate this point. The act does not attempt to divest a lien; but it does require those who possess them to enforce their claims through the bankrupt court, and in so doing does not interfere with the rights of such a creditor any more than it does with the rights of other creditors. If the act did not exist, an unsecured as well as a secured creditor could resort to state courts, yet it is not pretended that, after bankruptcy, an unsecured creditor can sue the bankrupt in a state court in violation of section twenty-one, and the other provisions of the act.

The question is not as to the rights of property or the existence of liens, but of jurisdiction for their ascertainment and enforcement. The views expressed might be vindicated more fully if the second clause of section twenty-five, as to property in dispute, and sections twenty-seven and twenty-eight, as to settlement of the estate, and sections fifteen, sixteen and seventeen as to the rights and duties of assignees, with respect to suit pending or to be brought, were carefully analysed. It is true the act is not always precise in its use of terms, and some of its provisions are seemingly inconsistent with others. Thus, it is not easy to determine the precise effect of sections twenty, twenty-one and twenty-two, and the course to be pursued under them, with respect to certain demands, and hence the conflicting decisions with respect thereto. By section twenty a secured creditor may prove the balance of his debt over and above the value of the security, or release the security and prove the whole of the debt, sharing pro rata with the unsecured creditors as to the amount so proved. The language is, as to a secured creditor: "He shall be admitted as a creditor only for the balance of the debt," seemingly excluding him as a creditor to the extent that he has ample security so long as he retains that security; but section twenty-two requires that "all proofs of debts against the estate of a bankrupt" shall be made before a register, &c., and that the claimant shall disclose what securities he holds. Those and other provisions show that the language just quoted means that the secured creditor shall prove his debt and disclose the securities, but shall not be admitted as a creditor against the general assets to share pro rata with unsecured creditors, except for the balance of the debt remaining unsatisfied after the securities have been exhausted. By section eleven the bankrupt is required to place in his sworn schedule "all his debts," and "a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same;" also in his inventory of assets, "whether there are

any, and if so what encumbrances thereon." A public notice and special notice is given "to all creditors upon the schedule," stating that "a warrant in bankruptcy has been issued against the estate of the debtor;" that "the transfer of any property by him is forbidden," and that "a meeting of the creditors to prove their debts and choose one or more assignees, will be held." Thus section eleven includes secured as well as unsecured creditors, just as do sections twenty, twenty-one and twenty-two. But section twenty-one evidently has reference, in its first sentence, to debts proved against the estate for pro rata distribution—that is, if a judgment creditor elects to abandon his unsatisfied judgment and prove his original debt, he can do so, thus availing himself of the benefit further provided for in section twenty-two as to preferences. The second sentence forbids creditors "from prosecuting to final judgment in law or equity any suit against the bankrupt until," &c.; and the third sentence provides for the stay of proceedings in such suit, except by leave of the bankrupt court, &c. Very serious questions have arisen under section twenty-one, where such suits have been prosecuted without a stay of proceedings asked by the bankrupt. Inasmuch as the discharge of the bankrupt leaves him still liable for his debts created by fraud, embezzlement, defalcation, &c., suits for recovery on such demands, it has been supposed, might proceed to final judgment, though the debt had been proved before the register and dividends received, as the act expressly permits. But whether that be correct ruling or not, (and no opinion is now given on the point), it is obvious that all debts have to be scheduled, all creditors notified, and all who wish any proceeds out of the bankrupt's estate must prove their demands, whether the bankrupt is discharged and released from the debts or not. On no other ruling can the various provisions of the act be reconciled nor the estate properly administered. The bankrupt schedules the secured debt and states what the security therefor is; the secured creditor proves his debt and discloses the security; and the assignee is vested with the bankrupt's rights of property as they stood at the date of commencing proceedings. The assignee is in a more favorable condition than the bankrupt as to many questions; for, representing creditors, he may cause conveyances to be set aside which the bankrupt could not himself avoid. Such evidently is the case with regard to preferences, voluntary conveyances, judgments suffered or procured, &c. Hence if the bankrupt court is not to intervene, creditors will be deprived of their rights and the act to that extent become a nullity.

This court has held uniformly that after adjudication of bankruptcy an execution and levy may be enjoined, so that the bankrupt court may proceed to dispose of the property in such manner as to secure and enforce the rights of all concerned in the bankrupt's estate—that the administration of no part thereof, whether a lien thereon exists or not, is to be taken from it. The assignee under the direction of the bankrupt court must reduce the assets to money and account therefor to the fullest extent. The title to real estate, though judgment lien thereon exists, is in the assignee. How is that title to pass from him? If he sells, releases or compromises, he does so by order of the bankrupt court. If an adverse interest therein is claimed, he may cause the same to be judicially settled, either by litigation or by reporting the facts and receiving the proper order of the court in the premises.

Without pursuing this branch of the subject further, it may suffice to say that bankrupt courts have invariably, as occasion demanded, granted injunctions or taken such other steps with respect to judgment and other liens, as indicated that no other view obtained than that the property of the bankrupt could not be reached without the intervention of the proper bankrupt court—or in other words, that such property, whatever might be the liens upon it or its condition, was in custodia legis, not to be interfered with by any process or proceedings from any other tribunal.

But it is said that the assignee did not file a copy of the assignment to him for record in Scott county during the prescribed six months, and therefore the purchasers at the sheriff's sale had no notice that the title had passed out of the bankrupt into the assignee. As a matter of fact, Joseph T. Anderson did have such notice before any of the levies or sales. At the first two sales he and his brother became joint purchasers, and at the third he was sole purchaser. Hence if it were important to charge the defendants with notice, they stand so charged by the proofs. But what is the object of the requirement to record the assignment in the various counties where the realty is situated? The recording thereof is not essential to the title, for by the assignment and operation of the law, title, by relation, passed to the assignee as of the date of filing the bankrupt's petition. Of course the assignment, which cannot be made before the election of an assignee, cannot be recorded prior thereto, that is, before it exists. If its validity depended on its being duly recorded, then it could not relate back; and if the purchase from or under the bankrupt—as by direct conveyance from him, or by execution, levy and sale on judgment previously rendered—is to be held valid because the purchaser had no notice that his title was diverted, then the relation spoken of would be a nullity. Is it to be contended that sales made intervening the adjudication of bankruptcy and the election of the assignee, are valid unless actual notice of the adjudication is brought home to the purchaser and no constructive notice by a recorded assignment

had been made? It is obvious that the requirement about recording is for other purposes. It has been held that it was not to give force or validity to the transfer to the assignee, or for the purpose of constructive notice within the ordinary interpretation of registry acts, but to enable the purchaser under the assignee to have in the proper county a record of his derivative title. It was wise, however, for other reasons. As the county records should contain a complete registry of all instruments on which transfers of titles depend, it was eminently proper for the protection of all concerned that the assignment in bankruptcy should be there recorded—an instrument in writing which though not conforming in the usual particulars with conveyances from one party to another, or even with sheriff's deeds, yet by the paramount law is a complete transfer and conveyance of all the bankrupt's real and equitable interests, with the exceptions named in the act. That instrument is not signed by the bankrupt, or acknowledged by him, but is signed by the register or judge. When the assignment is recorded, the record or duly certified copy thereof is by section fourteen made evidence of the assignment in all courts, notwithstanding very different rules as to instruments affecting realty may obtain under state laws.

It is to be remarked that the clause directing the assignment to be recorded gives no further effect thereto than that just stated. The assignment itself passes the property with relation back to the commencement of proceedings, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made or afterwards, and consequently the recording of the assignment is not essential to the validity of the transfer, and is not designed to operate as under state registry acts. The purchaser from the bankrupt after adjudication in bankruptcy or commencement of proceedings, although he had no notice thereof, would take no title. The question of notice could not therefore arise. As held by the Iowa supreme court in the cases hereafter referred to, purchasers under the bankrupt, after the transfer of title to the assignee, bought nothing, because they took only what the bankrupt had, and after proceedings in bankruptcy the bankrupt had nothing to be taken. The purchase being of what the bankrupt debtor had at the time, and all of his interest having passed to the assignee previously, the purchaser acquired no title as against the assignee.

A more serious question pertains to the true construction of the limitation in section two and the proper application thereof to the facts before the court. So far as was disclosed by the bankrupt's schedule, and as the records of the county showed, the bankrupt had no interest in this real estate. Lane had conveyed it to Goodin some nine months previous to the time he was adjudged a bankrupt for what purported to be a valuable consideration, and therefore there was no need to record the assignment in Scott county, or to institute suits with reference to this property against any person. It was not until November, eighteen hundred and seventy, that the fraud as to the Goodin and Schwank deeds became known to the assignee or creditors, and consequently no one except Goodin had any interest in combating the levy and sales by the sheriff. There was no apparent interest in the assignee to be affected.

Section two is in these words: "But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid (viz.: of said bankrupt, transferable to or vested in the assignee), in any court whatever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." If the sheriff's levies and sales were valid, unless set aside by direct proceedings had for the purpose, then the causes of action may be said to have accrued at the date of the respective sheriff's deeds, and the bar of the act to be complete as to the first two sales, if the terms of the act are to be followed without regard to the ordinary statutory and equitable exceptions, making statutes commence to run in cases of fraud only from the date of the discovery thereof, or of knowledge or information of facts inducing a reasonable belief that a fraud has been perpetrated. Martin v. Smith [Case No. 9,164]. Whether section two is to be construed so as to admit such an exception, it is not now necessary to decide. The defendants were no parties to the Goodin fraud, and do not claim under the Goodin title. If that title be, as it has been adjudged, fraudulent and void, their title is in nowise affected thereby. The assignee not having discovered that fraud, had no reason for proceeding against the defendants unless that fraud existed; for the bankrupt's case could not be benefited by setting aside the sheriff's deeds. If those deeds are merely voidable at the option of the assignee, and he cannot maintain a suit to avoid them, after two years, then the fraud, so far as the bankrupt's estate is concerned, has effectively worked its purpose. It is, perhaps, wise that such a limitation should be made in order to compel a speedy settlement of the bankrupt's estate, and also to close the many vexing suits that might arise under sections thirty-five and thirty-nine after knowledge of the facts was lost. There should be as early an end to litigation as is consistent with the rights of parties.

It has been held that section two does not apply to ordinary money demands not barred by the statutes of limitation. Sedgwick v. Casey [Case No. 12,610]. But the full force and effect of that provi-

sion seem not to have been judicially determined. 5 N. B. R. 252 [Peiper v. Harmer, 8 Phila. 100]. It has, however, been held by the United States circuit court here, that the concurrent jurisdiction vested by that section in the circuit courts does not reach actions of assumpsit. It would seem, therefore, that the limitation is to be confined to controversies about property rights, or legal and equitable titles to property. What titles? Those existing at the date of proceedings in bankruptcy, or those supposed to have accrued subsequently? The assignee must unquestionably bring his suit against an adverse possessor or claimant—that is, adverse to the bankrupt originally—within the time specified. But how is it with regard to suits which the bankrupt could not maintain, but his creditors could, as under the statute of frauds and fraudulent conveyances, wherein the statute begins to run only from knowledge or information first had of the fraud? However that may be, the question still remains, does section two cover cases of fraudulent concealment of assets from the assignee? Is a fraud, successfully concealed for two years, to ripen into a valid title, or the assignee to be barred from unravelling it? Such questions may arise and have to be decided hereafter; but the present case has its solution in the legal rule which this court holds to be the true one under the bankrupt act, viz: That all liens, whether of judgments or mortgages, or by pledges, &c., must, after proceedings had in bankruptcy, be enforced solely through the intervention of proper bankrupt courts, and that a subsequent sale, whether under judgment or mortgage, without the consent of that court, is subject to be set aside by the bankrupt court. In no other way can the property, which is in its custody or under its control, be preserved for the equal benefit of creditors. Nor is this rule any more variant from those ordinarily governing litigation in state courts, than the direct provisions of the bankrupt act concerning new or pending suits against the bankrupt. If it be the supreme law within the purview of the constitutional grant concerning bankrupts, it overrides state statutes, not only as to assignments, preferences, &c., but also as to proceedings under insolvent and other conflicting laws, not as to the legal rules governing such transactions, but as to the forum where justiciable. On what legal theory do United States courts enjoin proceedings in state courts affecting the interest of bankrupt estates, if not on the theory that such questions should be determined exclusively in the bankrupt court or under its direction? The bankrupt act expressly provides that by its own operation attachments in the state courts, in prescribed cases, are dissolved and suspends all other suits in state courts against the bankrupt, except by leave of the court in bankruptcy, and when that leave is granted, the suit proceeds merely "for the purpose of ascertaining the amount due," but execution is stayed. In Re Kahley [Case No. 7,593], Hopkins, J., held: "Under sections one and twenty the bankrupt court has the right through its officers to take possession of the mortgaged property after a default in payment, and sell it free of the lien without first satisfying the lien, in which case the lien is transferred to the fund in court. It is a matter of discretion with the court to sell subject to or free from the encumbrance of the lien." He cites in support of his views, Houston v. Bank of New Orleans, 6 How. [47 U. S.] 846; Foster v. Ames [Case No. 4,965]; Ex parte Christy, 3 How. [44 U. S.] 308. And again in Re Cook & Gleason [Case No. 3,151], the same learned judge holds that the liens of mechanics and all others should be presented to and read by the bankruptcy court, and the parties claiming those liens have no right to proceed in such suits without first obtaining leave of the bankrupt court. In support of his view he cites Angel v. Smith, 9 Ves. 335, and Wiswall v. Sampson, 14 How. [55 U. S.] 52. He held further that parties who proceed in the state courts to enforce their lien demands without leave of the bankrupt court were guilty of contempt; that the principle is applicable to every interference with the possession of a receiver or custodian who holds property as an officer of the court, for his possession is in law the possession of the court itself. Edw. Rec. 129; 3 Paige, 199; 1 Hogan, 216; Madd. 406; 5 Paige, 489; [Peale v. Phipps] 14 How. [55 U. S.] 368; [Taylor v. Carryl] 20 How. [61 U. S.] 583. And therefore the bankrupt court was bound to insist upon its exclusive right to administer and distribute the bankrupt's property, and not permit anyone with impunity to interfere through state process with such property. In re Hanna [Case No. 6,026]; Swope v. Arnold [Id. 13,702]; Beers v. Place [Id. 1,233]; Shaffer v. Fritchery [Id. 12,697]. There are many other cases to the same effect, and this court has never hesitated to act upon the foregoing principles. The levy and sale by the sheriff under the executions named were in violation of the well settled rules governing these cases—an interference with property in the custody of this court—and therefore could give no right or title thereunder. Taylor v. Carryl, 20 How. [61 U. S.] 583. As between the assignee and the defendants, the title is still in the assignee. The defendant, William B. Anderson, is in no better position than his co-tenant in common and subsequent grantor.

The decree of the court will therefore be that said sheriff's deed be set aside, and held for naught; that the assignee proceed to sell said real estate free from all encumbrances, reserving to defendants the right to proceed against the fund for any demand they may have. If any question should arise concerning the residue of the fund, the court will determine it at the proper time and in the proper way.

To the case of Davis v. Campbell [12 Ind.

192], which has also been heard, the foregoing views apply, so far as the sheriff's deed is concerned.

The facts are that an execution on a prior judgment was issued and levy was made and sale was had after bankruptcy proceedings commenced; that the defendant, who was assignee of a mortgage, became the purchaser at the sheriff's sale; that his deed, it is contended, was filed for record before the assignment, although it appears from the clerk's certificate it was filed afterwards, and that Campbell had no actual notice of the proceedings in bankruptcy when he purchased. The lien demand of neither the judgment nor mortgage was ever presented to the bankrupt court, nor has any leave to proceed thereunder been granted. The property was sold for a sum far below its value. But in this case as the defendant is, perhaps, a mortgagee in possession, although his sheriff's title is valueless, the court will enter a decree to sell the property free from all encumbrances, reserving to the defendant the right to prove any demand he may have against the fund.

The following doctrines on this subject have been frequently held and have passed into some of the text-books as settled law: "The commencement of proceedings in bankruptcy operates as a supersedeas of all process in the hands of the officer of any other court, and as an injunction against all other proceedings than such as may afterwards be had under the authority of the court of bankruptcy until the case is closed. Thus the levy of an execution, or the filing of a bill to foreclose a mortgage, or the filing of a libel in rem, or the issuing of a distress warrant, or the filing of a mechanic's lien claim, where the lien only exists from the time of such filing, or the issuing of a writ of replevin for the purpose of affecting the estate, are null and void when such proceedings are instituted in any other court after that time. Claims against the bankrupt's property can only be enforced in the court of bankruptcy during the pendency of the proceedings, and this principle extends not only to liens, but to all controversies concerning even the title to property which was in his possession at the time of filing the petition."

The supreme court of Iowa in Stuart v. Hines [33 Iowa, 60], and several other cases passed upon at the same time, quote the foregoing, and add that the several cases cited in support of the doctrines thus laid down fully sustain the text. Indeed, as previously shown in this opinion, no other rules are consistent with the bankrupt act. And the custody of the property, the title being in the assignee as an officer of the court, cannot be divested except under the direction of the court. Hence some ill-considered opinions to the effect that the lien creditors may wait until bankruptcy proceedings are closed, and then enforce their liens through the state courts or under powers to sell, can have no force. The assignee may cite in the secured creditor so as to determine what shall be done with respect to the security, and it may be advisable so to do, yet it is none the less the duty of the secured creditor to prove his demand and obtain the aid of the court for its enforcement. The court has jurisdiction over both the bankrupt debtor and all his creditors, and also over all demands affecting the bankrupt's estate. If the lien creditor does not act, and the property is sold by the assignee under the order of the court, free from all liens or encumbrances, what recourse is left to the creditor after the fund has been fully distributed? If he thus sleeps on his rights, he does so at his peril. The estate must not be left open indefinitely, to the detriment of all other creditors, because some secured creditor will not assert his rights as the law requires. It may even be a serious question whether, under the limitation in section two, he can proceed to prove his demand after the expiration of two years, and have the same enforced. Whether that section will admit of such a construction or not, it is certain that such a creditor may, through his own laches, like unsecured creditors failing to act, lose whatever right of property or interest he had in the bankrupt's estate. This court has held from the commencement, that secured creditors could not enforce their demands except through the bankrupt court, and has never hesitated to set aside sales made without its action after bankrupt proceedings were commenced. It has now given its views more at large than was necessary, without, however, citing the numerous authorities which support the various propositions stated. The bankrupt reports are full of cases, and the text-books refer to them with sufficient fullness.

Case No. 3,624.

DAVIS et al. v. ARMSTRONG.

[3 N. B. R. 33 (Quarto, 7);[1] 2 Am. Law T. 138.]

District Court, N. D. Mississippi.

ACTS OF BANKRUPTCY — FRAUDULENT SUSPENSION — WHO ARE TRADERS.

A trader gave promissory notes in part payment of purchases of goods, and before they fell due, sold out the balance of his stock in gross, without invoice, at ten o'clock at night, to a purchaser for ten hundred and thirty-two dollars cash, and went out of business, after paying one of the notes before maturity. He failed to pay the other notes at maturity, and they remained unpaid for more than fourteen days. *Held*, it was no defense that the debtor had ceased to be a trader at the period of suspension. The sale for cash was not a sale made in the ordinary course of business. The suspension of payment of his paper was fraudulent, and he must be adjudicated a bankrupt.

[Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402; Re Carter, Id. 2,470; Re Weaver, Id. 17,307.]

[1] [Reprinted from 3 N. B. R. 33 (Quarto, 7), by permission.]

[Petition in bankruptcy by Davis & Green against F. M. Armstrong.]

HILL, District Judge. This case in involuntary bankruptcy is submitted to the court upon petition, answer, and proof. The act of bankruptcy charged is that said defendant, being a merchant, did, on or about the 25th of February, 1868, fraudulently suspend the payment of his commercial paper, and did not resume payment thereof within a period of fourteen days. The answer denies the bankruptcy charged. The issue thus made makes it incumbent upon the petitioners to establish, by proof, the bankruptcy charged. The most important proof is that produced by the defendant, and is found in his deposition, and is substantially as follows: That in the latter part of October, 1867, he purchased, in the city of Louisville, Ky., from various wholesale dealers, a stock of goods for retail, at Red Land, in Pontotoc county, Miss.; that about four thousand dollars of said stock was purchased on a credit, and a portion, about one thousand dollars, for cash; that among the purchases was one from the petitioners for the sum of nine hundred and twenty-six dollars, for which he executed his note, due at four months, and payable on the 24th February, 1868; that he brought the goods to Red Land and offered them for sale at retail until the 26th December, 1868, when he sold out the entire stock remaining on hand, to one Bounds, for the sum of ten hundred and thirty-two dollars, which was paid him in cash; that it was a lumping trade, made without taking any invoice of the stock; that the trade took place between nine and ten o'clock at night; that of the sum so received he paid off and took up one of the notes given for the stock, amounting to five hundred and fifty-eight dollars; that the payment was made before the maturity of the note; that he received a discount of ten per cent.; that he immediately left Red Land, and went to look after his father's estate, some thirty miles distant, his father having recently died; that he then ceased to be a merchant, and has so continued to the present time; that whilst doing business, as a merchant at Red Land as stated, he kept no books, showing the condition of his business, only kept memoranda; does not know the amount due him, and either does not know or declines to state from whom; states that had it not been for the fall in cotton his estate, real and personal, was at the time of sale to Bounds, sufficient to have paid his debts. He does not state what amount of cash he received for the sale of goods made at retail or the disposition he has made of it, or the disposition made of the balance received from Bounds, but admits that the note due to petitioners remains unpaid; and that on its maturity, he owed on said purchases some two thousand two hundred dollars; does not state whether any part of the same has since been paid.

The main ground of defense relied upon is, that at the time of suspension of payment stated, defendant was not a merchant or trader. This renders it necessary to give a construction to this clause in the bankrupt act [of 1867 (14 Stat. 531)], and in order to arrive at a correct conclusion, we must ascertain the benefits intended to be secured, and evils remedied. In all commercial countries, such as ours, it is deemed a matter of the first importance, that obligations and contracts entered into by those engaged in such pursuits, and in the transaction of commercial business, shall be promptly paid, and for the reason that the failure of one, often occasions the failure of others. These obligations, in the shape of notes, bills, checks, etc., form a part of the circulating medium between those, engaged in such pursuits. The reason, therefore, that a distinction is made, in the bankrupt act, between merchants, bankers, and traders, in meeting their commercial obligations, and the rest of the community, is to secure promptness and good faith with this useful class of the community; and to secure this desirable object, a fraudulent failure to meet these obligations, is declared to be an act of bankruptcy; such being the object and purpose of the law-makers, the proper construction of the act should be read as follows: That a merchant, banker, or trader, who, in the course of his business as such, shall execute notes, bills, or other instruments which circulate as commercial paper, and who fails to pay the same within fourteen days after maturity, or the same shall have become due and payable, without a sufficient excuse for such failure, shall be deemed to have fraudulently suspended payment, and shall be declared a bankrupt. If this be the true construction of the act, it follows that if the maker of the paper is a merchant, banker, or trader, at the time of its execution, he becomes liable to meet it in the time specified, unless he can show a sufficient excuse for failing so to do, or he becomes liable to this provision of the law, no matter what his occupation may then be. This brings us to another important inquiry, that is, has the defendant shown a sufficient excuse for the non-payment of the petitioner's demand, the note having become payable on the 24th February, 1868, and their proceedings not having been commenced until the 26th of the following June, a period of over four months; or, in other words, was it, within the meaning of the act, a fraudulent suspension? The note was executed after the passage of the act, and the defendant must be held to have assumed all the obligations and liabilities imposed by the act, one of which was that he should keep proper books, showing the true condition of his business, the stock invested, the cash received, cash on hand, debts due him, cash paid out, and debts outstanding against him in his business, a failure to do which, after the passage of the act, is, by the 29th section, declared to be a

cause for refusing the bankrupt a discharge, or, if granted, for its revocation. The defendant has failed to meet this obligation. By the 35th section of the act it is provided that a conveyance, sale, assignment, or transfer, not made in the usual and ordinary course of business of the debtor, shall be deemed prima facie evidence of fraud. The sale of a stock of goods of five thousand dollars or more, that had only been on sale at retail for about two months, when cotton was down at nine and ten cents per pound, and when money was scarce in the country, made at night, in a lump, without examination or invoice, at the sum of one thousand and thirty-two dollars, cannot be held to be in the usual and ordinary course of the business of a merchant. Other sections of the act might be referred to to show that the utmost good faith and fair dealing is required of those so engaging in mercantile pursuits; a failure to observe which, is treated as evidence of fraud. When a merchant engages in business and purchases his stock, or any part of it, on credit, there is an implied promise that the proceeds of the sale shall be applied to their payment. The merchant commits a fraud upon his creditor if he appropriates the proceeds to any other purpose until the obligation is discharged; indeed, his whole capital stock is virtually pledged for the payment of such commercial liabilities as he may incur in such business; he is further pledged to give to his business his best skill and attention, and a failure to comply with these requisitions may be held a fraud on the rights of those who have given him credit in his business, and whose demands remain unsatisfied. The reason given by the defendant, that he did not pay the note before the commencement of these proceedings, is unsatisfactory. Had the goods been received and sold when cotton was at a high price, and when there was every expectation of easy collections, and then fallen, the reason would have been more plausible; but they were purchased when cotton was at the low price, and should not have been sold on credit only to those able to pay at the low price of cotton. The low price of cotton would have been a good reason why sales were not made, but if not made, it should have remained on hand, and not sold for the small sum of one thousand dollars or thereabout; upon the other hand, if the goods were sold it was the duty of the defendant, either by himself, or some suitable person employed for the purpose, to collect these debts, or at least to have required the debtors to execute their notes for the amount due.

Although the defendant was permitted to give his own deposition, upon re-hearing of the cause, he has wholly failed to show what amount of cash he received for goods, the amount due and unpaid, or the disposition he has made of the same. These circumstances, together with his whole transaction, connected with his mercantile business, whether so intended or not, must be held, within the meaning of the bankrupt act, to have resulted in a fraudulent suspension of the note of petitioner, which is upon its face mercantile paper, and was in fact so executed; and rebuts the excuse given for its non-payment, and must be declared an act of bankruptcy. The enforcement of this side of the bankrupt law is decidedly unpleasant, but when cases arise, they must be met, and disposed of according to law and testimony as the court understands them. Fortunately, so far, out of nearly five hundred cases, not more than twenty have been on the involuntary side of the docket, and not more than half that number have been contested; and of the remaining number but few have come to the final hearing, so that so far, this portion of the law has received but little consideration from either the court or the bar. It may, however, be well that its principles be understood by the community, especially those engaged in trade, that any necessity for its enforcement may be avoided in the future, as in the past.

Case No. 3,625.

DAVIS v. BALTZER.

[1 Cranch, C. C. 482.][1]

Circuit Court, District of Columbia. June Term, 1808.

SLAVERY—FILING LIST WITH COUNTY CLERK.

The list of slaves required by the law of Maryland, 1796, c. 67, must be delivered to the clerk of the county into which they shall be first brought, and within three months thereafter.

[Petition by a negro, Harry Davis, against John Baltzer.]

THE COURT (CRANCH, Chief Judge, absent) decided that the master's entry of the slave, with the clerk of this court, made this day, was not a compliance with the act of Maryland, 1796; the slave having been brought into the state of Maryland, from Virginia, by Daniel Dulany, in the year 1797; and that it ought to have been made with the clerk of the court of the county into which the slave was first brought. The slave was sold by Dulany within fourteen months after he was brought into Maryland. Verdict for the petitioner.

DAVIS (BANK OF ALEXANDRIA v.). See Case No. 845.

Case No. 3,626.

DAVIS et al. v. BANK OF RIVER RAISIN.

[4 McLean, 387.][2]

Circuit Court, D. Michigan. June Term, 1848.

BANKS—UNAUTHORIZED BILLS—PAYMENT.

A bank which draws a bill in express violation of its charter, can not set up such bill in pay-

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

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

ment. The bill is void, and must be so held in all transactions relating to it.

[This action was brought by Davis & Lockwood against the Bank of River Raisin.]

Mr. Romeyn, for plaintiffs.

Mr. Noble, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, the general issue being pleaded. The defendant gave to the plaintiffs a draft of the Bank of Brest, for two thousand dollars. It was understood, at the time, that the draft was received by the plaintiffs, in payment of a debt due them by the defendant. The Bank of Brest was insolvent, and no part of the draft was ever received. The plaintiffs contend, if the draft was received in payment, it could not operate as such, because the Bank of Brest was organized under the general banking law of Michigan, which the supreme court of the state has held to be unconstitutional. But if the bank was a corporation, the draft was void, it having been issued in express violation of the law. It is not material to inquire whether this Bank of Brest was organized or not. It is enough to know, that it was one of a large batch of banks established under a general law of Michigan, which was recommended to the popular sanction, and that numerous banks were organized under it, all of which turned out to be banks without capital. They were all subject to what was called the "Safety Fund Act," which, by the 31st section, provided that "no moneyed corporation, subject to this act, shall issue any bill or note of the said corporation, unless the same shall be made payable on demand and without interest." The draft in question was in violation of that law, as it was not made payable on demand. It was, therefore, an instrument which the corporation had no right to create, and being void, it can not be considered as payment to the plaintiff. And the court so instructed the jury, who found for the plaintiff. Judgment. Weed v. Snow [Case No. 17,347].

DAVIS (BANK OF THE UNITED STATES v.). See Case No. 915.

DAVIS (BELL v.). See Case No. 1,249.

DAVIS (BENEDICT v.). See Case No. 1,293.

Case No. 3,627.

DAVIS v. BEVERLY et al.

[2 Cranch, C. C. 35.][1]

Circuit Court, District of Columbia. Dec. Term, 1811.

BANKING ASSOCIATIONS—INDIVIDUAL LIABILITY—ACTIONS AT LAW—RELIEF IN EQUITY.

The eleventh article of the association called "The Union Bank of Georgetown," which declares that every person dealing with them, "disavows having recourse, on any pretence whatever, to the person or separate property of any present or future member of the company," does not prevent a laborer from recovering judgment at law against the individual members of the association who employed him. But they may be relieved in equity.

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

Assumpsit, for work and labor.

Mr. Morsell, for the defendants, contended that as the plaintiff had proved that the work and labor were done for the private banking association, called "The Union Bank of Georgetown," he was bound by the fourteenth article of that association, which declares that every person dealing with them "disavows having recourse, on any pretence whatever, to the person, or separate property of any present or future member of this company," and could not recover in this action brought against Beverly and Riggs individually, they being the persons with whom he contracted, and who were members of the association.

But THE COURT (nem. con.) said that at the most it could only be considered as a contract on the part of the plaintiff, that he would not enforce his judgment against the person or property of the defendants; a contract which was binding on his conscience, and which they could not presume he would violate; and if he attempted to violate it, a court of equity might grant an injunction.

DAVIS (BLACHLY v.). See Case No. 1,456.

DAVIS (BROOKS v.). See Case No. 1,950.

DAVIS (BRYAN v.). See Case No. 2,065.

DAVIS (CANNON v.). See Case No. 2,385.

DAVIS (CARLETON v.). See Case No. 2,408.

DAVIS (CARLISLE v.). See Case No. 2,411.

Case No. 3,628.

DAVIS v. CHILD et al.

[2 Ware (Dav. 71) 78;[1] 3 N. Y. Leg. Obs. 147.]

District Court, D. Maine. Aug. 4, 1840.

MARITIME LIENS — REPAIRS, SUPPLIES, AND ADVANCES—DOMESTIC AND FOREIGN VESSELS—ADMIRALTY JURISDICTION — TRUSTS, ACCOUNTING, AND SPECIFIC PERFORMANCE.

1. By the general maritime law of Europe, material-men have a privileged lien on a vessel for repairs and supplies furnished for the vessel. But by the maritime laws of this country, they have no lien when the repairs are made and the supplies are furnished for a vessel in a port of the state to which she belongs, unless it is allowed by the local law.

[Cited in The Scotia, 35 Fed. 909.]

2. Where the repairs are made, or the supplies furnished, for a vessel in a port of a state to which she does not belong, she is considered a foreign vessel, and the rule of the general maritime law prevails.

[Cited in The Eliza Jane, Case No. 4,363.]

3. A person who lends money to be employed in the repairs of a vessel, or to furnish her with

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

supplies, has the same privilege against the vessel that material-men have. He is considered as giving credit both to the ship and to the owners. The ship is hypothecated to him for his security, and he may maintain, in the admiralty, either a libel in rem against the vessel, or a libel in personam against the owners. See [Thomas v. Osborn] 19 How. [60 U. S] 29, where this doctrine is affirmed. Whether this principle be supposed to have been borrowed from the Roman law, or to have had an independent origin in the commercial usages of the Middle Ages, it appears to be equally unquestionable in one case as in the other.

[Cited in Thomas v. Osborn, 19 How. (60 U. S.) 29; Collins v. The Fort Wayne, Case No. 3,012; The J. R. Hoyle, Id. 7,557; The A. R. Dunlap, Id. 513; The Custer, 10 Wall. (77 U. S.) 217; The Kate Tremaine, Case No. 7,622; The Tangier, Id. 13,744; The J. F. Spencer, Id. 7,316; Nippert v. The Williams, 39 Fed. 828, 829.]

4. The admiralty has a general jurisdiction to enforce all maritime liens.

[Cited in The Richard Busteed, Case No. 11,-764.]

5. The admiralty has no direct jurisdiction over trusts, although they may relate to maritime affairs; if the libellant states a trust, as the foundation of his suit, he states himself out of court.

[Approved in Kellum v. Emerson, Case No. 7,-669. Cited in Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 288.]

6. Nor has the admiralty any jurisdiction over matters of account, merely as accounts, although they may arise exclusively out of maritime transactions. It can take cognizance of accounts, only as incidental to other matters over which it has jurisdiction.

[Cited in Tunno v. The Betsina, Case No. 14,-236; The Brothers, 7 Fed. 878; Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 288; The H. E. Willard, 53 Fed. 600, and 52 Fed. 388.]

7. Nor has the admiralty jurisdiction to enforce the specific performance of an agreement relating to maritime affairs.

[Cited in Deely v. The Ernest & Alice, Case No. 3,735; The C. C. Trowbridge, 14 Fed. 874; Paterson v. Dakin, 31 Fed. 684.]

The substance of this case, as stated in the libel, is as follows: On the 29th of March, 1837, Child & Dole, being the owners of the schooner Sultan, let her on shares to one Prince B. Lewis, to be employed in the coasting trade. He proceeded in the vessel to the southern states, and employed her until the 13th of October, 1838, when the owners, having become dissatisfied, employed Jacob B. Stanwood to proceed to New Orleans, to take possession of the vessel for them. He went accordingly, and took the schooner into his possession, and appointed James P. Coffin, master. On the return of the Sultan, from a voyage to Texas, in February, 1830, she was found to require repairs; and it was then also ascertained that there were large sums due for debts alleged to have been contracted on account of the vessel, by Lewis, the former master. Lewis had absconded and was not to be found. For the purpose of settling these accounts, and for raising money to pay the expenses of these repairs, Stanwood applied to the libellant [Samuel Davis] for a loan, who advanced the money for that purpose. Afterwards, on the 22nd of March, the libellant, at the request of Stanwood, caused process to be sued out against the vessel for the money he had advanced; and it was agreed between them that, at the sale, she should be purchased by the libellant, provided that she sold for less than her value, for the benefit and in trust for the owners, Child & Dole. The object of the sale was to free her from the claims of other creditors. She was sold under an order of court, and bought by the libellant, May 24, 1830, he, by the agreement with Stanwood, taking the conveyance in his own name, and to hold the legal title of the vessel as a security for his advance, but in trust for the owners; and by the direction of Stanwood, acting as the agent of the owners, he caused the repairs to be completed and the vessel to be fitted for sea. Stanwood left New Orleans before the repairs were finished, having given directions to the libellant to procure for her a freight, when repaired, as soon as practicable, to take the entire management and control of the vessel, and act for the interest of the owners. The libellant expended upon the vessel, at New Orleans, $2,339.32. He then appointed Thomas F. Hinds, master; procured freight, and she sailed for Mobile, June 26, 1839. After going to sea she was found to leak, and on her arrival at Mobile it was found, from the defective condition of her bottom, that further repairs were necessary to render her seaworthy, and she was further repaired by the direction of the libellant, acting under the authority derived from Stanwood, at the cost of $3,272.89. She then sailed with a freight for Boston. When she had been out about four days, she was run into by another vessel, and was obliged to put into New Orleans for repairs, where she was again repaired under the direction of the libellant, at the expense of $1,418.75. She then sailed for Boston, where she arrived on the 27th of April, her freight amounting to $1,338.56, after deducting her expenses of $502.27, leaving a credit to the owners of $836.29. A bill of particulars, annexed to the libel, contains a statement of all the moneys expended by the libellant, on account of the vessel, and all he has received for insurance, average, and freight, leaving a balance now due him of $4,828.37. The libel concludes with a prayer that the court will pronounce for the repayment of the balance of the sums expended, and that Child & Dole may be required to accept a reconveyance of the vessel, which the libellant now tenders. To this libel, the respondents put in a plea to the jurisdiction. The question of jurisdiction was ably argued.

Mr. Fox, for libellant.

C. S. Davies, for respondent.

WARE, District Judge. Two questions arise upon the pleadings in this case, and which have been elaborately argued by the

counsel. The first is, whether a person who lends or advances money to be expended in repairing a vessel, or in furnishing her with supplies necessary for her employment, as provisions for the crew, can maintain a libel in personam against the owners for such advances, or a libel in rem against the vessel herself. The second is, admitting the first question to be decided in the affirmative, whether the jurisdiction of the court can be maintained on the particular facts alleged in this libel. The first question does not appear to me to involve any serious difficulty. It is true that no judicial decision was cited, at the argument, directly in point, and I am not aware of any reported case, in which the precise question has been presented for decision. But the jurisdiction of the court seems to me to stand on principles too well established to be brought into doubt.

By the general maritime law of Europe, any person who furnishes materials or labor for the repair or equipment of a ship, or supplies her with things necessary for her employment, as provisions for the crew, acquires by this alone, without any express stipulation for that purpose, a tacit hypothecation of the ship itself for his security. In this country, no such implied hypothecation is recognized by the common or customary law, when the repairs are made, or the supplies furnished, in a port of the state to which the vessel belongs. In some of the states, the local law gives a lien, and where it does, it may be enforced by the admiralty. Peroux v. Howard, 7 Pet. [32 U. S.] 12,324; Harper v. New Brig [Case No. 6,090]. But by the common maritime law of this country, if the supplies are furnished in the port of a state to which the vessel does not belong, the privilege is admitted, and the lien attaches. The Jerusalem [Id. 7,294]; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; The Gen. Smith, 4 Wheat. [17 U. S.] 438; The Aurora, 1 Wheat. [14 U. S.] 105. The creditor, in such a case, is considered as giving credit both to the ship and the owners, and he may proceed in the admiralty against either. But it was contended, at the argument, that this privilege is confined to the persons who actually furnish the supplies or make the repairs, called, in the language of the admiralty, material-men, and is not extended to a party who loans money, which is expended in repairs or in furnishing materials for the vessel. The ground assumed in the argument is, that such advances are to be considered as a common loan, not distinguishable from any other credit arising in the common course of mercantile business, and that the purposes for which the money was advanced and to which it was applied, cannot be inquired into, to show that the consideration was maritime, and thus within the cognizance of the court as a cause of admiralty and maritime jurisdiction.

The first inquiry that is naturally suggested, as a test of the jurisdiction, is, whether such a loan is held by the maritime law to be a privileged debt, giving the creditor a lien on the vessel for his security. If it does, then I hold it to be clear, that it may be enforced by this court, for the admiralty has a general jurisdiction to enforce all maritime liens. The lien which material-men have against the ship, for repairs or supplies, has been supposed to be derived from the Roman law. Abb. Shipp. p. 102, c. 4, § 10. Now if this privilege of the creditor be admitted to be a principle borrowed by the maritime law from that of Rome, there would seem to be an end of the controversy as to the rights of the lender, for it is quite clear that in the Roman law he had this privilege. It was a general principle of the law of Rome, that any creditor who loaned money to be employed in preserving, repairing, or improving a thing, had a privilege against it for the reimbursement of the loan. Domat. Lois Civiles, Liv. 3, tit. 1, § 5, n. 6, 7. The very case, of repairing a vessel, is put as an illustration of the general doctrine. "Qui in navem extruendum vel instruendun credit vel etiam emendum privilegium habet." Dig. 42, 5, 26, 34; Id. 20, 4, 5. 6. And the privilege, in the Roman law, extended to a creditor who loaned money for the purchase of a ship. Indeed, by the text of the law, the privilege seems to be confined to the lender, and it is only by analogy that it is extended to comprehend the immediate furnisher of the materials or labor by which the vessel is repaired. Domat. Liv. 3, tit. 1, § 5, n. 9. And the principle was carried further in favor of lenders. If the master hired money of a third person, with which he paid the creditor who loaned directly for the repairs of a ship, this new creditor was subrogated to the right of the first lender, and considered as giving credit to the owner. Dig. 14, 1, 1, § 11. Domat. Liv. 3, tit. 1, § 6, n. 6. But by the Roman law, this was a mere personal privilege, and did not involve a tacit hypothecation of the thing. It gave to the creditor a right of preference, jus praelationis, a right of prior payment out of the thing, over the general creditors of the owner; but his right was postponed to all hypothecary creditors. Emerigon, Contrate a la Grosse, c. 12, § 1; Vinnius, Select. Jur. Quaest. 42, c. 4. And the privilege of the creditor was postponed to that of the fisc. Dig. 42, 2, 34. But these personal privileges of creditors, independent of hypothecation, are unknown to the maritime law. In that law, every privilege implies a tacit or privileged hypothecation. Emerigon, Contrate a la Grosse, c. 12, § 2, § 1. Cleirac, Jurisdiction de la Marine, art. 13, No. 6. Whether the rules of the maritime law on this subject were derived from the Roman law, or what is more probable, had their origin in the customs and usages of maritime commerce in the Middle Ages, there is no doubt, that a person who lends money for

the purpose of repairing a vessel, or of furnishing her with supplies, and which is actually employed for that purpose, is entitled to the same privilege against the ship, as one who actually furnishes the supplies, or performs the labor. The reasons of justice, equity, and public policy are the same in the one case as in the other, and the law makes no distinction between them. It makes no difference, says Emerigon, whether one has furnished the materials, or loaned the money with which they have been purchased. Contrate a la Grosse, c. 12, § 4. A merchant whose goods are sold in the course of the voyage, to supply the necessities of the ship, is entitled to the same privilege, this being, in fact, a loan to the vessel. We find this privilege of the lender for the repairs or the necessities of the vessel, established in the earliest monuments that remain of the maritime law of the Middle Ages. In the Ordonnance of Peter 4th of Aragon, of 1340, for regulating the proceedings of the consular or maritime courts, which makes the first forty-two chapters of the common editions of the Consulate of the Sea, it is said, that in the sale of a new vessel, before she had made a voyage, the laborers and furnishers of materials shall have the first rank of privilege, and be preferred to creditors who have loaned money for the building of a ship, but still recognizing the privilege of the lender as subordinate to that of the workmen. After she has made a voyage, the mariners shall hold the first rank of privilege, and after them come those who have loaned money for the use of the vessel. 5 Pardessus Lois Maratimes, pp. 389, 325, c. 32, 34. Cleirac marshals the privileges in the same order—that of the mariners first, and after them, creditors who have lent money to repair or to purchase rigging and provisions for the ship; and he quotes this Ordonnance from the Consulate as authority. Jurisdiction par la Marine, art. 5, § 15, and Id. art. 18, §§ 4, 5. The rule established by the French Ordonnance of 1621, is, that upon the seizure and sale of a vessel, the wages of the mariners for the last voyage shall be first paid, in preference to all other creditors, and after them, those who have loaned money for the necessities of the ship during the voyage, and thirdly, those who have loaned money for repairs, for provisions, or the equipment of the ship, before the commencement of the voyage. Liv. 1, tit. 14, art. 16. That is, according to Valin, those who have loaned on bottomry or otherwise, for the repairs, victualing, or equipment of the vessel, and these comprehend carpenters, calkers, and other workmen who have been employed in the repairs, as well as those who have furnished the materials used in the repairs, and also the keepers of boarding-houses, who have, by order of the master, boarded the crew while repairs were being made (1 Valin, Comm. p. 363), putting the lender in the same class with the furnishers of materials and the workmen. Boulay Paty, in his commentary on the Code de Commerce, says, that the privilege exists, as well in favor of the simple lender, as of him who takes the security of a bottomry bond. 1 Cours de Droit Maratime, p. 119, tit. 1, § 2.

Indeed, it appears to me, that upon the principles of the maritime law, it is very clear, that a person who lends money to be expended in repairing a vessel, or in furnishing her with provisions, or fitting her for sea, has the same privilege against the vessel, which is allowed to material-men who are the actual furnishers, or the mechanics who perform the labor. The authorities are entirely conclusive. The lender is considered as trusting to the ship, as well as the owners; and by the loan itself, he acquires a privileged hypothecation, which is as sacred in every respect as that which is created by an instrument of bottomry, except that he is not entitled to maritime interest. Peckius, Ad Rem Nauticam, p. 99, and Vinnius' note; Kurike, Quaest. Illust., Quaest. 13; Voet, Ad Pand. 20, 19; Stypman, Jus Maritimum, par. 4, c. 5, § 146. By the law of this country, the privilege exists only where the credit is given to a vessel, in a port out of the state to which she belongs, unless it is allowed by the local law. Now, if the law allows to a creditor a lien on the vessel for his security, the jurisdiction of the admiralty follows of course. This is the appropriate court to enforce maritime liens, and the only court in which it can be done effectually. If the admiralty has jurisdiction over the matter in a proceeding in rem, I do not see on what principle the jurisdiction in personam can be denied. It is only on the ground that the contract is maritime, that the court can issue process against the thing. It is the subject-matter that determines whether it is of admiralty and maritime jurisdiction or not; and if it is so, the court has jurisdiction as well in personam as in rem. In this case, the consideration of the contract is purely maritime. If this were the only ground on which the plea could be supported, I should feel no difficulty in overruling it, and requiring the respondents to answer to the merits. Upon the principles stated, the jurisdiction would attach for the money advanced for repairs in the first instance, before the vessel was sold, and when legal title was in Child & Dole. But for these advances the vessel was arrested and sold. The libellant was the purchaser, and took the legal title in his own name. If the jurisdiction of the court rested on a lien alone, it is clear that the libel could not be maintained on this claim, for by the sale the lien was discharged. But as the admiralty has jurisdiction in favor of material-men in personam as well as in rem, if the proceeds of the sale were not sufficient fully to discharge the debt, the libellant's claim may be good against the owners for the balance, for a decree against the vessel, without satisfac-

tion, might not discharge the owners from their liability. It does not, however, appear from any allegation of the libel, but that the libellant was fully paid for all his advances, made before the sale of the vessel, by the proceeds of the sale; and from the bill of particulars annexed to the libel, it appears, that, in point of fact, he was. As the libellant, by the form of his pleading, has made this a part of his libel, my opinion is, that this part of his claim must be taken as satisfied.

The only question that remains is, whether the libel can be maintained on the transactions that took place after the sale. It is alleged in the libel, that the seizure was made and the vessel sold under a decree of court, on proceedings instituted by the direction of the agent of the owners; and that by an agreement between the libellant and the agent, he became the purchaser for the owners, and took the legal title in his own name, as a security for advances to be made, but for their use, and to be held for their benefit; and that all the subsequent expenditures upon and on account of the vessel, were made in pursuance of his orders, and for the benefit of the original owners. The libellant, therefore, states himself to be the trustee of the respondents. All the expenditures were for the vessel while he was the legal owner. If the plea is overruled and the respondents are required to answer to the merits, the first question presented for decision, if the fact is denied by the answer, will be, whether the libellant is trustee or not; whether he took the legal title for the benefit of the respondents, or purchased on his own account. Now, let it be admitted, that the subject-matter of the contract set up in the libel—that is, the repairs made and the supplies furnished—are within the undoubted jurisdiction of the admiralty, can the court take cognizance of the case, where, in order to arrive at the merits, it must first decide a question covering the whole case, which is of the peculiar, and generally the exclusive, jurisdiction of another tribunal, and is not within the jurisdiction of this court? In other words, can the court take jurisdiction of a trust ex directo, as constituting the very foundation of the suit? It seems to me that it cannot, and when the libel sets forth a trust, upon which the court must pronounce a judgment before it can look at the merits on which relief is sought, that the libellant states himself out of court. Matters of trust, whether in relation to real or personal property, belong to the peculiar and appropriate jurisdiction of courts of equity, and the modes of proceeding in equity are particularly adapted to the discovery and enforcing of trusts; and though it is true that courts of common law do take cognizance of some matter of trust, as in the case of bailments (1 Story, Eq. Jur. § 60), yet the general rule is, that mere matters of trust are within the exclusive jurisdiction of equity (2 Story, Eq. Jur. § 960). It is admitted that the admiralty is competent to pronounce upon the question of title to vessels, but when this is said, I apprehend that generally the legal title is intended. It is not, however, intended to be denied, but that this court may take notice of an equitable title when it comes up incidentally, especially when it is alleged in the way of defense, in a case over which the admiralty has a clear and unquestionable jurisdiction. In a suit for possession, it might well decline to interfere in favor of the legal title against one who had an equitable title, at least until the rights of the parties had been settled by a competent tribunal. It is admitted also, that when the admiralty has jurisdiction of the principal matter, it has authority to pronounce on the incidental questions which may arise in the cause. The Tilton [Case No. 14,054]. But my difficulty is, that in this case the equitable title does not arise incidentally, but is alleged in the libel as the very foundation of the libellant's title to relief. Such a case, it appears to me, cannot be properly a subject of admiralty jurisdiction. Indeed, the libel seems to me to be a bill in equity in disguise.

But the case presents other objections to the jurisdiction, which, if not insuperable, are not easily overcome. The libellant alleges, that in pursuance of an agreement with the agent of the owners, he purchased the vessel for them, and took the title in his own name, to be held for their benefit; that he expended on the vessel, at different times, large sums of money, in repairs and in the purchase of supplies, having the control and management of the vessel, and receiving for their use her earnings; and the libel concludes with a prayer that the respondent may be required to receive from him the legal title and pay him the balance of his account. The suit, therefore, in one aspect, partakes of the nature of a bill in equity for a specific performance of an agreement. It was never contended, that a court of admiralty has the authority to decree a specific performance of an agreement. If the court, in this case, should pronounce for the payment of the balance of the account, it might, perhaps, annex a condition that the libellant should reconvey the vessel to the respondent. But a direct suit for the specific performance of an agreement is a thing unheard of in the admiralty. But allowing this objection may be avoided, there is more difficulty in overcoming the other. The libel unavoidably involves the taking of an account, for it is indispensably necessary, in order to ascertain the balance. There might be here, in equity, matter for a cross bill, if the defendants chose to resort to it, in order to extract the facts directly from the party, though the admiralty might, perhaps, obtain the same object by an examination of the party on interrogatories. But the suit itself seems to be primarily for an account. Now the admiralty has no direct jurisdiction over matters of account, although they may relate purely to

maritime affairs. The New Orleans v. Phebus, 11 Pet. [36 U. S.] 175. The simplicity and directness of its course of proceeding are not supposed to be adapted to such controversies, and a libel for an account directly will not lie in the admiralty. The court takes cognizance of accounts only when they arise incidentally in a cause, as in a suit on a bottomry bond or for average. Libel dismissed.

Case No. 3,629.

DAVIS v. CHILDS.

[Nowhere reported; opinion not now accessible.]

Case No. 3,630.

DAVIS et al. v. CLEMSON.

[6 McLean, 622.][1]

Circuit Court, D. Ohio. Oct. Term, 1855.

CONFLICT OF LAWS—USURIOUS CONTRACT—ACCOMMODATION PAPER—PLACE OF NEGOTIATION.

Clemson, a citizen of Ohio, drew a bill on Suydam & Co., of New York, for their accommodation, and after indorsing it forwarded it to them. They accepted the bill, and negotiated it with the plaintiffs, citizens of New York, for a usurious consideration, by the laws of New York. An action being brought against the drawer, the usury was pleaded, under the laws of New York, which, for usury, avoids the contract. *Held* that the laws of New York governed the contract, and that the assignment to the plaintiffs, being usurious, avoided the contract.

[Applied in Re Conrad, Case No. 3,126.]

[This was an action at law by Davis, Brooks & Co. against William F. Clemson.]

Stanbery & Hunter, for plaintiffs.
Swayne & ——, for defendant.

OPINION OF THE COURT. This action is brought on a bill of exchange dated 1st June, 1850, by Clemson, payable to his own order, on Suydam, Sage & Co., for five thousand dollars payable in four months, and indorsed by him. Several special pleas were filed by the defendant, substantially the same. Among other things they set out that the cause of action in the different counts of the declaration are the same; that the bill was drawn for the accommodation of Suydam, Sage & Co., who were to pay it at maturity, of which the plaintiffs had notice; that they accepted the paper, and afterwards made a corrupt and usurious agreement with the plaintiffs to loan from them four thousand eight hundred sixty-nine dollars and ninety-nine cents, until October 4th, 1850, for the sum of one hundred and thirty dollars, and to receive the above bill accepted by Suydam, Sage & Co.; which sum so paid as interest was more than seven per cent. per annum on the sum loaned, in violation of the Statutes of New York, which declare all instruments void, founded on a usurious consideration. To these pleas the plaintiffs filed a general demurrer. As the demurrer admits the facts stated in the pleas, the law must be applied to the facts. The main stress of the argument by the plaintiffs' counsel is, that the drawer of the bill who indorsed it, is a citizen of Ohio; and that the contract must be considered as governed by the laws of Ohio. It is admitted that the drawer and indorser, whether the same person or different persons, do not contract to pay the money in the place on which the bill is drawn; but only to guarantee its acceptance and payment, in that place by the drawer. And it is also admitted that the liability of both the drawer and indorser arises, under the law of the place where, in legal contemplation, the bill was drawn or indorsed. And it is also admitted, that where a valid instrument is created, untainted with usury, that a subsequent usurious negotiation of it, cannot be pleaded by the drawer in discharge of his obligation. That in such a case, the question of usury is limited between the indorser and the indorsee; but does not reach or taint the original instrument. There are authorities which do not go this length; but the weight of authority sustains the principles above stated; and they embrace the legal ground assumed by the plaintiffs' counsel. Nichols v. Fearson, 7 Pet. [32 U. S.] 110; Munn v. Commission Co., 15 Johns. 55; Lloyd v. Scott, 4 Pet. [29 U. S.] 229; Braman v. Hess, 13 Johns. 52.

The bill in question was signed by Clemson and indorsed by him, and then it was transmitted to Suydam, Sage & Co., in New York, who accepted it, and by them it was offered to the plaintiffs of New York, who discounted it, reserving a rate of interest which, by the law of New York, was usurious. This bill was blank paper when it was transmitted by Clemson to Suydam, Sage & Co., and after it was accepted by them, it was nothing more than blank paper. It was intended for the benefit of the acceptors, but thus far, there was no liability by the drawer, indorser or acceptors. No action could be sustained on it. It was then, in contemplation of law, no contract or bill of exchange. Until negotiated, it was, in effect, blank paper. It was susceptible of being made a valid bill by filling up the blanks, and passing it bona fide to a third party. In Snaith v. Mingay, 1 Maule & S. 87, it was held, that where a merchant in Ireland, sends to England certain bills of exchange, with blanks for the dates, the sums, the times of payment, and the names of the drawers, signed and indorsed by himself, with a request that his correspondent in England would fill up the blanks, who did so with a date at a place in Ireland, the bills were held to be Irish contracts. And Mr. Justice Bailey held in the same case, if the bills had been negotiated to an innocent indorsee, after the death of the drawer, his representatives

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

would have been bound. But if these Irish bills had been signed by the drawer for the accommodation of the acceptor, and they had been filled up and negotiated on a usurious consideration, could the usurious holder have recovered their amount from the drawer? These Irish bills were drawn for the benefit of the drawer, the drawees were his debtors or securities, and the bill was to pay the debt of the drawer. The transaction was bona fide, and altogether different from the one before us. It is true no additional name was added to the paper, but that on principle can make no difference. The act of negotiation imparted to the bill validity, if it be a valid bill. Without this, the bill with the names upon it, was of no validity. It was not the signature of Clemson, or the signatures of the acceptors, but the loan of the money, on the credit of the bill, which could give effect to it. And here the question arises, whether that which was essential to give effect to the bill, did not enter into its inception. Whether that, without which the paper constituted no bill of exchange, does not constitute a part of it. But it is argued by the plaintiffs that Suydam, Sage & Co., did not indorse the bill, and that they claim under the blank indorsement of Clemson. If the bill had been an effective instrument as between the parties, before it was negotiated, the argument would be unanswerable. But as its negotiation was essential to its vitality, the argument is without application to the case. On principle, these positions would seem to be clear, and they are also clear on authority. "If a bill of exchange be drawn in consequence of an usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to this agreement, still it is void in the hands of a bona fide indorser." 2 Camp. 599. In Holt's N. P., Lord Ellenborough lays down the law, that a bona fide holder cannot recover upon a bill founded in usury; so neither can he recover upon a note where the payer's indorsement, through which he must claim, has been made by an usurious agreement. But if the first indorsement be valid, a subsequent usurious indorsement will not affect him; because such intermediate indorsement is not necessary to his title to sue the original parties to the note. Lloyd v. Scott, 4 Pet. [29 U. S.] 229. In Nichols v. Fearson, 7 Pet. [32 U. S.] 106, the court say: "It is necessary to bear in mind that we are not now called upon to consider a case occurring upon the transfer of a note which is, in its origin, a mere nominal contract, one on which, as the test is very properly established in the New York courts, no cause of action arose between the original parties. The present is a case of greater difficulty." "It will hardly be contended that although the indorsement gave no cause of action against the indorser, yet it did operate to give a right of action against the maker of the note." In the case of Munn v. Commission Co., 15 Johns. 55, the court say: "If a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it, can, as between themselves, maintain a suit upon the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious and the bill must be void."

The counsel for the plaintiffs admit, at least tacitly, that the negotiation of this bill was void under the laws of New York, by the argument that it is an Ohio contract, and is, consequently, governed by the laws of Ohio. The legal obligation which arises against the defendant, whether as drawer or indorser, it is contended, is not that he shall pay the money positively, but that he will pay it, if the acceptors do not pay it at the maturity of the bill, provided payment shall be demanded and a legal protest made, and he shall be duly notified of the same. There is no expression on the face of this contract, where the money was to be paid. In such an obligation, unless there was something in the negotiation of the instrument to change the effect of it, the place of payment is taken to be the domicil of the person bound. But on such a contract the party is liable wherever he shall be found. Where was the bill in question made and under what law? The plaintiffs who discounted it were citizens of New York, and so were Suydam, Sage & Co. The latter were bound to pay the bill at maturity. That it was usurious and void, as to them, wil not be controverted. And if this be so, how can a void act create a liability against the defendant, either as an accommodation drawer or indorser? As before shown, until the plaintiffs discounted the bill, it had no binding effect upon the defendant. And if by reason of the usury this discount imposed no obligation to pay on the acceptors, for whose benefit the bill was drawn, can it be binding on his sureties? If an instrument be void for usury as to one, it is so as to all; and any party may set up the defence. Austin v. Fuller, 12 Barb. 360.

The case of Andrews v. Pondard, 13 Pet. [38 U. S.] 65, arose on the following bill of exchange: "Exchange for $7,287.78. New York, March 11, 1837. Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth, or order, seven thousand, two hundred and eighty-seven dollars, seventy-eight cents, negotiable and payable at the Bank of Mobile, value received, which place to the account of your obedient servant. D. Carpenter. To Messrs. Sayre, Converse & Co., Mobile, Alabama." The bill was indorsed by Carpenter, the drawer, who, as well as the drawees were citizens of Alabama. The bill was drawn to pay a debt admitted to be due to H. M. Andrews & Co., of New York. But the amount stated in the bill, included a prior indebtment with ten per

cent. on it to cover exchange, and which appeared to have been done, to avoid the statute of usury.

In their opinion, the court say: "The defendants allege that the contract was not made in reference to the laws of either state, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon usurious agreement, which neither will execute. Unquestionably, it must be the law of the state where the agreement was made and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles, with a bona fide agreement made in one place to be executed in another. In such cases the legal consequences of such an agreement, must be decided by the law of the place where the contract was made. If void there, it is void everywhere." In that case it was argued by Mr. Webster, as the counsel in the case before us have argued, "that the contract is to be governed by the laws of the place where it was to be executed. The contract on the face of this bill of exchange expresses that it was to be executed elsewhere than where it was made. The parties entered into it with a view to its performance at another place. It is a foreign bill and of course is dated in one place, and in one state, and made payable in another." In that case the usury was included in the body of the bill, but the bill was made payable in Alabama, and all the defendants were citizens of that state. It was an Alabama contract, in a much stronger point of view, than the one before us was an Ohio contract. The effect of usury in New York was to avoid the instrument; in Alabama, the interest only was avoided.

In the case under consideration, the bill, as between the parties, was as blank paper, until it was negotiated to the plaintiffs on an usurious consideration. Could the plaintiffs sue the acceptors, who were and are citizens of New York? This will not be contended. They were citizens of New York, and acted under the laws of New York. They were the principals in the transaction, and the usury releases them from all liability on the bill. Admit, that the imperfect bill was forwarded to the acceptors by the defendant to be filled up by them; to bind him must they not act in good faith; and must not the party who discounts the bill, act in good faith? Can the plaintiffs complain that they should be governed by the laws of their own state? In the defence, it is averred that they had notice, that the defendant was an accommodation drawer and indorser. He, therefore, can only be made responsible on strict principles of law. If the bill had been a valid instrument, as between the parties to it; if an action could have been sustained against the acceptor by the drawer for non-payment, at maturity, and it had been negotiated bona fide, it is admitted (the bill having been signed and indorsed in Ohio, from which facts the legal liability arises, on the failure of payment by the acceptors, so far as the defendant is concerned), it would have been an Ohio contract. But it is denied that any liability against the defendant can arise, he being an accommodation drawer and indorser, on an usurious negotiation of the bill, in the hands of the person who thus obtained it. It is void by the act under which it was negotiated. Not void in part, but in whole. Void not only as against the acceptors, for whose benefit it was negotiated, but also as against the accommodation drawer and indorser. If the facts alleged in the pleas shall not be established before a jury, the rulings now made, will not apply. Demurrer overruled.

Case No. 3,631.

DAVIS v. DAVIDSON et al.

[4 McLean, 136.][1]

Circuit Court, D. Michigan. June Term, 1846.

EQUITY PLEADING—JOINT ANSWER—SIGNATURE OF COUNSEL.

1. A joint answer is sufficient, all the parties swearing to it.

2. Answers to bills are generally drawn jointly and severally.

3. In a joint answer, each individual is liable to be indicted for perjury, if he swear falsely.

4. An answer must be signed by counsel, in order that the counsel may be held responsible to the court for the contents of the answer.

5. If the answer be taken by commissioners, the signature of counsel is not required.

[This was a bill in equity by Davis against Davidson, Van Pelt, and Crum.]

Mr. Lee, for complainant.
Mr. Emmons, for defendants.

OPINION OF THE COURT. A motion is made to set aside the answer to a bill in chancery, on two grounds:

1. Because it is the answer of three individuals, and is sworn to by three. In the caption it purports to be the joint answer of the three, but not their several, as well as joint answer; this is erroneous, it is contended, for two reasons: 1st. Because all established precedents require them to be several, as well as joint. And 2d. Because, in case one of the defendants should swear falsely in the answer, he could not be indicted separately for such false swearing upon a joint answer, without joining all the joint respondents. The precedents are, generally,

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

as stated by the counsel. They are drawn jointly and severally. But we are not prepared to say that this form is indispensable. We see no satisfactory reason why a joint answer, responsive to the bill, would not be sufficient. The reason assigned, that one of the defendants could not be indicted for false swearing, without including the others, is not satisfactory. Each individual, who answers jointly, is responsible for the facts sworn to the same as if his answer had been separate. And it is not perceived why he might not be indicted, without uniting the other defendants.

2. The answer is not signed by counsel, which is undoubtedly a defect. Except in certain specified cases, the answer must be signed by counsel. Under peculiar circumstances, the signature of the defendant may be dispensed with; but the signature of the counsel is required, unless the answer is taken by commissioners. The signature is necessary, that the person signing may be responsible to the court for the contents of the answer. Story, Eq. Pl. § 876; Mitf. Eq. Pl. (by Jeremy) 315.

Leave is given to amend the answer.

DAVIS (DESSOR v.). See Case No. 3,826.

DAVIS v. The ELEANORA. See Case No. 4,-335.

DAVIS (ELLIS v.). See Case No. 4,402.

Case No. 3,632.

DAVIS v. The ENTERPRISE.

[3 Betts, D. C. MS. 30.]

District Court, S. D. New York. Oct. 13, 1842.

ADMIRALTY JURISDICTION — WHAT ARE MARITIME CONTRACTS—CANAL NAVIGATION.

[1. A contract for the navigation of a boat on the Erie canal from Albany to Rochester, and back to Albany and New York, is not a seaman's contract, of which admiralty has jurisdiction.]

[Distinguished in The D. C. Salisbury, Case No. 3,694.]

[2. The fact that the vessel floated from Troy to Albany on tide water did not vary the effect of the services, so as to give the court jurisdiction; nor would the fact that the boat continued to New York affect the situation, as such service was only incidental to the contract for the main service.]

[Libel by Joseph Davis against the lake boat Enterprise for seaman's wages.]

PER CURIAM. This was a contract for navigating the boat on the canal from Albany to Rochester, and back to Albany and New York, with her lading, with the privilege to libellant to leave the boat at any time, at his own option, when he could obtain better wages. This is not a seaman's contract, being within the jurisdiction of this court. Its object was not a hiring to navigate on tide waters. A part of the service might be contingently rendered there, but it was no part of the stipulation to which the libellant was bound.

The contract commenced on the canal at Albany, and that is not to be regarded as tide water, falling within the jurisdiction of admiralty; and the main and expected service as to duration of time and distance was to be performed on the canal. The circumstance that a boat leaves the canal at Troy and floats on tide water to Albany would not place the contract of her crew within the jurisdiction of this court; nor is there any sound principle which varies the effect of these services, if continued on to New York instead of terminating at Albany. The contract was not substantially one for navigating the vessel on tide waters. That service was incidental and partial, and not the gist of the hiring, and accordingly falls within the principles declared by the supreme court in the cases of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, and The Orleans, 11 Pet. [36 U. S.] 175. The doctrine has before been applied in this court to this description of crafts. The libel is dismissed.

Case No. 3,632a.

DAVIS v. The ERIE.

[1 Betts, D. C. MS. 32.]

District Court, S. D. New York. Oct. 2, 1840.

SEAMAN—PERSONAL INJURIES — GRATUITOUS HOSPITAL TREATMENT.

[1. A seaman cannot recover against a vessel for gratuitous hospital treatment for an injury received on board. The right to recover is limited to actual charges and disbursements.]

[2. Nor can he recover for injurious effects still remaining, because of the injury.]

[Libel by Henry Davis against the ship Erie for expense of being cured of an injury.]

A. Nash, for libellant.

Z. Zabriskie, for ship.

BETTS, District Judge. The plaintiff was a seaman on board the ship Erie on a voyage to Havre. Owing to an injury received on board the vessel in the harbor he was taken on shore to the hospital, where he was cured gratuitously, no charge whatever being brought against him or paid by him. He now claims the expense or cost of such cure, and the question submitted to the court is whether he is entitled to recover it from the ship. The law charges upon a ship the expenses incurred by a seaman taken sick or injured in her service. Gardner v. Isaacson [Case No. 5,230]; Harden v. Gordon [Case No. 6,047]. Such lien, however, is only raised in behalf of actual charges and disbursements to which the seaman has been subjected, and, when the relief is bestowed by charity, he cannot make it the foundation of a claim against the vessel. Reed v. Canfield [Case No. 11,641]. Nor is the vessel liable for damages sustained by him consequential

to such sickness or injury. Potter v. Suffolk Ins. Co. [Case No. 11,339]. This general doctrine is not controverted, but it is supposed to have received an application covering this case in a decision rendered in this court in the year 1832 (Robinson v. Gifford [unreported]), and that the court in that case furthermore allowed the seaman $50, the usual surgical charge in case of amputation, in addition to $3 per week, the price of board and attendance in the hospital. I do not find the notes of the reasons upon which the order was founded in that case, but upon turning to the proofs on file I perceive that the hospital opened an account against the seaman, charging $3 per week for board and nursing. This charge was also carried in against the commissioners of the almshouse and was probably satisfied by that board; but it was proved that the hospital in this city does not receive and cure seamen gratuitously, and that they are placed in the books on the footing of paying patients. That was an action in personam, and the order might have proceeded upon the legal liability of the seaman to pay the charge of his cure, or upon some recognition of the master of his responsibility therefor to the seaman. I am well persuaded that, whatever special consideration led to that particular decision, the court did not intend thereby to trench upon the rule restricting, in suits in rem by seamen, the recovery for the hospital expenses to the amount of disbursements necessarily made, or to assert the same principle that a seaman could maintain an action against the vessel for his cure, when the cure had been gratuitous. I find nothing in the clerk's report in that case, or the order of the court, respecting an allowance of $50 for the surgeon's bill on amputation. An extra allowance of $20 for counsel fees and expenses was awarded, which imports that the court then considered the claim rightful against the master, and his defence as inequitable.

The present case falls directly within the general rule. The libellant, having been received into the French hospital and cured on charity, cannot maintain an action against the vessel for the value of the nurture and treatment furnished him, nor for any injurious effects still remaining upon his body or constitution because of the injury he had received. His claim is accordingly dismissed.

Case No. 3,632b.

DAVIS et al. v. FAUCON et al.

[3 Betts, D. C. MS. 48.]

District Court, S. D. New York. March 28, 1843.

SEAMEN'S WAGES—WRECK—MASTER'S NEGLIGENCE—EVIDENCE—SHIPPING ARTICLES.

[1. Wreck and loss of freight caused by a master's negligence does not free the owners from liability for seamen's wages.]

[2. It is negligent for a master not to be prompt in changing his course when the lead shows a rapid shoaling of the water near dangerous and well-known shoals.]

[3. Where the negligence of a master is in issue, the failure to show or account for the chart used by him raises an inference that the shoal where the vessel was wrecked was set down thereon.]

[4. Liability for wages of seamen duly discharged in a home port after a wreck exists, notwithstanding general maritime law, when the shipping articles promise wages unless forfeited by misconduct.]

[Libel by Thomas Davis and others, seamen of the barque Florida, against Edward Faucon and Francis Hathaway, for wages.]

BETTS, District Judge. The barque Florida, on her return from a China voyage, was wrecked on the Brigantine shoals off Absecom beach, on the Jersey shore, the 21st of September last, at mid-day. The allegation in the libel is that the barque was run ashore by the carelessness and negligence of the master. The vessel was totally lost. The crew went off in her boat to another vessel then in her vicinity, saving their clothing in part and a few articles from the cabin of considerable value, but which, it is alleged by the respondents, composed no part of the cargo proper. The next day a wrecker, with aid of the crew, saved a part of the cargo and some of the tackle of the vessel, but it is made a point by the respondents in their defence that the amount saved did not equal the charges for salvage. The crew were kept together on the beach by the captain until ——, and, as they allege, they were formally discharged.

The defence to the claim of wages rests upon the wreck of the vessel and her failure to make freight. The libellants contend that these facts create no bar to the recovery of wages—First, because the articles of agreement secure them their pay, irrespective of the loss of freight on the vessel; and, second, because the loss occurred by means of the carelessness and negligence of the master of the ship. It is urged that in both these particulars this case comes before the court under an aspect distinguishable from those in which the right to wages is usually called in question because of the wreck of the vessel. The peculiarities in the agreement relied upon are, the voyage or time of hiring stipulated on the articles, and the termination of it by the actual discharge of the libellants, after the shipwreck. Before, however, dismissing this branch of the case, it will be more convenient to consider and dispose of the other great feature, the charge that the ship was lost by the carelessness and negligence of the master. The consequences in law in respect to the rights of the seamen may present an interesting topic of inquiry if the testimony is found to substantiate the charge. In reviewing the testimony to this point, it must be weighed to ascertain whether it proves a positive fault, or no more than a mere error in the master, in judgment, or the want of superior skill or precaution.

The circumstances and facts attendant upon the loss of the vessel may disclose an error, a fault in commission or omission, conducing mediately or directly to the wreck; but does the law charge the master and owner personally for that cause, where the master has competent skill, without proof of gross neglect or the doing of some act by him with knowledge of its impropriety? The consequence of the unskillfulness or misconduct of the master in the execution of his duties comes under frequent consideration in insurance cases, and in suits by shippers for loss or injury to the cargo, and the principle governing those cases will afford light to the inquiry in this cause. The general doctrine laid down by elementary writers is sustained by the adjudications of the courts, that the underwriters are not answerable for losses occasioned by mistakes of the captain, happening through gross negligence or from great ignorance or unskillfulness in his profession. 1 Phil. Ins. 227; Park, Ins. 103. The owner is held to insure, for himself, the competency and good conduct of the master and mariners (1 Phil. Ins. 226) and their incompetency or gross negligence would never be claimed by him as "a peril of the sea," exempting him on his bill of lading from liability for the loss of cargo.

It is an essential particular to the seaworthiness of a vessel that she be supplied with a faithful captain and of competent skill in his profession. 3 Kent, Comm. 287; Holt, c. 3, § 6. In Tait v. Levi, 14 East, 481, the court was inclined to regard the vessel unseaworthy, the master, from ignorance of the coast, having mistaken Barcelona for Tanagona. So again, upon general principles, a loss is held not to arise from a peril of the seas if, when all the circumstances are taken into consideration, it appears to have arisen from want of due skill or knowledge on the part of the master. Thus Abb. Shipp. 252, 258, in stating the case of Smith v. Shepherd [decided in 1795; opinion not now accessible], seems to understand the doctrine laid down to be, that it is the fault of the master if a ship strikes a rock or shallow generally known, not being forced upon it by adverse winds or a tempest. The English law, independent of statutory regulations, holds owners responsible to shippers for losses or injury of the cargo happening otherwise than by the act of God or perils of the sea (Abb. Shipp. 255; Holt, cc. 2, 4); and upon the stipulations of the bill of lading, and the implied contract that the vessel is seaworthy, the fault of the master in her navigation is regarded as fixing on the owner a liability for the damage (Id. c. 3, §§ 2–4). It is manifest that the law, in affixing responsibility upon the owners because of the incompetency of their master, looks beyond mistakes in judgment, although it may be shown that a great majority of persons of like skill would have adopted a different conclusion from the same facts. It demands evidence that the error or mistake arose from actual incompetency or the unheedful or intentional misuse of his knowledge. When the master possesses adequate knowledge and experience, and brings them honestly to act in the navigation of his ship, I apprehend he or the owners cannot be made liable because he failed to adopt the best expedient, and that a loss accrued by means of the one he did choose.

In this case the testimony shows that the master was perfectly competent and trustworthy in his profession, and, indeed, that his character as a skillful and cautious navigator stood in the first rank of his class. But I am constrained to say, that the proofs, to my judgment, establish that at the time of the occurrence in quesion he omitted to exercise that attention and precaution which the facts known to him, or which the law holds him bound to know, exacted from him. The Brigantine or Absecom shoals, where the vessel was wrecked, have been notorious to pilots and navigators for several years, valuable vessels having been lost upon them, and soundings having been taken determining, if not their exact location, at least their general position, so as to warn vessels in that vicinity to be on their guard with respect to them. They are marked down on the better and latest coast charts, and, if not designated on the chart on board the Florida, were described in Blunt's Coast Pilot, at the time on board; and the omission to produce the chart or account for its absence gives ground for the presumption that this shoal was also indicated on that. The testimony of Mr. Bush with respect to the charts on board is not by any means decisive on this point. The Coast Pilot directs navigators coming north along the Jersey coast, and at the point where this vessel was lost, "not to steer northward of N. E. if in 10 fathoms water or less, as you will be apt to get on Absecom shoals or Egg Harbor bar." Page 214. All these reefs are lying in the vicinity of the Brigantine shoals. The shoaling of the water is proved to be gradual off this shore, generally differing a fathom in three-fourths of a mile, until directly amongst the shoals, and then the depth becomes accordingly irregular, and many of the witnesses, most experienced in this coast navigation, speak of the necessity of a constant use of the lead, and that unceasing caution is required to prevent a vessel fulling off into less than 8 fathoms. Most of the witnesses insist that she should come about whenever she was shoal of 10 fathoms, but some consider it safe in 8 or 7 fathoms, and even 6 and 5, when they know perfectly their position.

The captain says in his answer, that when he went in to dinner, a little before 1 p. m., the vessel was heading about north, going at the rate of three miles the hour, the land then in sight; that at 20 minutes past 1 seven fathoms water was reported, and he immediately gave orders to get the ship ready

to tack, and whilst getting ready, and about five minutes after sounding, she struck on the shoal three or four miles from the beach. Mr. Bush says the vessel was laying along shore, generally steering about N. N. E., sometimes N. or N. W., rarely so much as that. Between half past 12 and 1 the lead was thrown, and 10 fathoms reported, when they went into dinner, and had been in about 10 minutes when the captain ordered the lead hove, and 7 fathoms were reported, and the order was then given to get ship ready for stays. The captain was just stepping out of the house when she struck. This witness also states that the lead had been thrown every 10 or 15 minutes during that morning, and no less than 10 fathoms had been before reported. Thomas Denis, one of the libellants, testifies that the vessel at the time was heading in for the land, and going at the rate of three knots. James Williams, second mate, says the vessel was making a course about north by west, three knots, and land plain in sight, wind from the northward and eastward light. William Howe, seaman, says the wind was light ahead, about north east, baffling; thinks vessel was standing about north, land plain in sight. Henry Barnes, the carpenter, says the vessel was going on towards the beach when she struck, house on the beach in sight. George Neuber, the steward, reported the draught of water to the master, and then went by his orders to the man at the helm to see how the vessel headed, and reported to the master she was heading west of north. Orders were then given to see all clear to go in stays. Henry Barnes, the carpenter, says the vessel was heading towards the shore, house in sight. He says she struck 25 or 30 minutes after 7 fathoms were reported; that, with her then wind and headway, she would have come about in 4 or 5 minutes. The testimony of the seamen is to be received with caution, and weighed with a watchful regard to their motives and biases, as well as to all the attendant circumstances. But it is to be remarked that the essential features of their statements concur with the answer of the master and the evidence of Mr. Bush; and they stand in direct conflict only on the fact of soundings being taken, and the period that elapsed, after 7 fathoms were declared, before the vessel struck. The log book is not produced, and no evidence is given of its loss, and, as that would have supplied the appropriate and more satisfactory proof of the proceedings in navigating the vessel that morning, the absence of that document, if not to be regarded as presumption of proof in it, adverse to the allegations of the defence, is certainly to be regretted in conducting an inquiry into facts which would be most materially aided by its contents. The first mate, examined by the respondents, says the run of the vessel was entered regularly in the log. Upon the oral evidence, I think Mr. Bush's memory as to the cast of the lead cannot safely be depended on, even if it be admitted he is not expressly contradicted by a preponderance of proof. An instantaneous shoaling from 10 to 7 fathoms, in the position and direction of the vessel, would naturally excite the most stirring activity, as the master is to be presumed cognizant of the fact that along that coast the descent of the bottom is very gradual and uniform, not varying a fathom for hundreds of rods, unless in the direct neighborhood of shoals, and if, but 10 or 15 minutes previously, they were in 10 fathoms, it cannot be credited that no more than a commonplace direction to the second mate to make ready for stays would have followed so startling a fact, nor but that the master and first officer would instantly have applied every means to put the vessel about.

The master does not in his answer aver that deeper soundings than 7 fathoms had been reported previously, or that he knew the depth at the time he left the deck for dinner. There is also some discrepancy in his own statements as to the time of the several occurrences marked as preceding the striking of the vessel. He says in his answer that he went into dinner a little before 1, and that the report of 7 fathoms was made at 20 minutes past 1, and that he immediately gave orders to get the ship ready to tack, and whilst getting ready, and about 5 minutes after sounding, they struck. This answer was sworn to the 26th of January, 1842. The day after the occurrence, he made his protest, and in that said, "Standing north at 1.30 P. M., judging myself three miles from shore, sounded 7 fathoms water. Whilst getting ready for stays, vessel struck on the shoal." The time is spoken of as if it had been noted with care and precision, and the difference may be very material when it comes to be compared with the other evidence in the case. And as to the captain's own conduct it would have an important bearing if he allowed his ship to stand head towards the shore 10 minutes before getting ready to tack, then being three miles off, and in a depth calculated to excite the liveliest watchfulness. This evidence, in connection with Mr. Bush's statement, would indicate a surprising remissness in an intelligent and vigilant officer. Mr. Bush says the lead was thrown when they went into dinner and 10 fathoms was reported, and after they had been in about 10 minutes 7 fathoms was reported. Both concur that they went into dinner between half past 12 and 1. The protest of the captain the next day stated that the vessel struck at 30 minutes past 1, and in his sworn answer, he puts it at 25 minutes past 1; in either case he must then have been at his dinner from half to three-quarters of an hour; and the computation of Mr. Bush as to time compares very exactly with the statement of Barnes, the carpenter, that the vessel struck 25 or 30

minutes after 7 fathoms were reported; and with that of Reuben, the steward, who, after the report of depth of water, was sent to the man at helm to learn the course of the vessel, and reported it back to the master, before orders were given to get ready for stays; this testimony all tending to show that the vessel was allowed to continue her course in shore full 20 minutes after she was found to be in 7 fathoms of water, without including the evidence of Williams, the second mate, who says the vessel struck about 15 minutes after orders to get ready for stays, and that he received these orders in about 5 minutes after the report of the cast of the lead was made to the master.

The preponderance of the evidence is that the vessel at the time was heading W. of N., though the exact point cannot be ascertained. The captain says she was heading about north; Mr. Bush, that she was generally steering N. N. E., or sometimes N. W., rarely so much as that. The steward ascertained from the man at the helm, she was W. of N., and so reported to the master, and the second mate and other seamen all represent her to be laying W. of N. when she struck. John Livingston, a pilot, says, if the vessel was in 8 fathoms water with her then wind, a safe course must have been N. E. by N.; if laying N., her situation would be more dangerous; and, if N. by W., the danger would increase. John Hayes, pilot, says vessels may lay along within about 5 miles of the shore. The water will suddenly shoal from 10 to 5 fathoms at these shoals, and he should not hesitate in daytime to run in 7 fathoms, but in night should come about in 10 fathoms. Francis Alleger has run whole line of coast in 8 fathoms, and, if he knew of no shoal, should go within 7, 6, or 5, but, if aware of shoals, should go about in 10 or 12 fathoms. Elisha E. Morgan, master of a ship in the London trade, has run in good weather and smooth water to within 6 or 8 fathoms, and 3 or 4 miles of land, when not opposite shoals known or laid down on the chart. If on the coast, without personal knowledge of it, should follow the directions of Blunt's Coast Pilot, though he does not think it is much relied on. Russel Sturges, master of a ship, would hug shore as close as possible to preserve his wind, and should not fear running in 5 or 6 fathoms. Should regard 8 or 7 always safe. Blunt's book ought to be consulted, but it is considered to err on the side of over caution. Should weigh his reasons rather than follow his mere directions. Does not consider it safe to approach coasts with only a general chart of the Atlantic. If he approached Absecom with wind on shore, without knowing points, he should certainly follow Blunt's directions, and tack in 10 fathoms, and should not go within that depth in a large ship, except in case of necessity. James H. Smith, New York pilot, in light wind and smooth sea, and vessel heading north, should run in to 8 fathoms off Brigantine shoals, but should not think it prudent for a navigator, not knowing the coast, to run inside of 10 fathoms. Phyler E. H. Dibble, a pilot, has brought in vessels along this coast. Should not go nearer the beach in fair weather, with a ship, than 8 or 10 fathoms, and a stranger coming in from sea could not prudently go so far as 8 fathoms; ought to follow the direction of Coast Pilot. Has struck on these shoals in a pilot boat 2½ or 3 miles from shore, owing to negligence in not throwing the lead.

I think these conclusions must be adopted as the fair effect of all the evidence:

1. That the course of the vessel was more westwardly and in shore than was prudent in the state of the wind, and in her situation as known to the master, or which he had the means of knowing.

2. That proper precautions were not observed by the master in casting the lead and having the change of water ascertained and reported him.

3. That he kept the vessel so near the shore as to render her situation highly hazardous under any degree of care and watchfulness, which was an act of great remissness on his part, on a strange coast and without the aid of a pilot.

4. That if, within 10 minutes after sounding 10 fathoms, 7 were reported, it was his duty to put the ship about in the shortest time practicable.

5. But if 10 fathoms had not been cast, and 7 fathoms was the first throw of the lead, he allowed from 10 to 20 minutes to elapse after that before taking steps to change his course.

6. That these facts show remissness and negligence on the part of the master, and that the wreck of the vessel is owing to that conduct.

7. That there is no ground to impute barratry or wrongful intent to the master.

The inquiry then arises, upon this conclusion of facts, how far the rule of law which renders the recovery of wages by seamen dependent upon the arrival of the ship in port applies to a case of wreck occurring through the inattention and remissness of the master, without any positive fault of commission on his part, or intentional omission to perform his duty. The rule of law declared by the authorities, "that if the ship perishes at sea the mariners lose their wages" (Moll. De J. Mar. B. 2, c. 3, §§ 7, 10; 1 Sid. 179; Weshett, 591), is not aplied in its absolute sense by continental jurists,—they contending that seamen are to be awarded their full wages, when the loss of the vessel arises from her unseaworthiness or the misconduct of the master. This proposition is made part of the edict in article 3, tit. 4, liv. 3, of the Ordinances of Marine, and is repeated in the French Code de Commerce, tit. 5, art. 252. Velim and Pothier, although differing as to the amplitude of the indemnity secured seamen of different classes, concur in applying

the provision of the article to every loss of the voyage, arising from the act of the owner or master. 2 Velim, 688; 5 Poth. Mar. Cont. 384, 386. Unseaworthiness of the vessel in any particular required by law is regarded as the act of the owner, and he becomes responsible as for positive misconduct. Abb. Shipp. 218, 259. And Abbott, in his early editions, adopted the doctrine, in broad terms, that when the loss of the ship is owing to the fault or misconduct of the master, the seamen shall have their wages. This the supreme court of this state regarded as the general law. 3 Johns. 520. The position is not restated in the edition of Abbott last commented upon by Judge Story, it not then having been recognized by any express decision of the English courts. That this is the general rule of the maritime law is clearly shown by the provisions of foreign edicts, and the opinions of eminent jurists (Jac. Sea Laws, 152–154; The Saratoga [Case No. 12,355]; 3 Kent, Comm. 186; Romus, No. 43), and the decisions of the English admiralty have more recently recognized the cogent equities of the claim of seamen to wages, when the voyage or vessel may be lost without fault of theirs, or not through inevitable accident or vis major (1 Hagg. Adm. 232; 2 Hagg. Adm. 158). The general principle to which those authorities tend is that in respect to seamen, as in all other bailments for hire, they are entitled to compensation for services performed under the contract, without regard to the consideration whether the services are profitable to the employer. Pitman v. Hooper [Case No. 11,185].

The response that "freight is the mother of wages," not unfrequently employed to defeat a recompense for the most meritorious and hazardous services, should be ranked with those cant phrases, founded neither in fact nor reason, when applied to the ordinary contracts of hiring, and which are sometimes perverted from figures of speech, which they are merely, to rigid rules of law. We may take a just pride in the fact that the American courts have ever preceded the English in adopting, with the commercial and equity codes, doctrines resting upon principles of unusual application, and not dependent upon mere technical rules or the crude dicta of judges. I am persuaded the sound conclusions of the law merchant, supported by the most urgent equity, is that seamen are to recover wages upon the terms of their agreement, to a like extent as if the contract was with any other class of laborers, notwithstanding the wreck of the vessel and loss of the voyage, unless such misfortune was the result of inevitable accident in no way produced by the fault of owner or master.

Placed on this basis, the liabilities of mariners, onerous and peculiar as they are to an oppressive extent, become in a degree relieved and mitigated under the rights accruing in correspondence thereto. Here the occurrence is not merely an error of judgment, a mistake in opinion on a faithful view and consideration of the facts then known to the master, or which he is held in law to have known (which I am by no means called upon or prepared to pronounce would be a cause for giving wages), but the case takes a position beyond that, and shows a positive remissness and inattention on the part of the master, contrary to the practice of heedful navigators in like circumstances, and disregardful of facts which, in the exercise of ordinary discretion, should have awakened him to that commonplace prudence sufficient, in this instance, to have saved the ship. The Fortitude [Case No. 4,953.] The decree for wages will go upon the broad doctrine that the ship was not lost by either of these agencies, "tempest, fire, enemies," &c., declared by the law to take away the seamen's right to antecedent wages, and upon the principle, also, that it no more affects their right to wages in this case, that the ship failed to make freight, than it would if the owners had sent her home in ballast. Their services were fully and faithfully performed. The owners' loss in respect to freight, if any has been sustained, accrued from the unskilful or inattentive navigation of the vessel, and he cannot render the seamen guarantors for the capacity and fidelity of the master to the value of their wages, though the law may place them under that liability in respect to shipwrecks from inevitable perils of the seas. 3 Kent, Comm. 187, 194; Abb. Shipp. 447, note 2.

But, though the court places its decision directly on that point, it cannot overlook another consideration upholding the right of the libellants to recover, which may sustain the decree, if the reasons assigned for it should not be found entitled to the weight given them here. After the vessel grounded, the crew were still detained under the command of the captain, and put to such services in behalf of the vessel as they could render, until they were subsequently discharged on shore, on Absecom beach. It is incontrovertible, upon cases already cited, that the seamen could be entitled to compensation out of the wreck saved with their assistance, though all the freight be lost, and from all the freight carried on delivery of any part of the cargo, to the full amount of the wages in arrear, without abatement for salvage compensation in respect to cargo. Those principles of law, however, are generally accepted as subordinate to the doctrine that it is indispensable to the right of wages that some part of the ship or cargo should be rescued from the wreck, and would not therefore, as already shown, if admitted with that qualification, aid the libellants in the present case. But it seems to me they are entitled to claim a principle still further conservative of their rights, which is that having fully performed the contract stipulated in the shipping articles on their part, and having continued under the orders of the master, until formally

discharged by him on shore, they can recover compensation for all those services without regard to the loss of ship and cargo. Their case contains an important feature, not noticed in the general rule ordinarily stated in the books, that the policy of the maritime law subjects them to the risks of the voyage, and to the loss of wages when no freight is earned, which is their remaining under the command of the master and formal discharge in a home port after the wreck of the ship.

The supposed rule of the maritime law was first questioned (Two Catharines [Case No. 14,288]), and directly impugned by Lord Stowell (1 Hagg. Adm. 227), in cases of wreck, and Judge Story has developed the principle in a forcible train of argument and illustration (Pitman v. Hooper [Case No. 11,185]); and, upon the English and American authorities, the contract of the seamen, when the terms are to their advantage, is to be enforced in their behalf, irrespective of the provisions of the declarations of the Maritime Code, however expressed, or wherever collected, and can only be made subordinate to the authority of express statutes. The shipping articles in this case were executed July 18, 1840, and stipulated the libellants should serve on board the barque Florida, bound from the port of New York to a port or ports east of Cape of Good Hope, and such other ports or places as the master may direct, for the term of three years, unless sooner discharged. It was further agreed that in case of desertion, death, or impressment the wages should cease. Another stipulation was "that each seaman or mariner also shall well and truly perform the above-mentioned voyage (provided always that there be no desertion, plunderage, or embezzlement or other unlawful acts committed on said cargo or stores) shall be entitled to the payment of the wages or hire that may become due to him, pursuant to this agreement," with a proviso only that in cases of disobedience of orders, or absence without leave, the wages shall be forfeited. The vessel was lost September 21, 1842, leaving 10 months of the period of hiring yet unexpired. This is not an engagement of the crew for the voyage merely, which could terminate with the voyage, either by its being performed in full or by being broken up. The common-law courts hold these written agreements conclusive even against seamen (14 Johns. 260; 1 Cow. 543; 13 Johns. 390; 2 Bos. & P. 116); and they are so also before admiralty tribunals, unless some undue advantage has been taken of the seamen, or they contain engagements in contravention of the common or statute law (2 C. Rob. Adm. 241; 6 C. Rob. Adm. 207; Id. 350; Edw. Adm. 38; The Langdon Cheves [Case No. 8,063]). It would be difficult to say, upon the terms of this contract, that it was dissolved by the wreck of the vessel, or any other breaking up of any part of the voyages contemplated, or at any period of them. The reservation of the right to discharge the crew imports that it was intended to provide against contingencies that might render it desirable not to retain them the full term of three years. The subsequent stipulations are in accordance with this view of the agreement, for, while the master has the power to relieve himself and the owners from the contract by discharging the crew, the agreement specifically stipulates that they shall receive their wages, unless forfeited through their own misconduct, and thus affords a strong presumption that no other event should work that consequence to the crew. A decree will be entered in the cause that the libellants recover their wages, after the allowance of all advances and payments.

Case No. 3,633.

DAVIS v. FIRST BAPTIST SOCIETY OF ESSEX.

[2 Browne, Nat. Bank Cas. 110;[1] 44 Conn. 582.]

District Court, D. Connecticut. Nov. Term, 1877.

TRUSTEE—EXEMPTION FROM PERSONAL LIABILITY, HOW TO APPEAR—RELIGIOUS SOCIETY HOLDING STOCK BOUGHT WITH BEQUEST.

1. A trustee, holding shares in a national bank, cannot avail himself of his exemption from personal liability for debts of the bank, unless his trusteeship appears on the books of the bank.

2. With a bequest of money a religious society purchased, and held in its own name, shares in a national bank. The society had other donations otherwise invested. *Held*, that the society was not a trustee, but an ordinary stockholder, and liable to assessment for debts of the insolvent bank.

Action by [Theodore M. Davis] the receiver of a national bank against stockholders to recover the amount of an assessment for the debts of the bank.

T. M. Davis and W. Howe, for plaintiff.

L. E. Stanton, for defendants.

SHIPMAN, District Judge. This is an action at law brought by the receiver of the Ocean National Bank of the city of New York, to recover from the defendants an assessment upon their stock in said bank. The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court. All the allegations of fact which are contained in the plaintiff's declaration were admitted by the defendants to be true and are found to be true. The certificate of stock which was delivered to, and was accepted and is now held by, the defendants, is in the name of the First Baptist Church and Society of Essex, individually, and not as trustees. The stock stands, and has always stood, since its purchase by the defendants, upon the stock ledger and the stock books of said bank in the name of the de-

[1] [Reported by Irving Browne, Esq., and here reprinted by permission.]

fendants, without indication or notice that they are, or were at the time of the purchase, trustees. The foregoing facts were proved by the plaintiff. It was not claimed that the bank was ever notified that the defendants claimed to be trustees.

The defendants, as a matter of defense, offered to prove the following alleged facts, which are set forth in the notice annexed to the plea of the general issue. To the admission of this evidence the plaintiff objected, upon the ground that it was irrelevant and immaterial and constituted no defense against the admitted facts. The defendants offered to prove that said thirty-six shares of the capital stock in the said Ocean National Bank, described in the plaintiff's declaration to have been owned or held by the defendants as shareholders in said bank, "were purchased and held by the defendants only as trustees, and were never in any manner owned or held by them in their individual capacity, either as a society, corporation, or as individuals, but that said shares were in fact purchased wholly with funds which were given by William Williams of Saybrook, Connecticut, deceased, in and by his last will and testament, which was dated December 31, 1834, as follows, to wit: One-nineteenth of his estate to the Second Baptist Church and Society in Saybrook, and their successors forever, in trust to be put to interest with good and sufficient securities, or invested in stocks, the use of which shall be applied annually to defray the expenses of said society; always provided that the salary shall be not at any time less than four hundred dollars the year, including house rent; and another nineteenth of his estate, less three hundred dollars, given to the same persons and their successors forever in trust to be invested as aforesaid, and the use of which is to be applied from time to time to the cause of missions. The defendants will prove that when said stock was purchased the defendants were and now are the successors of said Second Baptist Church and Society in Saybrook in said trust, and that on or about the 27th day of January, 1867, a committee of the defendants invested in the purchase of said thirty-six shares, the sum of about $1900, the same being wholly derived from said bequest of William Williams, and being the whole of the funds derived from said Williams, viz. two-nineteenths of his estate, less three hundred dollars, and held by the defendants only under said trust." The defendants further offered to prove "that, by the failure of said Ocean National Bank, the defendants, trustees as aforesaid, have wholly lost all of the trust fund received under said will, and have not now in their hands or possession any property or estate, except such as was given and granted to them by other grantors and donors in trust for charitable and pious uses, and none which is liable to be taken to pay the assessment set forth in the plaintiff's declaration." This evidence was excluded. The defendants duly excepted to the ruling of the court excluding said evidence.

The foregoing constituted all the facts which were proved, and which were offered to be proved, upon the trial. The evidence was excluded upon the ground that the facts which were offered to be proved constituted no defense against the action. Section 5150 of the Revised Statutes, the personal liability section of the act authorizing the establishment of national banking associations, is a part of the charter of each national bank. It "pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee, the stockholders, by subscribing for stock and becoming members of it, have assented." Hawthorne v. Calef, 2 Wall. [69 U. S.] 22. A stockholder of record is liable to an assessment although he has sold his stock, if such transfer has not been made upon the books of the bank. Pledgees of stock who hold the legal title and are stockholders of record are liable, although the pledgor may be the actual owner of the stock. So long as stockholders permit themselves to appear upon the record as stockholders, their personal liability continues. The creditors have a right to rely upon the guarantee of those who continue to hold themselves out as stockholders. In ordering an assessment, the stock certificates and the stock ledger are the basis upon which the comptroller of the currency, in the absence of fraud or mistake, must rely. It is impossible for him to ascertain the equities of each stockholder, and if any stockholder could relieve himself from the consequence of his laches by showing that another unknown person was the owner of the stock, creditors might have payment of their debts indefinitely postponed, and an unjust burden might be imposed upon the acknowledged stockholders. Some definite and conclusive means of information as to the ownership of stock for the purposes of assessment ought to be furnished to creditors, to the receiver, and to the comptroller. This information should be found, in the absence of fraud or mistake, in the certificates of stock, and in the stock books of the bank. But the defendants insist that inasmuch as section 5151 frees from personal liability persons who hold stock as trustees, extrinsic evidence can be resorted to for the purpose of proving the trust, although the certificates and the stock ledger do not disclose trusteeship. Creditors have a right to know who have pledged their individual liability. If the trusteeship does not appear upon the books of the bank, they have a right to infer that the stockholder is personally liable. If a trustee wishes to disclose his trusteeship, there is no difficulty in giving notice upon the books of the bank. If he does not disclose his trusteeship, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great

labor, expense and delay, if persons who appeared upon the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock as executors, or guardians, or trustees. If A. is permitted to prove that he holds his stock as trustee for B., and B. is permitted to show he is trustee for A., litigation would be protracted, individual stockholders would suffer, and the strength of the personal liability section might be seriously impaired. Existence of the trust should appear upon the evidence of ownership. Adderly v. Storm, 6 Hill, 628. If it does not appear, and no fraud or mistake is imputed to the bank, the trustee is in fault, and not the bank, nor the creditors. As between two persons otherwise equally innocent, the one who is guilty of laches whereby the other was misled should suffer. Id.; Stover v. Flach, 30 N. Y. 64; Crease v. Babcock, 10 Metc. [Mass.] 525; Hale v. Walker, 31 Iowa, 344. Again, the liability of the stockholder arises from his virtual contract, evidenced by his subscription to the stock, or by his becoming a stockholder. He thereby assents to become security to the creditors for the payment of the debts of the bank. It is not in form a contract, but is an agreement resulting from the assent of the parties to the statutory liability. "It does not exist solely as a liability imposed by statute; it is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he consents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation." Loury v. Inman, 46 N. Y. 125; Hawthorne v. Calef, 2 Wall. [69 U. S.] 22; Corning v. McCullough, 1 Comst. [1 N. Y.] 47. The defendants, by becoming stockholders, and by the acceptance of a certificate which shows that they hold the stock in their own right, have entered into this contract of personal liability. The contract is a completed one, and cannot now be changed against the will of one of the parties into a contract of different character. Let judgment be entered for the plaintiffs for the sum of $720, with interest on $360 thereof from February 26, 1877, and upon $360 thereof from April 26, 1877, at 6 per cent.

Case No. 3,633a.

DAVIS et al. v. FIVE HUNDRED AND SEVENTY-FOUR BAGS OF COFFEE.

[N. Y. Journal of Commerce, May 26, 1862.]

Circuit Court, S. D. New York. May 24, 1862.

SHIPPING—CHARTER PARTY—BILL OF LADING—FREIGHT—COSTS.

[1. A charter party from New York to Rio Janeiro and back made the cargo subject to the round freight. The charterers at Rio shipped coffee owned in equal shares by themselves and the consignees, under a bill of lading signed by the master, upon which the consignees advanced more than the value of the charterers' share. There was no evidence that the consignees had any knowledge of the charter party. *Held*, that the bill of lading controlled, and that the coffee was liable only for the freight stipulated therein.]

[2. On a libel for freight under a charter party, claimants tendering freight due under a bill of lading, but not having brought the money into court until after appeal by them, allowed, on reversal, only costs of appeal.]

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

[Libel in rem by Ira B. Davis and others against 574 bags of coffee for freight due under a charter party. Troost, Schroeder & Co. appeared as claimants. A decree was entered for libellants (case unreported), and claimants appealed.]

NELSON, Circuit Judge. This is a libel filed by Davis and others, owners of the vessel G. H. Townsend, to recover some $3,000 balance of freight upon a charter party from this port to Rio Janeiro and back. The claimants resist the claim, on the ground that the coffee was shipped to them as consignees, by the house of Schroeder & Co., of Rio, under a bill of lading signed by the master of the vessel, in the usual way, by which he agrees, among other things, to deliver the coffee to the consignees or their assigns, they paying freight for the said goods at forty-five cents per bag; that they had tendered the amount of the freight, and were ready to pay the same. There is some confusion in the facts of the case, as it appeared in the court below; but, on the appeal, a new answer was filed, and new proofs taken, which have cleared it of many of the imperfections and obscurities in that court. The libellants rely, and must rely in order to succeed, upon the allegations that the coffee shipped belonged to the firm of Schroeder & Co., of Rio, who, it is claimed, were the charterers of the vessel, and that, by the terms of the charter party, the cargo is made subject to the round freight of the vessel from New York to Rio and back. The claimants deny this, and set up that they were the original owners of one-half of the coffee, and the firm at Rio of the other; and that they had advanced, on this other half, one thousand pounds sterling, at the time of the shipment. And I am of opinion, upon the proofs, that this ground of defence is established; and further, that the advance of the thousand pounds exceeded the value of the moiety of the coffee, upon which it was advanced when it arrived at this port. The point, therefore, that the coffee belonged to the charterers, has failed. It was insisted on the argument, on the part of the libellants, that there was some sort of partnership interest between the house of the claimants and that at Rio; but the proofs furnish no ground for the argument. Indeed, the contrary is expressly proved. The shipment by the house at Rio was made upon the orders of the house in New York, and the advance

of the one thousand pounds by their agent at Rio, whose authority is not questioned. It is well settled in this court, and has been recently affirmed in the supreme court, that a ship, chartered as the G. H. Townsend was, may be set up as a general ship by the charters: and that as to goods shipped by a merchant, in the usual way, under bills of lading signed by the master, the contract in the bill of lading governs, and not the charter party. This principle covers the one moiety of the coffee, as the shipment was made by the claimants through the house at Rio. The other moiety stands upon different ground, as that was shipped by the charterers. If there was nothing else in the case, this moiety would be chargeable for the freight under the charter party. But an advance was made upon this, as we have seen, by the claimants, on the faith of the bill of lading; and there is no evidence in the case that they or their agent had any knowledge at the time of the charter party; and hence, having advanced their money bona fide, we think they have the superior equity. They had a right to assume the master was authorized to sign the bill of lading, and that it bound his owners; and, of course, that the only lien for freight was that specified therein. As we have said, this advance exceeded the value of this moiety of the coffee. The claimants tendered the freight, under the bill of lading, before the filing of the libel in the court below, which was refused; but the tender was not followed by bringing the money into court. It has been placed in the registry of this court since the appeal by the claimants. This does not, however, supply the omission in the court below, as matter of practice. The libellants are also embarrassed in the case, as their libel is founded solely upon the charter party, without any reference to the bill of lading. We have a discretion over the costs, and think the case one in which it should be exercised. We shall reverse the decree below, with costs to the claimants and appellants, in this court only.

Case No. 3,634.

DAVIS v. FORREST.

[2 Cranch, C. C. 23.][1]

Circuit Court, District of Columbia. June Term, 1811.

SLAVERY—PETITION FOR FREEDOM—HEARSAY AND RECORD EVIDENCE—IMPEACHING WITNESS.

1. A record of a recovery of freedom by the female ancestor of the petitioner, on the ground of her having been born free, may be given in evidence to support the petitioner's title, although the present defendant was not a party to that record; and the depositions of deceased witnesses, contained in that record, may be read as hearsay, to prove pedigree.

2. A party producing a record in evidence is not obliged to read the whole of it; but the opposite party may read it.

3. Particular acts of turpitude cannot be given in evidence to discredit a witness. The question is only as to his general character for veracity. But see Wood v. Davis, 7 Cranch [11 U. S.] 271; Henry v. Ball, 1 Wheat. [14 U. S.] 1; Davis v. Wood, Id. 6; and Mima Queen v. Hepburn, 7 Cranch [11 U. S.] 290.

Petition for freedom.

E. J. Lee, for the petitioner, offered the record of a recovery in a suit for freedom by Rosamond Bentley v. A. Addison [unreported], which THE COURT (CRANCH, Chief Judge, absent) admitted as evidence, to prove the freedom of Mary Davis, the ancestor of the present petitioner, and of the said Rosamond Bentley, who was the petitioner's aunt.

Mr. Lee, in support of his motion, contended that hearsay evidence would be admissible, and, if so, à fortiori a record which, although between other parties, goes to the same facts. Peake, Ev. 8, 9; Taylor v. Cole, cited in 7 Term R. 3, note a; and Pegram v. Isabell, 2 Hen. & M. 193.

THE COURT also suffered the depositions of witnesses, now dead, which had been taken in that suit and made part of that record, to be read in evidence as hearsay. THE COURT also suffered the defendant to read such parts only of a record which he produced as he thought proper, and said it was competent for the counsel of the petitioner to read the residue. THE COURT also admitted in evidence the record of a recovery by the petitioner's sister, Susan Davis, of her freedom, on the ground of having been freeborn.

Verdict for the defendant.

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

Case No. 3,635.

DAVIS v. GARLAND.

[5 Cranch, C. C. 570.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.

CLERK OF HOUSE OF REPRESENTATIVES — BREACH OF CONTRACT FOR PUBLIC PRINTING—PERSONAL LIABILITY.

The clerk of the house of representatives is not personally responsible in damages for refusing to give the public printing to a person to whom the preceding clerk had promised it, and, therefore, cannot be held to special bail in an action upon the case founded on such refusal.

This was a special action upon the case, in which the plaintiff [George M. Davis], in his declaration, complained, that whereas the house of representatives of the United States, at the 1st session of the 25th congress had passed a resolution that their clerk be directed to cause to be printed, a ninth volume of the laws of the United States, after the manner of the eighth volume thereof, in pursuance of which resolution, the then clerk, one Walter S. Franklin, in the year 1838, had, in

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

his capacity of clerk of the said house, employed the plaintiff, and agreed and contracted with him to print a ninth volume of the said laws, in the manner as resolved, and to deliver a copy of the said laws to the plaintiff, to enable him to print the same; the plaintiff in consideration thereof had made ample arrangements, and employed the means to print the said ninth volume, and was ready and willing to print the same, when the said Walter S. Franklin departed this life, and the defendant [Hugh A. Garland] was elected his successor as clerk of the house of representatives; soon after which the defendant was notified of the said contract, and of the plaintiff's readiness and preparation to comply with the same; and the plaintiff demanded of the defendant a copy of the said laws, for the purpose of printing the same, according to the said resolution and contract; but the defendant intending to injure the plaintiff, and to deprive him of the benefit of the said contract, refused to deliver to the plaintiff a copy of the said laws, and prevented plaintiff from printing the same; by means whereof he lost the printing of the said ninth volume of the said laws, and the benefit of the said contract, and has lost his time, trouble, and money in preparations for complying with the said contract, &c. to the value of $2,500. The second count contains an additional averment, that the defendant after having had notice of the contract with the plaintiff, and his readiness to comply with it, gave the job to another person. The facts were substantially verified in the plaintiff's affidavit, and the further fact that the persons whom the plaintiff had employed to do the work, had purchased paper to the amount of $300; and that he had sustained damage, by the defendant's refusal, &c. to the sum of $2.500.

Mr. Key moved for leave to enter an appearance for the defendant without special bail; upon the ground that it appeared, on the face of the declaration, and by the plaintiff's affidavit, to be a public contract, upon which the defendant was not personally liable.

Mr. Morfitt, for the plaintiff, contended that this action was not founded on the contract, but on the tort in the defendant's not delivering to the plaintiff a copy of the laws, which it was his duty, as a public officer, to deliver, to enable the plaintiff to comply with the contract which he had made with his predecessor.

But THE COURT (THRUSTON, Circuit Judge, absent) refused to require special bail; considering it as a public contract made under a resolution of the house of representatives, and for which neither the present defendant, nor his predecessor, was personally liable.

[NOTE. The case was subsequently tried on the merits, and a verdict given for plaintiff, which the court refused to set aside. Davis v. Garland, Case No. 3,636. But, on a writ of error to the supreme court, the judgment was reversed. Garland v. Davis, 4 How. (45 U. S.) 131.]

Case No. 3,636.

DAVIS v. GARLAND.

[1 Hayw. & H. 125.][1]

Circuit Court, District of Columbia. Jan. 4, 1843.[2]

PLEADING AT LAW — INSUFFICIENT PLEA — AIDER BY VERDICT.

1. When a declaration sounds in tort and the plea is non-assumpsit, such a plea is bad on demurrer.

2. If not demurred to and the case goes to trial, the defect is not cured by verdict.

There were two counts in the declaration, both setting forth the same circumstances in a different manner, charging the defendant with a wrongful and injurious neglect and refusal to furnish a copy of certain laws to the plaintiff, as had been agreed upon by Franklin, the predecessor of the defendant. The plea of the defendant was non-assumpsit.

Henry M. Morfit, for plaintiff.

F. S. Key, for defendant.

The cause went to trial on the issue thus made up. Certain instructions were asked by the defendant's counsel, but refused by the court, and exceptions taken thereto. The verdict of the jury was, "that the said defendant did assume upon himself in manner and form, as the aforesaid plaintiff above against him, hath complained, and they assess the damages of the said plaintiff, sustained by reason of the non-performance of the promise and assumpsit aforesaid, to the sum of $1,900 current money."

The defendant, by his counsel, moved in arrest of judgment for the following reasons: Because there is no cause of action stated in the second count of plaintiff's declaration. Because there is a general verdict, and one count is bad.

Motion overruled and judgment entered upon the verdict.

This case was taken to the supreme court of the United States, on exceptions, where the judgment of the circuit court was ordered to be reversed and the cause remanded for further proceedings. See [Garland v. Davis] 4 How. [45 U. S.] 131.

NOTE. Mr. Justice Woodbury, in delivering the opinion of the court in 4 How. [45 U. S.] 143, said: "The declaration is an action on the case, sounding in tort. It sets out no contract except by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We

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

[2] [Reversed in 4 How. (45 U. S.) 131.]

are required to take this view of the declaration, not only by the averments in it, but by both the present and past positions of the counsel for the plaintiff, that it was intended to be founded on a misfeasance. The plea, however, instead of being 'Not guilty,' as was proper in such case, is non assumpsit, and the plaintiff below, not demurring thereto, nor moving for judgment notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue." And on page 147 he said: "In Patterson v. U. S., 2 Wheat. [15 U. S.] 224, Judge Washington lays down the whole law precisely as we view it in respect to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of the declaration."

DAVIS (GARROW v.). See Case No. 5,257.

Case No. 3,637.

DAVIS v. GEORGETOWN BRIDGE CO.

[1 Cranch, C. C. 147.][1]

Circuit Court, District of Columbia. Dec. Term, 1803.

ASSUMPSIT AGAINST CORPORATION—ACCOUNT STATED—EVIDENCE.

Indebitatus assumpsit will lie against a corporation aggregate upon an account stated by their treasurer, without examining him as a witness.

Indebitatus assumpsit for work and labor by the plaintiff [Thomas Davis] as a blacksmith; plea, non assumpsit and issue. 1st count, a certain sum. 2d, quantum meruit. 3d, insimul computasset. The plaintiff produced an account stated, and proved it to be in the handwriting of Walter Smith, the treasurer of the company, and certified by the three directors, Templeman, Lowndes, and Deakins.

Mr. Mason, for defendants, objected to the reading of the account to the jury as evidence, because Walter Smith was a competent witness, and his testimony could be procured. That the best evidence ought to be had; although the account is in the handwriting of Walter Smith, yet that does not authorize the reading of the account. The account is certified by Templeman, Lowndes, and Deakins, but it is not proved that they were directors; nor that Smith was treasurer at that time; and if he was, he had no right to bind the company. Mr. Mason also contended that the company cannot assume by parol; and cited Bac. Abr. tit. "Corporation," D, p. 8.

Mr. Morsell, contra. The objection does not go to the merits of the case. Every corporation aggregate has the power of appointing all necessary officers. Bac. Abr. tit. "Corporation," E; Rex v. Bigg, 3 P. Wms. 419. The Bank of England has no express power to issue notes; nor has the Bank of Columbia, nor the Bank of Baltimore, nor any of the banks of the United States. Assumpsit lies against a corporation, upon an implied promise. Imp. Mand. 85.

THE COURT (nem. con.) permitted the account to be read in evidence; and instructed the jury that if they should be of opinion from the evidence that the account was stated in the handwriting of Walter Smith, and that he was the treasurer, or authorized to settle their accounts, the account was proper evidence in support of the issue. And that if they should also be of opinion that Templeman, Lowndes and Deakins were directors at the time of certifying the account, or were the authorized agents of the company for the purpose of making contracts, their signature of the account was also proper evidence in support of the issue.

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

DAVIS (GODDARD v.). See Case No. 5,491.

DAVIS (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,589.

DAVIS (GRAY v.). See Case No. 5,715.

DAVIS v. GREENE COUNTY COURT. See Case No. 15,259.

DAVIS v. HATCHER. See Case No. 3,610.

DAVIS (HAYDEN v.). See Case No. 6,259.

DAVIS (HERIOT v.). See Case No. 6,404.

DAVIS (JONES v.). See Case No. 7,460.

Case No. 3,638.

DAVIS v. KENDALLVILLE.

[5 Biss. 280.][1]

Circuit Court, D. Indiana. May Term, 1873.

MUNICIPAL BONDS—RECITALS—BONA FIDE HOLDER—SUBSCRIPTION BY CITY—HOW PROVED.

1. Where subscriptions of private citizens to the capital stock of a railroad corporation are taken up, and a subscription of the city substituted by consent, such an arrangement does not invalidate the city bonds unless the citizens had been deceived, or had voted or petitioned for the subscription under a misconception of the facts.

2. Where bonds bear upon their face the statement that they have been issued in pursuance of law, and under the contingencies required by law, a bona fide holder is not bound to go back and examine all the intermediate steps taken prior to their issue.

3. He is not presumed to have notice of everything which takes place before the issuing of the bonds; and an averment that the proceedings of the city council were spread upon the records of the city is not sufficient to charge him with notice

4. A resolution of a common council declaring the subscription, and approved by the mayor, is sufficient to show a subscription by the city.

This was a suit by Julian J. Davis, as the holder of a number of coupons attached to a series of bonds amounting to $83,000, issued by the defendant to the Grand Rapids and

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

Indiana Railroad Company in payment for a subscription of stock to a like amount made by the city. One of the bonds was filed with the complaint, from the face of which it appeared that the bonds were for a "six per cent. loan in aid of the Grand Rapids and Indiana Railroad, authorized by a petition of a majority of the resident freeholders of said city, and resolutions and ordinances of the common council thereof in pursuance of law." The several pleas are stated in the opinion. Demurrer to pleas.

C. P. Jacobs, for plaintiff.

The common council having determined that the requisite number of citizens had petitioned, plaintiff had a right to rely on their action in making the subscription. Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Bissell v. Jeffersonville, 24 How. [65 U. S.] 287.

L. M. Winde and James A. Fay, for defendant.

The city having no power to use money for purposes other than what are specified in its charter, cannot borrow for other purposes. Such contract would be ultra vires and void. Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 110; Madison & I. R. Co. v. Norwich Sav. Soc., 24 Ind. 457; Halstead v. Mayor, etc., of New York, 3 N. Y. 430; Hodges v. City of Buffalo, 2 Denio, 110. Power to borrow money for public purposes on city bonds, does not confer power to aid a railroad. Chamberlain v. City of Burlington, 19 Iowa, 395. A contract for improvement by the city without formalities directed by the charter is void, and the contractor can neither recover on it nor on the common counts. Johnson v. City of Indianapolis, 16 Ind. 227; City of New Albany v. Sweeny, 13 Ind. 246; Cowen v. West Troy, 43 Barb. 48. If a contract is void, the bonds issued in pursuance of it are also void, even in the hands of an innocent holder. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676. If the precise mode of entering into the contract directed by the charter is not complied with, the contract will be void. Johnson v. City of Indianapolis, supra; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, 587; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127. For further authorities that a city cannot contract beyond the power given it, see Western Mass. Ins. Co. v. Duffy, 2 Kan. 352; Board of Com'rs of Tippecanoe Co. v. Cox, 6 Ind. 405; City of La Fayette v. Cox, 5 Ind. 39; Kyle v. Malin, 8 Ind. 37; City of Aurora v. West, 22 Ind. 96; Starin v. Town of Genoa, 23 N. Y. 439; Gould v. Town of Sterling, Id.; McSpedon v. Mayor, etc., of New York, 7 Bosw. 601. "The protection which commercial usage throws about negotiable paper can not be used to establish the authority by which it was originally used." Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676, 681; Clark v. Polk Co., 19 Iowa, 248, 252; Brady v. Mayor, etc., of New York, 20 N. Y. 312; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125.

DRUMMOND, Circuit Judge. It is not disputed that under the statute the city had the right to borrow money and subscribe for stock in the railroad company, and to issue bonds for stock. I assume, then, that the city had this power. This being so, and the bonds bearing upon their face the declaration that they were issued in aid of the railroad company, and authorized by a majority of the freeholders of the city, they were prima facie issued in conformity with the law.

Various defenses have been set up in the case, but they all depend on a state of facts substantially as follows: There had been a subscription to the stock of the railroad company by certain individuals, citizens of Kendallville and the adjoining country, through Mr. Samuel Hanna, the president of the company, to the amount of $83,000; and by an arrangement between the railroad company and the city, it was understood that these private subscriptions should be taken up, and the subscription of the city substituted in their place by consent. All the defenses proceed upon this agreement as a basis, and that it was the consideration and motive which induced the city to subscribe for the stock. In some of the pleas it is averred that this was the only consideration or inducement for the subscription by the city.

It seemed to be taken for granted during the argument, by defendant's counsel, that if the individual subscriptions were surrendered and the subscription by the city substituted in their place, that this ipso facto would be a defense. I am not prepared to admit this without qualification. There might be circumstances which would render such a subscription by the city illegal, and be an answer to the action, but they should be such as would show that some unfair advantage had been taken of the city or the citizens in the transaction.

If there were certain stock subscriptions of the citizens of Kendallville made in aid of this railroad, it would seem there could be no objection to the company's releasing these private subscriptions if all parties consented. No one could well make complaint in such case, and if the city should then subscribe for stock in the company, and if the subscription of the city was in fact substituted for the private subscription, and the citizens agreed to it, no one would be injured. If there was some secret trick by which the citizens were deceived, and the matter had been so arranged that the citizens had voted or petitioned for the subscription under a misconception of the facts, it might be inoperative. But if the facts were well known, and all parties understood it, I cannot see any objection to a subscription by the city on such a basis.

So, in examining the defenses, in addition

to what has been stated, I must consider that if the matter was understood all around there could be no fraud or wrongful act in making the subscription. And in view of the many cases decided by the supreme court of the United States on the question of the validity of municipal bonds, I have to assume this as the settled law—that where bonds bear upon their face that they have been issued in pursuance of law, and under the contingencies required by the law, and which have been left to the local officers to determine, and the bonds or coupons have come into the hands of a holder for value, it is not necessary for him to go back and examine all of the intermediate steps taken, to see whether there has been any flaw or irregularity. The only question is one of power, and if the power is given under certain circumstances, I must assume after the bonds are issued and held bona fide, that they were rightfully issued. It follows, then, that the special defenses should allege something more than the surrender and substitution already mentioned. For when the stock was issued and the city clothed with the rights of a stockholder, it is not enough to say that these were the motives upon which the subscription was made and the bonds issued. A party is not presumed to have notice of everything which takes place before the issuing of the bonds, and it is not enough to say that the proceedings of the city council were spread upon the records of the city. The averment ought to be that the plaintiff had actual knowledge of matters which might constitute the defense.

The first plea is the general denial, which presents a proper issue.

The second plea avers that Mr. Hanna had procured these individual subscriptions of citizens, which were afterwards canceled, and the city issued its bonds as set forth in the record, a copy of which is attached to the pleas, and of which therefore we can take notice; that plaintiff took the coupons after they became due, and therefore had notice, etc.

This defense does not go far enough. It may be true, and yet the subscription by the city be legal. The record of the proceedings clearly shows a subscription by the city; by resolution of the council and approval of the mayor, to the stock of the company. Some objection is taken in the argument that this does not show a subscription. Why not? What more solemn step in the matter could the city take than that set forth in the resolutions and ordinances adopted by the council?

The third defense is similar, and alleges notice by the city's record, which is insufficient. In fact, all the pleas numbered five, six, seven, eight and nine are defective for a similar reason.

The fourth plea avers notice, but does not aver facts sufficient to constitute a defense. I hold there must not only be the substitution of one subscription for another, but there must also be some deceit practiced upon the citizens, for if they do it with their eyes open no one can make any objection.

If there were a plea that this agreement was the only consideration for the bonds; that the city made no subscription and received no stock; and that plaintiff had notice,—it might be good. But here the fourth plea in fact admits, by not denying it, that the city received the stock of the company in exchange for the bonds, which stock became its property. This stock was a valuable consideration. The plea is therefore insufficient; and it may be added that the averment in one of the pleas, that the plaintiff took the coupons after they were due, is not enough without the other averment that some fraud or deceit had been practiced upon the citizens or the city. It is said that the city bonds would be more available to the railroad company than the private subscriptions of the citizens, and this may well be true, and yet if the citizens, knowing all the facts, did not at this time complain, they can not now be heard.

The tenth plea is held to be bad for the reasons given by the court in the case of Payson v. Withers [Case No. 10,864].

The demurrers of plaintiff to the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth pleas of the defendant are therefore sustained. If the defendant's counsel think they can make the pleas sufficient by amendment they may take reasonable time to do so, but it may be a serious question whether the city's liability is not fully fixed by its records.

NOTE. A state legislature has the right, unless specially prohibited by the constitution, to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds therefor. If such authority is conferred to be exercised in a special manner, and it appears upon the face of the bond by recitals that the power was exercised in the manner required, proof that any or all of such recitals are incorrect will not constitute a defense to the bonds in the hands of a bona fide holder. St. Joseph Tp. v. Rogers, 16 Wall. [83 U. S.] 644. Though mere informalities in the issue of municipal bonds, avail nothing as against bona fide holders, yet where the bonds are issued without any authority or right, though reciting on their face facts essential to their due issuance, they are void as against everyone. Dill. Mun. Corp. § 108; Pendleton Co. v. Amy, 13 Wall. [80 U. S.] 297, 304; Supervisors of Marshall Co. v. Cook, 38 Ill. 44; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; U. S. v. City Bank of Columbus, 21 How. [62 U. S.] 356, 364; Starin v. Town of Genoa, 23 N. Y. 439; Gould v. Town of Sterling, Id.; contra (seemingly), Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 6; Bissell v. City of Kankakee, 64 Ill. 249. Consult also Mygatt v. Green Bay [Case No. 9,998]; Luling v. Racine [Id. 8,603]; Schenck v. Marshall Co. [Id. 12,449]; Goedgen v. Manitowoc Co. [Id. 5,501]; Nugent v. Putnam Co. [Id. 10,377]; Portsmouth Sav. Bank v. Yellow Head [Id. 11,296]; and notes to those cases.

DAVIS (LAWRENCE v.). See Case No. 8,137.

Case No. 3,639.

DAVIS v. LESLIE.

[1 Abb. Adm. 123.][1]

District Court, S. D. New York. Jan., 1848.

ADMIRALTY—PLEADINGS AND PROOF—AMENDMENT—JURISDICTION AS BETWEEN FOREIGNERS—SEAMEN'S WAGES—LOSS OF SHIP.

1. In admiralty no decree can be rendered upon proofs merely, when the subject-matter of those proofs is not embraced within the pleadings. The decree must conform to the allegations of the parties.

2. The maritime courts of this country and of England are not without jurisdiction over actions, whether in rem or in personam, between foreigners.

[Cited in Bucker v. Klorkgeter, Case No. 2,083; The Becherdass Ambaidass, Id. 1,203.]

3. But as a general rule, both the American and the English courts will decline to entertain such actions, excepting where it is manifestly necessary that they should do so, to prevent a failure of justice.

[Cited in Bucker v. Klorkgeter, Case No. 2,083; The Russia, Id. 12,168; Muir v. The Brisk, Id. 9,901; The Becherdass Ambaidass, Id. 1,203; Slocum v. Western Assur. Co., 42 Fed. 236. Criticised in The Hermine, Case No. 6,409.]

4. Act 7 & 8 Vict. c. 112, § 17, authorizing the recovery of seamen's wages notwithstanding the loss of the ship before earning freight, provided the seaman shall produce a certificate to the fact that he exerted himself to save the ship, cargo, &c.,—does not operate to create a new right of action formerly unknown, but only by way of removing a disability which the rules of maritime courts previously imposed. Hence the action, in such cases, is not upon the statute, nor upon any right created thereby, but upon the contract to pay wages.

5. In an action for wages, brought since Act 7 & 8 Vict. c. 112, the production of the certificate mentioned in the act is not required as an absolute condition precedent to a right of recovery by seamen, but is directed as a mode of proof which shall be sufficient, other legal means of evidence to show the fidelity of the seamen, and their title to wages, not being excluded.

6. After a full hearing, and the decision of the court that the action is not sustained by the proofs, as the pleadings stand, it is competent to the court to permit parties to amend their pleadings, so as to embrace the merits of the case.

This was a libel in personam, by Thomas Davis against John Leslie, master of the ship Virginius, to recover seaman's wages, and the value of wearing apparel lost in the wreck of the ship. There were six other suits arising out of the same facts, and involving the same questions. Five of the seven suits were brought against the master, and two against the owner of the Virginius.

Alanson Nash, for libellant.

1. This is the case of a British vessel, commanded by a British master, manned by British seamen, and sailing under the British flag, and lost in British seas. The men are entitled to the benefit of British laws, and in particular to the privileges given by 7 & 8 Vict. c. 112, § 17, which provides that in case a vessel is wrecked or lost at sea, the men may recover their wages up to the time of the loss.

2. The law of a place where a contract is made or to be performed is to govern as to the nature, validity, and effect of such contract; that being valid in such place, it is to be considered equally valid and to be enforced everywhere, with the exception of cases in which the contract is immoral, unjust, or where the enforcing of it would be injurious to the rights of our own citizens. Lodge v. Phelps, 1 Johns. Cas. 139; Smith v. Smith, 2 Johns. 235; Ruggles v. Keeler, 3 Johns. 263; Thompson v. Ketcham, 4 Johns. 285; Sherrill v. Hopkins, 1 Cow. 103, and cases cited, Id. 105–109; Van Schaick v. Edwards, 2 Johns. Cas. 355; Masson v. Lake, 4 How. [45 U. S.] 262; Alexandria Canal Co. v. Swan, 5 How. [46 U. S.] 87. Thus a contract of marriage, though invalid by our laws, will be held valid here if valid by the law of the place where made, and if not contrary to the laws of God. Decouche v. Savetier, 3 Johns. Ch. 190. So, if one lawfully sell goods in a foreign country, in a manner or on grounds not lawful here, our courts will uphold the sale. Grant v. McLachlin, 4 Johns. 34. So the rate of interest is governed by law of place. Fanning v. Consequa, 17 Johns. 511. So of the liability of a party to negotiable paper. Hicks v. Brown, 12 Johns. 142. See, further, Masson v. Lake, 4 How. [45 U. S.] 262; Alexandria Canal Co. v. Swan, 5 How. [46 U. S.] 87. The general rule upon this subject is, that the law of the place where the contract is made, is to control its construction, unless it appear on the face of it that it was to be performed at some other place, or was made with reference to the laws of some other place; and the reason of the rule is the supposed reference which every contract has to the laws of the state or country where it is made, or where it is to be executed, whether the parties are citizens of that state or country, or not. Sherrill v. Hopkins, 1 Cow. 108. The libellant asks the court to decide these two sets of causes according to the British law, and not according to the decisions of causes in the United States courts;—they ask the benefit of the lex loci contractus.

3. The British statute being thus shown to be applicable, ought to receive an equitable construction. By equitable construction a statute may be applied to a case not within its letter, but within its meaning, on the ground that the case is within the mischief for which it was intended to provide a remedy. Platt v. Sheriffs of London, Plowd. 33; Eyston v. Studd, Id. 467. A remedial statute may be applied by equitable construction whenever it was manifestly the intention of the law-givers to embrace within the operation of the statute such a case as that in question. Remedial statutes should be construed

[1] [Reported by Abbott Brothers.]

liberally. 3 Co. Inst. 381; Van Hook v. Whitlock, 2 Edw. Ch. 304; St. Peter's of York v. Middleburgh, 2 Younge & J. 196.

4. The mischief sought to be remedied by the British statute was two fold. (1) Although the seamen might perform their duty faithfully, yet when the vessel was lost on the voyage, the whole of their wages were lost. This led to carelessness and indifference on the part of seamen, and often to total loss of the vessel and cargo. To remedy this evil, and give the mariner what he had honestly worked for, and of which he should not be deprived, except for his own act, this statute was passed. It still requires him to exert himself to the utmost, and in such exertion he risks his life momentarily; but it gives him, while thus working, the knowledge that if he is not able, though willing to save his employer's property, he will not be deprived of the fruit of his honest labor and peril, unless for his own conduct. In the present case the men did every thing that could be done; they were placed, by the negligence of the owners, under a captain who, as the testimony shows, was at least careless in preparing for sea, and who, on the appearance of danger, left his crew at the first opportunity, to struggle through the danger as best they might. (2) Seamen cannot insure their wages, but an owner may his ship and freight, (out of which the men are paid,) thus making it for his advantage that the vessel should be lost. This statute certainly removes this temptation, and diminishes the temptation to destroy the ship for the insurance upon her, and in that view is certainly for the benefit of all concerned; it leaves the risk of the voyage with the party who may insure it, and relieves the generally penniless sailor of the risk, that after working and perilling his life for six months or longer, his money may go into the owner's pocket, in the shape of insurance, without the opportunity of making such owner respond for the services and risks he has undergone.

5. The seamen ought not to lose the remedy given them by the act, by reason of their inability to procure the certificate of the master to their faithful service, as prescribed, even if the production of such certificate is to be regarded as a condition precedent to the right to the relief granted. A party is not to be deprived of a right, by failure to perform a condition, where such performance is out of his power, especially where, as here, the condition is substantially though not literally performed; the deposition of the master to the faithful service of the crew being as reliable evidence as his certificate could be. Thus the act of God will excuse the performance of a condition. Hughes v. Edwards, 9 Wheat. [22 U. S.] 345; Merrill v. Emory, Id. 489; 8 Cow. 299; 10 Pick. [Mass.] 507; Rolle, Abr. 450. So he who prevents the performance of a condition cannot take advantage of its non-performance. Williams v. Bank of U. S., 2 Pet. [27 U. S.] 102; 1 Bibb, 380; 2 Bibb, 437.

6. Independently of the British act cited, the libellant might recover under the general maritime law. Abb. Shipp. 750; Col. Laws Mass. 1668; Laws of Oleron; Laws of Wisbuy; Laws of the Hanse Towns.

W. Mulock, for respondent.

1. A total loss of the vessel being established, this court has decided that, by the law maritime, the claim for wages is gone by a misfortune common to all concerned.

2. The statute of Victoria, relied on, is a matter of fact of which no proof is given, and of which this court, without consent or evidence, cannot take cognizance. A commission or evidence might show that it was repealed or inoperative.

3. All navigation laws are enacted for the benefit of commerce. This case of a total, hopeless loss, when the vessel was "water-logged" in the ocean, "off the banks of Newfoundland," and "loaded with timber," no hope of saving any thing from the wreck being proved, the defendant having even "lost his clothes," cannot come within the policy or scope of the statute.

4. But at all events, no force of construction can apply this statute in a personal action against the master. He is liable under his contract only, and the statute is silent as to him. There is a certificate required, which is not produced; and the statute requisition shows it applies to owners only.

BETTS, District Judge. This is one of seven suits in personam, prosecuted by the crew of the British ship Virginius—two against the reputed owner of the ship, and five against her master—to recover the wages of the men and the value of their wearing apparel taken on board and lost with the ship. The parties have stipulated that the seven suits shall stand as if consolidated. In respect to the two suits against the alleged owner, it is sufficient to say that the allegations of his ownership were wholly disproved upon the hearing, and the libels against him must be dismissed for that reason. In the remaining five suits there are several questions which require consideration.

It appears that the ship sailed from Quebec for Liverpool about September 13, 1847, and encountered a gale early in October; and after riding it out for three days, became water-logged, and on or about October 9, was abandoned by the officers and crew when on the point of foundering. The officers and crew were received on board two other vessels then in sight, lying to for them, the Virginius having hoisted a signal of distress. The libellants demanded wages for the the full period of service on board, at the rate of thirteen pounds sterling each man per month, and also payment for their clothes, &c., lost in the wreck.

The libels charged that the ship was unseaworthy when she sailed, and was lost in consequence thereof. There is no allegation, ei-

ther in the libel or answer, which has any relation to the fact of services having been rendered to the ship as a wreck, such as—under the operation of Act 7 & 8 Vict., by the aid of which it was sought upon the argument to sustain the action—would save the seamen their antecedent wages. The whole case is put by the libel upon the ground that the ship was unseaworthy when the voyage commenced, and the answer avoids all averments or allegations whatever in regard to the services or conduct of the seamen on the voyage, or at the time of the wreck. Upon this point I am clear that no cause of action has been made out by the libellants. The charge of unseaworthiness is wholly unsustained. The ship was in a sound and safe condition and fitment for the voyage; and if any color of fault is shown, it respects only the prudent and correct management of the master after she left port. The evidence to that point is exceedingly feeble and unsatisfactory, and is far short of establishing any act of gross negligence, or the want of competent skill in navigating or keeping her seaworthy on the voyage.

It is a cardinal rule in admiralty proceedings, that no decree can be rendered upon proofs alone, when the subject-matter of those proofs is not essentially alleged in the pleadings. The decree of the court must be secundum allegata et probata. See The Rhode Island [Case No. 11,745], and authorities there cited. The decree of the court upon the case, in its present aspect, must therefore be against the claim preferred by the libellants to recover upon the ground of unseaworthiness. wages for the whole duration of the employment contemplated by their shipping contract. But the impressive equity of the libellants' case to the protection of the act of parliament, and to the relief provided under it, being manifest, and the questions having been fully argued upon both sides in respect to the character and operation of the remedy given by the statute, I deem it proper to state my opinion respecting the application of the provisions of the act to the state of facts disclosed by the proofs now before me, with a view either to terminate the litigation here, or to place the libellants in a condition to have the advantage of the statute in support of their rights.

The general rule of maritime law is, that seamen lose their wages in toto in case of the wreck of the ship upon her voyage; and this rule prevailed equally in the American and English courts—Adams v. The Sophia [Case No. 65]; The Neptune, 1 Hagg. Adm. 239; Abb. Shipp. 790; 3 Kent, Comm. 187—until modified in England by the statute of 7 & 8 Vict. c. 112, § 17. By this act it is provided that in all cases of the wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned freight, provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo, and stores.

This is a most wise and salutary substitute for that old figment of law which has in many cases been most oppressively enforced against seamen, that "freight is the mother of wages;" so that, where no freight is earned, no wages can be recovered. See Dunnett v. Tomhagen, 3 Johns. 154; The Elizabeth & Jane [Case No. 8,321]; Abb. Shipp. 760. And the Virginius being a British vessel, the crew British subjects, and the contract one entered into in the British dominions, with a view to execution therein also, the law of Great Britain must prescribe the rule by which the operation of the contract, with the benefits and disadvantages accompanying it, are to be determined. Masson v. Lake, 4 How. [45 U. S.] 278, and cases cited; Story, Confl. Laws, § 279.

The libellants bring themselves clearly within the spirit and equity of the act of parliament referred to. The vessel was lost by vis major in a violent storm at sea, and during her peril, and up to the moment of her foundering, the crew rendered every exertion in their power to save her. The master and mates left the ship in the ship's boat after her condition was hopeless. The crew were subseqently taken off by other vessels lying to for their rescue, and the ship went down immediately afterwards. The peril was so imminent, that when a chance of escape was presented, no attempt was made to save more than the lives of the ship's company. It is also shown that the mates received their pay in full or in part, after their arrival in this port, and by drafts of the master on the owners in Ireland.

If, then, the seamen presented the certificate of the master, pursuant to the proviso of the act. there could be no doubt that the proper tribunal would award them wages, notwithstanding the wreck and total loss of the ship at the commencement of the voyage and before any freight had been earned.

Two objections are, however, presented to the recovery of those wages in this action: 1. That the court will not take jurisdiction of an action for wages earned in a foreign vessel, and prosecuted wholly between aliens, and based upon a statute of their own country, granting them a right of action in a case in which it would not exist according to general principles of law common to all courts of maritime jurisdiction. 2. That the libellants do not produce the evidence prescribed by the statute, as that which will alone justify an award of damages to them.

I do not think the first objection, that the court is without jurisdiction of a suit for wages between foreigners, so far as it rests upon the idea that foreigners are without a standing in court, can be maintained. There has been, on the part of maritime courts, both of England and America, a very

general disinclination to entertain such suits, and they have in several cases declined to take jurisdiction, in language which almost amounts to a denial of the power to take it. But I understand the weight of authority in both countries to be, that upon the one hand the courts are not without ample power to hear and determine such suits, when the circumstances of the case before them seem to render it fit that they should do so; while, upon the other hand, they are not bound to do this, but will, in general, from motives of international comity, of delicacy, and of convenience, decline the suit. In other words, the foreign libellant is regarded as not entitled to invoke the powers of the court, as matter of absolute right; yet where the court is satisfied that justice requires its interposition in his favor, those powers may be, and will be, exercised in his behalf.

That there is vested in the court at least a latent jurisdiction over these actions, which may be exercised under the guidance of a sound discretion, seems to be clearly shown by reference to those cases in which, both in England and America, suits between foreigners have been entertained in admiralty, on the ground of a special necessity. The Courtney, Edw. Adm. 239; The Wilhelm Frederick, 1 Hagg. Adm. 138; Ellison v. The Bellona [Case No. 4,407]; Willendson v. The Försöket [Id. 17,682]; Moran v. Baudin [Id. 9,785]; Weiberg v. The St. Oloff [Id. 17,357].

The very question has, moreover, been brought under thorough discussion in England, as recently as 1840, in the case of The Golubchick, 1 W. Rob. Adm. 143. This case was a libel in rem for wages. The master appeared under protest to the jurisdiction, grounded on the fact that the suit was between foreigners. In delivering his opinion against the protest, Dr. Lushington reviews the previous English cases on the subject, and thus expresses the views taken by himself: "Upon general principles, I am inclined to hold that this court does possess a competent jurisdiction to adjudge in these cases;—at the same time the exercise of this jurisdiction is discretionary with the court; and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the court must decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself in which this difficulty might arise, that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice; in such cases, undoubtedly, the court would decline to adjudicate."

The cases in this country, upon the whole, sustain the same doctrine.

In The Jerusalem [Case No. 7,293], the libellant sought to recover upon a bottomry bond upon a foreign ship. The parties were both subjects of the Sublime Porte, and the claimant appeared under protest to the jurisdiction. Mr. Justice Story held that a proceeding in rem might be maintained in our courts against property within our jurisdiction, although the parties were foreigners. And although he waives any decision of the question as to jurisdiction in personal actions, he intimates a decided opinion, that even in respect to the personal action for wages, the jurisdiction of the court is clear, while the policy of its exercise in particular cases may be matter of question. This view is approved by Dr. Lushington, in a supplementary opinion in the case of The Golubchick, already cited.

In the case of Thomson v. The Nanny [Case No. 13,984], the court declined to entertain the cause, but rested the decision entirely upon the equities of the case, and held, that while there should be great caution in the exercise of jurisdiction as to foreigners, unless under peculiar circumstances, yet such jurisdiction ought not to be relinquished where it may appear proper or necessary to prevent a failure of justice.

So in the case of Johnson v. Dalton, 1 Cow. 543, which was an action by a seaman against a master, both foreigners, for assault and battery, committed on shipboard, the supreme court of New York sustained the jurisdiction. They say: "Our courts may take cognizance of torts committed on the high seas on board a foreign vessel; but on principles of comity, as well as to prevent the frequent and serious injuries that would result, they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances."

These cases sufficiently sustain the view which this court has already taken in one or two cases—see The Napoleon [Case No. 10,015]—formerly before it, and which certainly rests upon sound principle, that this court is not without power to adjudicate upon a controversy between foreigners, although such suit is in personam; while at the same time, as this class of actions tend to embarrass and interrupt the navigation and business of foreign vessels visiting our ports, I fully recognize the right and duty of the court, upon general grounds of propriety and expediency, to decline such jurisdiction, where not induced to its exercise by a clear necessity. It seems, indeed, to be the settled understanding and course of courts of admiralty, as already intimated, not to permit their jurisdiction to be invoked as matter of right, to sustain suits brought by foreign seamen against masters or owners being also foreigners, or against foreign vessels. In England, indeed, the assent of the representative of the government to which the seamen belong is required before the courts will proceed to entertain jurisdiction. The Wilhelm Frederick, 1 Hagg. Adm. 138; Edw. Adm. Jur. 128. But in the courts of the United States this precautionary condition is not required; and jurisdiction will ordinarily be exercised if the voyage has been terminated

by full completion or abandonment, or if the contract of hiring is dissolved by the wrongful act of the owner or master. Where, on the contrary, the vessel to which the seaman belongs is still in the prosecution of the voyage, and the shipping contract remains in full force, the court will in general decline taking cognizance of the case, and will remit the parties to the tribunals of their own country, unless the commercial representative of that nation asks the aid of the court in the seamen's behalf. Two decisions of a contrary import, in the district court of Pennsylvania (Moran v. Baudin [Case No. 9,785]; Weiberg v. St. Oloff [Id. 17,357]) are of questionable authority, unless placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

The present case appears to me to come fully within the principles recognized by this court, as authorizing it to take cognizance of a suit for wages between foreigners—the voyage being broken up and the seamen left unprovided for in this country. But the objection urged to the jurisdiction in this case was rested in part upon the idea that there were peculiar reasons for declining the jurisdiction of an action between foreigners, where it was based upon a statute peculiar to their own country, giving them a right of action unknown to the general maritime law of the world. It is a sufficient answer to the objection, in this aspect, that the present is not such an action. The claim of the libellants, in the present case, arises out of the general maritime law, and not out of the municipal law of Great Britain. The action is not upon the statute, or upon any right created by the statute, but upon the contract to pay wages for the services upon which the libellants were employed. The act of parliament does not operate to create a new right of action, but only by way of removing a disability which the rules of maritime courts previously imposed on seamen, in respect to wages already earned under their contract, in cases where, by the misadventures of the voyage, the ship was wrecked and totally lost. They were disabled under the former rule in such cases from proceeding against the master or owner for the recovery of earnings, which they would clearly be entitled to by the terms of their hiring. That this was a disability imposed upon mariners by an arbitrary rule of law, and was not a condition adopted by them so as to enter into their contract of hiring, and that the wages were deemed actually earned in cases of wreck, is abundantly manifest, from the reason uniformly assigned for the rule, namely, that public policy required that the law should create in the sailor the highest possible interest in the salvation of the vessel and cargo; and also from the doctrine that everything belonging to the owner, saved from the wreck, both remnants and freight, was chargeable with the payment of these wages. This qualification of the rule in some degree assuaged its severity, and it furthermore establishes the principle that wages were regarded as earned, and justly due, wreck or no wreck, and that the calamity did not operate to extinguish the meritoriousness of the sailor's service, or to abrogate the right vested in him, or to defeat a condition upon which that right depended; but that it merely sheltered the ship-owner against being compelled to pay wages according to his promise, in case he had the misfortune to lose his ship. The act of parliament then operates to relieve British seamen from this partial rule of the former law. The right to wages notwithstanding a wreck, stands upon the same footing as before,—on the fidelity of the seamen, and their prompt and efficient aid to the ship and cargo, to the utmost of their ability. The Sydney Cove, 2 Dod. 13; The Neptune, 1 Hagg. Adm. 227; The Lady Durham, 3 Hagg. Adm. 196; Abb. Shipp. 229. Nor do I apprehend that any evils are likely to arise from this change of the law; for so far as the old rule was founded upon a supposed necessity to stimulate the fidelity of seamen by appeals to their interest, that object is sufficiently attained by leaving it still most important to mariners to save the ship and cargo, in order to secure a certain remedy for their wages.

The facts in evidence having brought the libellants clearly within the equity and spirit of the enacting clause of this act of parliament, the further question was raised at the hearing, whether the libellants could have the advantage of that statutory provision, without producing the specific proof designated by the proviso;—viz., the certificate of the master or chief surviving officer of the ship, to the effect that the libellants exerted themselves to the utmost to save the ship, cargo, and stores. The proviso is evidently a wise precaution and safeguard, both in respect to the maintenance of the authority of the officers of a vessel over the crew, in cases of wreck, and also as a check upon groundless suits which sailors might institute against owners, after the loss of the ship and cargo. Whether, in that class of actions, the proviso is to be understood literally, and enforced in its strict sense, is a question which is not now raised. The present is an action against the master, and the question is as to the proper construction of the proviso in its application to that class of suits only.

The elementary principle governing the construction of statutes is, that the will of the legislature, as manifested in the plain sense of the enactment, is to be carried into effect; and so as, if possible, to secure operation to every part of the statute. The courts will avoid, if possible, placing upon any one clause or part of an act such a construction as will necessarily abrogate another part;

and especially a qualification or limitation will not be extended by force of construction so as to supersede or annul a substantive enactment. 19 Vin. Abr. 519, tit. "Statutes," E 6, 81–93. It is said that a proviso directly repugnant to the enacting clause of a statute, repeals it, because, if in absolute contradiction, the last expression of the legislative will is the one which must prevail. 19 Vin. Abr. 522, tit. "Statutes," E 6, 105. Although it is also laid down as the rule, that a saving in an act of parliament, which is repugnant to the body of the act, is void. Case of Alton Woods, 1 Coke, 47, and cases cited; 1 Bl. Comm. 89. And there is very high and satisfactory authority for considering an exception and a saving attached to an enacting clause as being, in effect, one and the same thing, except, perhaps, as to manner of pleading.

The proviso under consideration, if taken in its absolute sense, would render the enacting clause of the statute nugatory in many cases clearly within the contemplation of the legislature, and in which, it is to be supposed, the act was specially designed to have effect. Thus, where, in cases of shipwreck involving meritorious efforts on the part of the crew to save the ship and cargo with the lives of the ship's company, the lives of all the officers are lost, the survivors of the crew must be deprived of the benefits of the act, if the strict and exact observance of the proviso is to be required, because of the impossibility of supplying the written certificate demanded by its terms. So the case of the fraudulent stranding or destruction of the vessel by the officers; or of the obstinate or wrongful refusal of the proper officers to give the certificate, although incontrovertibly merited by the seaman; or of the removal of such officer from the reach or knowledge of the seaman, are some instances of cases which must be of common occurrence, in which a compliance with the exact terms of the proviso would be impracticable, whatever might be the efforts or merit of the mariner. The present case also supplies a forcible illustration of the injurious effect of giving the proviso such a construction as leaves the seaman remediless, except upon production of the specific species of proof contemplated. The master admits the two mates to be within the protection of the statute, and pays their wages. They testified that the sailors performed like services with themselves on board the ship, for days and nights in a gale of wind, and after the vessel was waterlogged, and to all intents a total loss. The captain refuses or neglects to pay their wages, and when sued, defends himself by setting up his own omission or refusal to give the certificate which would insure their recovery. To hold that the production of the certificate was absolutely essential to authorize the court to award the recovery which the act permits, would practically nullify the benevolent purpose of the law, and render its professed liberality a mockery, inasmuch as the statute, under such an interpretation, would secure the seaman little broader right than that which he has always enjoyed—the right to receive wages, if paid to him voluntarily by the master or owner.

Upon these grounds, and in the light of the views previously expressed respecting the principle upon which the act in question is to be regarded as based, I am of opinion that the construction of the proviso contended for cannot be maintained. I do not think it imposes an absolute condition precedent to the right of recovery. It introduces no new requirement of duty to be performed by the seamen. The law maritime exacts of them the same diligence and fidelity of service throughout the whole period of their employment. Although the voyage may be uninterruptedly prosperous and safe, yet the mariner who, upon any occasion, from its inception to its close, shall refuse to exert himself to his utmost in the discharge of his duties on board, will either entirely forfeit his wages for the voyage, or become subject to damages or mulct in diminution of them. The proviso designates a mode of proof, which is the primary and highest evidence of the fact to be established, but secondary evidence is not excluded expressly, and the equitable and salutary purposes of a remedial and eminently beneficial statute will not be defeated by a construction which is strictly technical. People v. Utica Ins. Co., 15 Johns. 358; Wilkinson v. Leland, 2 Pet. [27 U. S.] 662. The construction should be liberal, in order to give effect to the remedy. Whitney v. Emmett [Case No. 17,585]; 1 Kent, Comm. 465; Dwar. St. 707–736. The mode of proof designated is one over which those to be benefited by the provision have no control, nor is there any process furnished them to enforce the giving the certificate. It is the sole act of the master, and I think there is cogent reason for holding that, by the true import of the section, this important act of justice to mariners is not to be left to the master's discretion or to his interest or caprice; that it is his duty, in a case coming within the statute, to furnish the certificate, or to show satisfactory reasons for not doing so, otherwise the courts will accept other evidence as a legal substitute for the certificate, regarding the proviso as alike directory to the master and to the men. This is in consonance with the principle applied in analogous cases.

As the cases now come up they must be decided against the libellants; but I shall allow them the privilege of amending their libels, and of taking new proofs under allegations appropriate to give them a remedy under the provisions of the act of parliament, reserving any definite opinion upon their rights and remedy upon the facts as they may ultimately be proved, until the full case is heard. The amendment, however, must be at the expense of paying the respondent his taxed costs, because, in the only matter litigated,

his defence is perfect against the right of action.

The following decree must, therefore, be entered in each of the five causes against the master: It appearing to the court that the libellants have not, by the proofs in this case, shown that the ship Virginius was unseaworthy, when she sailed on the voyage in the pleadings mentioned; and it further appearing unto the court, that the said ship was wrecked and totally lost at sea, by perils of the sea, on her voyage, and without earning any freight on said voyage: It is considered by the court that the libellants have established no right of recovery against the respondents upon the pleadings in this case. But it further appearing to this court that the libellants remained with the said ship after she was water-logged and wrecked, exerting their utmost efforts in saving the said ship and cargo, and the lives of the ship's company; and it further appearing to the court that the parties to this action are British subjects, and the said ship is a British vessel, and that by the provisions of an act of parliament, British seamen, serving on board of British vessels, under circumstances therein specified, may be entitled to their wages, notwithstanding the wreck and loss of the vessel, or her failing to earn freight; and it further appearing to the court that the libellants have not so framed their libel and allegations in this case as to have advantage of such provisions of said act, if they can prove themselves entitled thereto: It is ordered and decreed by this court that the libellants have leave to amend their libel in this behalf, on payment of the taxed costs of the respondent, for his answer filed in this cause, for his proofs taken therein, and also upon the final hearing. But it is further ordered, that each party be at liberty, at his election, to use on the amended pleadings the proofs already taken by depositions, so far as the same may be applicable; and if the respondent elects so to use the testimony taken in his behalf, then the expense of the same is not to be allowed him in the taxation of costs hereby awarded.

Case No. 3,640.

DAVIS et al. v. M'CONNELL et al.

[3 McLean, 391.] [1]

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

ACTION ON BILL OF EXCHANGE—PARTIES—DEFENSES.

1. Under certain circumstances, a suit may be prosecuted by the drawer of a bill of exchange, in the name of the payees, for the benefit of the drawer.

2. In such a case, payment of the bill by the drawer to the payees, is no bar.

3. The drawer having paid the bill to the payees, after the acceptors refused to pay it, had a right to sue the acceptors.

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

[This was an action at law by N. H. Davis & Co. against M'Connell & Vansyckel.]

OPINION OF THE COURT. This action is brought [by N. H. Davis & Co.] on a bill of exchange, drawn by F. Fielder on the defendants [M'Connell & Vansyckel], dated at St. Louis, 2d November, 1841, and accepted by them, for one thousand dollars, payable in four months. The suit is brought for the use of the drawer. The defendants pleaded, "that after the expiration of four months from the date of said bill of exchange and said acceptance, and after the same became due and payable, the same being unpaid by the acceptor aforesaid, they, the said plaintiffs, as payees of said bill of exchange, returned the same to the drawer thereof for payment: and the said drawer, then and there, after the said bill of exchange fell due and was unpaid, and before the commencement of this suit, on the 11th April, 1842, paid to the said plaintiffs the full amount of said bill, interest and costs due thereon, and then and there took up the same from the said plaintiffs: and that at the commencement of this suit the plaintiffs had no interest in said bill." &c. To this plea the plaintiffs demurred.

This suit is brought in the names of the plaintiffs, the payees, for the use of S. R. Fielder, the drawer of the bill. The plea, therefore, is no bar to the action. By the acceptance the defendants acknowledged an indebtedness to the drawer to the amount of the bill, but the drawer being liable to the payees, took up the bill on the failure to pay by the acceptors, and now prosecutes this suit in the names of the plaintiffs, to recover the amount from the defendants, the acceptors. The only doubt which would seem to arise on this demurrer is, whether the action can be maintained by the plaintiffs, under the circumstances of the case. The property in the bill is in Fielder, the drawer, he having paid to the holders the amount of it. In 2 Am. Com. Law, 324, it is said: "There is nothing in the law which forbids the holder of a negotiable note, after it has been indorsed, from using it in the name of another, with his consent, provided it is unattended with any circumstances of fraud and oppression. Nor is it unlawful for another person to institute such suit in his own name, with the privilege and consent of the party beneficially interested." And in Gage v. Randall, 15 Wend. 640, it is said the holder of negotiable paper may bring an action upon it in the name of a person having no interest in it; and it is no defence that the suit be thus brought without the knowledge, assent or authority of the nominal plaintiff.

To sustain the present suit, it is not necessary to sanction the extent of this authority. For the plaintiffs are named in the bill as payees, and by bringing the suit for the use of the drawer, they show for whose benefit they sue, and no injury can result to the de-

fendants from such a procedure. If they have any matter in bar or discharge, they may set it up, in this form of action, the same as if suit had been brought in the name of the drawer. The demurrer to the plea is sustained.

DAVIS v. McCORMICK. See Case No. 3,645.

Case No. 3,641.

DAVIS et al. v. MARSHALL.

[1 Cranch, C. C. 173.] [1]

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

SPECIAL BAIL—WHEN REQUIRED.

A defendant, discharged under the insolvent law of Pennsylvania, may appear here and discharge an attachment without giving special bail.

Attachment of goods under the act of assembly, 1795, c. 56.

Mr. Mason, for the defendant, moved to appear without bail, so as to discharge the attachment. The debt was contracted in Maryland. The defendant removed to Pennsylvania, where his creditors arrested him, and he was released under the insolvent law of Pennsylvania. The plaintiffs sued in the general court of Maryland. On producing the discharge, the general court admitted an appearance without bail; and the plaintiffs struck off the suit there, and laid this attachment in the District of Columbia.

Mr. Morsell, for the plaintiffs, objected: 1st. That the act is not in force in this district. 2d. That the defendant cannot dissolve the attachment without giving bail.

THE COURT permitted defendant to appear on filing common bail.

CRANCH, Circuit Judge, did not sit in this case.

Case No. 3,642.

DAVIS v. MASSACHUSETTS MUT. LIFE INS. CO.

[13 Blatchf. 462; [2] 5 Ins. Law J. 736.]

Circuit Court, D. Vermont. July 25, 1876.

LIFE INSURANCE — POWER OF AGENT TO WAIVE CONDITIONS—PAYMENT OF PREMIUMS.

1. A policy of life insurance by a company, on the life of S., declared that it was issued and accepted upon the express conditions, that it "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured; that no premium, or instalment of premium, hereon, shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company; that no agent of the company shall make any contract binding the company, nor alter or change any condition of the policy, nor waive forfeiture of this policy." The policy was put into the hands of S., by an agent of the company, who informed S., at the time, that there was no hurry about his paying the premium. Thereafter S. died, still retaining the policy, but without having paid the premium, and without any receipt for the premium having been given to him: *Held*, it is to be inferred, from the fact that S. retained the policy, without objection, that he accepted its terms and provisions.

2. The premium was not paid, as between S. and the company.

3. The agent attempted to give a credit to S. for the amount of the premium, in violation of the conditions of the policy.

4. The attempted waiver by the agent was not effectual, and the policy never took effect.

[This was an action at law on a policy of life insurance by L. L. Davis, administrator of Jerry B. Sweatland, against the Massachusetts Mutual Life Insurance Company.]

E. Henry Powell, for plaintiff.

Guy C. Noble, for defendants.

SHIPMAN, District Judge. This case was tried by the court, upon the following agreed statement of facts, a jury having been waived by the written stipulation of the parties: "The plaintiff's intestate, Jerry B. Sweatland, resided in Richford, in this district, and was the keeper of a hotel. The defendants are a corporation created by the laws of the state of Massachusetts, with headquarters at Springfield, in that state. [The defendants' charter may be referred to so far as necessary, and considered a part of this case. The application of the said Sweatland, bearing his signature, and the premium receipt and policy made and signed by the defendants, and in question in this suit, are hereby referred to and made a part of this case.] [3] On the 1st of August, 1873, and for two years before, one M. V. B. Edgerly, of Manchester, N. H., was the general agent of defendants for a portion of New England, including the state of Vermont. For the same time, one Charles Parkhurst was special state agent for Vermont, for the purpose of soliciting applications for insurance in said company, delivering policies and collecting premiums thereon, appointed by said Edgerly, with headquarters at Burlington, Vermont. About April 1st, 1872, Parkhurst employed one H. M. Buxton to solicit applications for insurance, and it was also Buxton's duty, under such employment, to collect premiums on policies that were place in his hands, and thereupon to deliver premium receipts and such policies to the assured. Said Buxton made monthly remittances of all such premiums so collected to Parkhurst, keeping an account of all such applications, policies delivered and not delivered, payments, &c., in a book, which account was the only one kept by Buxton with the company, or in the insurance business. Parkhurst's compensation, as agent, was a

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

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

[3] [From 5 Ins. Law J. 736.]

certain commission reserved out of all said premiums. He employed Buxton as sub-agent, and paid him an annual salary for his services. The above comprised all the duty and authority of said Buxton under such employment. All his communications about the defendants' business were with Parkhurst. Parkhurst was under bond to the defendants. Buxton was not under bonds to Parkhurst or the defendants. Neither Edgerly nor Parkhurst had any authority to grant insurance, and all the authority Buxton had was derived from said employment by Parkhurst. Buxton's headquarters were at St. Albans, Vermont, and he was at the time subject to the orders of Parkhurst, but his work was done mainly in Franklin, Grand Isle, and Lamoille counties. Richford is 28 miles from St. Albans, and Buxton was in the habit of going there once each month, and, while there, stopping sometimes at Sweatland's hotel, and sometimes at another hotel in the place. On June 4th, 1873, Sweatland executed and delivered to Buxton an application for insurance, signed by him. Buxton sent the same to Parkhurst, the latter transmitted it to Edgerly, and the latter to the defendants, at Springfield. The same was accepted by the defendants, and, on the 13th day of June, 1873, they made out and signed a premium receipt and policy. They sent the same to Edgerly, general agent, at Manchester, who received and stamped the same June 16th, 1873, and forwarded the said premium receipt and policy to Parkhurst, at Burlington. About the last of June, 1873, Parkhurst sent the same to Buxton, at St. Albans. On the 1st of July, 1873, Buxton wrote a letter to Sweatland, of which the following is a copy: 'St. Albans, Vt., July 1st, 1873. Jerry B. Sweatland, Esq., Dear Sir: Enclosed find your policy. You can send the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please; no hurry about it. Yours, very truly, H. M. Buxton.'—and sent the policy, with the letter, by the hand of C. M. Searle, therein named, to Sweatland. Searle was a mail agent running between Richford and St. Albans, daily. Said policy and letter were received by Sweatland on or about said 1st of July, and they were found among his papers after his decease, and, after said letter, no communication of any kind was had between Sweatland and Buxton, or Sweatland and the defendants, in respect to the policy or anything else. The premium provided for in the policy was never tendered or paid by Sweatland, or by any one on his behalf, to Buxton, or the defendants, or any one in their behalf, before Sweatland's decease. Said premium receipt was never delivered to Sweatland or asked for by him, but remained in Buxton's hands after his receipt of the same from Parkhurst, until one or two days after Sweatland's decease, when Buxton returned it to Parkhurst. Said Sweatland was, at the time he received said policy, in perfect health, and so continued until the 15th of July, 1873, when he died in an apoplectic fit. No question is made but that all the requirements of the policy as to notice of death, and all other matters, subsequent to the decease of said Sweatland, have been complied with. The plaintiff offers to show by E. H. Powell, his attorney, and, if competent or admissible against defendants' objection, it may be taken as proved, that, a few days after the decease of Sweatland, the said Buxton told him, said Powell, that he thought the company would make no question about the claim, and that it was not necessary to make any tender of the premium which the said Powell then had and proposed to pay, and otherwise would have tendered to said Buxton, as agent for defendants." The application of Sweatland, a copy of which was partly written and partly printed upon the back of the policy, contained the following agreement: "And it is hereby further agreed, that, under no circumstances, shall the policy be in force until the first premium, as stated in the policy, shall have been paid, during the lifetime of the said party whose life is hereby proposed for insurance, to the company, or to an agent duly authorized by the company to receive payments of premiums, and that no premium, or instalment of premium, shall be considered as paid, unless a receipt shall have been given therefor, at the time of payment, duly signed by the secretary or president of the said company." By the policy, the defendants, "in consideration of the declarations and statements made in the application for this policy, and of the annual premium of $32.80, to be paid on or before the 13th day of June, at noon, in each and every year, during the continuance of the policy, do insure the life of Jerry B. Sweatland, * * * in the amount of one thousand dollars, for the term of life;" and the company promised to pay the sum insured to the said Jerry B. Sweatland, his executors, administrators, or assigns, "said sum insured being for the express benefit of Mary B. Sweatland, wife of the said Jerry B. Sweatland." The policy was "issued and accepted upon the following express conditions: * * * Second. That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured. * * * Third. That no premium or instalment of premium hereon shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company. * * * Eleventh. That no agent of the company shall make any contract binding the company, nor alter or change any condition of this policy, nor waive forfeiture of this policy." The book of Buxton contained a list of the poli-

cies which he had received, with the numbers, names of the insured, and other important memoranda in relation to each policy, arranged in tabular divisions or columns. Under the head of "Premiums Received," and "When Received," opposite the name of Jerry B. Sweatland, were blanks, and the words "died July 15, 1873," were written against his name.

In order to determine the principles of law which are applicable to this case, it is necessary for this court to find the inferences of fact which are properly deducible from the agreed statement of facts.

(1.) From the retention of the policy, without objection, by Sweatland, for fifteen days, under the circumstances which have been detailed, the court is authorized to infer an acceptance of its terms and provisions.

(2.) Was payment of the premium actually made, as between the insured and the company? If Buxton had undertaken, either expressly or impliedly, to pay the premium to the company, and to make Sweatland his own debtor therefor, the transaction would have been equivalent to payment. Cases of this kind are not infrequent. But there is an entire absence of evidence that there was any such express or implied agreement or understanding between them. On the other hand, the letter of Buxton furnishes evidence that the premium was not paid, as between the insured and the company. The agent says, "You can send the amount due, and I will return you receipt for the same"—showing that no receipt was to be given, and indicating that no payment was to be considered as made, until the money was actually received. Buxton's book-keeping confirms this view. The question is answered in the negative.

(3.) Did Buxton attempt to alter the condition of the policy, requiring a prepayment of the advance premium before the policy should take effect, and to give a credit to Sweatland for the amount? If the provisions of the policy are agreed to and accepted by the insured, "where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended." Miller v. Life Ins. Co., 12 Wall. [79 U. S.] 303. This is not a conclusive presumption, but the question whether credit was intended is one of fact, and there is not an unyielding rule of law implying such a result from the mere fact of the delivery of an executed contract. Waiver is the act of the company, acting through its duly authorized agents. The intention of the only person who acted in this matter is to be gathered solely from his letter, in which he says, "You can send me the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please. No hurry about it." If he had not added the last clause, the letter might have been construed to mean—"You can examine the policy and send me the money, and I will return you receipt," it being well understood that the policy does not take effect until the premium is paid; but, when the writer says, there is "no hurry about it," it indicates that he intended that the policy should be subsisting; otherwise, there was need of promptness, as the event proved. If it was desirable to the insured that the policy should take effect, it was also desirable that he should take the proper steps to make it effectual. Although Buxton knew of the express provisions of the policy, he probably relied upon the continuance of the life of a man who was apparently in good health, and, in the expectation that payment would be made in the future, he took the unauthorized liberty of disregarding the terms of the contract. I am, therefore, of opinion, that the presumption which is to be inferred from delivery has not been overcome by the defendants.

It having been thus found, as matter of fact, that there was an attempted waiver by Buxton, the question of law arises—was the attempted waiver effectual? It is not necessary, under the provisions of this application and policy, to consider any distinction between the powers of a general agent, by which term I mean an agent who is authorized to make contracts of life insurance, and the powers of a sub-agent, who is employed "to solicit applications for insurance, and, under such employment, to collect premiums on policies that are placed in his hands, and thereupon to deliver premium receipts and such policies to the assured," and whose powers are coextensive with the business intrusted to his care, because, in my opinion, the powers of any person who was an agent, and not an officer, of the company, to vary the terms of the contract which had been entered into between the company and Sweatland, had been taken away, and the prohibition of the exercise of such powers was known to Sweatland. The provisions alike of the application and of the policy declare that the policy will not take effect, unless prepayment has been made. This condition could have been waived by the company, or its duly authorized agent, unless the agent had been prohibited from varying the terms of the policy, and that restriction of his powers had been brought home to the knowledge of the insured. In this case, the contract, which the insured had in his possession, bore upon its face the restriction of the powers of any agent, as to the alteration of the provisions of the policy. Sweatland had expressly agreed, in his application, that under no circumstances should the policy be in force until the first premium had been paid during his lifetime. This agreement was embodied in the policy to which he had also assented, and which informed him that an agent could not vary or alter one of its conditions. In the absence of fraud or imposition, it is conclusively

presumed that a party to a written contract which has been received and accepted by him, knew of its terms. Rice v. Dwight Manuf'g Co., 2 Cush. 80; Grace v. Adams, 100 Mass. 505; Hopkins v. Westcott [Case No 6,692]. In this case, under the express provisions of the contract, credit must be given, or be sanctioned, by the company, acting through its board of directors, or those executive officers who represented the company in this policy. Unless so made or sanctioned, the attempted waiver is ineffectual. The company would have had the power, notwithstanding the terms of the policy, to invest its agent with authority to waive its provisions, but no attempt has been made to show that the company ever sanctioned the act of Buxton. Union Mut. Life Ins. Co. v. McMillen [24 Ohio St. 67]. There being no evidence of such sanction, Sweatland knew that he had not paid the premium, that Buxton had no authority to waive prepayment, and that the policy had not become effectual. The decision of this point renders it unnecessary to determine whether the suit was properly brought in the name of the administrator. Let judgment be rendered for the defendants.

DAVIS (MAYHEW v.). See Case No. 9,347.

DAVIS (MORSE v.). See Case No. 9,855.

DAVIS (MYERS v.). See Case No. 9,986.

DAVIS (NATIONAL BANK OF MADISON v.). See Case No. 10,038.

Case No. 3,643.

DAVIS et al. v. NEW BRIG.

[Gilp. 473.] [1]

District Court, E. D. Pennsylvania. Sept. 1, 16, 1834.

ADMIRALTY JURISDICTION—MARITIME LIENS—REPAIRS AND SUPPLIES — DOMESTIC AND FOREIGN VESSELS—LIENS BY STATE LAWS — PRACTICE IN STATE AND FEDERAL COURTS.

1. The subject matter of the controversy generally determines the question of admiralty jurisdiction.

[Cited in The Calisto, Case No. 2,316; Cox v. Murray, Id. 3,304.]

2. The provisions of the act of 24th September, 1789 [1 Stat. 73], which give to the district courts original cognisance of all civil causes of admiralty and maritime jurisdiction, comprehend all maritime contracts, and those which relate to the navigation, business or commerce of the sea, and the building, repairing or supplying of vessels.

[Cited in Todd v. The Euphrates, Case No. 14,074; Re Metzger, Id. 9,511; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421; Parmlee v. The Charles Mears, Case No. 10,766; The Richard Busteed, Id. 11,764.]

3. Workmen, materialmen, and persons furnishing repairs and necessaries to a vessel, in a port of a state to which she does not belong, have a lien on the vessel, which they may enforce by a suit in rem in the admiralty.

[Cited in Cole v. The Atlantic, Case No. 2,976; Leland v. The Medora, Id. 8,237; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 390; Thomas v. Osborn, 19 How. (60 U. S.) 28.]

4. Workmen, materialmen, and persons building a vessel, or furnishing her with repairs or necessaries, in a port or state to which she belongs, have no implied lien on the vessel, and cannot enforce one by a suit in rem in the admiralty, unless such a lien is given under the provisions of a state law.

[Cited in The Marion, Case No. 9,087; Jenkins v. The Congress, Id. 7,264; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 390; The Alida, Case No. 199.]

5. Where courts of a state and the United States have concurrent jurisdiction, the mode of trial is to be regulated according to the law, usage and practice of that court in which the suit may be instituted.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 500; Hill v. The Golden Gate, Case No. 6,491.]

6. Where a lien on a vessel is given by a state law, the district court rightfully obtains jurisdiction, and may exercise it; not according to the provisions of the state law, but according to the mode of proceeding in the admiralty.

[Followed in Boon v. The Hornet, Case No. 1,640. Cited in The Harvest, Id. 6,175; Crapo v. Allen, Id. 3,360; Ludington v. The Nucleus, Id. 8,598; The Celestine, Id. 2,541; People's Ferry Co. v. Beers, 20 How. (61 U. S.) 402; Marsh v. The Minnie, Case No. 9,117; The Edith, Id. 4,283; Petrie v. The Coal Bluff No. 2, 3 Fed. 534; The Rapid Transit, 11 Fed. 332. Distinguished in Cunningham v. Hall, Case No. 3,481.]

7. Workmen and materialmen having a lien on a vessel, under the provisions of a state law, have their election to enforce it either in the district court or a state court; but having made their election, the defendant must follow them into the court chosen, and submit to the mode of proceeding and trial used in that court.

8. The lien of workmen and materialmen on a vessel attaches when the work and materials are furnished, and cannot be afterwards divested by the act of one of the parties.

9. Workmen and materialmen having a lien on a vessel, may enforce it before the vessel is finished or sold.

10. Workmen and materialmen having a lien on a vessel, under the provisions of a state law, which makes a vessel liable to them for all debts contracted by the masters or owners thereof for work and materials, do not lose their lien on a transfer of the vessel to another owner, or on a change of the master.

11. A usage, to affect the lien of workmen and materialmen on a vessel, must be clearly and uniformly well known and understood among the parties.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

12. Where a libellant, in a suit in rem in the admiralty, establishes a clear legal right to a condemnation and sale, there is no discretionary power in the court to refuse or postpone an order of sale.

William S. Davis and George W. Lehman filed a libel in the district court of the United States for the eastern district of Pennsylvania, against a new brig, not completely finished and ready for sea. They alleged that they had, at the request of the owner, between the 6th September, 1833, and the 7th

[1] [Reported by Henry D. Gilpin, Esq.]

July, 1834, furnished and delivered certain materials, which they enumerated, necessary for the construction of the vessel; and that they had also performed the work and labour necessary for building and equipping the vessel for the purposes of navigation. Their libel was filed for the recovery of the value of these materials, work and labour. Process of attachment being issued, pursuant to the prayer of the libel, the vessel was taken into custody by the marshal. The owner, Jacob Tees, made no answer to the libel, and did not deny any of its allegations, but put in a plea to the jurisdiction of the court, on the ground that the brig being a domestic and not a foreign vessel, the case was not within the cognizance of the court; and that if liable to any proceedings in rem, they must be instituted in the state courts, and under the provisions of the state laws.

On the 24th August, 1834, the case came on to be heard before Judge Hopkinson. It was argued by

Mr. Hazlehurst, for respondent.

This being the case of work and materials furnished for a domestic ship, the court has no jurisdiction over it by the general admiralty law. The remedy in such a case is derived altogether from the local laws of Pennsylvania. By the act of assembly of 27th March, 1784 [2 Smith's (Pa.) Laws, 95], at which time the admiralty was a state court, jurisdiction is granted to it for the recovery of debts for work done and materials furnished to any ship or vessel built or repaired within this state; and such vessels are declared to be liable for such debts, in preference to any other debts due from the owner. By the act of assembly passed on the 9th February, 1793 [3 Smith's (Pa.) Laws, 89], when the admiralty court of the state was abolished, and admiralty jurisdiction was vested in the courts of the United States, the remedies given by the former act for the recovery of debts due for work and labour furnished to vessels, were transferred to the court of common pleas of the state, and a court of admiralty has no power over a case for materials or work on a domestic ship; the remedy ought to have been sought in the courts of the state, according to the law of the state, which gives it. Even if the law of the state shall be considered to give the jurisdiction to this court, then it must be here exercised, under the qualifications and conditions provided for by the act of assembly, according to which all questions of fact are to be tried by a jury. 1 Story, Laws, 56; The General Smith, 4 Wheat. [17 U. S.] 438; 3 Kent, Comm. 169.

Mr. Bayard, for libellants.

This court and the common law courts have concurrent jurisdiction in all cases, except those of prize. This is a case of "admiralty and maritime jurisdiction," under the constitution and laws of the United States. That jurisdiction depends on the subject matter. The act of Pennsylvania of 27th March, 1784, expressly gives a lien. When the legislature of Pennsylvania transferred this remedy for the recovery of these debts, from the court of admiralty of the state, which no longer existed, to the courts of common law, they were bound by the constitution to call a jury to ascertain any disputed facts in a case; but the constitution of the United States secures the trial by jury only in suits at common law; but not in those at equity or in the admiralty. The General Smith, 4 Wheat. [17 U. S.] 438, 443; The Robert Fulton [Case No. 11,890]; The Jerusalem [Id. 7,294]; Stevens v. The Sandwich [Id. 13,409].

HOPKINSON, District Judge. The libel, in this case, sets forth that at sundry times, between the 6th day of September, 1833, and the 7th day of July, 1834, at the request of Jacob Tees, who was employed in building a new brig on the Delaware river, in the said district, the libellant did provide, furnish, and deliver certain enumerated materials, and did perform certain work and labour for the use of the said brig, which were necessary in the building, fitting, furnishing, and equipping her for her safety, and the navigation of the high seas. Particular accounts of the said work and materials and their cost and value are annexed to the libel. It is further set forth, that although the brig is not yet completely furnished, and has not yet proceeded to sea, nor received any name, whereby to distinguish her, the owners are about to send her out of the district, as the libellants fear, without paying for the materials, work, and labour, furnished and performed by the libellants; and that they have not accepted any other security for their said claims than their liens on the said brig, which they have not consented to release. The prayer is for process of attachment against the brig, and a decree of condemnation for the payment of these claims. The defendant, Jacob Tees, has put in no answer to the libel, nor denied any of its charges, but leaves the case of the libellants to stand as they have stated it. But assuming or admitting the facts set forth in the libel, he alleges that this court has no jurisdiction over the matter of complaint, to grant the relief prayed for, and ought not to take further cognisance of it, because, that the new brig referred to in the libel has been built at the city of Philadelphia, where the said owner resides; that by an act of the legislature of the state of Pennsylvania, passed on the 27th March, 1784, and a supplement thereto, passed on the 9th February, 1793, it does not pertain to this court, nor is it within its cognisance at all to interfere or hold plea respecting the said brig; but that the said cause of action, if any accrued to the libellants, accrued to them at Philadelphia, within the jurisdiction of the district court of the city and county of Philadelphia, and not within the jurisdiction of the district court

of the United States, for the eastern district of Pennsylvania.

The ground of the objection to the jurisdiction of this court is that the brig in question is a domestic vessel, belonging to owners residing in this district, where she was built, and the work and materials for her use furnished; that no lien is given by the general maritime law upon the brig for work and materials so furnished; and consequently that this court had no authority to enforce this claim against or upon the body of the vessel. The subject matter of the controversy generally determines the question of jurisdiction The act of congress constituting the courts of the United States, gives to them cognisance of "all civil cases of admiralty and maritime jurisdiction;" this grant certainly comprehends all maritime contracts; and a contract which "relates to the navigation, business, or commerce of the sea," is of that description. In the case of De Lovio v. Boit [Case No. 3,776], Judge Story says, that "all civilians and jurists agree that in this appellation (maritime contracts) are included, among other things, contracts for maritime service in the building, repairing, supplying, and navigating ships." In the case of The Jerusalem [Id. 7,294], the same judge repeats this doctrine as to the general jurisdiction of the court of admiralty over all maritime contracts, and, particularly, in favour of materialmen. But it is obvious that this does not decide our case, as the jurisdiction of the court over the case or claim may be admitted, and the relief now prayed for denied. The proceeding here is in rem, against the brig, and not in personam, against the owners or persons making the contract. This brings us to the question, whether, in the case of a domestic ship built or repaired where the owner resides, materialmen have a lien upon her as a security for their payment, for if they have such lien, there can be no doubt that it may be prosecuted and enforced in this court. Judge Story, in the case referred to, says that there are great authorities on both sides of the question, though "upon principle, independent of common law authorities, there is not much room to doubt." He adds, that "be this as it may, it cannot affect the question of the jurisdiction of the admiralty in such cases, for that stands altogether independent of the doctrine of liens, and may be enforced as well by process in personam, as in rem."

The supreme court of the United States, the authority which must govern the judgment of this court, has, happily, afforded us a guide for our opinion. I refer to the case of The General Smith, 4 Wheat. [17 U. S.] 438. The ship was an American vessel, and was formerly the property of Mr. Stevenson, a merchant of Baltimore, and a citizen of the United States. Whilst she so belonged to Stevenson, the libellant, a ship chandler of Baltimore, furnished, for her use, various articles of ship chandlery, to equip and furnish her, it being her first equipment, to perform a voyage to a foreign country. The ship departed from Baltimore on the voyage, without any express assent or permission of the libellant, and also without objection on his part, or any attempt to detain her, or to enforce any lien, which he had against her for the articles furnished. She continued to be the property of Stevenson during the voyage, and after her return, and was not sold until the 3d October, 1816, when, being obliged to stop payment, he executed an assignment, to the claimants of his property including the ship for the payment of duties to the United States, and for the satisfaction of other creditors. Another libel was filed 11th November, 1816, by the administratrix of Thomas Cockrill, deceased, for iron materials and work furnished to prepare the said ship for navigating the high seas. The district court of Maryland ordered the ship to be sold, and decreed that the libellants should be paid out of the proceeds the amount of their demand for materials furnished. The circuit court affirmed this decree, pro forma, and the cause was brought by appeal to the supreme court.

Mr. Pinckney, for the appellants, admitted the general jurisdiction of the district court, as an instance court of admiralty, over suits of materialmen in personam and in rem, but denied that a suit in rem could be maintained in this case, because the parties had no specific lien on the ship for supplies furnished in the port to which the ship belonged. That in the case of a domestic ship, mechanics have no lien upon the ship itself for their demands, but must look to the present security of the owner. Had the suit been in personam, there would have been no doubt of the jurisdiction, but there being no such local law, or specific lien to be enforced, there could be no cause to maintain a suit in rem. This is the same ground now taken in support of the plea in our case.

Judge Story, in delivering the opinion of the court, declares, that the admiralty rightfully possesses a general jurisdiction in cases of materialmen; and that had the suit been in personam, there would have been no hesitation in maintaining the jurisdiction of the district court; but that when the proceeding is in rem, to enforce a specific lien, it is incumbent on those who seek the aid of the court, to establish the existence of such lien in the particular case. That in case of repairs or necessaries furnished to a foreign ship, in a port of a state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the admiralty to enforce the right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed by the municipal law of the state; and no lien is implied unless it is recognised by that law. These doctrines, so clearly explained, are confirmed by the same court in the case of Peyroux v. Howard, 7 Pet. [32 U. S.] 324.

The law of the case being thus settled, the question that remains for us is, whether by the local law of Pennsylvania, the libellants have a lien on the brig libelled, for the satisfaction or security of their claims. Of this there seems to be no possible doubt, either on the words of the act of the legislature of the state, or the unvaried practice under it, by which proceedings, in the manner prescribed by the act, have been prosecuted in rem, against the body and tackle of the vessel, from the time of passing the law to the present day. By the act of 27th March, 1784 [supra], it is enacted. that "ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done or materials found or provided by any carpenter, blacksmith, mast-maker, boat-builder, block-maker, rope-maker, sailmaker, rigger, joiner, carver, plumber, painter or ship chandler, for, upon and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any and before any other debts due and owing from the owners thereof." If any thing can add any strength to this language in creating a lien, it will be found in the circumstance that the language used in the New York statute, on the same subject, is substantially the same, declaring that the vessel shall be liable, and no doubt has been entertained, in the construction of that statute, that it gives a lien. These observations are made, although they may seem unnecessary, because it has been said in the argument for the defendant, that the act of Pennsylvania does not raise a lien for the materialmen, but only gives them a preference over other creditors. This law of Pennsylvania was passed antecedent to the adoption of the present constitution of the United States, and when the state had her own court of admiralty, and directs that the libel shall be filed in that court against such ship or vessel, and her tackle, "whereupon process shall issue, and such proceedings shall be had as are usually had in the courts of admiralty for the recovery of mariners' wages, and other debts actually contracted upon the high seas, and within the jurisdiction of the court of admiralty." So the law of Pennsylvania stood for the creation of the lien, and the manner of enforcing it, when she had a court of admiralty. By the constitution of the United States, and the provisions of the judiciary act, passed in pursuance of it, cognisance was given to the courts of the United States, of "all cases of admiralty and maritime jurisdiction," and the state admiralty courts ceased to exist. It became necessary for Pennsylvania, still believing that "the business of ship-building was a very important branch of the commerce of the state," to provide some other jurisdiction and means for "securing the persons employed in building and fitting ships or vessels for sea, by making the body and tackle of such ships and vessels liable to pay the several tradesmen, employed in building and fitting them, for their work and materials." A law was therefore passed on the 9th February, 1793 [supra], enacting that the libel authorised by the former act to be filed in the court of admiralty of this state, may be filed in the office of the prothonotary of the common pleas of the county, who is to issue an attachment directed to the sheriff, to arrest and detain the vessel, and the court is to take stipulations. Thus the whole proceeding to enforce this lien is transferred from the admiralty to a common law court, in which questions of fact have always been tried by a jury, and the constitution of Pennsylvania expressly declares that "trials by jury shall be as heretofore." In conformity with this declaration, the act of 9th February, 1793, instead of directing, as the former act did, that "such proceedings shall be had as are usually had for the recovery of mariners' wages," provides that "where, in any cases occurring under the said act, questions of fact shall arise, an issue or issues shall be joined by the parties under the direction of the court, and shall be tried by jury."

The argument, then, of the defendant in this case, in support of his plea to the jurisdiction of the court, is reduced to this: That as this court has cognisance of the case by reason of the lien given by the local law of Pennsylvania, the jurisdiction of this court must be governed and exercised according to the provisions of that local law, and as it is exercised by the courts of Pennsylvania; that is, by a trial of questions of fact by a jury. Now if this argument were sound, it would not support the plea of the defendant, which objects, not to the course of proceeding in this court; nor to the mode of trial; nor suggests that there are any questions of fact for a jury to pass upon; but broadly to the entertainment of the suit by this court in any way, or by any mode of trial. But the argument is not sound. When Pennsylvania had her court of admiralty, to which cognisance of these cases were given, she said nothing, in her act giving this lien and prescribing the manner of enforcing it, of a jury, but the whole proceeding and trial were to be had according to the usage of the admiralty courts for the recovery of mariners' wages, and other debts actually contracted on the high seas. When her court of admiralty ceased to exist, and she was desirous to continue this security and remedy to mechanics and tradesmen furnishing work and materials for a ship, she was obliged to bring them into her common law courts, and, of course, to conform the proceedings and trial to the usage of those courts. But when the case comes rightfully into a court

of admiralty, it is to be conducted, tried and decided according to the usage and practice of that court. This court obtains its jurisdiction over the case, not by any grant, express or implied, from the legislature of Pennsylvania; that could not be: but incidentally, as a consequence of the lien, given by the local law of that state, upon the vessel for the satisfaction or security of the debt or claim of the libellants. The jurisdiction being thus rightfully obtained over the claim or cause of action, it must be exercised, not as such a claim would be prosecuted in the state court having also jurisdiction over it, but in the manner in which cases are prosecuted and tried in a maritime court. Each court exercises its jurisdiction in its own way, according to its own law of proceeding. The jurisdiction is concurrent; the mode of trial to be regulated by their respective usages and practice. So it is in other cases. The common law courts of the state have a concurrent jurisdiction with the maritime courts of the United States for the recovery of seamen's wages, for damages for assaults and batteries, and other trespasses committed on the high seas. If the party in such a case goes into a state court, his cause is tried by a jury, as other cases are tried there; but if he comes into the admiralty, he must submit himself and his cause to the judge, because such is the law and usage of that court. So the mechanic or materialman, who has built, repaired, or furnished supplies for a ship, has his election, in Pennsylvania, to go into the state court, or into the district court of the United States, to prosecute and recover his claim; and, having made his election, the defendant must follow him into the court he has chosen, and both must submit to the course of proceeding and trial used in that court.

The plea to the jurisdiction was overruled.

The plea to the jurisdiction having been overruled, the respondent put in an answer to the libel, to which there was a general replication. The answer admitted the amount claimed by the libellant, Davis, but denied the amount claimed by the libellant, Lehman; upon which, evidence was given in support of the account. The respondent also alleged a special agreement, set forth in the answer, according to which, it was declared that the vessel was built on a speculation, and that the mechanics employed upon her, as well as the persons furnishing materials, agreed that she should be sold for the benefit of all concerned, when she was finished; and, therefore, that the libellants had relinquished their right to proceed against her, and force a sale for their own advantage, before she was completed. Evidence was offered to sustain this allegation; but it failed to do so. The counsel of the respondents admitted that the special agreement had not been established, and that the disputed account had been well proved.

Mr. Hazlehurst, for respondents.

1. The contract is not such as will give the claimant a lien, under the act of assembly of Pennsylvania. 2. If it be such a contract, it must be construed with reference to the custom of the port. 3. The court will not decree a sale, where it is apparent it will produce a sacrifice of the property. It is altogether a question for the discretion of the court. By the act of 27th March, 1784 (2 Smith's [Pa.] Laws, 95), it is enacted, "that ships and vessels of all kinds, built, repaired and fitted within this state be, and they are hereby declared to be, liable and chargeable for all debts contracted by the masters or owners thereof." It is contended that the respondent, Jacob Tees, was neither master nor owner of this brig; that the contracts in question were made with and by him, and the debts were due from him to the libellants. In this case, a sale has been made of the brig, after the materials furnished, to Charles Harper and others. The argument is, that they are the present owners of the brig; that no contract was made with them; and that Tees, with whom the contracts were made, is not the owner. Collings v. Hope [Case No. 3003]; Stultz v. Dickey, 5 Bin. 287; Steinmetz v. Boudinot, 3 Serg. & R. 541.

Mr. Bayard, for libellants, in reply.

This is a right claimed under an act of assembly, which specifies exactly the circumstances in which it arises. They are two. 1. The debt must be contracted with the master or owners of the vessel. 2. It must be for work done, or materials furnished, by a person within the several classes specified in it. These libellants are within the description; they contracted with the respondent, who was the owner at the time of the contract; they worked on the vessel, and furnished materials for her. There has been no evidence of any usage by which their claim was impaired; but if there were any, it could not operate to deprive them of a remedy given by law; they must have assented to such an effect; but there is no circumstance showing either an express or implied assent. As to the exercise of a discretion by the court, which is to deprive these workmen of a legal remedy, no ground for it has been shown, and it would require a case of extreme necessity to justify it.

On the 16th September, Judge HOPKINSON delivered the following opinion:

The objections to the account of George W. Lehman, are withdrawn, and it is agreed that no proof has been given to support the special agreement alleged in the answer. Other questions of law have been raised to defeat the claim of the libellants, at least, in this mode of proceeding. It is alleged that, by the act of assembly under which the lien is claimed, and without which no proceeding can be sustained against the body of the ves-

sel, this suit cannot be entertained, by the court, in its present form. That it now appears that the brig was sold by the respondent, Jacob Tees, who built her, to Charles Harper and others, who are now the owners; that with them no contracts for these materials were made by the libellants; and that Tees, with whom the contract was made, is no longer the owner, nor was he so, when this libel was filed. On these facts it is contended, that, as the act of assembly gives the lien or charge upon the vessel, only for the payment or security of debts contracted by the masters or owners thereof with the mechanics and materialmen, and as no such contract was made with the present owners, the provisions of the act of assembly do not apply to this case. The injustice of this argument is so manifest and the frauds it would sanction so destructive of the objects of the law, that I could not hesitate a moment to reject it. Jacob Tees, the builder and owner of this brig when the contract was made, is the claimant and respondent to this libel; he is the party disputing the right of the libellants in this court. He does not deny his ownership, or put that fact in issue; on the contrary he claims the brig as her owner. But independently of this state of the case on the face of the pleadings, can it be supported that the lien and security given by the act of assembly to mechanics who build a vessel, and to the men who furnish the materials of which she is constructed, may be lost and defeated by a transfer of the vessel by the owner, with whom they did make their contracts, and to whom they did furnish their work and materials, to a stranger with whom they had no contract or dealing? Can they, in this way, be turned from the person, with whom they did contract, to one they had nothing to do with? Can they, by an act of the other party, to which they were not consenting or privy, be deprived of the substantial security on the body of the vessel given to them by the law, and be turned over to the personal responsibility of a man who may not be worth a farthing? The person, with whom they made their contracts, replies, "I am not the owner of the vessel;" and the owner says to them, "I am not the person with whom you made the contracts." When the act of assembly speaks of masters and owners of a vessel, it is most manifest it intends the masters and owners at the time the contract was made, the work done, or the materials furnished, and not those who might afterwards become so. The lien on the vessel attached when the materials were furnished, and it cannot be afterwards divested by the act of one of the parties. In this case the ownership of Tees continued until after the brig was launched; until that time the sale to Harper was contingent, and the right of Tees in her as her owner was full and complete. If this construction of the act, upon a change of the owners of a vessel, be sound, the same must be applied to a change of the master; and has it ever been suggested that the lien of a contract, made with the master of a vessel, is lost by the appointment of a new master?

Now as to the custom alleged in this case, to sustain this part of the defence, it was incumbent on the respondent to show one clearly and uniformly well known and understood, so that it must be presumed to have been part of the contract between the libellants and respondents, that the mechanics and materialmen of a vessel built in this port on speculation, are bound, by virtue of the custom and without any express agreement or understanding to that effect, to wait for the payment of their debts, until the vessel is finished and sold; and to forego and postpone all legal remedies and proceedings, for the recovery of their claims, until she is sold. No witness has testified to any such usage; on the contrary, the evidence rather gives a negative to any such pretension. The fair result of all the testimony upon this point is, that there is a sort of understanding that in such a case, that is, of a vessel built for sale, or, as it is called, on speculation, the mechanics and materialmen will not press for their debts until she is sold, because it is for their own advantage. It is an acquiescence in the delay of payment for their own advantage, and not by or under any obligation on their part, or any contract implied with their employer. No witness has said or suggested that, in such a case, the materialmen are bound by any usage or understanding of the trade, not to sue for their debts, or that they have abandoned or surrendered any of their legal rights or remedies, or given up their claim or lien on the vessel, or any other security for their debts. All beyond this must be the subject of a special arrangement or contract between the builder and the persons from whom he obtains his materials or labour. A number of witnesses have been produced to support this part of the defence; to wit, John Vaughan, Mr. Vandusen, W. Vanhorn, Samuel Green, John W. Eyre, with others; all experienced ship builders, or concerned in furnishing ships. Mr. Eyre said. "When a vessel is built on speculation, the understanding is, that the materialmen are to wait until she is sold." On a question from the court, in relation to a vessel built by himself on speculation or for sale, "my understanding was, that the materialmen were to wait a reasonable time to sell the vessel. I made an agreement with one of the men to wait six months." This is very different from the assertion of an uniform obligatory custom, which binds the materialmen to wait for the sale of the vessel, before they can claim a payment of their debts. But Mr. Eyre adds, "I thing the materialmen do not give up the vessel." If he is right in this opinion, and it can hardly be questioned, it

is absolutely destructive of the custom set up; entirely inconsistent with it. If these debts are not to be paid until the vessel is sold, and they are to be satisfied from the proceeds of the sale, it is clear, that this fund cannot be received until the vessel is delivered to the purchaser without incumbrance; and, of consequence, that she passes into the hands of the purchaser clear of the liens of the mechanics and materialmen, who will have only the personal security of their employer for their debts, and must depend altogether upon his ability or integrity to appropriate the money received by him to the discharge of their claims. Every witness rejects this consequence, and, of course, denies the premises from which it must follow. Other objections have been made to this custom, and counter evidence was produced, which it is unnecessary to examine, as, in my opinion, the testimony of the respondent entirely fails to support it.

Nothing remains but the appeal to the discretion of the court, not to order a sale when, from the pressure, as it is said, of the times, a sacrifice of the property will be made. I have no such discretion. The rights and remedies of a creditor, against the person or property of his debtor, are given to him by the law, and a judge has no power to resist them on speculative opinions concerning their effect. If they are denied, or interrupted, or delayed, it must be by the law, and not by the discretion of the judge; unless when the law imparts such a power to him. The sales by the sheriffs are not stopped by the courts for such reasons. We see every day sacrifices of property to a vast extent. If the pressure of the times distresses the debtor and depreciates his property, it also reaches the creditor, and makes it the more necessary for him to collect the debts that are due to him; and prevent, perhaps, a sacrifice of his own property to satisfy his creditors. This appeal for indulgence, if I had the power to afford it, could not prevail in this case. We have no explanation of the real situation or object of this sale of the brig by Tees to Harper. If it is a real bona fide transaction, and Mr. Harper has truly paid to Tees the purchase money, why has not Tees paid with it the just and undisputed claims of the libellants? He is the party respondent before the court, and the claimant who takes defence, and prays for this forbearance. On the contrary, if Mr. Harper has not paid the consideration money of the purchase, why does he not at once come forward and pay these claims, and take his credit for them in his settlement with Tees?

Decree: That the vessel be condemned and sold according to the prayer of the libel.

[NOTE. The vessel having been sold and the proceeds brought into court, numerous claims were filed, which were referred to an auditor for liquidation, and the cause was subsequently heard on exceptions to his report. Case No. 6,090.]

DAVIS (NEWMAN v.). See Case No. 10,176.

Case No. 3,644.

DAVIS v. NEW YORK LIFE INS. CO.

[3 Hughes, 437.] [1]

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

LIFE INSURANCE POLICIES — LAPSE DURING CIVIL WAR—EQUITABLE VALUE—VERDICT.

1. The supreme court of the United States, in the case of New York Life Ins. Co. v. Statham, 93 U. S. 24, merely declared as a principle of law that the southern holders of northern policies of life insurance, which lapsed during the civil war by default in paying the annual premiums, were entitled to the "equitable value" of their policies, as of the date of the first default in paying the premiums, and did not undertake to set out the data or prescribe the process fo ascertaining that value, but left the whole subject to be determined by the jury or chancellor in each case.

2. Where a jury after a fair trial and full argument upon intelligent and competent testimony, finds a verdict in such a case which does not seem grossly excessive, or plainly disregardful of the law, the court will not set such verdict aside.

[This was an action at law by William P. Davis, assignee of Sloman Davis, against the New York Life Insurance Company.] Upon a motion for a new trial.

William W. Old and C. W. Williams, for defendant.

The jury in this case rendered a verdict for the plaintiff for $1,615.47, with interest thereon from April 17th, 1865, till paid. This verdict was rendered in response to a claim on the part of the plaintiff for the equitable value of a certain policy for $10,000 on the life of Sloman Davis. This policy was issued December 28th, 1857, and the annual premium was $627, of which 60 per cent. was paid in cash and a note was given for 40 per cent. thereof. The premiums on it were paid when they fell due in the years 1858, 1859 and 1860, but in 1861, when the premium fell due, it was not paid, but under a claim that it had been tendered, a suit was brought which went to the supreme court of the United States, and a report of the case is to be found in 93 U. S. 425. Under that decision the policy lapsed on December 28th, 1861, and the insured was entitled to the equitable value thereof on that day, as announced in the case of New York Life Ins. Co. v. Statham, 93 U. S. 24. The question before the jury which rendered the verdict complained of was, what was the equitable value of the policy on December 28th, 1861? That was the only subject of inquiry. There was no denial on the part of the company of the right of the plaintiff to recover this equitable value, the only question presented was the amount which he was entitled to as this equitable value.

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

The insured had paid in premiums in cash from December 28, 1857, up to December 28, 1860, the date of the last payment made, the sum of		$1,504 80
And he had paid in interest on his notes given for 40 per cent. of the premium in 1858	$15 08	
In 1859	30 16	
In 1860	45 24	
		90 48
Making the aggregate of the cash paid in up to the time the policy lapsed, the sum of		$1,595 28
He had given his four notes, each for the sum of $250.80, and these on the date of said lapse amounted to the sum of		1,003 20
And interest one year, at six per cent.		60 18
		$1,063 38

But the jury rendered a verdict for $1,615.47, with interest thereon from April 17th, 1865, the principal being for $20.19 more than all the cash ever paid into the company by the insured, without any regard to the value of the insurance on the life in question from December 28, 1857, to December 28, 1860, which must have been considerable considering the age of the insured, and without any regard to the notes which had been given in part payment of the premiums, and were still held by the company. They rendered their verdict upon the supposition, in their own view of the case, that the whole of the premiums had been paid in cash, of which the contrary is the fact, so that the equitable value of this policy as the jury fixed it amounts to:

Their verdict	$1,615 47
The notes which they refused to deduct, and interest one year	1,063 38
	$2,678 85

—Which is nearly double the amount actually paid in by the insured, without any regard to the value of the insurance for the four years during which this policy of $10,000 was carried on a person 57 years of age. Surely this statement, made partly arguendo, itself shows that the verdict of the jury is not right. The way in which the jury arrived at the amount of their verdict may be seen by the calculation which they made and which is filed with the papers in the cause.

They took the insurance on the life of a person of the age of 61, as given in certain tables in a book which was admitted as evidence	$819 60
And the cost of insurance, age 57, from the same book	662 90
And subtracted the two, getting	156 70
And this they multiplied by	10 309
—The present value of $1, age 62, American tables.	140960
	47070
	15670
	$1,615 47

In this multiplication they made a mistake of a few cents, as may be seen by a correct multiplication, but there is no doubt but that they arrived at their verdict in that way.

We insist the verdict is erroneous, and should be set aside for the following reasons; as they occur to us, among others:

1. The basis of ascertaining this equitable value was not the correct one. In New York Life Ins. Co. v. Statham, 93 U. S. 24, the court, in the last sentence of Mr. Justice Bradley's opinion, lays down the rule that "in each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation" of this equitable value. The tables which were introduced in evidence, and which we, as counsel for the insurance company, objected to, were not the tables used by the company at the time the insurance in this case was effected, nor were they in use at the time the policy lapsed. This is shown by an examination of the tables themselves, by what we know as internal evidence. On page 19 of this book we find that the annual premium on $1,000, age 57, is $66.29, and therefore, on $10,000, is $622.90, whereas the annual premium on the policy on Davis' life, age 57, as shown by the policy itself, is $627, a difference of $35.90. But we are not in want of direct evidence on this point. Mr. Moore, who was introduced as a witness by the plaintiff for the purpose of proving that this book was used by the company, also stated that, while the book had been in use for some years past, still there had been a change in the rate tables, but what that change was he could not say; and Professor Smith, also their witness, stated that the insurance on Davis' life was not according to those tables. These tables, then, were not in fact proper evidence before the jury in this case for the purpose of giving them the data for calculating this equitable value; and it is not enough for the learned counsel for the plaintiff to reply that we must produce these tables. He has not called for them, nor any other evidence in our possession. It was the plaintiff's part to produce evidence. He cannot shield himself by saying this was an insurance company. He could have gotten from this company any facts or data in their possession by the mere calling for them. The fact is that the premium paid by Davis in 1857 was upon the basis of Carlisle's tables, as may be seen from an examination of them. From those tables the insurance at 62 (age) would be for $10,000 the sum of $725, leaving a difference of $98, which, multiplied by $10,398, the value of an annuity of $1, age 62, gives $1,055.81 as the reserve fund; the fund spoken of by the learned justice in New York Life Ins. Co. v. Statham, 93 U. S. 24. Professor Smith stated in his examination that upon the basis of a premium of $627 on $10,000, age 57, he could not tell, without his book, or a long and tedious calculation, what would be the premium on the same amount, age 62,

but, guessing at it, said it would not be more than $777.50. Even upon this basis the value of the policy would have been only $1,551.50, which, according to our views, is the most that could be claimed by the plaintiff, from his own evidence, on the supposition that the whole premium had been paid in cash, and that the guessing at the amount of premium was sufficient when it was in the power of the plaintiff to get the exact figures.

2. But the verdict is erroneous on another ground already intimated. In New York Life Ins. Co. v. Statham, 93 U. S. 36, the court say, towards the close of Mr. Justice Bradley's opinion: "And the value," that is, the equitable value, "should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited." The first default occurred in this case on December 28, 1861, and the equitable value of this policy as of that day, with interest thereon from the close of the war, the plaintiff is entitled to recover. Now after estimating in their own way this equivalent value, the jury failed to deduct the notes which had been given for 40 per cent. of the premium on this policy, which they had already taken to have paid. This would have made the verdict:

Amount of verlict rendered...		$1,615 47
Less notes held by company given for 40 per cent. of premium, 4 notes of $250.80 each	$1,003 20	
Interest thereon one year......	60 18	
		1,063 38
		$ 452 09

—And we submit that at most the plaintiff should be put upon terms to give this credit now, or else have the verdict set aside. It is no answer, in our view, to this proposition, to say that these notes were paid by dividends. There was no proof of any such fact, and no evidence tending to prove it. There was evidence about the dividends declared from year to year in late years by the company, but there was no evidence that up to December 28, 1861, any dividends had been declared, and certainly it was in the power of the plaintiff to ascertain this fact specifically. The company could hardly suppose that in determining a case of this kind, where the principles for ascertaining the value are distinctly laid down, that the plaintiff would be allowed to speculate before a jury about the value of a policy, with no limit short of his own expanded expectations, and therefore may not have been prepared with all the documents necessary to rebut the evidence and theories propounded; nor do we understand that in this case such a course will yet be allowed, for as we understood the court the questions about the evidence introduced, raised by the company's counsel, were reserved by the court to be considered upon a review of the verdict of the jury after argument. Some of those questions were worthy of consideration, and we have no doubt, when the court has given that which they deserve, it will say that much of the evidence introduced by the plaintiff on this issue was improper and irrelevant, that it was in a degree merely speculative, and in no instance was the best evidence which the party making out his case is always bound to produce, even though it may be in the possession of an adverse party; and for procuring this evidence the law affords ample and ready means. In this case there did not appear any disposition on the part of the company to withhold anything; it did not appear that any effort of any kind was ever made by the plaintiff to get any information necessary for the formation of this verdict, which had proved unsuccessful.

3. We say in conclusion that this is a case in which it is eminently proper that the court shall review the verdict of the jury, and in doing so the court could not possibly invade any of the rights which belong to the jury. The verdict was simply the result of a calculation based upon certain premises or data. There were only two matters to be considered: 1st, the premises; and 2nd, the calculation. The court was to see that the jury had the proper data, and the calculation was simple enough. The only other question in this case was the question of set-off, already fully considered. Respectfully,

William W. Old,
Of counsel for defendant.

June 29th, 1879.

As a matter of interest to the judge, I beg leave to hand him a letter from Mr. Been, the company's vice-president and actuary, which may be taken for what it is worth. It was in reply to my letter giving him a statement of the facts of this case as proved on the trial, and the manner in which the jury arrived at their verdict.

William W. Old.

Samuel B. Paul and Samuel D. Davies [for plaintiff], in reply to defendant's brief in support of his motion, state that the only subject of inquiry by the jury arising out of the declaration is, what was the equitable value of the policy December 28, 1861? He introduced another subject, to wit, certain set-offs of notes made by the assured in partial payment of premium. To this we responded, our interest as participants in the surplus of the company. There was thus another subject before the jury, which was properly considered on evidence and after argument. Defendant admitted that the insured was a participant in the surplus of the company. The evidence introduced was addressed solely to these two points. The second does not show, nor as matter of fact was there any testimony admitted against the objection of the defendant. As the case went to the jury then its shape was all the defendant asked, so far as the evidence was concerned.

As to the law of the case. It stood before

the jury in the very language of the defendant, and the request of the defendant to the court was granted, except in a point so patently erroneous, in the shape the defendant had by consent given the evidence of plaintiff's rights as a participant, that we do not propose to support the action of the court by any remarks. It is this verdict the defendant asks to have set aside, the result of its own deliberate choice of position as to both the law and the testimony. The spectacle of such a motion is, to say the least, rare in any court.

And the grounds on which the brief supports the motion are hardly less remarkable.

1st. That the basis of ascertaining the equitable value was not the correct one. Why? Because we tried to reach it without introducing the defendant through its officers personally as a witness; by substituting, as the record shows, without objection by defendant, the rates of insurance used by defendant now all over the land, and the defendant responded, by examination of an actuary who had been introduced by us for a wholly different purpose, the relative deduction from those tables at age sixty-one, shown by the price at age fifty-seven in the policy with age fifty-seven in those tables, which, by the very argument of the defendant's brief, was what the jury adopted as the basis of their judgment. The court will recall without difficulty that we tried to show an annuity of $192, by deducting the premium of the policy from the premium of the defendant's publication, but that $156.70 was fixed for the defence on the basis above referred to. The objection then is either we did not manage our case, as now, after sleeping on it, they think they might have made us manage it; or 2nd, that they made a mistake in their own management, which they wish the court to give them opportunity to correct. Litigation would have no end if such views could influence motions for new trials.

The second ground is: That the jury failed to deduct the notes after finding the equitable balance; and that there was no proof nor anything tending to prove, that the interest of plaintiff in the surplus of the company should have absorbed them. We submit that there was evidence, and much of it; that it was admitted without question by the defendant; that its weight and effect were argued fully; that it was a question eminently such as a jury should decide; and that it cannot possibly affect defendant's right to a new trial to suggest that a different judgment on the point might have been reached had the defence been differently conducted. The suggestion in the commencement of the brief of defendant that the finding of the equitable value was slightly in excess of the apparent cash payment, was fully argued and fully explained in argument. The opening for defendant almost wholly confined itself to the claim stated in plaintiff's opening; and the evidence commented on was that the rights of plaintiff were to share equally in the surplus of the company, not simply to take the part of surplus declared in dividends; that all assets were compounded; that losses, forfeitures, short mortalities, and numerous matters enhanced this surplus; and that by their own showing the interest receipts exceed the mortalities paid for. The jury had reasonable ground for their finding. We showed that the company thought, and so said at the time the insurance was effected, doubtless based on its experience, that the dividends would absorb the notes. And proof, not objected to by the defendant, was admitted to show that the surplus, which the company's book introduced without objection, showed to be the property in due proportion of the assured, exceeded forty per cent.

HUGHES, District Judge. The defendant objects to the verdict in this case on the ground that the jury got at the amount of the equitable value of the policy by a wrong process and upon incorrect data, and that they erred in not deducting from the equitable value, as found, the amount of the premium notes given by the plaintiff to the company. The supreme court of the United States have decided in New York Life Ins. Co. v. Statham, 93 U. S. 24, that in cases in which, during the late civil war, southern holders of northern policies of life insurance were prevented by the war from paying their annual premiums, those policies lapsed; but that the holders could claim, after the war and the death of the persons named in the policies, the equitable value of the policies at the time of first default in the payment of premiums. In doing so the supreme court meant no more, I think, than to establish a principle of law. Nothing in their decision warrants the conclusion that they undertook more than to settle the legal question. I do not think that it was in the mind of the court, in thus declaring the law, to set out also the data upon which to determine, in every case, what the equitable value which they contemplated really was. The court uses many expressions, apparently designed to illustrate and explain what they mean by "equitable value," but they nowhere detail, with any attempt at completeness, either the data from which or the process by which this value is to be ascertained. They seem to refer these latter subjects to the actuary and the mathematician, and to leave the jury or the chancellor in each particular case to find as a fact what the equitable value of a policy is, from the best testimony at command. I have no doubt the court used the phrase in its actuarial sense, but I do not see that they said anything intended to deprive the jury or the chancellor of the prerogative of estimating the amount of the equitable value of a policy, upon the strength of such evidence as in each case might be adduced before them. We had a very intelligent investigation of

this subject at the trial in this case. The jury was an unusually good one, the trial fair and full, and the argument on either side able and exhaustive. The jury had the advantage of the testimony of very well-informed and competent witnesses, one or two of them learned experts. The question, what was the equitable value of this policy, in December, 1861, when default occurred in the payment of the premium; and the further question, whether the amount of the premium notes which were given by the plaintiff in part payment of four annual premiums ought to be set off against such equitable value, were elaborately considered, and were both deliberately dealt with by the jury, on full proofs after full argument. Now, if I thought that the supreme court intended in its leading decision on this question to do more than declare that the plaintiff in such a case as this was entitled to the equitable value of his policy, and went on besides to define accurately the data and process for ascertaining its amount, I would feel authorized to examine critically the verdict rendered by the jury, and the data and process which they employed. But I consider that the supreme court intended only to declare the law, and left the jury to find the fact. The latter having been done in this case by the jury, I do not feel authorized to do more than consider whether or not the jury has so grossly erred as to the fact, and so clearly disregarded the law, as to have presented a case for a new trial within the discretion of the court, as governed by the ordinary rules observed by courts in considering motions for new trial.

Counsel for defendant have exhibited correctly, no doubt, the process by which the jury got at the $1,615.47 which they found as their verdict. I have already said that I think it belonged to the jury to determine not only what amount they should find, but the process by which to ascertain the amount. I could not, therefore, interfere with the verdict unless it were grossly excessive. If this case had been before me as a chancellor, I am inclined to think I should have found a smaller amount; but the mere fact that a judge differs with a jury as to a fact does not make a case for a new trial. Defendants complain that the verdict of the jury is for twenty dollars more than it would have been if they had adopted the empirical plan of adding together all the cash premiums which plaintiff had paid up to December, 1861, and given a verdict for the aggregate, with interest from the close of the war. They complain specially, of this result, that it imposes upon the insurance company the risk, without compensation, of the insurance which stood against them for four years. This is one view to take of the subject, though it must be remarked that as there was in fact no death during that period there was in reality no risk. A compensating view of the matter is, that the plaintiff, at the date when his policy was terminated by law (December, 1861), had the right of insuring until the death should occur, at a very reduced premium, and also at the death (which did occur in a very few years) to the amount insured for, of $10,000. This right he lost by operation of law, and the value which he so lost the company gained by the lapse of the policy; and therefore, in the light of actual events now known, the verdict of the jury cannot be regarded as practically injurious to the company. To the mind unskilled in the learning of the actuary and the mathematician, the verdict is apt to appear more liberal to the company than to the plaintiff; and inasmuch as it so nearly corresponds with the result of the science of so learned and expert an actuary as Professor Smith, who testified as a witness at the trial, I think the verdict commends itself as reasonably correct to practical minds. I see, therefore, no material objection to the verdict on the score of excessiveness.

The other objection of the defendants is, that the amount of the notes given for forty per cent. of the annual premiums (four in all) was not treated by the jury as a valid offset against the equitable value found as already shown. These notes were given by the plaintiff at the solicitation of the company's local agent, and on the assurance that the scrip dividends, which it was a part of the scheme of this company to declare and pay to its insurers, would be equal to and would pay off and extinguish these forty per cent. premium notes. The jury considered that these confident representations of the company's agent were sufficient to raise the presumption that the scrip dividends did in fact equal the amount of the notes, and to throw the burden of proving to the contrary upon the company. The whole matter was very fully gone into by counsel in their argument at the trial; the jury dealt with the case on this basis after full argument as judges of the fact; and, having virtually found as a fact that the scrip dividends did offset the notes, I am indisposed to nullify their verdict on that account. The motion for a new trial is for these reasons denied.

Case No. 3,645.

DAVIS v. PALMER.

SAME v. M'CORMICK.

[2 Brock. 298; 1 Robb, Pat. Cas. 518; Merw. Pat. Inv. 218.][1]

Circuit Court, D. Virginia. May Term, 1827.

INTERPRETATION OF PATENTS—PROVINCE OF COURT AND JURY—INFRINGEMENT — COLORABLE ALTERATIONS—SUFFICIENCY OF SPECIFICATIONS.

1. An inventor obtained a patent for certain improvements made in the construction of the

[1] [Reported by John W. Brockenbrough, Esq. Merw. Pat. Inv. 218, contains only a partial report.]

plough, and brought suit for an alleged violation of his patent-rights. In the description of those improvements which is annexed to, and made a part of the patent, after reference to the imperfections of the mould-boards formerly in use, the specification proceeds: "In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape, and instead of working the moulding part or face of the mould-board to straight lines, my improvement is to work it to circular or spheric lines. By repeated experiments, I have ascertained that in one direction, viz.: from a, fig. 4, (the point of the share) inclining to the back part of the mould-board, the circle or segment to which the mould-board is wrought, should have about three times the radius of the smaller segments, represented by the letters e, c, &c., the former being about thirty-six inches, the latter twelve." After a detailed description of the new mould-board, the specification proceeds: "This being thus worked off, uniformly forms a section of a loxodromic or spiral curve, and when applied to practice, is found to fit or embrace every part of the furrow-slice far more than any other shaped plough, &c." *Held*, that this patent must be construed, not as extending to all mould-boards whose faces are worked to circular or spheric lines, forming a segment of a loxodromic or spiral curve, (which general description would apply to mould-boards already in use, and under that construction the patent would, consequently, be void,) but as applying only to mould-boards whose faces are worked upon transverse circular lines, whose radii are in the exact proportion of thirty-six to twelve. The word "about" must be rejected for uncertainty.

[Cited in Winans v. Denmead, 15 How. (56 U. S.) 343, 345.]

2. It is the province of the court to construe the patent and determine what improvements are intended to be patented, and of the jury to decide whether those improvements are described in the patent with sufficient clearness to enable a skilful mechanic to construct a machine thereby. In deciding this question, the jury should give a liberal common sense construction to the directions contained in the specification.

[Cited in Brooks v. Bicknell, Case No. 1,944; Hogg v. Emerson, 6 How. (47 U. S.) 482, 484, 486; King v. Gedney, Case No. 7,795.]

3. So much of the patent as relates to the face of the mould-board, is not violated, unless the same circular lines are adopted as are described in the specification, but if the imitation be so nearly exact as to satisfy the jury that the imitator intended to copy the model, and to make some almost imperceptible variation for the purpose of evading the right of the patentee, this may be considered as a fraud on the law, and such slight variation be disregarded.

4. A particular description of the mould-boards formerly in use, is not necessary to give validity to the patent; a reference to them in general terms, which are not untrue, or a reference to a particular mould-board generally known, accompanied by such an intelligible description of what is new, as will enable a workman to distinguish it from the old, is sufficient.

5. Although the act of congress declares, "that simply changing the form or proportion of any machine, shall not be deemed a discovery," yet, when the change of form or proportion produces a new effect, of which the jury must judge, it is not simply a change of form or proportion, and does not come within the inhibition of the statute.

[Cited in Smith v. Pearce, Case No. 13,089; Re Fultz, Id. 5,156; Teese v. Phelps, Id. 13,819; Milligan & Higgins Glue Co. v. Upton, Id. 9,607.]

The plaintiff, Gideon Davis, brought his several actions on the case against the defendants, to recover treble damages under the statute, for an alleged violation of the plaintiff's patent-rights, as the inventor of certain new and valuable improvements in the plough. See the act of congress "to extend the privilege of obtaining patents, and to enlarge and define the penalties for violating the rights of patentees," section 3, passed 17th of April, 1800, 1 Story's Laws, 753 [2 Stat. 37]. The declarations, which are identical, contained various counts. The first count charged the defendants with having made and sold divers improved ploughs upon the said improved plan, and in imitation of the said invention of the plaintiff. The second count charged, that the defendants had made and sold diver ploughs, partly upon the said improved plan, and partly in imitation thereof. The third count charged, that the defendants did counterfeit and did use and put in practice, the improvement and invention of the plaintiff. The fourth count charged, that the defendants did make divers ploughs, on the improved plan and in imitation of the invention of the plaintiff. And the fifth count charged, that the defendants did make divers ploughs, partly on the improved plan, and partly in imitation of the invention of the plaintiff. On the 1st of October, 1825, letters patent were issued to the plaintiff, granting to him for the space of fourteen years, the exclusive right of constructing, &c., ploughs upon his improved plan, and to the patent was annexed a diagram and schedule, which were made a part thereof, descriptive of the improvements which the plaintiff claimed to have discovered. The specification describing the face of the mould-board of the new plough, is as follows: "The general principle heretofore concurred in by all scientific men, who have turned their attention to this subject, is, that as the furrow-slice is detached from the solid ground, at a straight line parallel to the surface, at such depth as may be required, that it should be raised and turned over, so as to retain as far as possible the same flat shape. In order to accommodate the face of the mould-board to this idea of raising the furrow-slice up and turning it over, it has been so constructed as to form straight lines lengthwise, either horizontal or a little inclined, and also to correspond with another set of straight lines at right angles with the land-side, or nearly so, commencing at the point touching the edge of the share, and lower edge of the mould-board. These last mentioned straight lines, as they recede from the point of commencement, gradually change from a horizontal to a perpendicular direction, and even pass beyond the perpendicular so far as to give the proper overjet behind. It has been thought that mould-boards so constructed would fit and embrace every part of the furrow-slice in the opera-

tion of turning it over, not observing that the furrow-slice must necessarily acquire a convex form on the under side, during the operation by which it is raised up and turned over. The truth is, however, that in raising and turning over the furrow-slice, it always either acquires a convex form on the under side, or else it is broken off into pieces, and thrown over; as might therefore be anticipated, it will be found that all these mould-boards which are constructed on these principles, wear through in the operation of ploughing about midway, while the upper and lower edges are scarcely rubbed. It also necessarily results, that ploughs of this construction work hard, and are of heavy draught, because the mould-board, not being adapted to the convex form which the furrow-slice is disposed to assume, lifts the furrow-slice at a single point, and that in the middle, instead of being equally applied throughout the entire operation. In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape; and instead of working the moulding part, or face of the mould-board to straight lines, my improvement is to work it to circular or spheric lines. By repeated experiments, I have ascertained, that in one direction, viz.: from a, (the point of the share) inclining to the back part of the mould-board, the circle or sedgment to which the mould-board is wrought, should have about three times the radius of the smaller segments, represented by the letters c, c, &c., the former being about thirty-six inches, the latter twelve. In order, then, to shape the moulding part, or the face of the mould-board, having obtained a suitable block, I begin by laying off the bottom, (figs. 3 and 4,) by circular or spheric lines at a, a, a, a. If I intend to construct a plough of the proper size to cut and turn a twelve inch furrow, I strike this segment of a circle of thirty-six inches radius, (fig. 1,) and at twenty-four inches back from the point to b, at right angles with the land-side, this circle will intersect the angle line. The circle is extended out from the land-side. Then I work the block to fit the same segment inclined from a, (fig. 4,) at the point of the share to a, at a perpendicular raised twelve inches from the horizon, with the circle extended in towards the land-side. Then, having wrought the shape of these two lines, I apply the circular part of the smaller segment, (fig. 2,) and work the face of the mould-board until that segment will have an equal bearing on all parts, corresponding with the cross-lines c, c, c, &c., which, if produced, would all terminate at a point at d, which is about thirty-six inches from the perpendicular where the line a, a, crosses the line d, b. This being thus worked off, uniformly forms a section of a loxodromic, or spiral curve, and when applied to practice, is found to fit or embrace every part of the furrow-slice, far more than any other shaped plough. The plough may be made larger or smaller, suited to deep or shallow ploughing, by enlarging or diminishing the radii of the segments which it is wrought by. Believing that this mode of shaping the moulding part, or face of the mould-board is an original invention of my own, not heretofore used or known, and that it is a most important improvement in the shape of the plough, I claim the exclusive privilege of making, using, and vending the same." The defendants pleaded "Not guilty," and on the trial, moved the court to give the jury a series of instructions, which are stated and discussed in the following opinion.

MARSHALL, Circuit Justice. These suits are brought by the plaintiff, to recover damages for the alleged violation of his patent, for an improvement on the plough. His improvement is, in part, made on the face, throat, and hind part of the mould-board. The counsel for the defendants have moved the court (1) to declare the patent void, because the specification, so far as it regards the improvements in the mould-board, does not describe this part of the improvement with the certainty required by the act of congress. See Act Feb. 21, 1793 (1 Story's Laws, 301, § 3 [1 Stat. 321]). Should the patent be submitted to the jury, they then move that it be accompanied with the following instructions: 1. That so much of the patent as respects the face of the mould-board is not violated, unless the defendants have adopted the same spheric lines as are described in the plaintiff's specification. 2. That the jury must be satisfied that the former mould-board is described with sufficient certainty, to distinguish between it and the improvement claimed. 3. If the jury shall be satisfied that M'Cormick has made and used mould-boards, worked out by transverse and concave circular lines, before the plaintiff obtained his patent, or made his alleged improvement, then the particular spheric lines described in his specification constitute only a change of form and proportion, and is not an invention capable of being patented.

In the course of the argument, the counsel have also contended that the same uncertainty exists in that part of the specification which describes the throat and hind part of the mould-board, as in that which describes its face.

1. We will first consider the proposition, that the patent is void for uncertainty. It is, undoubtedly, the province of the court to construe every written instrument offered in evidence; and it results from this duty, that if the instrument be so uncertain in its terms as to have no meaning; if it be insensible, or have no application to the case, it may be rejected. Is the patent, on which the present actions are founded, of this description?

The specification, No. 1, relates to the face of the mould-board. It consists, first, of a general, and then of a more particular description of this part of the improvement. The defendants contend that these descriptions are uncertain in themselves, and that there is also a fatal uncertainty which of them describes the improvement for which the plaintiff claims his patent. The plaintiff, after a general description of the mould-board then in use, and the inconveniences arising from its form, proceeds thus: "In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape, and, instead of working the moulding part, or face of the mould-board to straight lines, my improvement is to work it to circular or spheric lines." The specification then proceeds to a more particular description of the lines used, and of the manner in which they are applied, in order to form the face of the mould-board.

The counsel for the plaintiff seem disposed to consider this general description, as constituting the essential part of the specification, and the subsequent more particular description, as merely an illustration of the general principle, as one mode of carrying it into execution. If the specification will admit of this construction, then the subsequent and particular description may be expunged without affecting the patent. A principle remains the same, whether it be accompanied by any case put for illustration or not. It may be comprehended more easily, but is not varied by the illustration. If we consider this general part of the specification as standing alone, and as describing this part of the improvement, it is not liable to the charge of uncertainty. It claims, as an improvement, "to work it (the mould-board) by circular or spheric lines." Every mould-board worked by circular or spheric lines, however those lines may cross each other, and whatever may be their relative proportions, is within the plaintiff's patent. If the face of no mould-board previously in use will fit this description, the plaintiff's patent may, perhaps, legally cover the broad ground it would occupy. But if any mould-board previously in use would fit this description, then the plaintiff would claim, as his invention, that which was previously known, and his patent would be void. But we do not think the specification will admit of this construction. It proceeds to say, "By repeated experiments I have ascertained that in one direction, viz.: from a, fig. 4," (which is the point of the share) "inclining to the back part of the mould-board the circle or segment to which the mould-board is wrought, should have about three times the radius of the smaller segments represented by the letters c, c, &c., the former being about thirty-six inches, the latter twelve." This is intended for a plough which will turn a furrow-slice of twelve inches. The specification then proceeds to detail minutely the mode of operation by which these lines are to be applied, in order to give the face of the mould-board the required shape, and says: "The plough may be made larger or smaller, suited to deep or shallow ploughing by enlarging or diminishing the radii of the segments which it is wrought by." "Believing," the specification adds, "that this mode of shaping the moulding part, or face of the mould-board, is an original invention of my own, not heretofore used or known, and that it is a most important improvement in the shape of the plough, I claim the exclusive privilege of making, using, and vending the same." This claim applies conclusively, we think, to the particular and laboured description of the mould-board which immediately precedes it. The language seems to us to require this construction; and the subject seems also to require it. If the patent were to extend to all mould-boards worked out to circular lines, crossing each other in any direction, or in any proportion, it would be unnecessary to describe with so much labour and minuteness, the direction of the longitudinal and perpendicular circular lines, by which the face of the mould-board should be worked out, and the proportions those lines should bear to each other, and the size of the plough. It is obvious, then, that the person who makes his improvement to consist in the peculiar shape given to the face of his mould-board, and who describes the lines and their several proportions, which will give that peculiar shape, must mean to appropriate the shape produced by the application of those new lines. We are then decidedly of opinion, that a mould-board conforming to the particular description contained in the specification, is the invention which the plaintiff claims, and that instead of being a mere illustration of the principle stated in the introductory part of the specification, it is itself the essential improvement, of which only a general idea was given in the introductory part.

It is contended on the part of the plaintiff that, if the patent be limited to the more particular part of the specification, still the claim is not confined to mould-boards worked out by segments of circles of the exact form and proportions mentioned in the specification. To support this argument, counsel rely on the word "about," which is introduced into the description; he has found, Mr. Davis says, by repeated experiments, that the segment of the larger circle should have about three times the radius of the smaller segments, &c. The claim, therefore, is not for a mould-board of the precise shape described, but for one "about" the shape described. It will at once be perceived, that unless the extent of this word "about," be limited, it introduces all the uncertainty which it was supposed would be fatal to the patent, according to the general description contained in the introductory

part of the specification. If, instead of thirty-six inches and twelve, the proportions may be thirty-seven and eleven, thirty-eight and ten, why not forty and eight, or thirty-five and fifteen? The proportions may be enlarged or diminished, and with every change of proportion, the shape of the mould-board will be changed. If this be the construction of the patent, then it covers all the various forms of mould-boards which may be made under this latitudinous exposition of its terms; and if any mould-board has been previously used, whose face may be formed by transverse segments of circles, whose radii bear to each other "about" the proportion of thirty-six to twelve, the patent is void. Will it be said that it may be left to the jury to determine, what is "about" the proportion particularly designated? This expedient will not remove the difficulty. We doubt how far it may consist with the principle that the court is to construe every written instrument. But, waiving this doubt, if the word has any limits, they must be always the same. When applied to a mould-board, it cannot be endowed with an elastic principle, to expand or contract itself according to circumstances. It cannot admit of being varied to a certain extent, if no mould-board has been in use of the shape which that degree of variation would produce, and at the same time of being restricted, if a mould-board of such a shape has been in use. The word "about," cannot be equivalent to a general claim of the exclusive right to all concave mould-boards, varying in any degree from those previously in use. The definiteness of the shape, which the specification professes to give to the mould-board, cannot be sacrificed by this loose word. It is further observable, that where the specification describes the process of the workman, it drops the word "about." It has been supposed that the precise proportion required between the radii of the larger and smaller segments of circles, may be relaxed under the concluding part of the description. After giving the mode of operation, the specification adds: "This being thus worked off, uniformly forms a section of a loxodromic or spiral curve, and when applied to practice, is found to fit or embrace every part of the furrow-slice, far more than any other shaped plough."

The argument is, that it is a mould-board whose face forms a section of a loxodromic or spiral curve that is patented, and that any lines which will give such a surface, are within the specification, and consequently, within the patent. Without noticing the difficulties growing out of this construction, it is sufficient to say, that the specification does not claim the loxodromic or spiral curve as the invention, but states it as the result of the prescribed application of the transverse circular lines, the application of which, in the relative proportions prescribed, is the invention. The language of this part of the specification, tends to confirm, we think, the opinion already indicated, that the plaintiff intended to claim a mould-board of the precise and definite shape prescribed, not one about that shape. He says his mould-board, "so worked off," "when applied to practice, is found to fit or embrace every part of the furrow-slice, far more than any other shaped plough." In construing this specification, we must keep in view the notice of the improvement which Mr. Davis claims to have invented and to describe. It is an improvement in the shape of a machine which has been in common use a great number of years, and in a great variety of shapes. The concave mould-board has been long considered as the most eligible shape that part of the plough can assume, and multiplied essays have been made to perfect it. Mr. Davis has recently added to their number; he professes to have discovered that precise concavity in the surface of the mould-board, which will better than any other fit every part of the furrow-slice, and, consequently, turn it over with less labour. For this discovery he claims a patent; we may reasonably expect, that a specification for such a patent, will give a precise and definite shape to the improvement to be patented. We are then decidedly of opinion, that in construing this specification, the word "about" must be disregarded, and the patent be restricted to the mould-board as described, independent of that word. If we consider the particular part of the specification as describing the object to be patented, the defendants insist that the description given in that part is not sufficiently clear to enable a skilful mechanic to construct the machine. It may not, perhaps, be easy to draw a precise line of distinction between a specification so uncertain, as to claim no particular improvement, and a specification so uncertain as not to enable a skilful workman to understand the improvement, and to construct it. Yet, we think, the distinction exists. If it does, it is within the province of the jury to decide, whether a skilful workman can carry into execution the plan of the inventor. In deciding this question, the jury will give a liberal common sense construction to the directions contained in the specification. See the able opinions of Mr. Justice Story, in Ames v. Howard [Case No. 326], and of Mr. Justice Baldwin, in Whitney v. Emmett [Id. 17,585].

If the patent be submitted to the jury, the defendants request the court to give the several instructions which have been already mentioned. 1. The first is, that so much of the patent as relates to the face of the mould-board is not violated, unless the defendants have adopted the same circular lines as are described in the specification.

This instruction will be given. But it may perhaps be understood with some slight modification. The patent, undoubtedly, covers only the improvement precisely described. But if the imitation be so nearly exact as to satisfy the jury that the imitator attempted to copy the model, and to make some almost imperceptible variation, for the purpose of evading the right of the patentee, this may be considered as a fraud on the law, and such slight variation be disregarded. 2. The second instruction is, that the jury must be satisfied that the former mould-board is described with sufficient certainty, to distinguish between it and the improvement claimed. We do not think a particular description of the former mould-board is necessary. A general reference to it, either in general terms which are not untrue, or by reference to a particular mould-board, commonly known, accompanied by such a description of the improvement as will enable a workman to distinguish what is new, will be sufficient. 3. The court is also requested to instruct the jury that, if M'Cormick has made and used mould-boards, worked out by transverse circular lines, so as to produce a concave surface, before the plaintiff obtained his patent, or made his alleged improvement, then the particular lines described in his specification, constitute only a change of form and proportion, not an invention capable of being patented. It is stated on both sides, that the clause in the statute, to which this instruction refers, is one of considerable doubt. It is in these words: "And it is hereby enacted and declared, that simply changing the form or the proportion of any machine, shall not be deemed a discovery." Act 1793, before referred to (1 Story's Laws, p. 301, § 2 [1 Stat. 321]). In construing this provision, the word "simply," has, we think, great influence. It is not every change of form and proportion which is declared to be no discovery, but that which is simply a change of form or proportion, and nothing more. If, by changing the form and proportion, a new effect is produced, there is not simply a change of form and proportion, but a change of principle also. In every case, therefore, the question must be submitted to the jury, whether the change of form and proportion, has produced a different effect. With respect to the throat and hind part of the mould-board, the court need only say, that the description of the specification is general, not giving the particular shape of those parts of the mould-board. If either the throat or hind part of a mould-board, was in use before, which answers the description contained in this specification, then the plaintiff has patented what belonged to the public, and his patent is void.

NOTE. After the opinion of the court was delivered, both suits were dismissed agreed; each party paying his own costs.

Case No. 3,646.

DAVIS et al. v. PENDERGAST et al.

[8 Ben. 84.][1]

District Court, S. D. New York. April, 1875.[2]

DEMURRAGE—DEFAULT OF CHARTERERS—RUNNING DAYS—CUSTOM OF PORT—LIGHTERS—AGENT.

1. The owners of the bark M. and L. chartered her to P. & Co. for a voyage from New York to Rio. The charter provided that there should be allowed "lay days as follows, that is to say, forty-five running days for loading and discharging," and that, "in case the vessel is longer detained," the charterers should pay demurrage at the rate of £9 for every day so detained. "providing such detention shall happen by default" of the charterers or their agent. The owners claimed to recover thirteen days' demurrage. The evidence showed that thirty-two of the forty-five lay days were consumed in loading in New York; that the vessel arrived at Rio on the 19th of December, 1866, and the agents of the charterers were notified on December 24th that the vessel was ready to discharge, and the cargo was finally all taken out on the 19th of January; that the cargo could be discharged either at a dock or by lighters, and the master, fearing he would have to take his turn at a dock, discharged all the cargo, except some coal, by lighters; that he applied to the charterers' agent to furnish lighters and he did so, the ship paying for the use of them, but there was delay in their being furnished; and that the coal was discharged at a dock and the discharge occupied seven days, but could have been made in one, if the charterers had furnished means to take away the coal, as they should have done. *Held*, that the burden of proof was on the owners to show that the vessel was detained by default of the charterers.

[Cited in McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 532.]

2. The mere lapse of time was not necessarily a default.

[Cited in McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 532.]

3. No default was shown in the thirty-two days consumed in loading in New York.

4. The charterers, as to the forty-five running days, took the risk of holidays, Sundays, and other non-working days.

5. The charterers were not responsible for the delay in furnishing the lighters.

[Cited in McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 532.]

6. As no default of the charterers was shown in respect to the thirty-two days consumed in loading, and none in respect to the cargo discharged in lighters, and, as there were thirteen running days left to the credit of the charterers at Rio it was of no consequence if they were in default as respecting the discharge of the coal. The libel must be dismissed.

[Libel for demurrage by William R. Davis and others against Charles H. Pendergast and others.]

Beebe, Donohue & Cooke, for libellants.
John N. Whiting, for respondents.

BLATCHFORD, District Judge. This is an action to recover for thirteen days' demurrage, at nine pounds sterling per day, on a

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

[2] [Reversed in Case No. 3,647.]

charter party made at New York, September 19th, 1866, between the libellants, owners of the bark Mary and Louisa, by their agents, and the respondents, by which that vessel was chartered to the respondents for a voyage from New York to Rio de Janeiro in Brazil. The charter party provides that there shall be allowed for the loading and discharging of the vessel, at New York and Rio de Janeiro, "lay days as follows: that is to say, forty-five running days for loading and discharging," and that, "in case the vessel is longer detained," the respondents shall pay "demurrage at the rate of nine pounds sterling per day, day by day, for every day so detained, provided such detention shall happen by default" of the respondents or their agent.

The libel, after averring the execution of the charter party and setting forth a copy of it as a part of the libel, states that it was agreed thereby that the respondents should have forty-five running lay days for loading and unloading, and that, if the vessel should be longer delayed, the respondents would pay to the libellants nine pounds sterling per day, day by day, so long as she should be so detained. This averment wholly ignores the clause in the charter party which provides that the respondents are not to pay demurrage for the detention of the vessel beyond the forty-five running days, unless such detention happens by the default of the respondents or their agent. The libel also avers, that the respondents, after being notified of the readiness of the vessel to receive cargo at New York, used in loading her thirty-two of the lay days provided for in the charter party; and that, after the agents of the respondents at Rio de Janeiro were duly notified that the bark was there and ready to discharge her cargo, it could easily have been discharged within six days, but the vessel was detained by such agents, in the discharge of her cargo, for the thirteen days after the expiration of the forty-five lay days.

There can be no doubt that, under this charter party, the burden of proof is on the libellants to show that the vessel was detained by the default of the respondents. The express contract was, in effect, that the respondents should be liable only for such detention of the vessel, after the forty-five running days were exhausted, as should happen by their default or that of their agent. The mere lapse of time was not necessarily a default. It was for the libellants to show such default affirmatively. Towle v. Kettell, 5 Cush. 18, 23.

Although the libel avers that the respondents consumed, in loading the vessel at New York, thirty-two of the lay days provided for in the charter party, yet it does not aver that such thirty-two days were improperly or unnecessarily so consumed, nor does it aver that there was any detention of the vessel by the respondents, within the meaning of the charter party, in loading her, or any default on the part of the respondents in taking thirty-two of the lay days to load the vessel. Nor is there any evidence that there was any such detention or default in loading the vessel. The allegation of the libel and the evidence are directed wholly to the point, that the detention and the default were in the discharging of the cargo at Rio de Janeiro.

The libel avers that the bark arrived at Rio de Janeiro on the 19th of December, 1866; that the agents of the respondents there were notified on the 24th of December that the bark was ready to discharge cargo; that the cargo could easily have been discharged by the bark within six days; but that she was thereafter detained by the agents of the respondents, in the discharge of the cargo, until and including the 19th of January, 1867, when the unloading was completed. If these averments be regarded as equivalent to an averment that the vessel was in fact ready to discharge on the 24th of December, the libellants have failed to show that she was ready to discharge by that day, and they have also failed to show satisfactorily when afterwards she was ready to discharge, so as to set running the thirteen lay days that were left. She was not at any wharf by the 24th of December, nor did she have by that day any lighter alongside, into which she could discharge. The notice of her readiness to discharge amounted to nothing unless she was in fact ready to discharge. The master of the bark, who is a witness for the libellants, testifies, that the vessel arrived at Rio de Janeiro on the 19th of December; that he reported to the agents of the respondents there on the 24th of December, as being ready to discharge; that the first cargo was taken out two or three days after that, and he cannot say positively what day; that the cargo was finally discharged on the 19th of January; that all of the cargo was discharged into lighters while the vessel was at anchor, except the coal, which was discharged at a wharf; that the delay was caused by the lighters not coming fast enough; and that, if the lighters had come fast enough, he could have discharged the whole cargo easily in six days. He also testifies, that he applied to the agents of the respondents to furnish the vessel with lighters; that he applied to no one else for a lighter; that the vessel paid for the use of the lighters; and that he remonstrated with the agents repeatedly about the insufficient number of lighters. The master appears, on his own evidence, to have chosen the method of discharging by lighters, and to have employed what he considered proper measures to procure them, and, although he thought at the time that the supply of lighters was not sufficient, he did not resort to any means to procure more lighters, or resort to any other means of discharging any of the cargo. He testifies that there was plenty of room in Rio to land coal and lumber; that there were other methods of discharging coal and lumber than in lighters; that coal and lumber were not custom house

goods and could have been discharged at other wharves than the custom house wharves; that the reason for his resorting to lighters was that he thought he could discharge the custom house goods sooner by lighters, than by waiting his turn for a custom house wharf, because there were a number of vessels ahead of his; and that he was informed that if he wanted to discharge otherwise than by lighters he would have to wait such turn. The charter party contains a clause that "the cargo shall be received and delivered alongside within reach of the vessel's tackles, or according to the customs of the port." The fact that the master employed the agents of the respondents to procure the lighters is of no consequence. The charter party provides that the vessel shall "be consigned to charterers' friends at port of discharge, subject to a commission of two and one-half per cent." The master says that the vessel paid for the use of the lighters. This made the agents of the respondents, pro hac vice and in reference to the furnishing of lighters, the agents of the vessel. As respects, therefore, all of the cargo that was discharged by lighters, which included all of the cargo except the coal, I do not see that the libellants have shown any detention of the vessel by the respondents.

As regards the coal, the master says he could have discharged it in one day, and that seven days were consumed in discharging it at the wharf, because the respondents failed to provide means for taking it away as they should have done. As no default by the respondents is shown in respect to the thirty-two days at New York, and none in respect to the cargo discharged at Rio by lighters, and as there were thirteen remaining days left to the credit of the respondents at Rio, it is of no consequence that they were in default in respect to the discharge of the coal at Rio, if that were the fact.

There is no doubt that the charterers, in respect to the forty-five running days, took the risk of holidays, Sundays, and other non-working days. The question is as to the days beyond the forty-five running days, and as to those the libellants must show a default by the respondents. The claim made by the libellants that the respondents bargained for only the forty-five running days, and that, if their cargo was not loaded and discharged absolutely in that time, they must pay demurrage for the additional time consumed, is inconsistent with the terms of the charter party. It is argued for the libellants, that mere lapse of time was default, and that, when the forty-five running days elapsed, the respondents then became in default, if the delay thereafter was not caused by the act of the libellants. This is to change the contract which the libellants made, and to throw off from themselves the burden which they thereby assumed. It is to give no meaning to the clause in regard to default.

It appears by the testimony that it is the custom of the port of Rio de Janeiro for the vessel to pay for lighters and to pay all other expenses until the cargo is landed on the wharf. This fact alone would, under the provision in the charter party, that the cargo is to be "delivered alongside, within reach of the vessel's tackles or according to the customs of the port," throw on the vessel prima facie the responsibility for the delay caused by the want of a sufficient number of lighters. The duty of the respondents in respect to the cargo at Rio commenced only when it was placed on the wharf by the vessel. Until then they could be chargeable with no delay in respect to it, unless they delayed the lighters, after they were loaded, in discharging their loads. It is not pretended by the master in his testimony that more than three days of that description of delay occurred. This, with the delay in respect to the coal, would make up but nine days out of the thirteen running days left as lay days when the vessel arrived at Rio.

On the whole case the libellants have failed to make out any cause of action and the libel must be dismissed, with costs.

[NOTE. On an appeal by libellants to the circuit court, this judgment was reversed. Case No. 3,647.]

Case No. 3,647.

DAVIS et al v. PENDERGAST et al.

[16 Blatchf. 565.] [1]

Circuit Court, S. D. New York. Aug. 5, 1879. [2]

DEMURRAGE—DEFAULT BY CHARTERERS—RUNNING DAYS—PORT REGULATIONS—LIGHTERS.

The libellants executed to the respondents a charter party of a vessel for a voyage from New York to Rio de Janeiro, by which "forty-five" running days were allowed for loading and discharging, and, if the vessel was longer detained, the defendants were to pay damages, at so much per day, provided such detention should happen "by default" of the respondents: *Held*, that the respondents took the risk of detention by intervening Sundays and holidays and by custom house and port regulations as to taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like; and that detention by any of those risks placed the respondents in "default" and rendered them liable for demurrage.

[Cited in Snow v. Three Hundred and Fifty Tons of Mahogany and Cedar, 46 Fed. 130; Smith v. Harrison, 50 Fed. 566; McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 531.]

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

This was a libel in personam, filed in the district court, in admiralty. That court dismissed the libel [Case No. 3,646], and the libellants [William R. Davis and others] appealed to this court. This court found the following facts: "In the month of September, 1866, the parties hereto executed a char-

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

[2] [Reversing Case No. 3,646.]

ter party, by which the libellants chartered to the respondents [Charles H. Pendergast and others] the bark Mary and Louisa for a voyage from New York to Rio de Janerio, Brazil. The provisions of the charter party material to the decision of the cause are as follows: 'It is further agreed between the parties to this instrument, that the said parties of the second part shall be allowed, for the loading and discharging of the said vessel, at the ports aforesaid, lay days as follows, that is to say, forty-five running days for loading and discharging; and, in case the vessel is longer detained, the said parties of the second part agree to pay to the said parties of the first part demurrage at the rate of nine pounds sterling per day, day by day, for every day so detained, provided such detention shall happen by default of the said parties of the second part, or their agent. It is also further understood and agreed, that the cargo shall be received and delivered alongside, within reach of the vessel's tackles, or according to the customs of the port. It is also further understood and agreed, that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the parties of the second part, or to their agent, in writing. Vessel to be consigned to charterer's friends at port of discharge, subject to a commission of two and a half per cent.' Thirty-two days were consumed in loading. The cargo consisted of 210 tons of coal, about 130,000 feet of lumber belonging to the respondents, and an assorted cargo of general merchandise, belonging to various consignees. The bark was consigned to the agents of the respondents in Rio de Janeiro. She arrived out on the 19th of December, and was ready to discharge cargo on the 24th, of all which the agents of the respondents were duly notified. The cargo was not finally discharged until January 19th. By the custom house regulations, the assorted cargo could only be discharged at the custom house, either from the vessel alongside, or by means of lighters. If lighters are employed, the expense is paid by the vessel. If the discharge is made at the custom house, the vessel must wait her turn for a place alongside. All the cargo on the bark was discharged upon lighters except the coal, which was delivered from the vessel at a wharf. The lighters were furnished by the consignees and paid by the vessel. Seven days were occupied in discharging the coal, when it might have been put out in half that time. The reason for this delay was, that the coal had been sold by the agents of the respondents, and was to be delivered at the rate of thirty tons per day. The lumber was delivered from the lighters to the different persons to whom it had been sold by the agents of the respondents. Much delay was caused by this mode of doing business, sometimes on account of the great distances the lighters were sent, and sometimes by the refusal of parties to take the lumber. There was no time when the persons receiving the cargo were delayed by the vessel. The lumber could have been put off in a little more than two days at the wharf, or upon lighters, if they had been ready to take it. The master of the vessel frequently called upon the consignees to furnish him with lighters more rapidly. The assorted goods were discharged by the lighters as soon as they could have been if the vessel had waited her turn at the custom house. The charter money, £700, sterling, was payable on delivery of the cargo at the port of discharge."

Welcome R. Beebe, for libellants.
John N. Whiting, for respondents.

WAITE, Circuit Justice. The lay days allowed by this charter are forty-five running days, that is to say, forty-five days as they run, day by day, from the time the vessel was ready and in a condition to load or unload, and notice thereof to the respondents or their agents. The term "running days" was evidently employed to exclude the idea of working days only. This throws upon the respondents all the risks of detention by intervening Sundays and holidays, as well as by the ordinary interruptions incident to the business, such as custom house and port regulations in reference to the manner of taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like. The respondents, in effect, agreed that no more than forty-five runnings days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made. Detention by reason of any of the risks assumed by the respondents placed them in "default," within the meaning of that term as used in the charter, and rendered them liable for the stipulated demurrage.

It is conceded, that thirty-two days were occupied in putting the cargo on board. No complaint is made by the respondents on this account. The testimony shows, that the vessel was ready and in a condition to commence unloading on the 24th of December, and the agents of the respondents were duly notified on that day. She was then at anchor on the anchorage ground set apart by the port regulations for vessels lying in the harbor for a discharge of cargo. It is also shown, that, by the customs regulations, the assorted cargo could only be unloaded into the custom house from the vessel alongside, or by lighters. If discharged from the vessel into the custom house, it would be necessary for the vessel to wait her turn to come alongside. In this case, lighters were employed and paid by the vessel, as it was supposed in this way time might be saved, other vessels being ahead at the custom house. No

specific charges of neglect are made against the vessel. The respondents required that their agents at Rio de Janeiro should be her consignees. This was, undoubtedly, to avoid disputes as to her diligence in discharging, and also to accommodate the respondents in receiving cargo. If, by reason of their agency for the respondents, the consignees failed in their duty to the vessel, it is not right that the respondents should be charged with the loss. It was the duty of the consignees to employ lighters for the vessel, when required. In this case, the consignees were repeatedly asked by the master to send lighters along more rapidly, and I cannot but think that the delay was caused by a scarcity of lighters, or an inability to unload them at the custom house, or, by what is, perhaps, even more likely, a desire on the part of the consignees to accommodate themselves, as the agents of the respondents, in making their deliveries to purchasers under sales effected after the vessel arrived in port. Certainly, I can see no fault on the part of the vessel. She was ready to unload, within the meaning of the charter, when she was at a place in the harbor where she could be unloaded, and had done all that was required of her in furnishing the facilities for unloading. In point of fact, she was prevented from going alongside of the custom house for want of room; the agents of the respondents preferred to have the lumber put out on lighters, so as to facilitate their own deliveries, and the coal, although finally put out on a wharf, was kept back by the same agents, to enable them to comply with their own contracts of sale.

Without pursuing the subject further, it is sufficient to say, that, after a careful consideration of all the evidence, I am clearly of the opinion that the detention beyond the stipulated lay days was caused solely by the default of the respondents, within the meaning of the charter, and that, as a consequence, they are liable for the stipulated demurrage, and interest from January 19th, 1867. The charter money and demurrage were payable in Rio de Janeiro. As no attempt has been made to show the legal rate of interest at that place, it may be calculated at the rate of six per cent. per annum.

A decree may be prepared in favor of the libellants, for the legal value, in dollars, of £117, and the accrued interest.

Case No. 3,647a.

DAVIS v. PITMAN.

[Hempst. 44.] [1]

Superior Court, Territory of Arkansas. Oct. 1826.

DAMAGES FOR TRESPASS—PROVINCE OF COURT AND JURY—JUSTICE OF THE PEACE CASES—PLEADINGS.

1. In actions of trespass, where the damages are uncertain, it is the province of the jury to ascertain them; and the court should not interfere, unless the damages are outrageously excessive, and disproportionate to the injury.

2. In suits originating before justices of the peace, no formal pleadings are necessary.

Appeal from Indepenuence circuit court.

[Action of trespass by Abijah Davis against Peyton R. Pitman.]

Before JOHNSON, SCOTT, and TRIMBLE, Judges.

OPINION OF THE COURT. This was an action originally brought by Pitman against Davis, before a justice of the peace, for an alleged trespass on a farm of Pitman in the county of Lawrence; and on trial of the cause before the justice, a verdict and judgment were rendered in favor of Pitman against Davis for twenty-two dollars and costs, from which judgment Davis appealed to the circuit court, where judgment was again rendered in favor of Pitman for the like sum. From this judgment Davis prosecuted his appeal to this court.

Although many errors have been assigned and argued, we shall confine ourselves to two or three of them, believing the others to be immaterial. It appears, that after judgment in the circuit court, the defendant moved the court for a new trial, on the ground that, "on the trial of the cause, there was not a particle of evidence to show the extent of damages, by which the jury could assess them." This motion was overruled by the court, to which decision the defendant excepted. This question we think the court could not have decided differently, for the measure of damages is the very gist of the action of trespass; and all the court will require to be shown is, that a trespass has been committed, and damages being uncertain, it is the peculiar province of the jury from all the facts to ascertain them. The court should not interfere unless where the damages are outrageously excessive, and disproportionate to the injury. The defendant then moved the court in arrest of judgment, on the ground that there was no issue joined in this case, stating that the defendant had filed a special plea alleging title to the premises upon which the trespass was stated to have been committed; to which special plea there was no replication. We do find such a plea tendered on the trial before the justice, but it was not urged on the trial before the circuit court, nor were any exceptions taken to the jurisdiction of the justice. The parties, therefore, by consent, proceeded regularly to trial, in the same manner they would or should have done before the justice. No pleadings or issue was necessary, and after judgment it was not competent for either party to avail himself of any defect in the proceedings had before the justice. It would have been different with regard to an issue, provided the suit had originated in the circuit court. Affirmed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 3,648.

DAVIS et al. v. RAILROAD CO. et al.

[1 Woods, 661;[1] 13 N. B. R. 258.]

Circuit Court, N. D. Florida. May 21, 1873.

BANKRUPTCY — PROPERTY HELD BY RECEIVER OF STATE COURT — PETITION IN BANKRUPTCY BY CORPORATION — RIGHTS OF STOCKHOLDERS- RES JUDICATA.

1. A receiver in possession of mortgaged premises under order of a state court of chancery, in proceedings for foreclosure, prior to commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings.

[Cited in Kimberling v. Hartly, 1 Fed. 575.]

2. Such possession is a lawful one under a specific and vested lien, and can only be interfered with by the assignee in bankruptcy by payment and redemption of the mortgage.

3. To deprive a man of his just possession under a specific lien would often involve a sacrifice of his rights.

4. A sale made by an assignee in bankruptcy of property thus unlawfully taken from a receiver (due notice being given of the illegality at the time of the sale), will be set aside, and the purchase money will be ordered to be returned.

5. A contumacious resignation by officers of a company can not prevent the company from filing a petition in bankruptcy, if a majority of shareholders authorize it to be done.

6. The district court having necessarily passed upon the question of the authority of the officers to file the petition in bankruptcy, it cannot be disputed in a collateral proceeding.

On the 1st of June, 1867, Davis and Jandon, trustees of the first mortgage of the Alabama & Florida Railroad Company, filed a bill to foreclose the same in the Escambia county court, of the state of Florida, which court on the 11th of July following, appointed Bushnell receiver, who took possession of the railroad and property mortgaged. Afterwards, on the 13th of July, 1867, the railroad company, by its officers, filed a petition in bankruptcy and was declared bankrupt by the district court of the United States for the northern district of Florida, and Hall was appointed assignee in December. The district court, on application of the assignee, ordered the mortgaged property to be taken out of the hands of the said receiver, and delivered to the assignee, which was done by the marshal of the United States, against the protest of the receiver. Afterwards, in February, 1868, the same court ordered the property to be sold as perishable property. The sale took place on the 25th of March, 1868, the trustees of the mortgage giving public notice that they claimed the proceedings to be illegal. William A. Richardson and others became the purchasers, and became organized under the name of the Pensacola & Louisville Railroad Company.

The trustees and their receiver then filed this petition for a revision of the proceedings of the district court, and for setting aside the sale. The hearing was postponed from time to time by arrangement, and finally on the 24th of April, 1871, Circuit Justice Bradley made a decree, declaring: First. That the mortgage was a first lien on the property and franchises described therein, and that the possession of the receiver under the order of Escambia county court was a lawful possession at and before the commencement of proceedings in bankruptcy, of which it was not competent for the district court in bankruptcy to deprive him. Second. That the order requiring the receiver to surrender the property be set aside. Third. That the question whether the sale in bankruptcy should be set aside and what title, if any, the respondents acquired thereby, be reserved for further consideration; and the assignee was restrained from collecting the balance of the purchase money. This decree was made without prejudice to any equitable claim which the Pensacola & Louisville Railroad Company might have for reconstructing and furnishing the railroad, and without prejudice to the claim of the trustees for mesne profits.

The reserved questions were subsequently (in November, 1872) argued by—

Clarkson N. Potter and C. C. Yonge, for petitioners.

A. G. Thurman, of Ohio, for respondents.

The petitioners, amongst other things, insisted that the proceedings in bankruptcy were a nullity, because no officer of the company had been duly authorized by a vote of the majority of the corporators present at a legal meeting called for that purpose, to present any petition for adjudication of bankruptcy. The facts bearing on this point are stated in the opinion.

BRADLEY, Circuit Justice. The questions now to be disposed of are—First, whether the sale of the property made by the assignee was valid notwithstanding the illegality of the order under which he acted; and second, what should be done with the proceeds of said sale. The petitioners contend that the sale was void for two principal reasons: First, because the bankruptcy proceedings were void in their inception; and second, because the district court had no authority to take the property out of the hands of the receiver appointed by the state court.

The first ground is based on the allegation that "no officer of the (bankrupt) company had been duly authorized by a vote of a majority of the corporators present at any legal meeting called for the purpose, to present any petition praying for such adjudication, as required by the bankrupt act [of 1867 (14 Stat. 517)]." I do not attach any importance to the objection of the respondents that this question cannot be raised, because not passed upon by the district court. It seems to me that the district court could not make a decree of bankruptcy without passing upon it. It lay at the foundation of the proceed-

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

ings, and the decision of the district court on the point cannot properly be brought in question collaterally. However, having looked at the evidence in the case, I cannot see any good ground for the position. If any irregularity occurred in the call for the stockholders' meeting, by which the direction was given to institute the proceedings, it arose from the contumacy of certain directors who resigned their offices for the purpose of embarrassing the stockholders. The city of Pensacola owned more than five-sevenths of the stock of the company, and it is sufficiently clear that the city authorities took all practicable measures for having a fair stockholders' meeting and vote on the subject; and that the vote of the city was positive in favor of the bankruptcy proceedings, and of the instruction to the president of the railroad company to institute the same. I shall, therefore, assume that the proceedings in bankruptcy were regularly instituted.

The question then recurs, what authority had the bankrupt court to take the property in question out of the possession of the receiver appointed by the state court? The former order in this case, declaring the possession of the receiver lawful, and directing the property to be returned to him, was based on the fundamental principle, that no proceeding in bankruptcy can deprive creditors of their just possession of property held as security for a debt, without discharging the debt. The possession of the receiver, under authority of the state court in virtue of the first mortgage, was the possession of the mortgagees, and could not be interfered with without liquidating the debt. This point has been recently decided by the supreme court of the United States, in the case of Marshall v. Knox, 16 Wall. [83 U. S.] 551. The respondents insist that by the law of Florida, a mortgagee cannot take possession of the mortgaged premises until he has foreclosed the mortgage, and become the purchaser. Whilst this may be the general law of that state, so far as regards the legal right of entry, and the maintaining of ejectment on the mortgage alone; yet, a court of equity, after proceedings have been instituted for the foreclosure of the mortgage, has an undoubted right to take possession of the premises for the preservation of the fund and the protection of the lien thereon. Besides which, the express covenants and stipulations in the mortgage given in this case authorize the trustees to take possession or to have a receiver appointed within a certain time after default shall be made in the payment of interest or principal.

The rights which supervene upon a mortgage or other specific lien, accompanied with possession before proceedings in bankruptcy, are very different from those arising from proceedings in state courts in cases of general insolvency. A mere insolvent proceeding, or a proceeding of that nature, and possession of the bankrupt property taken in pursuance thereof is antagonistical and repugnant to the bankrupt law, and will be avoided by regular proceedings in bankruptcy. But a proceeding to enforce a mortgage or other specific lien involves the right of property, and possession in pursuance thereof, legally or judicially, taken before proceedings in bankruptcy, cannot be interrupted by those proceedings. Hence, the action of the bankrupt court, in taking the property in question out of the hands of the receiver, was regarded as unwarranted and illegal. But the respondents' assignee contended that the sale should stand, although the order for sale was illegal. I do not think so in such a case as this. It is analogous to that of a sale by a sheriff on execution against A., of property belonging to B. The sale is void. The owner may recover his property of the purchaser. So may the trustees in this case. They ought not to be compelled to take the proceeds arising from the unlawful sale. Their rights might, in this way, be wholly sacrificed. The respondents, however, insist that no motion was made before the district court to set aside the sale by the assignee, and, therefore, the matter cannot be considered on this petition. But the sale was made in consequence of a special order of the district court, and that order is brought directly in question. Satisfied that the order, and the sale made in pursuance of it, were both illegal, I can see no difficulty in decreeing them both to be void.

The question then arises as to the disposition to be made of the purchase money paid or secured to be paid by the respondents. The purchasers insist, that it should be returned; the assignee, that it should be retained by him for the benefit of the general creditors. From an examination of the evidence, it seems clear that the assignee assumed to sell the property clear of the mortgage. He did not profess to sell the mere equity of redemption. The respondents in their answer claim that the sale was made free from the lien of the mortgage. They claim that the mortgage was void. And whilst it is true, that the petitioners gave notice at the time of the sale, that it would be subject to their lien, the assignee and the purchasers did not act on this view. The latter never intended to purchase subject to the lien, but clear of the lien. Had the receiver sold the property subject to the lien of the first mortgage, the amount bid for it by the respondents would have been payable by them, and would have been a proper asset of the bankrupt company's estate. But as they did not sell it in that manner, but sold it as unincumbered property, so far as the first mortgage was concerned, and as that was a clear mistake, since the first mortgage was a valid lien and absorbed the entire property, the sale ought to be held invalid, and the proceeds of the sale ought to be returned to the purchasers. This is clearly the justice of the case, and in my judgment the law is not con-

trary thereto. There ought to be a decree, therefore, setting aside the sale made by the assignee in bankruptcy, and directing a return of the purchase money to the purchasers. This decree should include all sales of property covered by the first mortgage, and in the actual or constructive possession of the receiver appointed by the court of Escambia county. Other sales, if any there were, are not subject to question in this proceeding. The proceeds belong to the estate of the bankrupt corporation. As the purchasers had notice of the first mortgage, and knew that the holders thereof intended to assert their rights, the costs and expenses of the assignee and others, in reference to the custody and sale of the property, should be deducted from the purchase money to be returned. Let a decree be framed in accordance with these views.

Case No. 3,649.

DAVIS v. ROBB.

[2 Cranch, C. C. 458.][1]

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

SCOPE OF AGENCY—HOW SHOWN—DECLARATIONS OF AGENT.

1. If the agency be special, the plaintiff must show the transaction to be within the scope of the agency.

2. The declarations of the agent in support of his authority, will not be received in evidence, unless cotemporaneous with, and constituting part of, the res gestae.

Assumpsit on a promissory note signed "Adam Robb by John N. Robb."

To prove the agency of John N. Robb, the plaintiff [Richard Davis] produced evidence that John N. Robb carried on a tan-yard for his father, the defendant, who had confessed judgment on a note signed as the present note is signed, and given for articles furnished to the tan-yard.

THE COURT (THRUSTON, Circuit Judge, doubting) refused to permit the note to be given in evidence, unless the plaintiff could show that it was given in relation to the business of the tan-yard.

Mr. Redin, for the plaintiff, then offered to give in evidence to the jury the declarations of the said John N. Robb, made after the transaction, to show that the goods for which the note was given, were furnished by the plaintiff for the tan-yard.

THE COURT (THRUSTON, Circuit Judge, contra) refused to permit them to be given in evidence, unless they were cotemporaneous with the giving of the note, and part of the res gestae.

Verdict for the plaintiff.

DAVIS (ROBBINS v.). See Case No. 11,880.

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

DAVIS (SACKETT v.). See Case No. 12,203.

DAVIS (SCHUESSLER v.). See Case No. 12,485.

Case No. 3,650.

DAVIS et al. v. The SENECA.

[Gilp. 10; 1 U. S. Law Int. 214.][1]

District Court, E. D. Pennsylvania. Dec. 23, 1828.[2]

SHIPPING—DISAGREEMENTS BETWEEN PART OWNERS—POWERS OF ADMIRALTY COURTS.

1. Where one of two part owners, who have equal interests in a vessel, declares his intention of taking her to sea, and offers to make stipulation for her safe return, a court of admiralty will not, on an application of the other part owner, grant a compulsory order of sale, or permit him to send her to sea with a master appointed by himself.

[Approved in Bradshaw v. The Sylph, Case No. 1,791. Cited in Tunno v. The Betsina, Id. 14,236.]

2. The provisions of the French commercial law which authorise a compulsory sale of a vessel, in case of partners disagreeing about the use of her, are to be regarded rather as municipal regulations of that country, than as the general law of admiralty.

3. The English courts of admiralty claim and exercise no power to compel a sale of a vessel, on the application of part owners who object to a contemplated voyage, but they will require stipulations in favour of the dissenting owner of a vessel for her safe return.

[Cited in The Marengo, Case No. 9,066.]

[See note at end of case.]

On the 5th December, 1828, the complainants in this case [Davis and Brooks] filed their petition, setting forth the following facts: That the petitioners are owners of one half part of the brig Seneca, now lying in this port; that the remaining half part belongs to Captain Henry Levely, who has had possession of the brig for several months, with the sole control of her: that he has proceeded on several voyages to the loss and dissatisfaction of the late owners, from whom the petitioners purchased the brig: that he now threatens to take the vessel to sea without their consent, and to their great detriment: that they have repeatedly offered to sell their share to Captain Levely at a reasonable price; or to purchase from him; or to sell the entire vessel at public auction; or to send her to sea with a master to be appointed by themselves; but that Captain Levely obstinately refuses all these propositions, and persists in saying that he will take the brig to sea. The prayer of the petition is for an attachment against the vessel, and a citation to the captain to show cause why the court should not grant an order for the sale of the brig; or why they should not be permitted to send her to sea with a master appointed by themselves. The attachment and citation were awarded.

[1] [Reported by Henry D. Gilpin, Esq. 1 U. S. Law Int. 214, contains only a partial report.]

[2] [Reversed in Case No. 12,670.]

The respondent admits the ownership of the vessel, as stated; that he is in possession of her; that he has taken her on several voyages, and means immediately to take her to sea; and asserts that the petitioners have no remedy or right, but to require of him to give security for her safe return, which he is willing and ready to do. On the 12th December the case came on for hearing before Judge Hopkinson, and was argued by T. I. Wharton for the complainants; and by Mr. Chauncey for the respondent, who agreed to the leading facts set forth in the petition, and submitted to the jurisdiction of the court, but contended that the only remedy for the complainants, was to require of the defendant to give satisfactory security for the return of the vessel.

T. I. Wharton, for complainants.

The complainants have made every effort to obtain a sale of the vessel, having offered to buy or sell at a reasonable price. In such a case the admiralty has a right to order a sale. The complainants and respondent are part owners of the brig: she is now here under the power of the court, and the respondent intends to take her to sea, against the will of his partners. The present application is novel in this court, nor has the question been decided in any court of the United States. It therefore lies upon us to show clearly, first, that this court has the power to grant the prayer of the petition, and to direct the sale of the vessel; secondly, that it has the power to take her out of the hands of the respondent and put her into the hands of the complainants on their giving security; and thirdly, that the facts of this case call for the exercise of this power.

I. To direct a sale. The petitioners have no remedy at common law; no attachment will lie, as the respondent is a resident here; nor can a part owner maintain trover against his partner; nor will a replevin lie. Perhaps in England, chancery would give an injunction; but as we have no court of chancery in Pennsylvania, the reason is the stronger for restoring to the admiralty its old, original jurisdiction. We contend, therefore, on the part of the complainants. 1. That the maritime courts of the continent of Europe have possessed, and still possess this jurisdiction. 2. That the English admiralty possessed it for a long period without dispute, and perhaps still possesses it. 3. That whatever may be the case in England, our courts possess an enlarged maritime jurisdiction, and this case is within it.

1. The germ of the maritime law of all Europe is found in the Roman civil law. It contains provisions on the subject of part owners, that are embodied in the earliest known ordinances. These establish the positions, that if a master who is part owner sells, the other owners may take the shares at a valuation; that where the interest is equally divided one may compel the others to sell; and that if the major part of the owners refuse to fit out a vessel she is to be valued and sold. Laws of the Hanse Towns, art. 56; Ordinances of France, tit. 4, art. 6; French Commercial Code, § 220; 1 Valin, Comm. 584; 1 Molloy de Jure Mar. 311; 2 Browne, Civ. Law, 131, 406; 1 Pet. Adm. cix.; 2 Pet. Adm. xvii., lxvi.

2. Originally the English maritime courts possessed the same powers as those of the rest of Europe, and until the year 1745, no decision is to be found which denied the right of the admiralty to compel a sale by one part owner of a vessel. That decision, in the case of Ouston v. Hebden [1 Wils. 101,] was made before the common law courts had recovered from their horror of the admiralty, which has since greatly passed away. Hall, Adm. viii. xvi. 10, 87; Beawe, Lex Mer. 51; 1 Molloy de Jure Mar. 311; Ouston v. Hebden, supra; De Lovio v. Boit [Case No. 3,776]; Holt, Shipp. 360, 364.

3. Whatever may be the opinions of judges in England, the admiralty has the power here; our courts possess an enlarged admiralty jurisdiction, extending under the third article of the constitution to all cases of admiralty and maritime jurisdiction. The admiralty courts of the United States, therefore, have all the jurisdiction of the English courts at an early period, and all which the continental courts still exercise. The power now claimed is within this, for it was possessed formerly by the English, and is now possessed by the continental courts. The law is the same in France now; admiralty jurisdiction extends over all matters relating to owners of vessels, and in cases where partners differ they are to be settled by the laws of the sea. Judges Story, Winchester and Peters have all held that the admiralty jurisdiction is more extensive here than in England; and even there all the cases, except the single one of Ouston v. Hebden, assert the jurisdiction of the admiralty generally over part owners of a vessel. The jurisdiction over the subject matter implies a right to order a sale; the question is only as to the expediency. Const. U. S. art. 3, § 2; Hall, Adm. xvii.; [McClung v. Ross] 5 Wheat. [18 U. S.] 115, note; De Lovio v. Boit [supra]; Jennings v. Carson [Case No. 7,281]; Gardner v. The New Jersey [Id. 5,233]; Willings v. Blight [Id. 17,765]; 6 Hall, Law J. 557, 576.

II. The court has a right to put the vessel into the hands of the petitioners on their giving security. The same reasoning and authority apply to this point as to the preceding. When the part owners disagree, the court have a right to order the vessel to either. Where one part owner is master, there is a greater reason for giving the vessel to the other part owner. The master, if allowed to take her, may commit barratry, and other frauds, which the other owners cannot; and this the maritime law under-

stands when it provides that owners may dismiss a master on paying him for his share. If this is the maritime law of Europe, as it certainly is, it ought to be the law here. In this case both of the part owners apply to send the vessel out, and if the permission is to be granted to one or the other, it seems more properly to belong to the complainants. 1 Valin, Comm. 572; 1 Pet. Adm. xcix.; 2 Pet. Adm. vi.

III. That the circumstances of the case require the court to grant that petition, is established by the allegations contained in it and not denied by the respondent, as well as by the testimony that has been produced.

Mr. Chauncey, for respondent.

The case is not, that the respondent desires a voyage to which the complainants will not agree, but they would prevent a voyage which the defendant proposes to make. We deny the jurisdiction and power of the court to order the sale; or to take the vessel out of the possession of the respondent, and deliver her to the petitioners. The only remedy for them is to let her go on the proposed voyage and take stipulations for her return. The argument ab inconvenienti, and a failure of remedy at common law, would apply to any other property or chattel as well as to a vessel. This power as now claimed has never been exercised in the United States; nor is properly an admiralty power; it has been frequently repudiated in England in the maritime as well as in the common law courts. The jurisdiction of the admiralty relates to matters happening on the high seas, or in their nature, having reference to the sea; but no law shows that it extends over all ships or all owners of ships. It is true the courts exercise a power over the employment of a ship; but not over the ship itself; or because it is a ship. In relying on the principle of the civil law, that in case of joint ownership of a chattel, the opinion of a majority shall govern, it should be remembered that it is purely one of the civil law, but does not go into the admiralty. So of the French regulations, they are special and part of their civil law, not that of admiralty. They are founded on a positive enactment or provision of their code, and not on the principles of the admiralty law. The only principle borrowed by the admiralty from the civil law is that a majority shall govern. Formerly one part owner could not sell his share, without the consent of the other, until the ship had made a voyage, with other restrictions and limitations. 2 Browne, Civ. Law, 34; De Lovio v. Boit [supra]. There is no such principle as that the admiralty has the power of sale. If there be a majority they prevail; if not, then the right is with those in possession, or who desire to send her to sea. In the latter case the opinion favourable to occupation ought to prevail. The ordinance of Louis XIV. introduced a new principle into the civil law of France. That a majority of part owners shall give the law, is the general principle of the civil law of chattels; but the right of sale, on an application of a moiety of the interest is not a principle of the civil law. It is a positive enactment of the French code; and the manner in which a public sale may be demanded, is expressly provided for. It becomes a right when demanded by a moiety. The authorities since that have been cited, show no such principle as that contended for, nor any power of sale, except in the case of a majority. None show that in case of equal owners differing as to the employment of a vessel, one may demand a sale; a ship is upon the same footing with other chattels, except as to her employment; and why should she be taken out of the possession of one owner to be delivered to another, holding the same interest in her? The complainants propose to take the vessel and give us security; why should they not leave us the vessel and take our security? Laws of the Hanse Towns, art. 59; Usages of the Sea, 178; Laws of Wisbuy, arts. 64–66; 1 Valin, Comm. 584; Ordon. of Louis XIV. tit. 4, art. 5; 1 Boulay-paty, 339; 1 Moll. bk. 2, c. 1, § 3; Beawe's Lex Mer. 51; 1 Holt, Shipp. 363; The Apollo, 1 Hagg. Adm. 306; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; Clinton v. The Hannah [Case No. 2,898]; Shrewsbury v. The Two Friends [Id. 12,819].

T. I. Wharton, for complainants in reply.

By maritime causes are understood persons or things belonging to the sea. Hall, Adm. 12; The General Smith, 4 Wheat. [17 U. S.] 442; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, 640; [McClung v. Ross] 5 Wheat. [18 U. S.] 115, note. The case is of the first impression here; it asks for the exercise of a power which no case has shown that the English admiralty courts have ever disavowed. The French ordinances and the commercial code are evidences of the general law, rather than municipal regulations; and though we admit that the provision contended for is not found in terms, any where but in the French ordinances and code, yet we have endeavoured to show that it is a principle, not a mere arbitrary enactment. In regard to the English authorities cited, it is to be remembered that they refer to a restrained jurisdiction; ours is one expressly enlarged by the constitution; but in fact, except the case of Ouston v. Hebden [supra], the peculiar feature of which has been noticed, there is no one denying the power of which we ask the exercise. As to the two American cases they were both decided previously to the present constitution, and under the peculiar enactments of the state laws. In regard to the relative superiority of the claims of the parties, it may be sufficient to say that the possession on which the respondent rests is that of master; of an agent, not a part owner.

HOPKINSON, District Judge. When a cause is to be decided, which involves in it an important and extensive principle of jurisprudence, it is a great satisfaction to the judge to feel assured that he has been furnished with all the aid that professional knowledge and industry can afford. In this case no pains have been spared to elucidate the subject, by researches into the learning of the past as well as the present age; and I regret that the urgency, which calls for a speedy decision, has prevented that critical examination of some of the books referred to, in foreign languages, which I should have made, if more time could have been taken for it. I do not, however, come to the decision of the case, without a careful and sufficient acquaintance with the authorities cited. The petition is filed by Davis and Brooks, merchants of the city of New York, who state that they are owners of one-half of the brig Seneca, now lying in the port of Philadelphia, and that the remaining half part belongs to Captain Henry Levely. That Captain Levely has had possession of the brig for several months, having the sole control thereof; and has proceeded on certain voyages to the detriment and dissatisfaction of the late part owners, (from whom the brig was purchased by the complainants,) and now again threatens to take the vessel to sea without their consent, and to their great detriment. They go on to state, that, finding themselves in a very inconvenient situation by the conduct of Captain Levely, they have repeatedly offered to sell their share to him at a reasonable price; or to purchase his share on sufficient terms; or to sell the entire vessel at a public sale; or to send her to sea with a master appointed by themselves; but that the said Captain Levely has obstinately refused to adopt either of these courses, and persists in declaring that he will take the vessel to sea. The complainants, in consideration of these circumstances, pray for an attachment against the brig, and a citation to Captain Levely to show cause why the court should not grant an order for the sale of the said vessel, or why they should not be permitted to send her to sea with a master appointed by themselves. The attachment and citation were granted; and the case has been argued on the two remaining prayers of the petition. The respondent admits the ownership of the vessel as stated in the petition; that he is in the sole possession of her; that he has heretofore proceeded in her on certain voyages; and that it is his intention immediately to take her to sea; but he denies that this case affords the court any jurisdiction, either to order a sale of the vessel, or to take her out of his possession; and he asserts that the only right and remedy of the petitioners are, to require of him to give them the usual security for the safe return of the vessel, before he takes her to sea against their consent, which he is willing and ready to do.

The counsel of the complainants has taken a very wide range over the ancient and modern powers of the admiralty, in England and on the continent of Europe, to establish the right of this court to order the sale of a vessel in cases of partners disagreeing about the use of her; and the respondent has peremptorily denied the jurisdiction of the court to compel a sale for any such reason, under any circumstances. It is for me only to decide the case presented to me; which seems not to call for the adoption of doctrines so broad and universal as those which have been spread in the argument. I am not now required to give an opinion upon an abstract question of law; nor to say whether a case may not occur or be imagined, in which the admiralty might direct the sale of a vessel, held under its jurisdiction, either as a direct or incidental power. My inquiries will be limited by the case of the complainants, and their right to the remedies they pray for. The parties in this transaction are truly placed in a most inconvenient position; but it results from the inevitable consequences of the contract they have made with each other. While the law would not impose injustice, or injury upon any one, it cannot undertake to save men from all the losses and inconveniences to which they may be exposed, in the connections they form in business or friendship; from the responsibilities and dangers they may incur in their various relations in society. The hardship of this case, on whichever side it may fall, is no ground of complaint against the law, which gives all the protection it can, but cannot always preserve men against themselves and their own acts. In the connections they form, they can, in many cases, have no other security than the discretion and good faith of those in whom they confide, and to whom they commit themselves.

The complainants have insisted, in support of their claim for an order of sale, on the following points:

I. That the maritime courts of the continent of Europe have possessed and still possess this jurisdiction. The direct authorities relied upon for the support of this doctrine, may be resolved into the passages cited from Molloy, and the sixth article of the second book, title eighth of the French Ordinances with the commentary of Valin (page 584). Browne's Civil and Admiralty Law, Beawe's Lex Mercatoria, and other books have been referred to, but they merely repeat the paragraphs of Molloy, without any additional authority. Other authors cited, of an older date, speak only in general terms of the extent of the admiralty jurisdiction, without specifying the case now under consideration. In examining, therefore, the passages of Molloy, and the pages of Valin, we shall probably omit nothing material to this first point. As to Molloy, I am compelled to say, that it appears to me that this learned and respected jurist has involved himself, or at least his reader, in

some confusion and uncertainty on this subject. In book second, chapter first (page 219), after giving us the sentiments often referred to by subsequent writers, that "ships were invented for use and profit, not for pleasure and delight; to plough the seas, not to lie by the walls," he adds, that "therefore the major part of the owners may, even against the consent, but not without the privity and knowledge of the rest, freight out their vessel to sea." Here the principle is announced, which is now adopted and acted upon in the admiralty of England and this country, as well as of the continent; requiring, however, security, for the dissenting owners, for the return of the vessel. He proceeds: "If a major part," and here he refers to numbers, "protest against the voyage, and but one is left that is for the voyage, yet the same may be effected by that party, especially if there be equality in partnership;" by which, I understand, he means to say, referring not to numbers but to interest, if the one dissentient owns as much of the vessel as all the others. The word "especially" would leave us in uncertainty as to what may be done in cases, where a majority in interest are opposed to the voyage, if another passage did not explain it. In a subsequent page he tells us, that "if it should fall out that the major part of the owners refuse to set out the vessel to sea, then, by reason of the inequality, they may not be compelled; but then such vessel is to be valued and sold." We seem now to have two cases provided for; the first, of an equality of interest in the ownership, between those in favour and those against the voyage, in which case it may be effected even by a minority of numbers; and the second, of a majority in interest opposed to the voyage, in which case the voyage may not be effected, but the vessel shall be valued and sold. So far we would charge the author only with the want of a lucid and precise explanation of his meaning. But what shall we say of the following paragraph: "If it falls out that one," without stating his proportion of interest, "is so obstinate that his consent cannot be had, yet the law will enforce him either to hold or sell his proportion." Now that he must hold or sell is an inevitable alternative in every case, and requires no enforcement of the law. It is probably intended, that the law will put him to his election, "but if he will set no price, the rest may out-rig her at their own cost and charges." Is this to be the course in every case, when one withholds his consent to a voyage, without regard to the quantity of his interest, whether more or less, or equal to the others, for no such distinction is noticed? I would presume that the one partner refusing, must be inferior in interest, as well as numbers, to his copartners; but there is a perplexing obscurity in all that this writer has said upon the subject. The interpretation of all the passages may be this. If there is an equality of ownership, the voyage is to proceed: but why "especially"? If there is a majority against the voyage, the vessel is to be valued and sold. If the majority is in favour of the voyage they may fit her out at their own charge; having reference in every case to the interest. How shall we apply the doctrines of this authority, as we understand them, to the case before us? It is not a case of a majority, in number or value, desiring to send the vessel, and opposed by the minority; but of an equality of interest, one insisting on sending her to sea, the other objecting, and in such case, says Molloy, the voyage "may be effected" by the party who would employ the vessel. It is not asserted, by the authority, that in this case, an order of sale would be granted, because it falls within the more convenient remedy of "effecting the voyage," under proper responsibilities to those who object to it. The compulsory sale is resorted to only when the majority object to the employment of the vessel, and may not therefore be compelled to undertake it; and then, in order that the ship, in which the public commerce claims an interest, may not be lost and "lie by the walls," the court, on motives of public policy, and not to cure improvident contracts, or serve individual convenience or interests, assumes the high authority of forcing a man to a sale of his property against his consent, at a price not under his control.

It will here be observed, that I consider this to be a case in which the dissenting owners "protest against the voyage," but propose no other employment of the vessel. It is true, the complainants say that they have offered to send her to sea, with a master to be appointed by themselves; which is imposing a condition on the other owner, unjust and unreasonable, and not to be affirmed by the court, if it had the power to do so. It cannot be held to be a case of mere difference between the part owners about the voyage to be undertaken. The case now to be decided does not appear to me to be such as, even under the doctrines of Molloy, would authorise the court to order a sale of the vessel; and if it were so, I should hesitate to assume a power never exercised by any court of admiralty in the United States or in Europe, on an authority so deficient in precision and perspicuity. The sixth article, cited and commented upon by Valin (page 584), may be thus translated: "No one can compel his partner to proceed to the public sale of a vessel held in common, unless opinions be equally divided about the undertaking of some voyage," or "of any voyage." I would not appear to be fastidiously critical, but am constrained to say, that this article is not to my mind clear of ambiguity. Is it absolutely clear, whether by the exception, "unless opinions be equally divided about undertaking (quelque) some or any voyage," we are to understand that the sale may be compelled, when the partners differ about

some particular voyage proposed by part of them, while the other part propose another, differing therefore about some voyage, that is, about which shall be undertaken? Or does it mean that the sale shall take place, when the parties differ about undertaking any voyage at all: one proposing to send the vessel to sea, and the other to keep her at home? The commentary of Valin gives us his understanding of the text, which is, that the right of compelling a sale exists in two cases: First, when the partners differ about the particular voyage to be undertaken, both, however, desiring to employ the vessel; and, secondly, when the objecting party does not propose any voyage as a substitute for that he opposes, but offers plausible reasons for his opposition. This is very reasonable, but no clue to it is to be found in the text of the ordinance.

The cases, in which a difference among partners on this subject may happen, seem to be: 1. When one partner proposes a voyage, and the other refuses his assent to it, but neither proposes another, nor gives good reasons for his refusal. In this case, the exception of the ordinance, which implies the power to force a sale, has no application, and the dissenting owner cannot be so constrained; because, the public commercial policy, looking only to the employment of the ship, does not require it, inasmuch as the willing partner may send her to sea, on giving security to the other owner for her safe return. 2. When both owners are desirous of employing the ship, but cannot agree about the voyage; then, as neither comes under the interdiction of wishing to keep her, "to lie by the walls," the power to order a sale is brought in, to settle the difference and save the property to both of the parties, as well as for the public use. The commentator truly remarks, that, "under such circumstances, the court cannot take cognisance of the subject of dispute;" that is, cannot decide in favour of one or the other voyage, and pronounce which would be most beneficial and prudent, and ought to be preferred; therefore, in the language of Valin, "there is naturally no other mode of putting an end to the dispute or difference of opinion." 3. When the dissenting partner does not propose another voyage, but offers good reasons for objecting to that proposed: here, under Valin's construction of the ordinance, a sale will be ordered for similar reasons to those above given. The court will not send the vessel to sea against the consent of an owner, who "sustains his dissent by plausible reasons;" nor will it deprive the other owner and the public of her use, by keeping her unemployed, on a difference of opinion, which they cannot settle, and may be endless. The court, therefore, from a sort of necessity, cuts the knot by dissolving an injurious and embarrassing connection.

Does the case of the complainants fall within the power of ordering a sale, as given by this ordinance, explained, as it is, by the commentator, with a very large and liberal interpretation? They propose no voyage as a substitute for that they object to; for, I repeat, I cannot consider their offer to send the brig to sea, on condition that they shall have the exclusive appointment of the master, to be such a proposal as should be regarded on this question; no intimation is given of when or where they would send her; no voyage designated. The remaining case of Valin is, where the dissenting owner offers plausible reasons for objecting to the voyage proposed. The objection of the complainants, as stated in their petition, and offered to be more circumstantially proved, is not to the particular voyage on which this vessel is about to be sent, as being unprofitable or hazardous, but to her going any where in the possession and under the command and control of the defendant. We fall here into another ambiguity or difficulty in the meaning of the commentator. Must we take him literally that the objection must be made to the voyage in question? Or may it be extended to the master, the mariners, the condition of the vessel, in short to any thing in relation to the vessel or voyage? I shall offer no opinion upon this question of construction, because, taking the commentary in its most enlarged sense, I should not feel myself to be bound by it, or authorised to adopt it as the law of this court, unless, on another point of this case, I shall find it to have been extended to this country. At present I consider it as a local municipal regulation of the country enacting it, and partaking, more or less, of the general jurisprudence and policy of that country. If, then, the objections or reasons, set up by the complainants, as the ground of their application to the power of the court, are not of the description alluded to by Valin, they stand in the third position of an owner dissenting to an intended voyage, but neither proposing another, nor "offering plausible reasons" for his dissent; and, in such case, his remedy is not by forcing a sale of the vessel, but by requiring security for her safe return.

II. The second point made for the petitioners, on the question of sale, is that the English courts of admiralty possessed this power for a long period, and, perhaps, still possess it. On the first branch of this point, that the English courts once possessed this power, no authority has been produced beyond very general expositions of admiralty jurisdiction. Molloy does not propose, in his treatise, to give the law of England on admiralty jurisdiction, on the contested questions in relation to it. He expressly disavows it, saying, "In the whole work I have no where meddled with the admiralty or its jurisdiction (unless, by the by, as incidentally falling in with other matter) knowing it would have been impertinent and saucy in me to enter into the debate." Judge Story in the case of De Lovio v. Boit [Case No.

3,776], says: "What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known." I assuredly will not attempt to illustrate what was hidden from him; nor do I think that a knowledge of what was the constitution of this court, centuries ago, under all the changes that have taken place in commerce, national intercourse, and municipal jurisprudence, should govern us at this day. Whether the power now claimed for the admiralty was formerly possessed by that court in England or not, I must leave in the uncertainty and obscurity in which ages of darkness have involved it; but it seems to me to be sufficiently clear, that the suggestion that the admiralty in England still possesses it, is altogether without foundation. The Case of Ouston v. Hebden, 1 Wils. 101, is full and direct to the point, that the admiralty has no power to compel a sale of a ship, on the application of a part owner who objects to a contemplated voyage. It may compel security to be given to the dissenting owners, but cannot force a sale upon them, or require of them to buy the shares of the others. I have not found any disapprobation of this doctrine, either by the court of admiralty or by any English writer on the civil and admiralty law; on the contrary Brown, no mean advocate for admiralty jurisdiction, gives the case of Ouston v. Hebden in his well known work, without any kind of disapprobation. Lord Stowell, in the case of The Apollo, 1 Hagg. Adm. 306, after stating the right of requiring stipulations, in favour of the dissenting owner of a ship, for her safe return, adds: "There is no case, either within the scope of my own inquiry, or which has been discovered by the diligence of the advocates, upon repeated challenges given them for that purpose, in which the court has moved beyond these limits." I feel therefore fully warranted in saying that a court of admiralty in England does not possess or claim the power now contended for.

III. But if the complainants are right in their third point, they must prevail; to wit, that whatever may be the case in England, our courts hold an enlarged maritime jurisdiction; and with it, the power now asked to be exercised. The proposition, that the admiralty powers are or ought to be more enlarged in this country than in England, is too general to bring us to the specified conclusion now required; it should be further shown that the enlargement comprehends the power in question. The general ground is a good foundation to build upon, but the materials of the fabric must be obtained from established principles and precedents. In the first place it is not pretended, that this power has ever been exercised or directly asserted by any court of admiralty in the United States. When I am called upon to wield a power never before used, or directly claimed by any court of admiralty, in England or in our own country, the right should be made exceedingly clear, from acknowledged principles and unquestionable deductions; and if any difference exists between the law of the United States and that of England, on the subject, arising from the nature of our political or judicial institutions, it should be brought home to the question, before the court can presume to add such a power to its jurisdiction. The courts of admiralty in England may have been, at one period, too much constrained by the watchful and rigorous jealousy of the common law, but, on the other hand the civilians have not been without ambition to extend their dominion; and, having the field very much to themselves on the continent, they may draw us over a wide range, if we follow them implicitly. By hastily disregarding the doctrines of the English courts, in favour of the apparent convenience of the civil law, we shall disturb the harmony of our system of jurisprudence, which has been essentially derived from that of England, and follows it in its leading arrangements. Let us be governed by a sincere desire to direct and regulate both jurisdictions by the great ends of public convenience, and individual justice, without rashly removing established limits and landmarks. How have the complainants proved that the admiralty courts of this country possess a jurisdiction so enlarged as to embrace the power, now expected to be used in their behalf? They have not shown any actual exercise of such a power, nor any assertion of it, but have endeavoured to deduce it from some general observations made by most respectable judges; to wit, Judges Story, Peters and Winchester. If, indeed, such names shall be found to support their pretensions, they will be strongly fortified.

The general expressions of Judge Peters, in the case of Jennings v. Carson [Case No. 7,281], that, "acting in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England, more than that of our own, or any other nation," furnish nothing by which we can obtain the least hint of his opinion upon our question. In the case of Willings v. Blight [Id. 17,765], a petition was preferred to permit the majority of owners to proceed with the brig Amelia on a certain voyage, after giving stipulation for the value of the recusant owner's share. The court clearly thought the case was one of admiralty jurisdiction. It is stated that the recusant owner would neither sell at a reasonable appraisement, nor make advances for the outfit. The judge says that, "whether a minority (the case of equality is not given) shall or shall not be compelled to sell, has not been here judicially decided." He then quotes passages already noticed, from Molloy, taking them from the Treatise on Sea Laws and Beawe's Lex Mercatoria, into which work they are carried from Molloy. The judge, however, is so far from intimating an opinion that a compulsory sale is the proper remedy for the

obstinacy of a recusant part owner of a ship, that, in conclusion, he says, "a privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct on indolent, perverse or negligent part owners." He adverts to no distinction of majorities or minorities. Nor can I discover in the laborious and learned investigation of admiralty jurisdiction, by Judge Winchester, in the case of Stevens v. The Sandwich [Id. 13,409], any thing which warrants us in concluding that he maintained that jurisdiction to the extent now claimed. He says that "a dispute between part owners, whether a ship shall be sent to sea, is cognisable in the admiralty;" and assuredly so it is, but the manner in which the court may interfere in such case, is not suggested by the judge; and we must suppose he alludes to the usual and unquestioned mode of demanding security for those who dissent. The subsequent general view of admiralty jurisdiction, and the matters subject to it, are equally unsatisfactory to guide us to his opinion on the particular point here in dispute.

To show the approbation of Judge Story, of the doctrines of the counsel for the complainants, we are referred to his celebrated opinion in the case of De Lovio v. Boit [supra]. I have carefully perused this profound and extensive investigation of the nature and extent of the admiralty rights and powers, which is certainly conducted with the most liberal disposition towards them, but I have seen nothing in it from which I can conclude, with the counsel for the complainants, that if this application were made to that learned judge, he would not hesitate to grant the prayer of the petition. In page 463 of that case, Judge Story says, that the admiralty exercises undisturbed jurisdiction, and entertains suits, first, for possession of ships, and. secondly, upon controversies among part owners as to the employment of ships. The distinction taken by the counsel of the respondent is here recognised. No intimation is given of any power in the admiralty to take a ship from one owner and deliver her to another; nor to compel an unwilling partner to sell his share at an appraisement to be made by others. The court will take care that she shall be employed, and when the party desirous of employing her offers to his associate the usual security, both the policy of the law and the interest of the individual are sufficiently guarded and protected. I must confess that I do not see how this policy or this question can be affected by majorities or minorities of ownership, except so far as they may influence the judgment and discretion of the court in the exercise of its power. The doctrine of Valin is, that where there is a majority against the voyage, it shall not proceed by reason of the respect paid to the majority; and yet this majority are to be made to submit to the stronger compulsion of a forced sale of their interest. The reason, which is the foundation of this extraordinary interference of the court, applicable to no other joint property but ships, is, to prevent the obstruction of commerce and navigation, in which the whole community have an interest; but this reason cannot be applied to a case like the present, where the whole dispute between the owners is for the possession of the vessel, and the party actually in possession desires to send her to sea, and is willing to secure the rights of his associate. On what principle can we compel a sale of the vessel in such a case, even if it were admitted that, abstractedly, the power exists in the admiralty? Too much time has already been occupied by me, on this occasion, or it might have been useful to have examined the various parts of Judge Story's opinion, which have been supposed to support the present application. It is not necessary, or I should not have omitted it, however prolix. The judge certainly does reject decidedly, in which I concur with him, any binding authority of the common law decisions in England upon this subject. I agree with him that "we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty, upon enlarged and liberal principles." But we are not to conclude from this, that we are to set no limits to it; or that we may do, under it, any thing that may seem to be convenient in any paticular case; nor yet that we should not cautiously respect the English decisions by great and learned men, tainted perhaps, but not blended or corrupted, by prejudice. We must look to established principles and precedents to guide us, and when the wisdom and experience of legislators and jurists have found it good and expedient for the public convenience, and the due administration of justice, to establish different tribunals for different subjects of controversy, giving to each its boundaries; it is the duty of those, who are called upon to administer the law, to do it in the manner prescribed to them; to keep within the allotted sphere of their operations; and not to believe, that because what is required of them may be convenient or just in itself, it may therefore be done by them. What would be the opinion of the learned judge on this case, we can only conjecture from his past adjudications; and in them there is nothing that directly or by inference bears upon it. It is worthy of remark that in his edition of Abbott on Shipping, the case of Ouston v. Hebden [supra] is twice refered to as authoritative law; and he does not intimate any disapprobation of the decision, or make a suggestion that a different law prevails, or ought to prevail, in the United States. Nor can this be attributed to inadvertence, as he has a note on this subject, in which he refers to the case of Willings v. Blight [Case No. 17,765], and to 2 Browne, Civ. Law, 131.

A few words will suffice for the second or alternative prayer of the complainants, that they shall be permitted to send the brig to sea with a master appointed by themselves;

that is, that the respondent, an equal part owner with themselves, in full and lawful possession of the vessel, shall be wholly dispossessed of her, both as owner and master; and that she shall be put under the exclusive control and power of the petitioners. This has not been, and could not be, strongly insisted upon. It would be an exercise of power beyond even the sale of the vessel, for which no principle or precedent has been shown. In the case of a sale, the proceeds would come into the hands of the court for those concerned; but this application would deprive the respondent of a property, clearly his own, and a possession certainly lawful, to put both into the hands of those whose rights and interests are no greater than his own; and from whom he can have no better security than he is willing to give them. In such circumstances his possession must prevail; and I know of no power in this or in any court to deprive him of it, and transfer it to his co-partners. I mean to decide, only, the case in hand. On the questions, whether a minority shall or shall not be compelled to sell, said, by Judge Peters, to be undecided; or whether a majority refusing to fit out, shall be so compelled; or an equal owner refusing to give stipulations; I am not called upon to give my opinion, more direct than was necessarily incidental to the course of my argument.

On this case it is my opinion and decree, that neither of the prayers of the petitioners can be granted, and that their petition be dismissed with costs; and further that the respondent have leave to send the said brig to sea, first entering into stipulations for the safe return of the same.

[NOTE. Libelants having moved for leave to enter an appeal, the same was opposed by counsel for respondent, but the court, after hearing argument, allowed the appeal to be taken. Case No. 3,651. In the circuit court the decree was reversed, and the power and duty of admiralty courts to order a sale under such circumstances was sustained. Id. 12,670.]

Case No. 3,651

DAVIS et al. v. The SENECA.

[Gilp. 34.] [1]

District Court, E. D. Pennsylvania. Dec. 30, 1828.

ADMIRALTY APPEALS—APPEALABLE DECREES—PART OWNERS.

1. An appeal lies from a decree of the district court, refusing an order for the sale of a vessel, on an application by one of two part owners, who have an equal interest.

2. After an appeal, a vessel, which was the subject of the decree in the district court, passes into the custody of the circuit court, and is no longer under the control of the former tribunal.

[Cited in Wilson v. Bell, 20 Wall. (87 U. S.) 225; Kynoch v. The S. C. Ives, Case No. 7,958.]

[1] [Reported by Henry D. Gilpin, Esq.]

On the 27th December, Mr. Wharton, of counsel for [Davis and Brooks] the complainants in this case, moved for leave to enter an appeal from the decree of the court, rendered on the 23d of December. [Case No. 3,650.]

Mr. Chauncey, for [Henry Levely] the captain and part owner, opposed the appeal.

The complainants must show that the decree made in this case is a final decree, coming within the act of congress. If the petition was for the sale, or possession of the vessel, it was in nature of a possessory action; it was an application to the court for an order, which the court has decided it had no power to give. The twenty-first section of the act of congress of 24th September, 1789 [1 Stat. 83], contemplates a final decree in a case in which the "matter in dispute is of the value of three hundred dollars." Is this such a final decree? Is it not rather, like the case of a debtor under the insolvent laws? 1 Story, Laws, 60. The former prayer of the complainants having been refused, I ask that, if this appeal be now allowed, the vessel shall be liberated from the custody of the officers of the court, and delivered to us on bail. The Guardian, 3 C. Rob. Adm. 93; The Aurora, Id. 133; The Ariadne, 2 Wheat. [15 U. S.] 143; The Grotius [Case No. 5,844].

Mr. Wharton, for the appeal.

1. Does the act of congress give an appeal in this case? 2. If it does, is it not a supersedeas to the entire decree, and can the court proceed or act upon that decree, as the foundation of a further order, such as the respondent has asked for?

I. The provisions of the act of 24th September, 1789, have been referred to; but by the subsequent act of 3d March, 1803 [2 Stat. 244], an appeal may be taken where the matter in dispute is of the value of fifty dollars. 2 Story, Laws, 905. It is incumbent on us to show (1) that this is a final decree; (2) that the matter in dispute is of the value of fifty dollars. 1. It is certainly a final decree; for it concludes the matter in dispute between the parties. It decides the question raised between them. No further proceeding or decree can be had here in relation to it. It is not preliminary to any further action of the court upon the matter. 2. As to the value. One half of the vessel may be taken to be the matter in dispute; or the profits incident to that one half, which may be derived from the use of it. All suits in the admiralty are now for the possession of property; or, to establish liens. The right of possession is itself a subject or matter of profit and property. In an ejectment, the object is to obtain possession; yet error lies, and the value will be inquired into. Serg. Const. Law, 40; Hall, Adm. Pr. 84, 85; M'Clung v. Silliman, 6 Wheat. [19 U. S.] 598.

II. That an appeal is an absolute supersedeas to any further proceeding by this

court, is not established. Serg. Const. Law, 43, 75, 136; The Collector, 6 Wheat. [19 U. S.] 194; U. S. v. Wonson [Case No. 16,750]; Anon. [Id. 444]; The Grotius [supra].

Mr. Chauncey, in reply.

There must be a substantial controversy between the parties as to the right of property or possession. The matter must be susceptible of valuation, and ascertained to exceed fifty dollars in value. In all cases submitted to the discretion of the court, and requiring an extraordinary extension of its power, no appeal is allowed; as in the case of the dismissal of an insolvent's petition.

HOPKINSON, District Judge. The petitioners and the respondent are the equal part owners of the brig Seneca. The latter being master, as well as part owner, had possession of her, and was about to take her to sea, against the consent of the petitioners. To prevent this, they applied to this court, praying that the court would either order a sale of the vessel, or take her from the possession of the respondent, and permit them to send her to sea, with a master to be appointed by themselves. The cause was argued on these points, the property being in the custody of the court, and no application was made by either party to make any other disposition of it, pending the hearing, or to make any order or decree concerning it, other than a final one on the petition. The court refused both of the prayers of the petition. The petition was dismissed, but a further order was made, preventing the respondent from taking the brig to sea, without giving bail to secure her safe return, for the other owners, in the usual manner. The petitioners now offer an appeal from this decree, which is opposed by the respondent, who also requires that if the appeal be allowed, the vessel should nevertheless be discharged from the attachment, and restored to his possession, on his giving the usual bail to answer the appeal. On the other hand, it is contended by the petitioners, that the vessel must go with the appeal to the circuit court, in the situation in which she now is; and that this court can make no order to dispose of her in the mean time, its power over her being paralysed by the appeal. The case may be called anomalous, and presents difficulties on every side. It is obvious that to remove the attachment from the brig, and restore her to the possession of the respondent, is to let her go to sea under his command and control, and to take from the petitioners all the benefit they may expect from their appeal; to continue her under the attachment, is to keep her not only in an useless but an expensive condition for all concerned. If the decree of this court should be reversed by the circuit court, how will the bail given by the respondent avail the petitioners in obtaining the object of their petition, to wit, a sale or delivery of the brig to themselves? The bail in such a case could not be a substitute for the thing. But if the vessel remains and passes into the custody of the circuit court, she will be ready to meet the judgment of that court, on the matter in dispute between the parties; that is, to be sold, or delivered to the petitioners, or to be restored to the respondent. When the dispute is about the ownership of property as in case of prize; or where a lien is claimed, as in a suit for seamen's wages; it is clear that bail may answer for the value in one case, and for the debt in the other. But in this case, there is no controversy about the ownership of the property, nor is the payment of any debt claimed from it; the whole dispute goes for the possession and we would take from the superior court the power to give the possession as it may adjudge to be right, if we do not give them the property of which the possession is claimed. In the case that has been mentioned of a libel against a vessel as prize, whatever might be done by the district court, pending the proceeding, and while the property is in the custody of the court, it seems, from the case of The Grotius [supra], that after a decree pronounced in favour of the claimants and an appeal taken, the property cannot be delivered to them by the district court on bail. So in the case of seamen's wages, though it has been the practice to relieve the vessel attached, on bail entered pending the suit, no such indulgence has ever been allowed, as far as I can learn, after a decree and appeal.

The counsel of the respondent has insisted that as there has not been, in the proceedings of this case, a strict attention to form, he should now have the same advantage of claiming the brig on bail, as if he had asked for it before the decree. The only informality has been that the answer to the petition was not reduced to writing, and filed before the argument; but it was distinctly and substantially stated orally by the counsel for the respondent, and reduced the dispute to a point so clear and single, that there could not be, as there was not, any misunderstanding about it, either with the court or the counsel. To put it afterwards in writing and file it, was truly mere form. But we cannot say so of the claim to discharge the vessel from the process of the court, and return her to the respondent, which, so far from being matter of form, is the sole and substantial matter of controversy in the case. I would not be understood to intimate that such a motion would have been granted, in any stage of the proceeding in this case, so unlike those in which similar applications have been granted; but merely to say that I shall decide the question as it now comes before me.

An appeal is given from the decree of this court, when it is final, and the matter in dispute exceeds the value of fifty dollars. The appellants must have both these points in their favour. The decree in this case, in my opinion, was final: it dismissed the case

from the court; it did all that the court could do with it; it decided finally, as far as it could, the matter in dispute between the parties. But it is further necessary that that matter should exceed the value of fifty dollars. Does this mean the subject concerning which the dispute arises; or the question between the parties in relation to it? The subject here, about which the dispute has arisen, is a vessel, certainly of more value than that required by the act of congress; but the question between the parties is not about the property or ownership of the vessel, but her possession and employment. What can we say is the value of this matter of dispute? In the case of the mandamus [M'Clung v. Silliman] 6 Wheat. [19 U. S.] 598,—referred to by the petitioners' counsel, the salary, annexed to the office in dispute, furnished and was taken as a standard by which its value might be ascertained with sufficient precision. We have none such here. So in the case of an ejectment, which tries the title as well as the right of possession in the land, the matter in dispute is susceptible of a satisfactory valuation. The right of possession of this brig, the counsel of the petitioners say, is a matter of profit and property. If it be so, yet the question returns. What is its value? The answer depends upon unknown contingencies. Instead of being a source of profit, an object of value, the possession and use of the brig may be the means of misfortune and loss. It would be difficult to fix this question by affidavit. She may be employed on an unprofitable voyage; she may or may not be let to freight, and may therefore lie idle; or she may be let to freight, which in various ways may be lost, as the vessel herself may be. In this uncertainty, the vessel being clearly of a sufficient value and perhaps the true guide, I feel it to be my duty to incline in favour of the appeal, not only because it is a valuable right to the party, but from a proper delicacy in the exercise of my judicial authority, for which I should be solicitous not to claim too much. Besides, if the appeal is allowed, improperly, it will be dismissed by the circuit court, with less inconvenience, and delay than it could be compelled, if improperly refused.

The appeal being allowed, the question recurs, what is to be done with the vessel in the mean time? I have already substantially answered it. To deliver it to the respondent, or as he proposes, on bail, I repeat, would be to defeat the appeal, and render it an absolute nullity. It would be to execute irrevocably the very sentence appealed from. But independent of the effect of such a proceeding in this case, so peculiar in its circumstances, the opinion of Judge Story in the case of The Grotius [supra], fully confirmed by the supreme court in that of The Collector, 6 Wheat. [19 U. S.] 194, advises me that I have no power to direct it. "After an appeal" says the judge, "the property is removed from the legal custody of the district court, and is no longer subject to its interlocutory orders." Being removed from this court, it must follow the appeal and passes at once into the custody of the superior or circuit court; to whom any application about the disposition of it must be made. I am aware of the inconveniences of this course to the respondent, which, by the by, are shared by the petitioners, as this vessel, in which they are equally interested, must lie useless to all until the meeting of the circuit court. I regret these inconveniences, but can meet them only by the language of Judge Story, that "it will be for the legislature to remove them by giving authority to either of the judges of the circuit court to make any interlocutory orders respecting property in its custody." The order of the court, in this case is, that the appeal be allowed.

[NOTE. The circuit court reversed the decree from which the appeal was taken. Case No. 12,670.]

DAVIS v. The SENECA. See Case No. 12,670.

Case No. 3,652.

DAVIS et al. v. SHERRON et al.

[1 Cranch, C. C. 287.][1]

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

SLANDER—PLEADING AND EVIDENCE—SERVICE OF ATTACHMENT.

1. Words spoken of one of the plaintiffs cannot be given in evidence to support an averment of words spoken of both plaintiffs; nor can words spoken by each defendant separately, and out of the presence of each other, be given in evidence to support an averment of words spoken jointly by the defendants.

2. An attachment cannot be served in court.

Slander. The declaration charges, that the defendants jointly said the plaintiffs were robbers, or thieves.

THE COURT instructed the jury, that words spoken of one of the plaintiffs only, cannot be given in evidence to support the declaration. And that words spoken by each of the defendants separately, and not in the presence of each other, cannot be given in evidence upon this declaration, which charges a joint speaking.

Nonsuit. Motion to reinstate, refused.

Robert McMunn was attached as a witness. The attachment was served in the gallery of the court-room. THE COURT said that the service was not good, being in court.

DAVIS (SHUTE v.). See Case No. 12,828.

DAVIS (STANLEY RULE & LEVEL CO. v.). See Case No. 13,288.

DAVIS (STEARNS v.). See Case No. 13,338.

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

Case No. 3,653.

DAVIS v. STEVENS.

[17 Blatchf. 259; 20 Alb. Law J. 490; 25 Int. Rev. Rec. 378; 8 Reporter, 710; 2 Nat. Bank Cas. (Browne) 158; 14 Am. Law Rev. 84; 36 Leg. Int. 462.] [1]

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

NATIONAL BANKS—WHO ARE SHAREHOLDERS—PRETENDED TRANSFERS—INDIVIDUAL LIABILITY.

A purchaser of stock in a national bank, who, to conceal his ownership and escape individual responsibility, causes it to be transferred to another person pecuniarily irresponsible, is, so long as he remains the actual owner, a shareholder, within the meaning of section 12 of the act of June 3, 1864 (13 Stat. 102), now sections 5139 and 5151 of the Revised Statutes of the United States, and liable as such.

[Applied in Case v. Small, 10 Fed. 724. Cited in Bowden v. Johnson, 107 U. S. 262, 2 Sup. Ct. 255; Irons v. Manufacturers' Nat. Bank, 21 Fed. 198; Anderson v. Philadelphia Warehouse Co., 4 Fed. 130.]

[This is an action by Theodore M. Davis, receiver of the Ocean National Bank, in the city of New York, against Calvin A. Stevens, as executor of Calvin Stevens, deceased. The district court directed a verdict in favor of defendant; and, to review the judgment entered thereon, plaintiff sued out this writ of error.]

John E. Parsons, for plaintiff in error.

C. W. Bangs, for defendant in error.

WAITE, Circuit Justice. This was a suit at law by the receiver of an insolvent national bank to enforce the individual liability of an alleged shareholder, under section 5151 of the Revised Statutes. The bank failed December 12th, 1871, and it is conceded that Calvin Stevens, the decedent, did not then appear on the books as a shareholder, and had not appeared as such since October 29th, 1870. On that day one hundred and seventeen shares stood in his name, which he caused to be transferred to one Elston, an irresponsible person, and a porter in the office of his New York broker. At the time of this transfer, so far as appears from the evidence, there was no suspicion of the insolvency of the bank, and it remained in good credit for more than a year afterwards. Subsequently, Stevens made other purchases of the stock of the bank and sometimes made sales. His purchases were put to the credit of Elston on the stock books, and, to meet his sales, he, acting as the agent of Elston, under a power of attorney for that purpose, caused the necessary transfers to be made from the same account. On the 22d of November, 1871, there stood to the credit of Elston, on the books, one hundred and sixty-one shares, for which a formal certificate was issued in his name, and delivered to Stevens, as his agent. It did not appear, from the testimony, that any of the shares which once stood in Stevens' name were included in this certificate. The account on the books remained unchanged from that time until the failure.

Upon this state of facts, the court below directed a verdict in favor of the defendant; and the single question now presented is, whether that was right. For all the purposes of this inquiry it must be assumed, that, as between Stevens and Elston, Stevens was the real owner of the stock. Clearly, the evidence tended to prove that fact, and there was enough to make it wrong to take the question from the jury. There is no pretense that Elston did not give his assent to the transfer to him on the books. This made him liable as a shareholder. Upton v. Tribilcock, 91 U. S. 48; Webster v. Upton, Id. 65; Pullman v. Upton, 96 U. S. 328. The point to be decided now is, whether, in an action at law, by a receiver of the bank, the real owner of stock in a national bank, standing, by his procurement, in the name of another, and never having been in his own name on the books, can be charged, as a shareholder, with the statutory liability for debts.

The banking act of June 3, 1864 (13 Stat. 106, § 6), now Rev. St. § 5134, provides, that the certificate of organization shall specify, among other things, "the names and places of residence of the shareholders, and the number of shares held by each of them." Section 12 of the original act is as follows: "That the capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act * * * shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; * * *" In the Revised Statutes these provisions are separated and reproduced as sections 5139 and 5151, but, for the purposes of construction, they are to be considered together. Rev. St. § 5600. Section 63 of the original act (now Rev. St. § 5152) provides, "that persons holding stock as executors, administrators, guardians and trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 710, contains only a partial report.]

same extent as the testator, intestate, ward, or person interested in said trust funds would be, if they were respectively living and competent to act and hold the stock in their own names." Section 40 (now Rev. St. § 5210) requires, that a full and correct list of the names and residences of all the shareholders shall be at all times kept in the office where the business of the association is transacted, subject to the inspection of shareholders and creditors, and that a verified copy of this list must be transmitted to the comptroller of the currency.

Under these provisions of the law, it is contended, that the registered shareholders alone can be charged with the statutory liability, and that an assignee of stock does not make himself responsible unless he accepts an actual transfer in his own name on the books. As has just been seen, the registered holder is liable. By holding himself out to the world as owner, as he does when he permits his name to appear to that effect on the books kept for the information of shareholders and creditors, he estops himself from denying that he is in fact what he represents himself to be. The question still remains, however, whether the person for whom the registered owner holds the stock, if actually the owner, may not also be liable.

The supreme court, at its last term, held, in National Bank v. Case, 99 U. S. 628, that if a registered owner transferred his stock in a failing corporation to an irresponsible person, for the mere purpose of escaping liability, or if his transfer was colorable only, the transaction was void as against creditors. At the same time, in Case v. Marchand [99 U. S.],—not reported,—an effort was made to charge Marchand with liability as the real owner of stock standing in the name of one Lubie, the allegation being that Marchand, having bought the stock from one Keenan, caused it to be transferred to Lubie, for the purpose of concealing his ownership and avoiding liability under the act of congress. The court decided the case on the ground that the evidence was not sufficient to show the actual ownership of Marchand, but there is nowhere an intimation that, if the facts had been as alleged, the action might not be sustained.

The present case shows that Stevens bought the stock from registered owners, and took assignments of their certificates, with authority to complete the transfers on the books. As between Stevens and the vendors this made Stevens the owner. At that time the vendors could have registered their transfers, and thus, while relieving themselves from liability, charged Stevens. Webster v. Upton, 91 U. S. 65. If Stevens had omitted to register the transfer, and on that account his vendors had been compelled, as registered owners, to respond to their statutory liabilities for debts, I cannot think there would be a doubt of their right to call upon him to reimburse them for the money so paid. The reason is obvious. While the vendors were the registered owners, Stevens was the actual "shareholder," and the money paid by the vendors would have been for his use and recoverable from him as such.

Stevens, by his transfers on the books, undoubtedly released his vendors from all future liability, because, as to them, the transfers were "out and out," in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston, the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, Stevens was the real owner, and Elston his authorized representative in the bank. As such representative, Elston could vote the stock at elections and receive and receipt for dividends. So, too, he could sell and transfer the stock on the books, and such sale and transfer to a bona fide purchaser would pass the title, free from any claim of Stevens. Neither would the bank, under ordinary circumstances, be liable to Stevens for permitting the transfer to be made. So far as Elston was concerned, the transfer to him was colorable only; and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see now he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens.

Assuming, then, as I must, for the purposes of this case, that the facts were as they are claimed by the plaintiff to have been, I cannot reach any other conclusion than that Stevens, the decedent, was, in law, a "shareholder" of the bank at the time of its failure, and, as such, liable in this action. It was error, therefore, to direct a verdict for the defendant. The judgment of the district court is reversed, and the cause remanded for a new trial.

Case No. 3,654.

DAVIS v. STITZER.

[7 Reporter, 484;[1] 19 N. B. R. 61; 36 Leg. Int. 176; 26 Pittsb. Leg. J. 115.]

Circuit Court, W. D. Pennsylvania. Feb. 21, 1879.

BANKRUPTCY LIEN—CONVERSION—LIMITATION.

Where an order of court is made directing the sale of realty discharged of liens, a conversion will be regarded as having been made at the time of the order, and therefore whatever was a lien on the realty on the day on which the order was made will be entitled to share in the proceeds of the realty whenever sold, and will not be barred from coming on the fund by the fact that between the order and the sale, the lien, as to realty, has expired by limitation.

Bill of review.

The question in this case was as to the validity of a lien for five thousand dollars on bankrupt's real estate. The facts in the case are as follows: Henry M. Stitzer was adjudicated a bankrupt on the 6th of April, 1876. A few weeks previous to his adjudication an execution was issued on a certain judgment, entered of record October 31, 1871, in favor of William Kightlinger, to amount of five thousand dollars, and levy made. The property of Stitzer was advertised for sale April 7, 1876, by the sheriff of Crawford county. Stitzer having been declared a bankrupt, an injunction was granted restraining the sheriff from selling the property. The assignee of the bankrupt then sold the property November 1, 1876, and in the distribution of the funds Kightlinger was not allowed to participate, on the ground that at the time of (or day before) the sale of the property of bankrupt the lien had expired by limitation, and the property was sold divested of it, and steps should have been taken for revival of judgment before assignee's sale. The matter was argued before the district court, and the decision rendered that the Kightlinger judgment could not participate in the distribution of the proceeds of the sale. [The case was taken to the circuit court on a bill of review, and there decided that the judgment of Kightlinger was a lien.][2]

Thos. M. McFarland, for complainant.

Geo. A. Davenport, for respondent.

McKENNAN, Circuit Judge. In this case the judgment, which was excluded from the distribution of the bankrupt's estate, was a lien upon the bankrupt's real estate at the date of the filing of the petition in bankruptcy. An order was made by the court, restraining the judgment creditor from proceeding in any manner upon his judgment which is unrevoked. On the 5th of September, 1876, when the judgment was an unquestionable lien upon the bankrupt's real estate, the court ordered the sale of this real estate by the assignee discharged of liens. This was in effect a conversion of the real estate into money, a substitution of the fund for the land, as the only security to which the lien creditors could look for the payment of their debts. And, under all these circumstances, I am of opinion that, in contemplation of law and to effectuate justice, the conversion of the land, and the substitution of the fund arising from its sale, are to be taken as having been effected when this order was made, and that the rights of the claimants to the fund are to be determined with reference to the circumstances existing at the date of such order. At that time the judgment of Kightlinger was a lien upon the bankrupt's real estate, and retained its priority upon the substituted security, and ought to have been allowed its proper portion of the fund for distribution. The order of the district court is, therefore, reversed, and the matter is remanded to that court, with directions to make distribution of the proceeds of the sale of the bankrupt's real estate upon the basis of the rights of the lien creditors to participate therein as of the date of September 5, 1876, when the order of sale was made.

[1] [Reprinted from 7 Reporter, 484, by permission.]

[2] [From 36 Leg. Int. 176.]

DAVIS (THORNTON v.). See Case No. 13,-998.

DAVIS (UNITED STATES v.). See Cases Nos. 14,923–14,932.

Case No. 3,655.

DAVIS v. VAN SANDS.

[45 Conn. 600.]

District Court, D. Connecticut. Feb. Term, 1879.

ADMINISTRATORS — DEVASTAVIT — DEBTS PROVED AFTER DISTRIBUTION—HOW ENFORCED.

[1. Failure of an administrator, on distributing the estate, to take from the distributees a bond for the payment of any debts subsequently shown, as provided by the act of 1699 (Gen. St. Conn. 374), is not of itself sufficient ground for holding the administrator guilty of a devastavit, especially as the statute has been practically disused for the last 50 years.]

[2. When a debt is proved against an estate after the real and personal estate has been distributed, the administrator can, as a general rule, under the Connecticut practice, obtain an order from the probate court to sell so much of the real estate, in the hands of an heir, as may be necessary to pay the debt; but that court has no adequate power to enforce payment from personal estate which has been distributed.]

[3. An administrator who has distributed personalty by order of the probate court, and not voluntarily, may bring a bill in equity to compel the distributees to contribute, to the extent of the personalty so received, for the purpose of paying a debt newly accrued, although there is real estate in the possession of the heirs or their alienees which has not been sold to pay debts.]

[4. A creditor whose debt accrued after the time limited by the probate court for the exhibition of claims and who has obtained a judgment against the executor or administrator, may himself bring a bill in equity to compel the distributees to contribute to the extent of the personalty received by them.]

This was an action of debt by one Davis, receiver of the Ocean National Bank, against defendant, Van Sands, administratrix of the estate of Horace Van Sands. The action was brought on a judgment previously obtained against the administratrix, and plaintiff now suggests a devastavit.

W. Howe, for plaintiff.

C. E. Perkins, for defendant.

SHIPMAN, District Judge. The plaintiff, as receiver of the Ocean National Bank, heretofore recovered judgment in this court, payable out of the estate of the intestate, against the defendant as administratrix of the estate of Horace Van Sands, for the amount of an assessment upon the stock of the intestate in said bank. The claim of the plaintiff accrued after the time limited by the court of probate for the presentation of claims, and after the distribution of real and personal estate of about the value of $33 000 among his heirs under the order of the probate court. The facts were similar to those in the case of Davis v. Weed, 44 Conn. 569. Execution was issued and was returned unsatisfied.

The plaintiff has now brought an action of debt upon the judgment against the defendant as administratrix, suggesting a devastavit. Judgment is sought de bonis propriis. If the defendant has been guilty of waste and mismanagement of the estate and effects of the deceased, she is liable in this form of action. Wheatley v. Lane, 1 Saund. 216, note 2; Olmsted v. Clark, 30 Conn. 109. The devastavit which is suggested in the declaration is that the defendant did not exact and receive from either of the distributees the bond, which is authorized by the statute (Gen. St. Conn. § 374), with surety to the state, to the acceptance of the court of probate, conditioned that if, after the settlement of the estate, debts shall appear and be allowed, he or she will pay to the administratrix his or her proportional share of such debts and of the charges of the administratrix. This statute was enacted in 1699. The first statute authorizing courts of probate to limit a time within which claims should be presented against solvent estates was passed in 1782. Previously, creditors of solvent estates could present their claims as if the debtor was living. In Griswold v. Bigelow, 6 Conn. 258 (decided in 1826), the court said that "since the legal authority given to the court of probate to limit the exhibition of demands" it was not usual to take such a bond. I am satisfied from inquiry of some of the oldest and most experienced lawyers of the state, that the statute has been practically disused for nearly fifty years. This being the history of the statute and of the practice under it. it would be manifestly improper to find an executor or administrator guilty of a devastavit from the mere fact that such a bond had not been taken.

The question still remains as to the manner of procedure for enforcing payment of the judgment. This question, although one of much practical importance, has not been presented for judicial determination in this state in the various phases in which it arises in practice. It is the duty of the administrator to pay the debts, and to take the steps which are necessary to accomplish that result. If he refuses, he can be be removed and a new administrator can be appointed. The principle which subjects the real estate which has descended to the heir from the ancestor to the payment of his debts is stated in Griswold v. Bigelow, 6 Conn. 258, substantially as follows: The real estate of a person deceased is a fund for the payment of debts, upon deficiency of personal assets, and the land remains subject to a lien for this purpose after distribution and alienation to a bona fide purchaser. This lien, though not perpetual, continues for a reasonable time after the claims accrue, and is not defeated except by the neglect or laches of the creditor. The heir receives title from the ancestor subject to the lien of creditors, and cannot aliene the land to their prejudice, provided they are not guilty of laches in the enforcement of their claims. Watkins v. Holman, 16 Pet. [41 U. S.] 25; Ricard v. Williams. 7 Wheat. [20 U. S.] 59. The ordinary mode in the United States of making real estate available to pay the debts of the deceased owner is through the executor or administrator, who is directed by the court of probate upon a deficiency of personal estate to sell so much of the land as will be sufficient to pay the remaining debt. In some of the states, by statute, an execution upon a judgment against the executor de bonis testatoris may be levied upon the lands in possession of the heir. 1 Greenleaf's Cruise, 60, note; Gore v. Brazier, 3 Mass. 523. In this state, when the personal estate has been exhausted, or has been distributed, and after the distribution of the real estate, the administrator can as a general rule obtain an order from the court of probate to sell so much of the real estate as shall be sufficient to pay the debts which accrued after the death of the debtor, and which from their nature could not have been presented within the time limited for the exhibition of claims. and which have been thereafter duly presented for allowance as provided by statute, together with the charges allowed by the court. The heir whose land is sold by the executor or administrator may have contribution from the other heirs, aequali jure. Griswold v. Bigelow, 6 Conn. 258; Seymour v. Seymour, 22 Conn. 272.

I am of opinion that a court of probate in Connecticut possesses no adequate power, after distribution, to enforce payment of this class of claims from personal estate which has been under its order distributed to heirs or legatees. Although personal estate in the hands of the administrator is the primary fund for the payment of debts, the creditors have no specific lien

upon it, as they have upon real estate. The legal title to personal estate vests in the administrator and is changed by a distribution to the heirs. Their right on the death of the intestate is a vested and transmissible equitable right, subject to the exhaustion of the property by the payment of debts and charges; they receive the legal title and the possession through the medium of a distribution. Griswold v. Bigelow, 6 Conn. 258; Kingsbury v. Scovill, 26 Conn. 349. The court of probate does not seem to have been vested with authority, after a distribution of personal property, to compel a reconveyance by the heirs, or a sale by the administrator, or to compel a contribution. It cannot enforce a decree against the heirs by attachment for contempt, unless authorized by statute. But the administrator or executor who has conveyed the personalty in obedience to the order of the court of probate, and not by his voluntary act, may bring a bill in equity to compel the heirs who received such estate to contribute to the extent of the estate so received, and pay the newly accrued debt, and the expenses of the representative in defending against the claim. 1 Story, Eq. Jur. § 503; Lupton v. Lupton, 2 Johns. Ch. 614. The executor or administrator may bring such a bill, although there is real estate in the possession of the heir or alienee which has not been sold by order of the court of probate.

The creditor whose right of action accrued after the time limited by the court of probate for the exhibition of claims, and who has obtained judgment against the executor in a suit instituted within the statutory time, may also proceed by bill in equity against the heirs or legatees of a solvent estate who have received personal estate from the representative, for contribution to the extent of the estate which they have received. Booth v. Starr, 5 Day, 419.

The general principle that creditors of an estate have a remedy in chancery after distribution against legatees for contribution has been elsewhere well recognized. 1 Story, Eq. Jur. § 503; Riddle v. Manderville, 5 Cranch [9 U. S.] 322. The second case of Booth v. Starr, in which the property in the possession of the guardian of the sole heir was personal property, has not been overruled or dissented from by the courts of this state. The other modern Connecticut cases in regard to the means of enforcing payment of a claim against a deceased person's solvent estate which accrued after settlement, were cases in which there was distributed or undistributed real estate in the possession of the heirs, or in which there was personal property of the estate in the hands of the executor. In such cases it is said that the remedy must be by suit against the administrator or executor, if he refuses to pay the debt. After judgment, the real estate can be subjected to the payment of the debt. No method of reaching the real estate has been pointed out except by sale through the intervention of the court of probate. Bacon v. Thorp, 27 Conn. 251; Hawley v. Botsford, Id. 80. When personal estate has been distributed, the heirs can be made to contribute and pay the creditor, after judgment in an appropriate suit has been obtained against the representative, and contribution can be obtained by bill in equity. If both real and personal estate have been distributed, it is not necessary that the real estate should be exhausted before the creditor can bring his bill in equity against the heirs for contribution.

It has been suggested that the real estate in the possession of the heirs may be subjected to payment of the judgment debt by scire facias prayed out by the creditor, upon the ground that the heirs have become chargeable with payment of the judgment, and that execution upon the scire facias may be levied upon the real estate. I do not examine this question, because the general practice in the United States seems to have been to subject lands to the payment of debts through the intervention of the courts of probate, unless some other course is authorized by statute.

Let judgment be entered for the defendant.

Case No. 3,656.

DAVIS v. VAN ZANDT.

[2 Cranch, C. C. 208.][1]

Circuit Court, District of Columbia. June Term, 1820.

LIMITATIONS—NEW PROMISE.

A promise to pay "when able" will take the case out of the statute of limitations, without proof that the defendant has since been able to pay the debt.

At law. Assumpsit against the maker of a note. The defendant pleaded the statute of limitations. Upon the trial the plaintiff proved that within three years the defendant promised to pay when he should be able.

Mr. Wallach, for defendant, contended that the plaintiff must prove that the defendant is or has been, since the promise, able to pay.

But THE COURT (nem. con.) said it was not necessary to prove that fact to take the note out of the statute of limitations. The action is brought on the note, and not on the new promise.

But see Wetzel v. Bussard, 11 Wheat. [24 U. S.] 309; Read v. Wilkinson [Case No. 11,611]; Lonsdale v. Brown [Id. 8,492].

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

Case No. 3,657.

DAVIS v. WALLACE et al.

[3 Cliff. 123.] [1]

Circuit Court, D. Massachusetts. May Term, 1868.

DEMURRAGE—ACQUIESCENCE IN DELAY—CUSTOMARY DISCHARGE—CUSTOM.

1. A vessel was chartered under a contract that she was to have "three working days to load" at the port of lading, and quick despatch in discharging at the port of discharge. On arrival at the port of discharge, the master notified the charterers, and was requested to call the following day, and received no orders as to his place of discharge till after the lapse of three days, when he went to the place to which he was directed. Nothing appeared to show that the delay was claimed as a matter of right by the consignees, but rather as a request voluntarily acceded to by the master. *Held*, that the libellant was not entitled to recover the rate of demurrage per diem, stipulated in the contract, for three days' detention.

[Cited in Teilman v. Plock, 21 Fed. 350; McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 531.]

2. After reaching the wharf designated by the consignees as the place of discharge, the libellant's vessel was detained four days before the unloading was completed: three by reason of the berth at the wharf being occupied by another vessel for whose departure the libellant was compelled to wait; one in consequence of the lack of teams to take the cargo away. *Held*, that libellant was entitled to recover the stipulated demurrage per diem for these four days of delay.

[Cited in Futterer v. Abenheim, Case No. 5,164; Carsanego v. Wheeler, 16 Fed. 254; Gronstadt v. Withoff, 21 Fed. 254. Applied in Williams v. Theobald, 15 Fed. 469.]

3. The contract in this case contained a clause that the cargo should be "received and delivered at the ports of lading and discharging as customary." *Held*, this clause referred to the manner of receiving and delivering the cargo and had no reference to the question whether the libellant's vessel was justly required to wait her turn at the wharf, where she was ordered to discharge by the consignees.

[Cited in Sleeper v. Puig, Case No. 12,940; Lindsay v. Cusimano, 12 Fed. 507; Mott v. Frost, 47 Fed. 84.]

4. Consignees cannot select a place of discharge within a port which would necessitate greater delay in discharging than the charter allowed.

[Cited in O'Rourke v. Two Hundred and Twenty-One Tons of Coal, 1 Fed. 620; Moody v. Five Hundred Thousand Laths, 2 Fed. 609.]

5. Proof of usage at a port, in respect to the reception or delivery of a cargo may be received to interpret the meaning of obscure or equivocal language in a contract, or in the absence of express stipulation, but demurrage is a matter of contract, the provisions of which usage cannot modify.

[Cited in Fish v. One Hundred and Fifty Tons of Brown Stone, 20 Fed. 202.]

Admiralty appeal. Libel [by Samuel L. Davis against William W. Wallace] for demurrage. The schooner Samuel Fish was chartered by the libellant to the respondents, to bring a cargo of coal from Georgetown or Baltimore, as they might elect, to Boston, at a certain freight per ton, and it was agreed that the respondents should have three working days to load at Georgetown, and quick despatch in discharging at Boston. In case the vessel should be longer detained, they were to pay demurrage at the rate of $35 per day, provided such detention should happen by their own or their agent's default. It was further agreed that the cargo should be received and delivered as customary, at the ports of loading and discharging. The schooner took a full cargo of coal at Baltimore, July 7, 1863, and arrived at Boston, Thursday, the 23d of July. The master promptly reported his arrival to the charterers. When informed that the schooner had arrived, they replied that they had nothing to do with the cargo, and referred the master to the shippers and consignees. Due notice was given the consignees, and they informed the master that the cargo was not sold, and requested him to call again, on the next day, which he did. On Saturday, following the arrival of the schooner, the consignees directed the master to proceed to a certain wharf in South Boston to discharge. He reached the designated wharf on Sunday, but finding another vessel, which had not commenced to unload, he notified the charterers that he had no place at which to unload his vessel. The libellant's vessel, however, lay there until the following Thursday, when the vessel that had previously occupied the berth at the wharf went away, and the Samuel Fish hauled up and commenced to discharge. She commenced to discharge in the afternoon, but was delayed one day for want of teams to take away the cargo, and did not complete the discharge until the following Thursday. Damages were claimed by the libellant for failure to comply with the stipulations of the charter-party. In the district court a decree was entered in favor of the respondents. [Case not reported.]

J. C. Dodge, for libellant.

First. Did this vessel have "quick despatch," according to the contract? Second. If she did not, did the detention happen by the default of the charterer?

1. Let us first ascertain the meaning of the term "quick despatch," in its application to the loading and discharging of vessels. The law seems to be settled, that in the absence of any express contract authorizing delay in discharging, or usage so well settled and uniform as to raise an implied contract, the consignee is bound to receive the cargo as soon as he is notified of the readiness of the carrier to deliver it. No doubt, in this as in every other case of a contract in which time of performance is not stated, we may apply the formula of "reasonable time," but this does not imply delay for the convenience or profit of the consignee, any more than in land carriage. The contract is, to carry and deliver the cargo. There is nothing in it au-

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

thorizing the consignee to use the vessel as a storehouse. The liabilities of a carrier are very onerous, and are not to be protracted beyond the contract. If the cargo is not received by the consignee when offered, it remains in possession of the carrier, not as carrier, but as bailee in deposit. But the carrier has not stipulated to assume this new relation to the cargo; and if he does so at the request or for the convenience of the consignee, the law implies a promise of payment for this new service. Clendaniel v. Tuckerman, 17 Barb. 184, and the cases there cited; Salmon Falls Manuf'g Co. v. The Tangier [Case No. 12,265]; Richardson v. Goddard, 23 How. [64 U. S.] 28, 40. Such being the legal rights of the parties without a special contract, and in the absence of usage, it cannot reasonably be pretended that less than this was intended when they contracted for "quick despatch." The truth is, that these words were inserted in the contract, to guard against being detained by virtue of a usage that has grown up in Boston, to wait three days, in the absence of a contract, before having a berth at which to discharge. The purpose was, to give this vessel the same rights she would have had by law, without the usage.

2. Was this detention by the default of the charterers or their agents? The term means failure on the part of the charterers to perform what they are bound to perform by the charter. If the vessel does not have "quick despatch" because the charterers, or persons standing in their place, fail to receive the cargo, the demurrage is due. If the delay is caused by neglect on the part of the vessel to deliver the cargo, then it would not be due. See the use of the term in Abb. Shipp. 307. See Randall v. Lynch, 2 Camp. 352–356. Under our charter with the defendants, a cargo is taken on board consigned to Lewis Audenried & Co., at Boston, but no particular wharf is specified. We arrive; the defendants refer us to the consignees, who order us to How's wharf at South Boston. And there most of the detention takes place. Our claim is, that when we reported, we should have been sent at once to a berth where unloading might be commenced without delay, and that the cargo should have been received without interruption for want of teams. It seems a practice has grown up in Boston for a vessel arriving with coal under the ordinary bill of lading only, without a charter or any stipulation as to time of discharging, to wait three days, if the consignee desires it, for him to sell the coal. I do not stop to inquire whether this is a good custom, because, under our stipulation for "quick despatch," the custom has no application to us. It cannot control our express contract. The Reeside [Case No. 11,657]; Macomber v. Parker, 13 Pick. 176, 182. It will be found that in every case relied upon by respondents, that the vessel had undertaken, expressly or by implication, to load or unload her cargo at a particular wharf or dock.

David Thaxter, for respondents.

Upon all the evidence, it is therefore fair to say that these facts are not in controversy, to wit: That coal-laden vessels discharge at coal wharves to which they are assigned. That the capacity of these wharves is limited. That the peculiarities of the trip often bring a large fleet of vessels here, requiring them to wait their turns at the wharves at which they are to discharge. That vessels do invariably wait their turn in discharging, upon being assigned a wharf. Now it is well settled that in the absence of any express agreement, fixing the time for unloading, the law implies a contract to unload in the usual and customary time for unloading such a cargo, having reference to the usual and customary manner of discharging, such as waiting turns, at the port of discharge. Rodgers v. Forresters, 2 Camp. 483; Burmester v. Hodgson, Id. 488; Nichols v. Tremlett [Case No. 10,247]; 2 Holt, Shipp. 27; Maude & P. Shipp. 177; Lawes, Chart. Part. 133; Macl. Shipp. 445; Harris v. Dreesman, 25 Eng. Law & Eq. 526; Parker v. Winlow, 7 El. & Bl. 942. It appearing, therefore, that the waiting for turns is a matter of frequent constant occurrence at this port, and that it is the invariable rule for vessels to wait their turn in discharging, to entitle the libellant to recover for any detention thus caused, he must show an express agreement to pay for such detention, or such a well-established and recognized usage to pay so known to the trade as to be recognized and treated as part of the contract. It is to be borne in mind that respondents' sole liability for any detention rests upon this proviso: "Provided such detention shall happen by default of the said parties of the second part (the respondents) or their agent." This clause, peculiar to American charter-parties, has received a judicial construction by the state court,—the only construction of which it is capable if it is to have any operative value in the contract. Towle v. Kettell, 5 Cush. 18. It appears by the first article of the libel, admitted in the answer, that the libellant, the master of the schooner, sailed her "on shares," having the exclusive management, navigation, and control of her. That this created him owner pro hac vice of the schooner is well settled. Thomas v. Osborn, 19 How. [60 U. S.] 22; Webb v. Peirce [Case No. 17,320]. Having this authority as owner, he made this charter with the defendants, and with the same authority he made the contract with L. Audenried & Co. to transport and deliver the coal in question according to the terms of the bill of lading then signed by him, and under which it was shipped. Even if he had not been, as he was, owner pro hac vice, but merely master, yet under this charter-party the custody of the vessel would remain in her owners, and the master

would be their agent, and in giving this bill of lading the owner would be bound thereby as against the shippers. The Freeman v. Buckingham, 18 How. [59 U. S.] 182. Now, this bill of lading is in the usual form, without any stipulation in regard to the time and manner of delivery, and, therefore, requires the master to deliver, and the shippers or consignees to receive, as, and only as, customary; that is, in the time which would be required to discharge her in the usual and customary manner; and this cargo, as has been seen from the testimony, was so discharged and received. It is submitted, however, that, by the true construction of the charter-party, the contract for delivery is substantially the same as that which the law implies in the absence of any express agreement, as in the case of an ordinary bill of lading. The manner of delivery must necessarily affect the time in which delivery can be made, and any provision for the quick despatch of a vessel, which also provides that such delivery shall be made in the customary manner, can only be interpreted with reference to the manner in which the vessel is discharged. Plenary evidence that such was the construction intended by the parties may be found in the provision in regard to the lading of the vessel. It cannot be doubted that the time actually required to discharge a cargo of coal, the vessel having a berth and all the conveniences for discharging, was known to the libellant, who was familiar with the trade; yet, while he limited the exact time for loading, for discharging he stipulated that she should be discharged in the customary manner with quick despatch. It is obvious that the parties agreed that the vessel should discharge as other vessels discharge, but that there should be no default in the defendants while thus discharging her to give her quick despatch.

CLIFFORD, Circuit Justice. Thirteen days elapsed in the efforts to secure a berth and in discharging the cargo, without reckoning the day of the arrival or the day the discharge was completed. Prior to the directions given to proceed to the wharf at South Boston, it may reasonably be inferred that the master acquiesced in the neglect to designate a place for the discharge of the cargo; and if so, then the day of the arrival of the schooner and the Friday and Saturday following should be deducted. Perhaps Sunday was spent in getting to the wharf and in preparations for unlading. Whether the second notice to the charterers was given on Sunday afternoon or Monday morning does not appear; but computing the delay in the most favorable light for the respondents, it is clear that there was a loss of three, if not four, full days for the want of a place to discharge and deliver the cargo before the stevedores were able to commence the work. They also lost one day afterwards for the want of teams to take the coal away, making at least four days of unnecessary delay, for which the respondents are clearly responsible, unless the defence set up in the answer can be maintained. Payment for six days' delay is claimed in the libel, but it seems to the court, for the reasons already suggested, that none of the time prior to the arrival of the schooner at the wharf in South Boston should be reckoned against the respondents. The defence set up in the answer is, that the schooner on her arrival was directed to a certain wharf to discharge, that she had a berth at that wharf in her regular turn, and that the master was enabled to commence the discharge of the vessel within the time and in the manner established by the usage and custom of the port for the unlading of vessels engaged in the coal and other coasting trade. The admission of the answer also is, that the schooner, when she proceeded to the wharf where she was directed to discharge, found the berth occupied by another vessel, and was obliged to wait for a turn until that vessel completed her discharge, and the period of delay, as stated in the answer, is somewhat longer than is shown in the proofs. A delay beyond what is ordinarily necessary during the discharge of the vessel is also admitted in the answer, but it is ascribed to the inability of the consignees to obtain stevedores, in consequence of the extreme heat and large arrival of coal, and not to the want of teams to remove the coal, as alleged in the libel. The respondents in argument make two points of defence on which they chiefly rely: First, they contend that the consignees had a right to select the wharf where the schooner was to discharge, and that if the berth was occupied by another vessel when she arrived there, she was bound to wait her turn without any charge for demurrage; second, that vessels arriving at this port loaded with coal not previously sold by the consignees are, if requested, obliged by the usages of the port to wait three days before commencing to discharge, to give the owners of the coal an opportunity to effect a sale. Whether the consignees effected a sale of the coal before they designated a place for discharging the same does not appear, but it does appear that the wharf designated belonged to a third person, and was not one occupied by the consignees. Undoubtedly the consignees, as the agents of the charterers, had a right to designate the place where the vessel should discharge the cargo, but it must be one within the terms of the charter-party. They could not go out of the port of destination, nor could they select one within the port which would involve greater delay in discharging than the charter allowed. Express reference was made in the bill of lading to the charter-party, so that the consignees had no greater rights than the charterers. The charterers were allowed "three working days to load" at the port of departure, and they stipulated to make

"quick despatch in discharging at" the port of destination; and the consignees had the same rights and were bound by the same obligations. Reference is made by the respondents to the stipulation in the charter-party that the cargo "shall be received and delivered at the ports of loading and discharging as customary." But it is evident that that clause refers to the manner of receiving and delivering the cargo, and that it has nothing to do with the question under consideration. Where there is no special contract, the usage of the port in respect to the reception and delivery of the cargo, in controversies between the ship-owner and the consignee, is frequently a very material consideration; but demurrage is a matter of contract, and it is well-settled law that usage cannot prevail over or nullify the express provisions of a contract. Bliven v. New England Screw Co., 23 How. [64 U. S.] 431; Add. Cont. 970. Proof of usage is admitted either to interpret the meaning of the language of the contract or to ascertain its nature and effect in the absence of express stipulation, and where the meaning is equivocal or obscure; but the proof of usage is not admitted to contradict express stipulations, or to vary the language employed by the parties where their meaning is expressed in plain and unambiguous terms. The Reeside [Case No. 11,657]. Such delay as occurred before the schooner arrived at the wharf designated by the consignees will be left out of view at present, and will be separately considered in examining the second ground of defence. First defence is, that the schooner was properly required to wait her turn at the wharf where she was directed to discharge by the consignees. By the terms of the charter-party the schooner was entitled to quick despatch at the port of discharge; and the libellant contends that the proposition of the respondent is in direct conflict with the stipulation of the charter-party. Demurrage is the sum fixed by the contract of affreightment as a remuneration to the ship-owner for the detention of the ship beyond the lay-days allowed for loading or unloading the vessel. Maude & P. Shipp. 176; Pars. Mar. Law, 261. Stipulations are usually inserted in charter-parties and bills of lading, to prevent disputes and define the rights of parties in case of unforeseen delays in loading or unloading, specifying that a certain number of days called running or working days are allowed for that purpose, and it is frequently stipulated that the charterer or freighter may delay the ship for a further specified time at an agreed price per day for such over-time. Sometimes the contract is, that the vessel shall be loaded and discharged in the usual time, or within a reasonable time after her arrival in port, or that the freighter shall be allowed the usual and customary time to load or unload at the port of loading or discharge. In other cases the contract of affreightment is without any such definite condition; but even in those cases the owner, if the ship is improperly detained, may frequently have a special claim to damage in the nature of demurrage. The settled rule is, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained, it shall be considered as the delay of the freighter, even where it is not occasioned by his fault, but was inevitable. Field v. Chase, Hill & D. 51. Where the contract is, that the ship shall be unladen within a certain number of days, it is no defence to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations, or government restraints. Detention of the vessel for loading or discharging longer than the time allowed by the contract entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time by natural causes. Randall v. Lynch, 2 Camp. 352; Barret v. Dutton, 4 Camp. 333; Hill v. Idle, Id. 327; Furnell v. Thomas, 5 Bing. 188. Much reliance is placed by the respondents upon the case of Rodgers v. Forresters, 2 Camp. 483; and also upon the case of Burmester v. Hodgson, Id. 488; but it is quite clear that they are not applicable to the present case, unless it be held that the words "quick despatch in discharging" have no meaning whatsoever. Stipulations, express or implied, that the ship shall not be detained beyond the period or periods specified in the contract of affreightment are not controlled by the usage of the port where the vessel is to load or discharge; and if the freighter detains the vessel beyond the time specified, he is liable to an action on the contract adapted to the nature of the instrument and the practice of the jurisdiction where the suit is brought. Abb. Shipp. 303; Clendaniel v. Tuckerman, 17 Barb. 184. Just prior to the arrival of the plaintiff's vessel an unusual number of other vessels arrived at the defendant's wharf for the purpose of discharging their cargoes. They had been held back for a time by a storm, but being first at the wharf they were entitled to priority in turn. The consignee had but one wharf, and he offered to prove the circumstances at the trial, as an excuse for the delay, but the judge excluded the evidence, and the court of appeals held that it should have been admitted. A direct admission, however, is made in the opinion that the defendant would be liable, if he was in fault, in suffering such an accumulation of craft, laden with cargo for himself, for the same wharf, at the same time. But the court also ruled that where there is an express contract, the parties are held strictly to its terms, and that no excuse, as a general rule, is available in such cases for delay; considering that the whole delay in that case did not exceed two days,

it may be that the decision is correct, upon the ground that the discharge, in view of the circumstances, was within a reasonable time. Conceding the correctness of that decision, still it cannot affect the case at bar, as by the express terms of the charter-party the owners of the vessel were entitled to quick despatch in discharging, and it cannot be admitted that thirteen days' delay was not a violation of that provision. Parties may contract as they please, but their contracts must be construed and executed as they are made. They may contract that the ship shall wait any number of days before commencing to load or discharge, and that the freighter shall have any number of lay-days, with or without charge, or none at all, or that the ship shall load or discharge in turn; but any such special arrangement, enlarging the time for loading or discharging, is matter of special contract. Even the covenant to load with usual despatch excludes every delay on the part of the shipper beyond "the ordinary time for bringing the cargo to the place of landing and loading." Kearon v. Pearson, 7 Hurl. & N. 386. Viewed in the most favorable light for the respondents, it must be understood that the stipulation for quick despatch in discharging excludes all delay save the time employed in unloading and delivering the cargo, except what is occasioned by natural causes beyond the control of the party contracting. Such exception was denied in the case of Kearon v. Pearson, and it is clear that it cannot be admitted where the covenant is only for usual despatch; it cannot be admitted in cases like the present. The power to designate the place of discharge belongs to the consignee, but he is bound to select a place where the ship will encounter no delay beyond the time necessary for the unloading of the vessel where the delivery and reception of the cargo is required by law. The Eddy, 5 Wall. [72 U. S.] 490; The Bird of Paradise, Id. 545. Delay beyond that, if occasioned by natural cause over which the defendant has no control, may, perhaps, be excused in a case where there is no express contract as to time, but that question does not arise in this case, and no decided opinion is expressed upon the subject. Enough has already been remarked to show that, in the view of the court, the second question presented by the respondents does not arise in the case, for the reason that the master appears to have acquiesced in the delay without complaint or notice to the respondents that he should hold them responsible. When told that the coal was not sold, and requested to call on the following day, if he did not intend to acquiesce in the consequent delay, he ought to have said so, or in some manner to have signified to the consignees that he did not waive the right of the ship-owner. Nothing appears in the record to warrant the conclusion that the delay at that time was claimed by the consignees as matter of right; but in view of the circumstances it is much more reasonable to infer that it was but a request, and as such was voluntarily acceded to by the master. Regarded as a claim of right, very strong doubts are entertained whether it could be sustained in any case, and it is quite clear that such a usage, if proved, can never avail as a defence where it comes in conflict with the terms of the contract. Usage is never held to make a contract, and proof of it will never be admitted to contradict a contract expressed in clear and unambiguous terms. The libellant is entitled to recover for four days' unnecessary delay of the schooner in discharging at the port of destination.

The decree of the district court is reversed, and let a decree be entered for the libellant.

Case No. 3,658.

DAVIS v. WEED.

[44 Conn. 569; 2 Nat. Bank Cas. (Browne) 115.]

District Court, D. Connecticut. 1877.

ADMINISTRATORS—CLAIMS PRESENTED AFTER SETTLEMENT — ASSESSMENT ON NATIONAL BANK STOCK—LIABILITY OF ESTATE.

[1. Under the Connecticut statutes, real and personal estate are alike a fund for the payment of debts, and both are assets in the hands of the administrator.]

[2. Failure to exhibit against a solvent estate, within the time limited for presentation of existing claims, a claim which accrued after the limitation expired, is not a bar to its payment, provided it be presented within one year after it accrued. Following Hawley v. Botsford, 27 Conn. 80; Bacon v. Thorp, Id. 251.]

[3. The order of a court of probate settling the administrative account, and the distribution of real or personal estate to the heirs, do not prevent such estates being subjected to the payment of a debt of the solvent intestate which accrued after the settlement of the estate. Distribution is not necessarily the final consummation of the administrator's powers, and is not necessarily a complete settlement of the estate. Following Griswold v. Bigelow, 6 Conn. 258; Seymour v. Seymour, 22 Conn. 272; Booth v. Starr, 5 Day, 419.]

[4. Where an administrator of a solvent estate denies the validity of a claim against the estate accruing after the time appointed for the exhibition of existing claims, or after distribution, it is necessary that the validity of the claim should be determined by suit thereon against the administrator before a court of common-law or equity jurisdiction. A court of probate has no original jurisdiction to allow or reject disputed claims against a solvent estate.]

[5. A receiver of an insolvent national bank has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock had not been transferred at the date of the comptroller's order making the assessment.]

[6. Rev. St. § 5152, does not affect the liability of the estate of a deceased stockholder in a national bank to an assessment on the shares while such estate is in course of settlement. The principal object of that section was to prevent a personal liability from running against executors, administrators, trustees, or guardians, who

had purchased as trustees, or in whose names stock belonging to the trust estates had been placed.]

Walter Howe and T. M. Davis, for receiver.

Samuel Fessenden and Henry C. Robinson, for defendant.

SHIPMAN, District Judge. This is an action at law brought by [Theodore M. Davis] the receiver of the Ocean National Bank, of the city of New York, to recover an assessment which is claimed, under the facts hereinafter stated, to be due from the defendant [Harvey H. Weed] as administrator de bonis non of the estate of Nathaniel Weed. The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court. The pleadings subsequently terminated in a demurrer to the special plea of the defendant.

The declaration alleges the organization of the Ocean National Bank, of the city of New York, as a national banking association; its failure on December 12th, 1871, to pay and redeem its circulating notes; the protest of said notes; the appointment of the plaintiff as receiver by the comptroller of the curren y; the plaintiff's acceptance of said office; the ascertainment by the comptroller that the assets of the bank are insufficient to pay its liabilities, and that it is necessary to enforce the individual liability of the stockholders; the order of the comptroller, dated January 19th, 1877, making an assessment of forty per cent. of the par value of the shares held by each shareholder, payable in two instalments, to wit, $10 per share on February 26th, 1877, and $10 per share on April 26th, 1877; and the order of the comptroller to institute suits for the enforcement of said liability. The declaration further alleges as follows: About the time of the failure of said bank, Nathaniel Weed died intestate, leaving a large real and personal estate; at the time of said failure he was the owner of 514 shares of said bank; on or about September 9th, 1872, Harvey A. Weed was duly appointed administrator of said estate; subsequently Harvey A. Weed died, and on or about December 3d, 1872, the defendant Harvey H. Weed was duly appointed administrator de bonis non upon the estate of Nathaniel Weed, who accepted said trust, and is now said administrator; demand was made on March 22d, 1877, and on June 12th, 1877, for payment of said respective instalments, and by reason of the premises the defendant is liable to pay said assessment.

The defendant pleaded specially the following facts: The said Nathaniel Weed died in January, A. D. 1871, intestate. That afterwards, on the 9th day of September, A. D. 1872, one Harvey A. Weed was duly appointed and qualified as administrator of his (said Nathaniel's) estate; six months from the date of said appointment was by the court of probate for the district of Stamford, which was the domicile of said intestate, limited as the time for creditors to present their claims against said estate; no claim in behalf of this plaintiff was rendered by said administrator; all claims theretofore presented against said estate were paid and settled, and said estate was settled according to law. Afterwards said Harvey A. Weed died, and on the 3d day of December, A. D. 1872, defendant was appointed administrator of the estate of said Nathaniel which had not been already administered; the defendant hath fully administered all and singular the goods, chattels and estate which were of the said Nathaniel Weed, deceased, at the time of his death, and which have never come to the hands of the said defendant administrator, &c., to be administered; and the said defendant hath not, nor on the day of the plaintiff's writ in this behalf, or at the time of commencing this suit, or at any time since had, any goods, chattels or estate which were of said Nathaniel Weed at the time of his death in the hands of said administrator, &c., to be administered. And the defendant has not now, and did not on the day of the demand set up in plaintiff's writ, nor at the commencement of this writ, nor at any time since either of said dates have in his hands any estates or funds belonging to the estate of said Nathaniel Weed. or which were said Nathaniel Weed's at the time of his death. Said Nathaniel Weed's estate, after the death of said Harvey A. Weed, was treated as the estate of said Harvey A. Weed, and distributed among his heirs at law.

In this state of pleadings, the defense is two fold: 1st. It being admitted that the estate of Nathaniel Weed had been settled according to law prior to the demand, and that there were no assets in the hands of the administrator at the time of the demand, and that he has fully adminstered the estate, and that no assets have come to his hands as administrator since the demand, no judgment can be rendered against him. 2d. That, inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liabil ty, if any, was against the administrator, who by section 5152 of the Revised Statutes is freed from personal liability, and is only liable to the extent of the trust estate and funds in his hands at the time of the demand. The plaintiff does not claim that a judgment de bonis propriis can be rendered against the defendant.

I. The first question requires an examination of the statutes of Connecticut in regard to the settlement of estates, and in regard to the presentation, allowance and payment of claims against the estates of solvent deceased persons. The settlement of estates in Connecticut is regulated by statute. A time is limited by the court of probate for the exhibition of claims against the estate of a deceased person which is represented by the executor or administrator to be in-

solvent, and every creditor who has not exhibited his claim within the time limited is debarred unless he can show some estate not in the inventory. In the case of an estate which is actually insolvent, the proceedings under the orders of the court of probate, by which all the estate has been actually paid to the claimants who have proved their claims within the limited time, are a bar to claims which subsequently accrue and have not been proved. But it is provided that, where an estate which has been represented insolvent turns out to be solvent, "the rights of all persons having claims against such estate subsequently accruing, and which shall not have been exhibited to the commissioner within the time limited for the exhibition of claims, shall be the same in respect to any estate of such deceased person remaining after the payment of the claims allowed by them, as they would have been in regard to such remaining estate, if said estate had always been treated as a solvent estate." Existing claims against a solvent estate must be presented to the representatives of the estate within the time limited by the court of probate; "but any creditors not inhabitants of this state may exhibit their claims against any estate which has not been represented insolvent, at any time within two years after publication of such notice, and shall be entitled to payment only out of the clear estate remaining after the payment of the claims exhibited in the time limited; and when a right of action shall accrue after the death of the deceased, it shall be exhibited within twelve months after such right of action shall accrue, and shall be paid out of the estate remaining after the payment of the debts exhibited in the time limited." Rev. St. § 5, pt. 3, c. 2, tit. 18, p. 388. "When the creditor of an estate, not represented insolvent, shall present his claim to the executor, or administrator, within the time limited by the court of probate, or by any of the provisions of the preceding section, and he shall disallow and refuse to pay it, if such creditor shall not, within four months after he has been notified by him that his claim is disallowed, commence a suit against him for the recovery thereof, he shall be debarred of his claim against such estate." Rev. St. § 6, pt. 3, c. 2, tit. 18, p. 388. Intestate solvent estates, after deducting the debts and the expenses of settlement, may be distributed to the heirs by persons appointed by the court of probate, and "every person to whom any part of an estate shall be distributed, and every person to whom any estate shall be devised or bequeathed, when no sufficient provision is made by will for the payment of the debts out of some particular estate, shall give a bond to the state, with surety, to the acceptance of the court of probate, conditioned that if after the settlement of the estate, debts shall appear and be allowed, he will pay to the executor or administrator his proportional part of such debts, and of the charges of the executor or administrator." Rev. St. p. 374. The provision for the giving of a bond is cumulative; the bonds are not the only fund for the payment of debts which are properly allowed after the settlement of a solvent estate. Griswold v. Bigelow, 6 Conn. 258. No suit, except for debts due to the United States or to the state, or for the expenses of the last sickness or funeral charges, can be brought against the executor or administrator of an insolvent estate in course of settlement. Suits against the representatives of a solvent estate are not prohibited. The two provisions which have been mentioned in regard to the payment from a solvent estate of the debts which accrue after the expiration of the time limited for the presentation of existing claims, viz. the provision for payment of a claim accruing after the death of the deceased, if exhibited within one year after the right of action accrued, and the provision requiring heirs to give a counter bond for the payment of debts which appear after the distribution of an estate, clearly indicate that the liability of the solvent estate of the deceased person does not cease with the settlement of the estate, as to those claims which accrue after the time limited for the presentation of existing claims. If the settlement of an estate and its distribution is a bar against the liability of the estate, or against the liability of a representative de bonis testatoris, no bond from the heirs would have been required. From the statutes which have been cited, and the Connecticut decisions upon the statutes, the following principles are deduced:

1. In Connecticut, real and personal estate of the person are alike a fund for the payment of his debts, and both are assets in the hands of the administrator.

2. The non-exhibition against a solvent estate, within the time limited for the presentation of existing claims, of a claim which accrued after the expiration of such limitation, is not a bar to its payment, provided it is exhibited within one year after it accrues. Hawley v. Botsford, 27 Conn. 80; Bacon v. Thorp, Id. 251.

3. The order of a court of probate settling the administrative account, and the distribution of real or personal estate to the heirs, does not prevent such estates being subjected to the payment of a debt of the solvent intestate, which accrued after the settlement of the estate. Distribution is not necessarily the final consummation of the administrator's powers, and is not necessarily a complete settlement of the estate. Griswold v. Bigelow, 6 Conn. 258; Seymour v. Seymour, 22 Conn. 272; Booth v. Starr, 5 Day, 419.

4. Where an administrator of a solvent estate denies the validity of a claim against the estate accruing after the time appointed for the exhibition of existing claims, or after distribution, it is necessary that the validity

of the claim should be determined by suit thereon against the administrator before a court of common-law or equity jurisdiction. A court of probate has no original jurisdiction to allow or reject disputed claims against a solvent estate. It will not be denied that this is true in regard to existing claims which are presented before the expiration of the limitation, and I do not see why the necessity of suit against the administrator does not exist in the case of subsequently accruing claims, provided he denies their validity. If he "disallows the claim" the creditor must commence suit within four months after notification of the disallowance, and the suit must be one in which the validity of the claim can be determined. Spalding v. Mutts, 6 Conn. 28. The suit must be in a court of ordinary jurisdiction, for courts of probate have no original power to decide upon the validity of claims which are disallowed by the administrator of a solvent estate. Isaacs v. Stevens, 13 Conn. 499; Bacon v. Thorp, 27 Conn. 251. If the administrator, as in Griswold v. Bigelow and in Seymour v. Seymour, admits the validity of the claim, and pays it, or, the personal estate having been exhausted, seeks an order of the court of probate to sell real estate for the purpose of payment, the validity of the claim is collaterally passed upon by the court of probate, by its approval or disapproval of the item in the administration account, or by granting or refusing an order to sell real estate. If the administrator disallows an unadjudicated claim, the court of probate cannot compel payment. The question whether a suit can be sustained against an administrator upon a claim which accrued after distribution, and when all the estate had been distributed before the claim accrued, has not arisen before the supreme court of errors of this state, except in the case of Booth v. Starr, 5 Day, 275, a case which was decided by a divided court, and the authority of which has been much shaken by subsequent decisions. In Griswold v. Bigelow, the first administrator had died, and a new one was appointed, who allowed the accruing claim upon presentation. In Seymour v. Seymour, the administrator was himself the creditor, and allowed his own claim. In Bacon v. Thorp, unadministered estate was in the hands of the executrix of a solvent estate which had been represented insolvent. In Hawley v. Botsford, undistributed real estate was in the hands of the two sons of the intestate, one of whom was the administrator. Dower had been set out to the widow. In the latter case, it is decided that a bill in equity to compel all the heirs to pay a debt which accrued after the limitation will not lie, there being adequate remedy at law. What the remedy may be is not stated, but, as it is substantially held in Bacon v. Thorp that the court of probate is not the tribunal in which relief can be originally sought, the inference is that the first step is to have the validity of the claim ascertained in an action at law against the administrator. While the precise point which is now under discussion has not been judicially settled in Connecticut, two things have been established: 1st. The court of probate has no original jurisdiction in regard to a disputed claim against a solvent estate; and, 2d, a bill in equity against heirs will not lie to compel payment from their real estate of a claim accruing subsequently to distribution. The tendency of the decision since Sacket v. Mead, 1 Conn. 13, is in support of the mode of procedure which I have pointed out. It may be urged that the administrator, having settled his administration account, and having distributed the estate, is functus officio, and that it is necessary for the creditor to apply to the court of probate for the appointment of a new administrator. Distribution, as has been said, does not necessarily exhaust the administrator's powers. If he is living, he is still the representative of the estate, and if he is competent and willing to act there is no necessity of a new appointment. He has not ceased to be administrator from the fact that his account has been approved, and that the estate which was in his hands at the time of the settlement of the account has been distributed. If new personal assets should be discovered, the title would vest in him, and he would be the person to reduce such estate to possession. If it should be ascertained that a debt theretofore undiscovered was due the estate, he is authorized as administrator to commence suit for its recovery. It is believed that the court of probate cannot appoint a new administrator until there is a vacancy by death or removal or resignation.

5. The system of the settlement of estates in Connecticut differs so materially from the method of settlement in England, that the system of pleading by an executor or administrator in Connecticut differs also materially from that which was in use at common law. By the common law, when the estate was insolvent, the representative was obliged to pay debts in a particular order, and, among creditors of equal degree, could pay one in preference to another, although this election was in a degree controlled by legal or equitable proceedings. The real estate was not liable in the hands of an executor to pay debts, but the heirs and devisees were liable upon specialties. Swift, Dig. 459. The plea of plene administravit, or want of assets at time of suit brought, was adapted to this system. In Connecticut, if the estate is insolvent, there should be a representation of insolvency. So soon as that fact appears, and thereafter, the payment of debts is conducted under the orders of the court of probate. So long as the estate is solvent, the debts which accrue after the expiration of the time for presentation of existing claims are a valid claim against the estate, if these are presented within one year from the time the debts accrue. Plene administravit is a good plea by an executor de son tort (Olmsted v. Clark,

30 Conn. 108), and want of assets is pleadable in an action against an executor for a legacy (Knapp v. Hanford, 7 Conn. 132). But says Judge Swift, in speaking of the statutory system of Connecticut for the payment of debts, "I can imagine but one instance in which the executor or administrator can avail himself of the plea of plene administravit. Debts due to the state and the expenses of the last sickness and the funeral are preferable debts; if the whole estate should be absorbed in discharging these debts, it would be useless to proceed in the settlement of it as an insolvent estate; and if a suit should be brought by a creditor against the executor or administrator for a debt, he might plead this in bar." 1 Swift, Dig. 459; Bennett v. Ives, 30 Conn. 329; Bacon v. Thorp, 27 Conn. 251; Griswold v. Bigelow, 6 Conn. 258. So, also, in England, a judgment against an executor de bonis testatoris is equivalent to a finding that he has assets. In Connecticut, a judgment is a finding that the estate of the deceased is liable to pay the claim which is sued upon. If the claim accrues and is presented after distribution, and payment is refused by the executor, it is incumbent upon the creditor to bring suit within four months after refusal. Suit is brought that the validity of the claim may be adjudicated. The question of assets is not before the court. The judgment shows that there is a valid claim against the estate of the deceased. In what manner payment may be obtained, it is not my province now to decide, but the authorities which have been cited show that, when the statute declares that the after accruing claims "shall be paid out of the estate remaining after the payment of the debts exhibited in the time limited," it is not meant that the estate remaining at the date of the judgment in the hands of the executor as executor is the only fund from which the claimant can enforce payment, and, if that has been distributed to the heirs, he is remediless. When an action is brought against an executor of a solvent estate, judgment is properly rendered for the whole demand, "for these, if for no other, reasons: That it was found justly due; that other assets might afterwards be discovered; and that if the estate should be, as it was afterwards represented to be, insolvent. the plaintiff might be enabled to obtain his dividend upon his whole demand." Tweedy v. Bennett, 31 Conn. 276. In this case, the bank became insolvent in December, 1871, an assessment was made upon the stockholders by the comptroller of the currency on January 19th, 1877, demand was made of the plaintiff on March 22d, 1877, and June 12th, 1877, and suit was commenced July 14th, 1877. Until the order of the comptroller of the currency the claim was contingent. He ascertains and decides how much shall be collected, and until his decision the receiver has no power to enforce a liability against the stockholders arising out of their stock. The action of the comptroller "is indispensable whenever the personal liabilty of the stockholder is sought to be enforced, and must precede the institution of a suit by the receiver." Kennedy v. Gibson, 8 Wall. [75 U. S.] 498. The claim accrued at the date of the comptroller's order, the amount to be paid was there liquidated, and by the terms of his order became due and payable. Until his order, the amount, if any, to be paid, was not due. Casey v. Galli, 94 U. S. 673.

II. The defendant next insists that, inasmuch as the intestate died previous to the insolvency of the bank, there was at the time of his death no claim contingent or otherwise against his estate; that the title of the stock vested by operation of law in the administrator upon his appointment; that the assessment is against stockholders and that, therefore, the liability has accrued against the administrator, who holds the stock as trustee; that, by section 5152 of the Revised Statutes, he is freed from personal liability, and that the estate only which is in his hands is liable for payment; and that it is admitted by the pleadings that the defendant has no estate or funds in his hands. The action is based upon the theory that the claim is against the estate of the intestate as an estate in process of settlement, and, under the facts in the case, the question arises whether a receiver of an insolvent national banking association has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock has not been transferred at the date of the comptroller's order. The defendant contends that the receiver never had a claim against the estate of Nathaniel Weed, but that his claim is against existing stockholders, and that the title to the stock vested in the administrator September 9th, 1872, and related back to the date of the intestate's death. It is true that the title to personal property of an intestate vests in Connecticut in his administrator, by force of local law and the grant of administration, but I think that the claim of the defendant, although ingenious, is not tenable, for the following reasons:

1. "An executor or administrator has his estate as such in auter droit merely, viz. as the minister or dispenser of the goods of the dead." 1 Williams, Ex'rs. 562.

2. The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies, his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the ex-

ecutor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. Corning v. McCullough, 1 Comst. [1 N. Y.] 47; Bailey v. Hollister, 26 N. Y. 112; Lowry v. Inman, 46 N. Y. 119; Hawthorne v. Calef, 2 Wall. [69 U. S.] 22; Gray v. Coffin, 9 Cush. 192.

3. When an obligation devolves upon an executor solely by virtue of his successorship to the estate, and not by express contract or agreement of his own, the estate is liable. If an executor is liable to pay an obligation resting upon personal property, which came to him from the testator, and of which the executor is the owner only as a representative of the estate, and which obligation is due from him solely because he represents the estate, he is liable as executor, even if suit might have been also brought against him personally. East Hartford v. Pitkin, 8 Conn. 404, per Williams, J.

4. I do not think that section 5152 was intended to affect the liability for assessments of estates in process of settlement. The principal object of the section was to prevent a personal liability from running against executors, administrators, trustees or guardians who had purchased as trustees, or to whom had been transferred in their names, as trustees of national bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a contingent liability for assessments, it might be claimed that a judgment de bonis propriis could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank, as trustees.

I am therefore of opinion that the facts alleged in the plea are not a valid defence to prevent a judgment against the defendant from the estate of the intestate. As it is not suggested that the defendant has any other ground of defence, the demurrer is sustained, and judgment should be rendered against him as administrator de bonis non, from the estate of the intestate, for the sum of $10,280, with interest on $5,140 thereof from February 26th, 1877, and on $5,140 thereof from April 26, 1877, at six per cent.

DAVIS (WEST v.). See Case No. 17,422.
DAVIS (WILKINS v.). See Case No. 17,664.

Case No. 3,659.

DAVIS v. WOOD.

[Cited in Matilda v. Mason, Case No. 9,280. Nowhere reported; opinion not now accessible. See Davis v. Wood, 1 Wheat. (14 U. S.) 6.]

Case No. 3,660.

DAVIS v. WYER.

[1 Cranch, C. C. 527.][1]

Circuit Court, District of Columbia. Dec. Term, 1808.

ATTACHMENT ON ASSIGNED CAUSE OF ACTION—PARTIES.

The proceedings upon attachment, upon an assigned cause of action, must be in the name of the legal plaintiff; and all the requisites of the statute must be complied with.

Attachment under the act of 1795, c. 56. The justice certified that William Davis made oath that the defendant is bona fide indebted to him in the sum of $92.50, &c., according to the act, and that William Davis at the same time produced before him a memorandum of a settlement betwixt the said Uriah Wyer and Jacob Todhunter, which memorandum was assigned to the aforementioned William Davis, by which it appeared that the said Uriah Wyer is indebted as aforesaid, and upon which memorandum of a settlement, the said oath was granted. The memorandum produced to the clerk was in the words following: "December 8th, 1807, this —— settled with Jacob Todhunter and am due him $9250 as witness my hand. Uriah Wyer." "I do hereby assign all my right, title, claim, and interest to the above to William G. Davis. Jacob Todhunter."

F. S. Key moved (if the court should suppose an amendment necessary) to amend the capias ad respondendum, by striking out the name of William Davis, and inserting in lieu thereof the name of Jacob Todhunter. The capias had been returned non est. No copy of the short note had been set up, &c. The proceeding by attachment is an equitable proceeding. It must issue in the name of the equitable plaintiff. Such has been the uniform practice in Maryland.

THE COURT (nem. con.) on motion, quashed the attachment. There was no evidence that a copy of the short note had been set up at the court-house door, nor that the proofs exhibited to the justice, were lodged with the clerk. The attachment was in the name of W. Davis, but the assignment of the account was to W. G. Davis. The handwriting of Todhunter was not proved.

CRANCH, Chief Judge, said the attachment must be in the name of the legal plaintiff.

DAVIS JEFFERSON, Case of. See Case No. 3,621a.

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

DAVIS, The JOSEPH A. See Case No. 7,-534.

DAVIS, The S. L. See Case No. 12,939.

DAVIS SEWING MACH. CO. (POTTER v.). See Case No. 11,324.

DAVISON (ADAMS EXP. CO. v.). See Case No. 73.

Case No. 3,661.

DAVISON v. SEAL-SKINS.

[2 Paine, 324.][1]

Circuit Court, D. Connecticut. 1835.

SALVAGE — PROPERTY RESCUED FROM PIRATES — "PIRACY" DEFINED — ADMIRALTY JURISDICTION — SEIZURE BY UNITED STATES OFFICER IN FOREIGN TERRITORY—ADMIRALTY APPEALS.

1. Salvage is demandable, of right, upon property taken from pirates. But to entitle a party to salvage in such case, the taking must have been lawful and meritorious.

2. A pirate is one who acts solely on his own authority, without any commission or authority, from a sovereign state, seizing by force, and appropriating to himself without discrimination, every vessel he meets with.

[Cited in Dole v. New England Mut. Marine Ins. Co., Case No. 3,966; The Ambrose Light, 25 Fed. 423.]

3. Robbery on the high seas is piracy. But to constitute the offence the taking must be felonious; and the quo animo may be inquired into.

[Cited in The Ambrose Light, 25 Fed. 426.]

4. If a court of admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself and if it stood alone, be within the admiralty jurisdiction. Therefore, in the case of a piratical taking, the court may have jurisdiction, although the retaking was upon land. And for the same reason, goods taken by pirates and sold upon land, may be recovered from the vendee, by suit in the admiralty.

5. An officer of the United States has no right, without express directions from his government, to enter the territorial jurisdiction of a country at peace with the United States, and forcibly seize upon property found there, and claimed by citizens of the United States. Application for redress should be made to the judicial tribunals of the country.

6. Where D., an officer of the United States, without the direction of his government, seized property at the Falkland Islands, claimed by citizens of the United States, and which it was alleged had been piratically taken by one V., who pretended to be governor of the Falkland Islands under the government of Buenos Ayres, and it was proved that V. was not acting on his own authority but under a commission from the government of Buenos Ayres, it was *held* that the seizure of the property by D. being unlawful, a claim for salvage by A. for personal services bestowed upon the property after it was delivered over to him by D., could not be sustained.

7. Where the evidence is conflicting, and it is doubtful on which side it preponderates, the decree of the court below will not be disturbed on the ground that it is against evidence.

[Cited in The Maggie P., 25 Fed. 206.]

THOMPSON, Circuit Justice. This case comes up on appeal from a decree of the district court of the United States for the district of Connecticut. This libel filed in the case is for salvage upon a quantity of seal-skins, alleged to have been saved and rescued from the unlawful and piratical capture of Lewis Vernet, at Port St. Lewis, in the Eastern Falkland Island, on the 19th of August, in the year 1831. The libel alleges the skins to have been taken from on board the schooner Superior, Congdon, master, by the said Vernet; who was wrongfully and unlawfully pretending and claiming to be governor of the Falkland Islands, under the government of Buenos Ayres, and landed and put into a store-house. Salvage is also claimed upon a quantity of seal-skins, alleged to have been taken in like manner from a boat's crew, commanded by Isaac P. Waldron, and put into the same store. The libellant [Gilbert R. Davison] states that he was carried a prisoner on board the schooner Harriet, to Buenos Ayres, where he arrived on the 20th of November, when he was liberated; and on the 1st of December he shipped as second sailing-master on board the Lexington, a sloop-of-war of the United States, commanded by Captain Duncan, and sailed for Port Lewis, and arrived there on the 27th of December, and sent a boat on shore and took the skins from the store-house, and broke up Vernet's establishment there: that he obtained a discharge as sailing-master, for the sole purpose of saving the skins for the rightful owner. The skins having been delivered by Captain Duncan to him, were put on board the schooner Dash, on the 5th day of January, 1832, and were afterwards transhipped to the schooner Carrier, of Stonington, John S. Barnum, master; who signed a bill of lading for 790 prime fur, and 401 pup-skins, consigned to Thomas Davison. The Carrier arrived at Stonington on the 15th of April, 1833. And the salvage claimed is for the personal services of the libellant, bestowed upon the skins after they were delivered over to him by Captain Duncan. The skins by order of the district court, were sold by the marshal of the district, and the money brought into court, and a claim for the proceeds was filed by Silas E. Burrows, as owner of the schooner Superior, and her cargo.

Isaac P. Waldron, in behalf of the boat's crew mentioned in the libel, or under the right of purchase made from them, filed a claim for a portion of the skins. The freight of the skins having been ordered to be paid out of the proceeds, the court decreed against the claim of the libellant for salvage; and after deducting the costs, that $704.52 should be paid to Isaac P. Waldron on his claim, and the remainder of the proceeds to be paid to Silas E. Burrows on his claim. From this decree the libellant and Burrows have severally filed an appeal; and the questions which arise under this appeal, relate, in the first place, to the claim for salvage, and, in the next place, to the respective pro-

[1] [Reported by Elijah Paine, Jr., Esq.]

portions of Burrows and Waldron to these proceeds.

The right to salvage in this case has been placed on the ground that the taking was piratical,[2] and gave a legal right to any person to retake, and claim a compensation for all meritorious and beneficial services rendered in saving the property. There can be no doubt that salvage is demandable of right upon property taken from pirates; and if the taking, in this case, by Vernet, is to be deemed piratical, the claim for salvage may be maintained; but to entitle a party to salvage, two circumstances must concur. The service rendered must be in a lawful taking of the property, and must be meritorious and useful. The taking must be lawful; for no claim can be maintained in a court of justice, founded on an act in itself tortious. It has, accordingly, been held, that as a recapture made by a neutral power, no claim for salvage can arise, although the beneficial service rendered may be the same as if the recapture had been by a belligerent; but the act of taking by the neutral being unlawful, no right can arise from an act in itself unlawful. [Talbot v. Seeman] 1 Cranch [5 U. S.] 28. Robbery on the high seas is understood to be piracy by our law. The taking must be felonious. A commissioned cruiser, by exceeding his authority, is not thereby to be considered a pirate. It may be a marine trespass, but not an act of piracy, if the vessel is taken as a prize, unless taken feloniously, and with intent to commit a robbery; the quo animo may be inquired into. [U. S. v. Pirates] 5 Wheat. [18 U. S.] 184; U. S. v. Jones [Case No. 15,494]. A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself, without discrimination, every vessel

[2] By article 1, § 8, of the constitution of the United States, congress has power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. If any person commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any vessel, shall piratically and feloniously run away with such vessel, or any goods or merchandise to the value of fifty dollars, or yield up such vessel voluntarily to a pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be brought. Act 30th April, 1790, § 8 [1 Stat. 113]. If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being convicted thereof, shall suffer death. Id. § 9.

Every person who shall, either upon the land or the seas, knowingly and willingly aid and assist, procure, command, counsel, or advise any person to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person shall thereupon do or commit any such piracy or robbery, then every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be accessory to such piracies, before the fact, and every such person, being thereof convicted, shall suffer death. Act 30th April, 1790, § 10. After any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any vessel, goods or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged to be accessory to such piracy or robbery after the fact, and on conviction thereof, shall be imprisoned not exceeding three years, and fined, not exceeding five hundred dollars. Id. § 11. If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any vessel, or upon any of the ship's company of any vessel, or the lading thereof, such person shall be adjudged to be a pirate; and being thereof convicted before a circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. Act 15th May, 1820, § 3 [3 Stat. 600]. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical vessel, shall land from such vessel, and on shore shall commit robbery, such person shall be adjudged a pirate, and on conviction thereof before a circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. Provided, that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offense in a state court. Id. § 3. If any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any vessel owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such vessel, and on any foreign shore seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board any such vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death. Id. § 4. If any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company

he meets with; and hence pirates have always been compared to robbers. The only difference between them is, that the sea is the theatre of action for the one, and the land for the other. 2 Arun. 351. Although the retaking in this case was upon land, yet if it was a piratical taking, the court might have had jurisdiction; for if the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction: and upon this principle it is, that goods taken by pirates and sold upon land, may be recovered from the vendee by suit in the admiralty. 1 Kent, Comm. 353. In this view of the case, it becomes proper to inquire into the situation and capacity in which Vernet was acting, and as connected therewith, the territorial government and jurisdiction of the Falkland Islands; and it is very clear, from the evidence in the case, that he was not then acting on his own authority, but under a commission from the government of Buenos Ayres, claiming to exercise jurisdiction over the Falkland Islands.

Mr. Slocum, in his letter to the minister of foreign affairs, dated 21st November, 1831, complaining of the conduct of Vernet, asks whether the government of Buenos Ayres intends to avow and sustain the capture. The minister of foreign affairs, in his reply of November 25, informs him that the subject was under the consideration of the government, which would adopt such decision as the laws of the country required; which Mr. Slocum, by his letter of the 26th of November, informs the minister that he cannot consider the answer in any other light than as an express admission, on the part of his government, of the right to capture American vessels fishing for seals at the Falkland Is-

of any vessel, owned wholly or in part, or navigated for or in behalf of any citizen or citizens of the United States, shall forcibly confine, or detain, or aid and abet in forcibly confining or detaining on board such vessel, any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such vessel, offer or attempt to sell as a slave, any negro or mulatto, not held in service as aforesaid, or shall, on the high seas, or anywhere on tide-water, transfer or deliver over to any other vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land or deliver on shore from on board any such vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate, and on conviction thereof, before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death. Id. § 5.

The president of the United States is authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews from piratical aggressions and depredations. The president of the United States is authorized to instruct the commanders of the public armed vessels of the United States, to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel: and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. Act 3d March, 1819, § 1 [3 Stat. 511]. The commander and crew of any merchant vessel of the United States, owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel owned as aforesaid, which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States. Id. § 3. Whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion. Id. § 4. If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or to run away with any vessel, or with any goods, or turn pirate, or to go over to or confederate with pirates, or in anywise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any vessel, or endeavor to make a revolt in such vessel: such person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. Act 30th April, 1790, § 12. By the common law, piracy consists in committing upon the high seas, or elsewhere within the jurisdiction of the admiralty, such acts of robbery and depredation, as if committed on land, would have amounted to felony there. The admiralty jurisdiction does not extend in general to any offence done infra corpus comitatus. All rivers in England till they flow past the furthest point of land next the sea, are infra corpus comitatus. As to havens, creeks and arms of the sea, where the sea flows in between two points, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line, as being infra corpus comitatus. It would seem, however, to be infra corpus comitatus, one must be able to see with the naked eye from one side of the creek, &c., to the other. The admiralty has exclusive jurisdiction on the coasts beyond low-water mark. And between low and high-water mark, the admiralty has jurisdiction if the offence be done upon the high water when the tide is in, and the courts of

lands, and then proceeds to deny in toto the right of Buenos Ayres to prohibit the Americans from taking seals, and protests against all acts which have been adopted by the government for that purpose, including the decree of the 10th of June, 1829, by which the said islands and coasts, and their fisheries, are declared to belong to that government; and protests against all acts of the government asserting any such right. And Capt. Duncan, in his letter of the 1st of December, admits that the captures or services by Vernet were made under the authority of that government. He, therefore, before he sailed on the expedition against the Falkland Islands, understood that Vernet was acting under the authority of the government of Buenos Ayres; and the proclamation of the 14th of February, 1832, shows the light in which the conduct of Capt. Duncan was considered. It charges him with having invaded that rising colony, and destroying the public property, and carrying away goods legally deposited there for judicial inquiry: and Capt. Duncan, after he had broken up the establishment, and taken as prisoners all the persons found there, writes to the minister of foreign affairs that he would deliver up and set at liberty the prisoners on board the Lexington, on assurance being given by the Buenos Ayrean government that they had been acting under its authority; and the minister, in his answer of the 15th of February, 1832, expressly declares, that Vernet was appointed political and military governor of the Falkland Islands, in consequence of the decree of the 1st of June, 1829, published on the 10th of the same month; and that Vernet, and the individuals acting under his authority, could only be judged of by their own government. Here was a full and complete sanction, by the government of Buenos

common law, if done on the strand when the tide is out. In cases purely dependent on the locality of the act done, the admiralty jurisdiction is limited to the sea, and to the tide-water as far as the tide flows. See Lewis, Cr. Law, p. 461, and cases there cited.

In England, in a case at the admiralty session, of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed, was to be considered as within the limits to which commission granted under St. 28 Hen. VIII. c. 15, do by law extend. Upon reference to the judges, they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point, the construction of this statute by Lord Hale (2 Hale, P. C. 16, 17) was much preferred to the doctrine of Lord Coke (3 Inst. 111); and that most, if not all of the judges, seem to think that the common law has a concurrent jurisdiction with the admiralty in this haven, and in all other havens, creeks and rivers in this realm. Brace's Case, 2 Leach, 1093. It appeared to them that 28 Hen. VIII. applied to all great waters frequented by ships; that in such waters the admiral, in the time of Henry VIII., pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships. MS. Bayley, J. If a robbery be committed in creeks, harbors, ports, &c., in foreign countries, the court of admiralty indisputably has jurisdiction of it, and such offence is, consequently, piracy. Rex v. Jemot, Old Bailey, 28th Feb. 1812. It is clear that upon the open sea-shore the common law and the admiralty have alternate jurisdiction between high and low-water mark (3 Inst. 113); but it is sometimes a matter of difficulty to fix the line of demarcation between the county and the high sea in harbors, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence; but some general rules upon the point are collected by Mr. East. He says, that "in general it is said that such parts of the rivers, arms or creeks, are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale, in his treatise De Jure Maris, says, that the arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man, standing on the one side of the land, may see what is done on the other; and the reason assigned by Lord Coke in the admiralty case (13 Coke, 52), in support of the county coroner's jurisdiction, where a man is killed in such places, because that the county may well know it, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred." 2 East, P. C. c. 17, § 10 pp. 803, 804.

The question, whether the act was committed on the sea, or within the body of a county, is of main importance. For if it turn out that the goods were taken anywhere within the body of a county, the commissioners under St. Hen. VIII., can have no jurisdiction to inquire of it; and if it should appear that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried, because the original felony was not a taking of which the common law takes cognizance. 2 East, P. C. c. 17, § 12, p. 805. And St. 39, Geo. III. c. 37, relates only to offences committed on the high seas, and out of the body of any county. Where a man was indicted for stealing three chests of tea out of the Aurora, of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing, or otherwise, at the place where the vessel lay, it was held, from the circumstance, that the tea was stolen on board the vessel, which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas. Rex v. Allen, R. & M. C. C. R. 494. It was decided that where A., standing on the shore of a harbor, fired a loaded musket at a revenue cutter, which had struck upon a sand-bank in the sea, about one hundred yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy; for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded. 1 Hawk. P. C. c. 37, § 17. And if a man be struck upon the high sea, and die upon the shore after the reflux of the water, the admiral by virtue of his commission, has no cognizance of the offence. 2 Hale, P. C. 17, 20. And as it was doubtful whether it could be tried at common law, it was provided by statute that the offender may be tried in the county where the death stroke, poisoning, or hurt happened.

Ayres, of the acts of Vernet: and Commodore Rodgers, in his letter of the 24th of April, 1832, to the minister of foreign affairs, on the subject of Capt. Duncan's conduct, says that he, (Capt. Duncan,) previous to his departure, wished to ascertain whether the persons alluded to acted under the authority of the government of Buenos Ayres; but not being able to obtain any official declaration upon the subject, he believed that he was justified in considering them as acting without authority, and in treating them as pirates; but that as the government had since officially declared, that the establishment at the Falkland Islands was under its special protection, and that the individuals in charge of it acted under its special authority, he considered the government responsible for the improper conduct of its agents, and that the persons arrested by Capt. Duncan were no longer responsible (except to their own government) for their outrages. He should, accordingly, set them at liberty; and he declares that he acts in this measure without instructions from his government; that it is not his intention to discuss the question pending between the two governments. This he should leave to the agent duly authorized to treat upon that matter, and who, it is expected, would shortly arrive at Buenos Ayres. From this correspondence thus far, it is evident that Capt. Duncan, when he went to the Falkland Islands, and broke up Vernet's establishment, was under the impression that they were a nest of pirates; and that Commodore Rodgers, as soon as he found this to be a mistake, but that they were acting under the authority of the Buenos Ayrean government, discharged the prisoners, disclaiming to hold them as pirates: and there is no pretence, in any of this correspondence, that Capt. Duncan, in this particular act, was pursuing any special order of the government of the United States; but he was, no doubt, acting in good faith, under what he considered his duty, in protecting the rights of American citizens.

I do not mean to enter into the question whether or not American citizens had a right to take seals upon the Falkland Islands: that was a disputed question between our government and that of Buenos Ayres. But if these islands were held in the possession and under the jurisdiction of the Buenos Ayrean government, and Vernet's establishment then was under the authority and protection of that government, as it clearly was, and even admitting that Vernet had abused his power, Captain Duncan could have no right, without express directions from his government, to enter into the territorial jurisdiction of a country at peace with the United States, and forcibly seize upon property found there and claimed by citizens of the United States. Such a principle would be too hazardous to the peace of nations to be admitted in practice. If the seizure of these skins by Vernet was wrongful, and a violation of the rights of American citizens, the presumption is, that on application to the judicial tribunals of Buenos Ayres, there would have been a restoration of the property; and if that, and all appeal to the government, should fail of redress it might become a case for the interference of the government of the injured party, and might ultimately lead to a just war. Such, according to the law of nations, would be the course to be adopted toward the citizens or subjects and the government of every sovereign power; and the weakness or strength of such power does not alter the principle. And this would seem to have been the understanding of the libellant himself, by the contract he entered into with Vernet, relative to the appeal to the tribunals of Buenos Ayres, for the trial of the right of seizure by Vernet, of the Harriet and Superior; and the employment of the Superior in sealing, until the determination and result of such trial should be known. This was an arrangement beneficial to all parties, and is not at all consistent with the charge that it was a piratical capture. I can discover nothing in the evidence to warrant the conclusion that this contract was forced upon the libellant and Captain Congar, by Vernet. It purports to have been entered into at the instance of these captains; and I see no reason to conclude that the trial would not have been proceeded in had not the property been retaken, and the whole establishment broken up by Captain Duncan, which the government of Buenos Ayres considered a gross violation of their rights. This right of taking seals (or fishery as it is called, though, perhaps, not strictly proper, as the seals are taken on shore) at the Falkland Islands, was then under discussion between our government and that of Buenos Ayres, as would appear by the letter of the secretary of state to Mr. Forbes, of the date of 10th of February, 1831, in which he says it is the wish of the president that you should address an earnest remonstrance to that government against any measures that may have been taken by it, including the decree and circular letter referred to, if they be genuine, which are calculated in the remotest degree to impose any restraint whatever upon the enterprise of our citizens engaged in the fisheries in question (the taking seal at the Falkland Islands), or to impair their undoubted right to the freest use of them. But notwithstanding this strong language on the part of our government, it did not undertake to pronounce this a piratical establishment, or to direct our public vessels to proceed there and break it up; but was negotiating on the question. Our government must have been fully apprized of the course pursued by the government of Buenos Ayres; for the decree referred to in this letter was undoubtedly the decree under which Vernet was acting. And that decree, which bears date on the 10th of June, 1829, in terms declares, that the Falkland Islands shall be governed by a military and civil governor, to be

appointed by the government of the republic, and whose residence should be on the island of Solidad, and that he should see to the regulations of the fisheries on that coast. And our secretary of state, in a letter of 29th of October, 1836, in answer to the inquiry whether our government had formally declared that it did not recognize the claims of the republic of Buenos Ayres to the jurisdiction of the Falkland Islands, says: "Measures were taken by my predecessor to ascertain on what foundation the claim of jurisdiction to these islands rested; but the sickness and death of Mr. Forbes, our charge d'affaires at Buenos Ayres, had for a time interrupted the investigation. Our right of fishery, however, in those seas, is one that the government considers indisputable, and it will be given in charge to the minister about to be sent there, to make representations against and demand satisfaction for all interruptions of the exercise of that right." Thus our government, four years after the seizure of the Superior, and, as must be presumed, with full knowledge of the fact, treated this right as a subject for negotiation between the two governments, and does not undertake to affirm such seizure to be a piratical act. And under this view of the case, I cannot consider the retaking by Captain Duncan a lawful act; and unless it was so, the claim of the libellant to compensation as for salvage services, in a court of admiralty, cannot be sustained. I do not, therefore, enter into the inquiry whether any meritorious and beneficial services have been rendered by the libellant. If any have been rendered, which in law entitles him to compensation, his redress must be sought in a court of common law, and not in a court of admiralty. The appeal of the libellant must, therefore, be dismissed.

I have not been able to arrive at so satisfactory a conclusion in relation to the distribution of the proceeds of the skins, as between Mr. Burrows and Captain Waldron. It is not denied but that all the skins taken on board the Superior belonged to Mr. Burrows; nor is it denied but that Captain Waldron was the owner of the skins taken from the boat's crew of the Belville, he having purchased the rights of the other part owners; and it is very satisfactorily established that all these skins were put into the same store-house at Port Lewis. But the doubt arises from the difficulty of ascertaining whether the whole of the skins taken from the boat's crew were shipped on board the Thomas Lowry and sent to London, or whether a part remained, and were taken away by Captain Duncan.

The evidence upon this part of the case is certainly very contradictory in several respects, and cannot be reconciled. Vernet swears that the skins taken from the boat's crew were put separately in the store-house, and were all put on board the Thomas Lowry. In this he is contradicted by several witnesses, who swear that these skins were stored promiscuously in the store-house with the skins of the Harriet and Superior, and that the skins shipped on board the Lowry were selected from the aggregate quantity. Under this view of the case, it cannot with any satisfactory certainty be said on which side the evidence preponderates, so as at all events to justify an appellate court on this ground to disturb the decree of the court below. I am, accordingly, of opinion that the decree of the district court be affirmed.

Case No. 3,662.

DAVOLL et al. v. BROWN.

[1 Woodb. & M. 53;[1] 2 Robb, Pat. Cas. 303; 3 West. Law J. 151; Merw. Pat. Inv. 414.]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

CONSTRUCTION OF PATENTS—PROVINCE OF COURT AND JURY—RULES OF CONSTRUCTION.

1. It is the duty of the court, rather than the jury, to construe the language used in a specification of a patent, if no parol evidence is offered in explanation, or none which is contradictory.

[Cited in Geier v. Goetinger, Case No. 5,299; Brush Electric Co. v. Electric Imp. Co., 52 Fed. 974.]

2. A patent is not to protect a monopoly of what existed before and belonged to others, but to protect something, which did not exist before, and which belongs to the patentee.

[Cited in Smith v. Downing, Case No. 13,036.]

3. A construction of patents, liberal for the patentees, is proper. But the description of the patent must be so certain, as to be understood by those acquainted with the subject-matter.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 484; Smith v. Downing, Case No. 13,036; Winans v. Denmead, 15 How. (56 U. S.) 341.]

4. But the whole of the specification, as well as the summary and the drawings, are generally to be examined and compared, and not one alone looked to, in order to decide what new part or new combination is claimed to be invented and protected.

[Cited in Hovey v. Stevens, Case No. 6,745; Aiken v. Bemis, Id. 109; Teese v. Phelps, Id. 13,819.]

5. In coming to a result, practical views, rather than subtle distinctions, must govern.

This was an action on the case for a violation of a patent right, owned by the plaintiffs [William C. Davoll and others], for an improvement in the speeder for roving cotton. The letters patent [No. 3,089] were averred to have issued May 19th, 1843. The general issue was pleaded, and notices given of several defences, all of which at the trial here at this term were found by the jury against the defendant [James S. Brown]. He then moved for a new trial, on account of a supposed misdirection by the court to the jury, in relation to the specification, a copy of which is annexed.[2]

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

[2] The schedule referred to in these letters patent, and making part of the same: "To All Whom It may Concern: Be it known, that I,

B. R. Curtis and Mr. Warren, for plaintiffs.

Dexter & Ames, for defendant.

WOODBURY, Circuit Justice. This motion is founded upon the position, that, by the specification, the improvement of the plaintiff is not confined to the use of the bow-flyer, that is, the flyer in "one continuous piece," as part of his new combination; and that the court, in charging the jury that it was so confined, on a fair construction of the whole specification and drawing, erred in point of law. In the argument, the counsel seemed to contend, that there was another error, in not leaving the point to the jury, as a question of fact, whether the bow-flyer required a different gearing from the open flyer, and if it did, then the bow-flyer formed a part of the new combination claimed; but if it did not require a different gearing, then the bow-flyer was not in point of law a portion of the new combination. But it is enough to dispose of this last position, to see that it would narrow the question of law as to what kind of flyer was contemplated in the patent, and that it must depend on a single fact, to be found by the jury. Whereas, in truth, that question depended mainly on the language used in the specification and on the drawing, and not upon any fact in the case, which was in dispute at the trial, and dehors or independent of the writing. Nor was the court, at the trial, requested to charge the jury, that the construction of the writing in this respect depended on any such fact; nor was it understood to be argued to the jury by the counsel, that the construction depended on it, but rather on the writing itself and the drawing, with some two or three other facts, about which no controversy or conflicting evidence existed.

It is well settled law, also, as to all written instruments, that their meaning is in general to be collected from the language of the instruments themselves. The construction seldom rests on facts to be proved by parol, unless they are so referred to, as to make a part of the description and to govern it; and when it does at all depend on them, and they are proved, or admitted, and are without dispute, as here, it is the duty of the court, on these facts, to give the legal construction to the instrument. But whether the court gave the right construction to the patent in dispute, so far as regards the kind of flyer to be used in it, is a proper question for consideration now; and if any mistake has occurred in relation to it, in the hurry and suddenness of a trial, it ought to be corrected, and will be most cheerfully. There is no doubt as to the general principle contended for by the defendant in this case, that a patentee should describe with reasonable certainty his invention. Several reasons exist for this. One is, the act of congress itself requires, that he "shall particularly specify and point out the part, improvement or combination which he claims as his own invention." Act July 4, 1836, c. 357, § 6 (5 Stat. 119). And another is, that unless this is done, the public are unable to know whether they violate the patent or not,

William C. Davoll, of Fall River, in the county of Bristol, and state of Massachusetts, have invented certain new and useful improvements in the machine known by the name of 'Speeder,' 'Double Speeder,' or 'Fly-Frame,' used for roving cotton, preparatory to spinning, and I do hereby declare that the following is a full and exact description thereof: My main improvement consists in the manner in which I arrange the spindles, in two rows, by means of which arrangement only about one half the room is required to receive the same number of spindles; the operator can also attend to a greater number than usual; much less power will be required to put them in motion; the cost per spindle will also be much less, the double row requiring but little more gearing than a single row, and the machine will bear running at a much higher velocity than the English fly-frame. In the accompanying drawing, figure 1 represents an end view of the machine, and figure 2 a top view of a spindle or flyer-rail. The position these rails occupy in the machine, is shown at n and o, figure 1, n being an end view of the spindle, and o of the flyer-rail, with the requisite gearing upon them, which is the same on each of them. These rails, instead of being drilled, like those in common use, with a single row of holes for supporting the spindles which pass through them, are drilled with a double row, as shown at a a, and b b, figure 2. The back row, b b, is placed about five inches from the front row, a a, or about the width of the flyer to be used. The holes b b, of the back row, are drilled intermediate between those of the front row a a, and by this arrangement the bobbins h are readily changed. The spindles e e e, figure 1, work up and down through the rows of holes a a and b b, and through the tubed wheels c c, figures 1 and 2, and also through the bottoms of the flyers as seen at a. The respective revolving and vertical motions of the spindles and flyers are effected in any of the known modes. The flyers, as shown in the back row i, figure 1, are made to stand with their planes at right angles to those of the front row k; this, with their intermediate position, greatly facilitating the changing of the bobbins. To the bottom of each flyer a tube wheel is attached, as seen at c, figures 1 and 2; and a similar wheel is attached to each spindle, as shown at c c, figure 1, and motion is consequently communicated to them independently; but the respective flyers and spindles of both rows are geared into the same intermediate wheels, f f, as shown in figure 2. The above constitutes the whole gearing for giving motion to the back row of flyers and spindles. It will be seen, that the flyers, as used by me and shown at i i and k k, are made in one continuous piece, instead of being open at the bottom, as is the case with those generally used in the English fly-frame, and this, among other reasons, enables me to give the increased velocity above referred to. Having thus fully described the nature of my invention, in the improved construction of the speeder, double speeder, or fly-frame, what I claim therein as new, and desire to secure by letters patent, is the arrangement of the spindles and flyers in two rows, in combination with the described arrangement of gearing. And this I claim, whether the said gearing be arranged precisely as herein represented, or in any other manner which is substantially the same, producing a like result, upon the same principle. William C. Davoll. Witnesses: B. K. Morsell, Edwin L. Brundage."

and are also unable, when the term expires, to make machines correctly, and derive the proper advantages from the patent. Bovill v. Moore, Davies' Pat. Cas. 361; Phil. Pat. 286; Lowell v. Lewis [Case No. 8,568]. These principles, however, are not inconsistent with another one, equally well settled, which is, that a liberal construction is to be given to a patent, and inventors sustained, if practicable, without a departure from sound principles. Only thus can ingenuity and perseverance be encouraged to exert themselves in this way usefully to the community; and only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears. Grant v. Raymond, 6 Pet. [31 U. S.] 218. See, also, Ames v. Howard [Case No. 326]; Wyeth v. Stone, [Id. 18,107]; Blanchard v. Sprague [Id. 1,-518].

The patent laws are not now made to encourage monopolies of what before belonged to others, or to the public,—which is the true idea of a monopoly,—but the design is to encourage genius in advancing the arts, through science and ingenuity, by protecting its productions of what did not before exist, and of what never belonged to another person, or the public. In this case, therefore, the jury were instructed to consider the case under these liberal views, but not to hold the patent valid, unless the invention, such as the court construed it to be in point of law, was described with so much clearness and certainty, that other machines could readily be made from it, by mechanics acquainted with the subject. Looking to the whole specification and drawing, both the figure and language, could any one doubt that bow-flyers were intended to be used in the new combination which was patented? The figure is only that of a bow-flyer, so is the language. First, the spindles are described as working up and down "through the bottom of the flyers, as seen at a," which is not possible in case of the open flyer, as that has no bottom for the spindle to work in. Again the specification says, "To the bottom of each flyer a tube wheel is attached, as seen at b, figures 1 and 2," which is impracticable with an open flyer. Again it says, motion is communicated to the flyer independently, but that is not feasible with the open flyer. And finally, towards the close, in order to remove all possible doubt, the specification adds,—"It will be seen, that the flyers, as used by me, and shown at i i and k k, are made in one continuous piece, instead of being open at the bottom, as is the case with those generally used in the English fly-frame." All know, that the flyer, in one continuous piece, is the bow-flyer. Besides this, other admitted or apparent facts tended to show, that the bow-flyer alone was intended. One great advantage, claimed from the new combination in the patent, was an increased velocity of the spindle. Thus, in the early part of the specification, it is stated, among the advantages of his improvement, that "the machine will bear running at a much higher velocity than the English fly-frame." And towards the close, he says, that it is the use of the flyer in "one continuous piece," i. e., the bow-flyer, instead of the open one, as in the English fly-frame, which, "among other reasons, enables me to give the increased velocity above referred to." How could there, then, be any reasonable doubt, that in his patent it was this bow-flyer he intended to use in his new combination? In truth he not only says so, and could not otherwise obtain one of his principal objects and advantages, but it is manifest from the form of the flyer itself, and was not doubted at the trial, that only the bow-flyer could be geared, as he described his flyer to be, in two places, through its bottom; the other form of the open flyer confessedly having no bottom susceptible of being used or geared in this manner. But it is said, the clause at the end does not specify this kind of flyer, and therefore all the rest of the specification is useless, redundant, and entitled to no weight in deciding what kind of a flyer is referred to in the closing part of the specification. We think otherwise. Sometimes the preamble, even, may be resorted to for ascertaining the object of the specification. Winans v. Boston & P. R. R. Co. [Case No. 17,858]. Sometimes, the body of the specification. Russell v. Cowley, 1 Cromp., M. & R. 864. 876. Sometimes, the summing up. Moody v. Fiske [Case No. 9,-745]. And sometimes, the formal clause at the end of the specification. Generally, all of them are examined together, unless the formal clause seems explicitly to exclude the rest, and require a decision on itself alone. McFarlane v. Price, 1 Starkie, 199; Rex v. Cutler, Id. 354; Wyeth v. Stone [Case No. 18,107]; Blanchard v. Sprague [Case No. 1,-518]; Ames v. Howard [supra]; 11 East, 101. But there is no such exclusion or conflict between the formal clause and the rest of the specification. On the contrary, it speaks of no different spindles from what he had just described and boasted of, as giving the increased velocity his machine possessed. And when he proceeds to describe what he claims therein, as new, to be "the arrangement of the spindles and flyers, in two rows, in combination with the described arrangement of gearing," he manifestly refers, not to spindles and flyers generally, but the spindles and flyers before exhibited in his drawing, and described in his specification, viz., the short spindle and bow-flyer, rather than the long spindle and open flyer. And it is not pretended, that any other kind of spindle or flyer could act in combination with the described arrangement of gearing," which he had before given, of spindles working through the bottom of the flyers, and a tube wheel attached to the bottom of each flyer. There

was no fact in doubt about this, to be left to the jury; and there was but one construction as to the kind of flyer intended to be used, that was consistent either with the drawings, or the express language employed, or the chief object of the machine in its increased velocity, or in the practicability of gearing it in the manner before described by him in two important particulars, or of giving motion to it "independently." It is as clear and decisive on this point as if he had said, the "before described" spindles and flyers, because he says the spindles and flyers, "with the described arrangement of gearing;" and no other spindles or flyers, but the short spindles and bow-flyers, could be geared in the manner before described, through the bottoms of the latter. Matters like these must be received in a practical manner, and not decided on mere metaphysical distinctions. Crossley v. Beverley, 3 Car. & P. 513, 514. Taking with us, also, the settled rules, that specifications must be sustained, if they can be fairly (Russell v. Cowley, 1 Cromp., M. & R. 864, 876; Wyeth v. Stone [supra]); that we should not be astute to avoid inventions; and that it is a question for the court, and not the jury, whether the specification can be read and construed intelligibly in a particular way (Whitney v. Emmett [Case No. 17,585]; Blanchard v. Sprague [supra]),—we think the instructions given at the trial in this case were correct, and that no sufficient ground has been shown for a new trial. Motion refused.

Case No. 3,663.

DAVY v. FAW.

[1 Cranch, C. C. 89.][1]

Circuit Court, District of Columbia. April Term, 1802.

ARBITRATION — EVIDENCE OF QUESTIONS SUBMITTED.

When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted.

Debt on award. The terms of submission were "of a controversy of several accounts and contracts existing between us."

THE COURT allowed parol evidence to show what were the accounts and contracts meant in the submission, and stopped C. Lee who had offered such evidence, and informed him that in the case of Ellzey v. Mosorop [Case No. 4,412], in Washington, they had decided that where the terms of submission were uncertain, parol evidence might be given of the controversies submitted.

MARSHALL, Circuit Judge, absent.

[NOTE. See Faw v. Davy, Case No. 4,701.]

DAVY (FAW v.). See Case No. 4,701.

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

DAVY (ROSS v.). See Case No. 12,073.

DAWES (BANK OF COLUMBIA v.). See Case No. 865.

Case No. 3,664.

DAWES et al. v. CORCORAN.

[1 Cranch, C. C. 137.][1]

Circuit Court, District of Columbia. July Term, 1803.

WITNESSES—CROSS-EXAMINATION.

Leading questions may be asked in cross-examining a witness.

Assumpsit.

Mr. Mason, for defendant, in cross-examining the plaintiffs' witness, asked whether there was not an agreement that, &c. (stating certain terms.)

Mr. Key, for plaintiff, objected on the ground of its being a leading question.

The objection was overruled, and the question permitted to be asked.

Mr. Key took a bill of exceptions. But no writ of error was issued. See Peake, Ev. 135.

DAWES (STOKES v.). See Case No. 13,477.

Case No. 3,665.

The DAWN.

[1 Ware (485) 499.][2]

District Court, D. Maine. Feb. 21, 1839.

SEAMEN'S WAGES—SALE OF SHIP IN FOREIGN COUNTRY—WRECK—BURDEN OF PROOF.

1. The act of congress of February, 1803, c. 62 [2 Stat. 203], allowing two months' extra wages to the crew, upon the sale of the vessel and their discharge in a foreign country, applies only to the case of a voluntary sale of a vessel, and not when the sale is rendered necessary by shipwreck.

[Cited in Dustin v. Murray, Case No. 4,201.]

2. If the vessel is sold in consequence of a disaster at sea, the owners will not be exempted from the payment of the extra wages, if the vessel can be repaired at a reasonable expense and in a reasonable time, and the burden of proof, to show that she could not so be repaired, is upon the owners.

This was a suit for subtraction of wages. The libellant shipped as mate for a voyage from Boston to Turk's Island, and back to her port of discharge in the United States, for wages at the rate of twenty-five dollars a month. The brig sailed December 4, 1836, and when four days out met with heavy gales, by which she was much injured in her spars and rigging, and strained in her hull. The ballast was shifted, the pump-well broken, and the pump forced up three feet and a half, so as to render it impracti-

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

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

cable to keep her clear of water. On the 16th of the month, being in latitude 32°, the vessel being in a crippled state, with only four sails remaining, and those old and damaged by the gale, and several of her spars lost, the master abandoned all hope of reaching his port of destination, and for the safety of the lives of the crew bore up for Bermuda, and on the 28th arrived at the port of Hamilton. Here a survey was called, and after an examination of the brig she was pronounced unseaworthy, and in consequence of her age and disabled condition not worth repairing. She was accordingly sold and the crew discharged. The libellant was paid his wages up to the time of his discharge.

C. S. Daveis, for libellant.
T. A. Deblois, for respondent.

WARE, District Judge. The facts in this case are not controverted. They appear in the pleadings, in the protest of the master and crew, and in the report of the surveyors. Two questions have been raised, and have been very fully and ably discussed at the bar; first, whether the libellant is entitled to two months extra pay under the act of congress of February, 1803, c. 62, § 3; and secondly, if the case is not within the purview of the act, whether, by the general principles of the maritime law, he can claim any thing beyond the full amount of his monthly wages up to the time of his actual discharge.

In the first place it may be proper to advert to one ground of defence insisted upon at the argument, which, if well founded, it is contended, at once withdraws the case from the operation of the statute. It is this, that the sale was made by order of law, and not by the authority of the master; and consequently neither he nor the owners can be held responsible for any of the legal consequences attached to a sale under such circumstances. In what light the case might have been considered if the master had applied to a court of admiralty for a survey, and the court had, on the coming in of the report of the surveyors, by a regular decree pronounced her unworthy of repairs and ordered her to be sold for the benefit of all who had an interest in her, it is not necessary in this case to decide. Sir Wm. Scott has on several occasions expressed an opinion in favor of the jurisdiction of a court of admiralty to order a sale under such circumstances as are presented by the present case. The Gratitudine, 3 C. Rob. Adm. 259; The Fanny and Elmira, Edw. Adm. 118; The Warrior, 2 Dods. 288. But the validity of such sales is not admitted by the courts of common law in England. Reid v. Darby, 10 East, 143; Morris v. Robison, 3 Barn. & C. 196. In this country the jurisdiction of the admiralty to order a sale of the vessel, on the application of the master in such cases of distress, has been viewed with more favor, and such a decree of sale is vindicated not only as a beneficial, but a rightful exercise of authority. The Tilton [Case No. 14,054]; Janny v. Columbian Ins. Co., 10 Wheat. [23 U. S.] 411. But then the decree is only prima facie evidence of that necessity upon which it is professed to be founded. It is not conclusive on the rights of persons who are not parties to the proceedings. In the present case, however, no such judicial proceedings were instituted. The master upon his arrival consigned the vessel to certain merchants of that place. They applied to the governor of the island for a warrant of survey, who appointed the surveyors. The surveyors, after examining the vessel, reported the state in which they found her; and there all proceedings having the semblance of legal proceedings terminated. There was no action of any court, nor of any of the public authorities of the island upon the report; but after it was made the sale was ordered by the consignees. All the authority they had was derived from the master, and their acts must be considered as his. The sale therefore can be viewed in no other light, than as having been made by the authority of the master.

The act of congress provides, that "whenever any ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country and her company discharged, or when any seaman or mariner, a citizen of the United States, shall with his own consent be discharged in a foreign country, it shall be the duty of the master to produce to the consul, &c., the list of his ship's company and pay to such consul, &c., for every such mariner so discharged, being designated on such list as a citizen of the United States, three months pay over and above the wages which may then be due to such mariner or seaman; two thirds of which to be paid by such consul, &c., to each seaman or mariner so discharged, upon his engagement on board any vessel to return to the United States; the remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen and mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute in such foreign port." It is contended for the libellant that this case falls within both of the hypotheses provided for by the statute; that the vessel was sold in a foreign country, and that the libellant not objecting to the sale and to the dissolution of his contract, by breaking up the voyage in this way, was discharged with his own consent. The statute is apparently intended to provide for the case of a dissolution of the contract by the voluntary act of the owners or of the master, their agent, in a foreign country, in the first place by the sale of the vessel, by which the voyage is broken

up and terminated, and in the second by the discharge of the seamen by the voluntary act of the master, with the consent of the seamen. This is the natural and obvious construction of the act. If it had been the intention of the legislature to comprehend cases of a forced and necessary dissolution of the contract, as by shipwreck, capture, seizure, and forfeiture of the vessel without the fault of the master or owners, or by any fortuitous occurrence against which human foresight and power could not provide, we should have expected some words would have been used indicative of such an intention. By the terms of the act, one third of the wages paid to the consul is to be retained by him as a fund to provide for the relief and to send home destitute American seamen. It is not gratuitously to be supposed that the legislature intended to raise a fund even for charitable purposes, by a tax on calamity and misfortune. Such an intention ought not to be inferred from general language that may well be satisfied with a more limited operation. And this construction, that it applies only to the case of a voluntary sale of the vessel, is the one which was given to the statute by the circuit court in the case of The Saratoga [Case No. 12,355]. The act also may probably apply to cases where the original object of the voyage is a sale of the vessel in a foreign port. But that aspect of the law does not present itself in the present case. The same remarks will apply with the same force to the other branch of the statute, which was relied upon at the argument, the discharge of the seaman with his own consent. To come within the act it must be a discharge by the voluntary act of the master, and not a mere separation from the vessel by the unavoidable breaking up of the voyage by misfortune. Indeed a seaman cannot in propriety of language be said to be discharged by the master, when the master himself is dispossessed of the vessel, and the whole enterprise is brought to a violent end, by an accident of major force. A discharge imports, in the natural and ordinary meaning of the word, a voluntary act on the part of the master.

If this be the true construction of the act, the question whether the libellant can maintain a claim for the two months' wages depends on the fact whether this was a voluntary sale on the part of the master, or a sale rendered necessary by inevitable accident; in other words whether the injuries, which the vessel sustained from the violence of the weather, were such that she was incapable of being repaired and proceeding on her voyage, or incapable of being thus repaired without so much expense and delay as to render it clearly for the interest of those who were to bear the loss to dispose of the vessel as a wreck where she was, rather than attempt to refit her and continue the voyage. It is indeed physically possible to repair a vessel when nothing remains of her but the keel. When we speak of the impossibility of repairing her, nothing more, therefore, is meant, than that she was in such a damaged and destitute condition that she was not worth repairing. The law is not so unreasonable as to require the owners, for the purpose of fulfilling their contract with the crew, to rebuild the ship at a ruinous sacrifice, merely because there is a physical possibility of doing it. But if the damage is not of so grave a character, but that she may well be repaired within a reasonable time, and at a reasonable expense, the case will not be withdrawn from the statute because the owner, or master, happens to meet with an opportunity of disposing of the vessel on advantageous terms, and making a better speculation by the sale than by repairing and continuing the voyage. This was the case of Pool v. Welsh [Case No. 11,269], and the court ruled that there was nothing in the facts of the case, although the protest of a shipwreck was set up in the defence, that took from the act the character of a voluntary discharge. And this question of eventual loss upon repairing and proceeding on the voyage is, I apprehend, to be viewed in relation to the party who is ultimately to bear it. If the owner is highly insured he may think it for his interest to abandon and sell the vessel, and convert a partial into a total loss, when if he were uninsured he might find his interest would be best served by repairing her and proceeding on the voyage. In such a case it appears to me that if the owner, or the master for him, chooses to sell as the easiest way of extricating him from the disaster by shifting the loss or a part of it upon the underwriters, it must be considered as a voluntary sale, and the seamen entitled to their two months' wages. These are calculations in which the interests the seamen have, in prosecuting the voyage and earning their wages, are not taken into the account. The master looks solely to the interests of the owner.

Now the embarrassing part of this case is that the evidence leaves the matter, to say the least, somewhat uncertain whether the brig was abandoned because the injuries were so considerable that she was not under any circumstances worth repairing, or only not worth repairing for the owner who was insured, as appears from the statement, which has been admitted in evidence, to the amount of four-fifths of the value on the brig, and on the cargo; within a few dollars of its full value. All the evidence we have is the report of the surveyors, unattended by any explanation beyond what appears upon the face of the report. These surveys when made in the most formal manner, under an order of a court of admiralty, are never conclusive on the rights of third persons (The

Tilton [supra]), and for many purposes are entirely inadmissible as evidence, as in a suit on the policy between the insurer and insured (Dorr v. Pacific Ins. Co., 7 Wheat. [20 U. S.] 611). It is I think admissible for the purposes of this case, but it is at best only prima facie evidence, and not perhaps of the most stringent character, even as prima facie proof. The survey is entirely an ex parte proceeding procured at the instance of the master. The surveyors are subjected to no cross-examination of an adverse party, and it is not perhaps presuming too much to suppose that their reports may often receive the coloring favorable to the known or supposed wishes and interests of a party who employs them. The report states the loss which the brig sustained in her masts, spars, and rigging, together with certain injuries to her hull. It is obvious that there can be no difficulty in supplying the loss of spars and rigging. The injuries to the hull, which the report enumerates, are that the water-ways abreast of the mainmast, on both sides, were much strained. The cabin work showed appearances of her having strained and worked aft; in the hold, the thick streak above the lower beams, on the starboard side, was found rent and split to the extent of about twelve feet in length, and in one place nearly broken across; the cross break three of the surveyors thought was new, but the rent was an old one, though it had been well secured by fastening. On the outside of the vessel one of the bolts, which fastened the knee opposite, had worked loose; about the stern she seemed to have strained greatly, particularly that part of the stern-post by the upper brace, and there appeared to be considerable water in the hold; but the surveyors could not try the pumps in consequence of the ballast having shifted and forced one of them up. The report concludes by saying that, "upon maturely weighing the general condition of the brig, the great extent of her distress in masts, spars, sails, and rigging, but looking particularly to the disabled state of her hull about the stern, all these circumstances, coupled with the age of the vessel, decide us in our opinion that she is unworthy of repair and refitting for the sea."

From the guarded and general terms in which the surveyors have expressed their conclusion, it seems to have been something of a balanced question in their minds whether the brig ought to have been repaired or not; and from the particular description of the injuries to the hull, given in the report, connected with the fact that the brig kept at sea twenty days after the principal damage was received, that is, from the 3d to the 28th of December, without any extraordinary danger, it appears to me that a court must find a great deal of difficulty in saying upon the facts which appear in the report alone, unaided in its judgment by any further elucidation of the matter, that this was a case of such extensive damage to the vessel, that the interest of all who were concerned in the loss required that she should be abandoned and sold as a wreck; or that such a clear case of necessity is made out for breaking up the voyage as to take from the sale the character of a voluntary act on the part of the master. That the sale was a determination favorable to the interest of the owner, largely insured as he was, is highly probable. His vessel had encountered a disaster from which he could not escape without loss, and the lightest loss for him would in all probability be to abandon the voyage and call upon the underwriters to pay the insurance. They had taken the risk and been paid for it. Nor do I mean to intimate an opinion that there was any thing unfair or improper in the sale as between the owner and insurers. That cause is not before me; and their rights are to be decided by the law of the contract between them. But in that determination the interests and rights of other parties were involved. The owner had contracted with the crew to perform the voyage and to pay them their wages. They had bound themselves to render their services; and in opposition to the general maxim of the law applicable to all other contracts faciendi, to do any particular thing, that is, that no one can be compelled peremptorily to do a specific act, "nemo cogi potest praecisé ad factum," the precise performance of the contract on their part might be enforced by stripes, chains, and imprisonment. Poth. Cont. Mar. No. 183. The owner became equally bound to give them the employment and pay the stipulated price; but a failure on his part in performing the obligation of the contract merely resolved itself as in other cases into an action for damages. If he voluntarily and without necessity abandons the voyage, and puts an end to the contract before it is executed, and thus prevents them from earning wages, he renders himself, on the common principles of the contract of hiring, responsible for damages. The rule of the civil law in such cases is, that the laborer is entitled to the full compensation which would be due for the performance of the entire contract (Dig. 19, 2, 38), unless he has had an opportunity of earning wages in another employment (Dig. 19, 2, 19, § 9). It is a general principle applicable to the contract of hiring, that when it is owing to the hirer himself that he has not had the enjoyment of the thing or the benefit of the contract, the whole hire is due. In the contract for the hire of labor or service, the rigor of the principle is tempered in favor of the employer, by deducting the wages which the laborer may or might have earned during the time in other employments. Poth. Cont. de Louage, Nos. 142, 173; Poth. Cont. Mar. No. 198; Domat, liv. 1, tit. 4, § 9, No. 6.

The maritime law, as it is administered in this country, in case of the discharge of a

seaman before the termination of the contract, without a valid cause, nearly agrees with the doctrine of the civil law. The right of the seaman is resolved into an action of damages; and the general rule of damages is, that the seaman shall be placed in as good a condition as if the contract had been performed. Emerson v. Howland [Case No. 4,441]. But when the contract is dissolved by the owner, by the sale of the vessel and a breaking up of the voyage in a foreign port, the statute comes in and fixes the amount of damage by an arbitrary rule, allowing two months' additional wages. Upon the general principles of the contract of hiring, the hirer is not responsible when the performance of the contract on his part is rendered impossible by an accident of major force; for no one is responsible for fortuitous events, unless he takes these risks upon himself by the express terms of the contract. The construction which has been put upon the statute is in this particular conformable to the general rule of law; it is that the statute does not extend to a case where the sale of the vessel is rendered necessary by such an accident, and of course in such a case the statute damages are not due. But when a party would exempt himself from the obligations of his contract by alleging an accident of major force, the onus probandi lies upon him to prove the necessity which constitutes his excuse. This is the general rule; and the reason of the rule applies as strongly when the statute damages are claimed as when the claim is for damages under the general law of the contract.

Whatever view we take of the case, then, we are brought back to this embarrassing difficulty, the imperfect state of the evidence on this essential point, whether the damage sustained by the vessel was so considerable that the interest of all concerned required that the voyage should be broken up, and the vessel abandoned and sold as a wreck. If within a reasonable time, and at a reasonable expense she might have been repaired and fitted to proceed upon the voyage, then my opinion is that it must be considered as a voluntary sale on the part of the master, and the extra wages are due. The case of Pool v. Welsh [supra], is a direct authority to this point. The language of the statute is general. When a vessel is sold in a foreign country the extra wages shall be paid; and if the owner would exempt himself from the payment, he must show that the sale is within the exception, that it was a sale rendered necessary by unavoidable accident. As satisfactory proof of this fact is not produced, the consequences must rest with that party upon whom the legal obligation is imposed of producing it. After the best consideration I have been able to give the case, I am brought to the conclusion that the wages are due. This view of the question being decisive of the case, it becomes unnecessary to consider the other point which was argued at the bar, whether in case of a shipwreck with salvage, the crew can in any case claim any thing, in the nature of salvage, beyond the amount of wages due at the time of the misfortune.

[NOTE. For further opinion in this case on the same subject, see Case No. 3,666.]

Case No. 3,666.

The DAWN.

[2 Ware (Dav. 121) 126;[1] 4 Law Rep. 106; 26 Am. Jur. 216.]

District Court, D. Maine. Feb. Term, 1841.

SEAMEN'S WAGES — SALE OF SHIP IN FOREIGN COUNTRY—WRECK—EXPENSES OF RETURN HOME —DUTY OF SEAMEN—EXTRA REWARD.

1. The libellant shipped for a voyage from Boston to Turk's Island. The ship, soon after leaving port, was so much damaged by the fortune of the seas, that the master, for the safety of the lives of the crew, put into Bermuda, where a survey was called, and she was condemned and sold as a wreck, and her crew discharged. Wages were paid to the libellant until he arrived at Bermuda. By his libel, he claimed either the two months' wages allowed to seamen on the sale of a vessel in a foreign port, and the discharge of the crew, by the act of congress of February 28, 1803, § 3 [2 Stat. 203], or a sum in addition to his wages to pay his expenses home.

[Criticised in Drew v. Pope, Case No. 4,080.]

2. The act of congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by misfortune; *held*, that the libellant was not entitled to the statute allowance, but was entitled to a sum in addition to his wages to defray the expenses of his return home, to be paid from the proceeds of the sale of the vessel.

[Cited in Brown v. Chandler, Case No. 1,998.]

3. Generally, when the performance of a contract has become impossible by a fortuitous event, the parties are discharged from its obligations.

[Applied in The Wenonah, Case No. 17,412. Cited in Thorson v. Peterson, 9 Fed. 520.]

4. On the happening of any disaster to a vessel, by which the prosecution of the voyage is rendered impossible, the seamen are discharged from the principal obligation of performing the voyage; but they are not released from the incidental obligation of rendering their best services for saving as much as practicable of the ship and cargo.

[Cited in The John Perkins, Case No. 7,360. Approved in The Bowditch, Id. 1,717.]

5. The opinions of Valin and Pothier on this subject examined and questioned.

6. On the principles of the common law, applicable to the contract of hiring of labor and service, a party cannot ordinarily claim an extra compensation, on the ground that, by some unexpected event, the service which he has agreed to perform, becomes more laborious and dangerous than was anticipated at the time of the contract.

7. The maritime law, on principles of public policy, makes an exception to this general rule, in cases of shipwreck.

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

8. In cases of shipwreck, the seamen are entitled to their full wages up to the time of the disaster, provided, by their exertions, enough is saved of the freight and wreck to pay them.

9. The old rule in England, that freight is the only fund against which wages can be claimed, was never the rule of the maritime law, and was never adopted in this country.

10. The ship, together with the freight, is, to the last fragment, hypothecated to the seamen for their entire wages, tota in toto et tota in qualibet parte.

11. In cases of shipwreck, the seamen are entitled to claim, according to the merit of their services, an extra reward, beyond their wages, against the property saved. This ought not generally to be less than the expenses of their return home. This, being of the nature of a salvage reward, may be allowed, as well against the savings of the cargo, as against the fragments of the ship. The decisions of the American courts quoted and commented upon. The doctrines of the maritime ordinances of the middle ages, on this subject, examined.

[Cited in The Niphon's Crew, Case No. 10,277; The John Perkins, Id. 7,360. Followed in Nickerson v. The John Perkins, Id. 10,252. Explained in Hoffman v. Yarrington, Id. 6,580. Cited, but not followed, in Kelly v. Otis, 23 Fed. 905.]

12. Under these ordinances, and the usages of the age when they were framed and established, the contract of seamen took a peculiar character. Their wages were made to depend on the successful termination of the enterprise. If that totally failed, contrary to the common principles of the contract of hire of labor or service, there was a total loss of wages. There is no trace of such a usage in the Roman law, nor in that ancient collection that goes under the name of the Rhodian laws, nor in the legislation of the Lower Empire. On the western coast of Europe, it appears to have been nearly coeval with the revival of commerce, after the fall of the Western Empire.

13. On this restriction contrary to common right, as a compensation and having its origin in the same policy of connecting the interest of the crew with the safety of the ship, was engrafted another principle, that, in cases of shipwreck, the seamen should be paid, out of the effects which they saved, a compensation beyond their stipulated wages, in the nature of salvage.

This case was before the court several terms ago, and is reported in Ware, 485 [Case No. 3,665]. After the opinion was then delivered, the counsel for the respondent moved the court to suspend the decree, to enable the party to offer further evidence to show the actual condition of the vessel, when she arrived at Bermuda. Under the circumstances of the case, the court allowed the motion. The case was now presented on the new evidence. The material facts upon the whole case were as follows. The libellant shipped on board the brig Dawn at Boston, Nov. 26, 1836, as mate for a voyage to Turk's Island, for wages at 25 dollars a month. Soon after the brig left port, she encountered violent gales, by which she was so much damaged in her hull and rigging, as to be incapable of continuing the voyage, and the master, for the safety of the lives of the crew, bore away for Bermuda, where she arrived on the 28th of December. The master then made his protest, and applied for a survey. Commissioners were appointed for that purpose by the governor, who, after an examination, reported, that from the great damage which the brig had received in her spars and rigging, and especially from the disabled state of her hull, connected with her great age, she was unfit for sea, and unworthy of repair; and she was subsequently sold as a wreck. The additional evidence, now introduced, went to confirm the report of the surveyors, and to prove the ruinous condition of the vessel, and to show further the great expenses of the repairs, which would have been required to fit her for sea. The crew were discharged, and paid their wages up to the time of the discharge. The libellant claimed, in addition, two months' wages allowed by the act of congress of February, 1803, § 3, upon the sale of a ship and the discharge of her crew in a foreign port, or upon the discharge of a seaman in a foreign country with his own consent; and if, under the circumstances of this case, he was not entitled to claim under the statute, an alternative claim was set forth in the libel for a reasonable compensation, in addition to his wages, in the nature of salvage for his extra labor and services in saving the vessel, and to pay his expenses home.

C. S. Daveis, for libellant.

T. A. Deblois, for respondent.

WARE, District Judge. I do not think it necessary, on this occasion, to say much upon the claim for the statute allowance of two months' additional wages, which are directed to be paid to the consul for the seamen's use on the sale of a vessel in a foreign port or when a seaman is discharged in a foreign country with his own consent. When this case was before the court at a former term, that question was fully considered, and the conclusion to which my judgment was brought, by that examination, was that the statute applied only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge rendered unavoidable by an imperious and overruling necessity. But when a vessel is sold in a foreign port, the case is within the words of the statute, and if the owners would exempt themselves from its operation, it belongs to them to show that the sale was involuntary on their part. As the evidence then stood, it did not appear to me that the necessity of the sale was sufficiently established by the proof; but, under the peculiar circumstances of the case, it seemed to be reasonable to suspend the decree, and allow the owner to offer further evidence to that point. The evidence now produced does, in my opinion, satisfactorily show that the sale was, in the reasonable meaning of the word, a sale of necessity. Not that it was physically impossible to repair the vessel and proceed on the voyage; for it is always possible to repair or rebuild a vessel, while any part of the hull remains. But the damages

were so extensive, and the expense of the repairs would have been so considerable, that it was, beyond question, greatly for the interest of those on whom the loss must ultimately fall, to abandon the voyage and sell the materials preserved for the most they would bring. A sale is, within the mercantile and reasonable sense of the word, necessary, when the vessel cannot be repaired but at a great sacrifice of the interests of the owners. And when a voyage is broken up for such cause, the seamen are not properly discharged, but the whole enterprise is brought to a premature conclusion by a fortuitous event, for which neither party is responsible.

The other question raised by the pleadings in this case is, whether, upon a shipwreck and loss of the vessel in a foreign country, the seamen, who have remained by the ship and faithfully performed their duty to the last, can, upon the principles of the maritime law, claim a compensation, out of the property which they save, beyond their stipulated wages up to the time when their connection with the ship is finally dissolved, sufficient to pay their expenses home. This question has been very ably and elaborately argued on both sides; and the authorities bearing upon it have been widely examined. But, with all the researches of counsel, no adjudged case has been found, in which the question has been directly and formally decided.

It is contended by the counsel for the libellant that this claim is founded on an ancient principle of the maritime law of Europe, incorporated into the earliest digests of the law, and recommended as well by the dictates of justice and humanity as by an enlarged and enlightened public policy; that if it is not directly sanctioned by any judicial precedents, neither are there any by which it is directly negatived; but, that there are cases in which a compensation in the nature of salvage may be allowed, beyond the amount of wages due, is fairly inferable from the doctrines of many of the adjudged cases, and is in fact but a just application of the general principle of the marine law, which studiously connects the interest of the crew with the safety of the vessel and cargo. On the other side it is argued, that the claim cannot be supported as one flowing from the contract, all rights under that being satisfied by the payment of wages up to the time when the contract was dissolved by an accident of major force; that it cannot be maintained as a salvage reward, because the ship's company can, it is said, in no case claim as salvors, being bound by their contract to use, on these melancholy occasions, their utmost exertions for the preservation of the ship and cargo for their stipulated hire; and the silence of our jurisprudence, on a question which must have frequently been presented to the court, has been strongly urged as a proof that no such principle, as that contended for in behalf of the libellant, is acknowledged by the maritime law of this country. And it is further contended, admitting the rule of the maritime law to be, that upon a shipwreck in foreign parts, the crew are entitled to claim against the savings from the wreck a sum sufficient to pay their expenses home, that this rule is superseded, in this country, by the acts of congress for the relief of destitute mariners in foreign countries, requiring the consuls of the United States to provide for their return at the public expense. Such I understand to be the general tenor of the arguments at the bar.

I agree with the counsel for the respondent, that by the maritime law, as it is received in this country, the seamen are bound to remain by the wreck and contribute their utmost exertions to rescue as much as possible from the violence of the elements, so long as there is a reasonable probability of saving any thing, without too much hazard of life. It is true, that a different view is taken of the obligations of the crew by the most distinguished maritime jurists of France. Valin says, that in case of shipwreck the seamen are at liberty to abandon the ship, although he admits that his opinion is in opposition to the decision of the judgments of Oleron and the ordinance of the Hanse Towns. The reason, he says, is, that in this case the owner is under no personal obligation to pay their wages or the expenses of their return home, and consequently, if they refuse to aid in saving the property, he has no cause of complaint. 1 Comm. sur Ordinance de la Marine, liv. 3, tit. 4, art. 9, p. 704. Pothier maintains the same doctrine. By the accident of major force, he says, which prevents the continuation of the voyage, the parties are freed from their engagements, and the seamen are no longer under any obligation to continue their services. Cont. Mar. No. 127. Boulay-Paty, without being very explicit, seems silently to acquiesce in the same conclusion. 2 Cours de Droit Mar. 230, 231.

But, notwithstanding the imposing authority of these great names, it appears to me that this doctrine is exposed to very grave objections. It is true indeed as a general principle, when the performance of a contract is rendered impossible by a fortuitous event, that the parties are freed from its obligations. And in this case, the prosecution of the voyage having, by an accident of major force, become impossible, the seamen are undoubtedly discharged from the principal obligation of the contract, that of performing the voyage. But as incidental to that, they are bound at all times to exert themselves for the preservation of the property intrusted to their care. It would be singular if they were released from this collateral obligation on the happening of an event, which rendered it peculiarly necessary. It appears to be a duty, resulting directly and necessarily from the nature of their engagement, to render their utmost exertions, on these occasions, to save all that is possible for their employers. This duty is expressly enjoined upon them in nearly all the old maritime ordinances. The law

is so stated by Abbott, in his treatise on Shipping (part 5, c. 2, § 2). And so it has, I believe, been uniformly held in this country. Sims v. Sundry Mariners [Case No. 12,893]; The Two Catherines [Id. 14,288]. So long as these services are continued, their right to wages, under the contract, remains in full force, and their lien against the fragments of the wreck which they preserve. But, by abandoning the wreck, they forfeit their wages, nor will their right be restored should the wreck be saved by other hands. 3 Kent, Comm. 196; The Two Catherines [Case No. 14,288]; Pitman v. Hooper [Id. 11,185].

But the question presented in this case is, whether the seamen can claim anything beyond the full amount of wages up to the time of the actual termination of their services. It is quite clear that this claim cannot be maintained upon the common principles applicable to the contract of hiring. Having agreed to perform the service for a stipulated price, they cannot maintain a claim for extra compensation, although, by some fortuitous event, that service may have been rendered more laborious, or have involved more danger than was anticipated. However just and reasonable such an allowance may, in some cases, be, as a pure question of casuistry, it cannot be sustained upon any established and known principle of law. Do, then, the principles and policy of the maritime law furnish any ground for making an exception in favor of maritime services, to the general rule of the common law? After an attentive consideration of the subject, and an examination of all the sources of information within my reach, I am brought to the conclusion, that to some qualified extent they do; and I will now proceed to explain somewhat at large the grounds upon which this opinion is founded.

No case was cited at the bar, in which this question has been decided, at least in the form in which it is presented in this case. There are, however, several, in which the general subject of the claims of seamen in case of shipwreck, against the fragments which they save, is considered. Chancellor Kent, in his Commentaries, in speaking of shipwreck in connection with wages, says that "some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of the seamen's wages, and for their expenses home." 3 Comm. 195. Here the expenses home are spoken of as a charge on the wreck, in addition to the arrears of wages. And I refer to this paragraph, not so much as an authority in support of the doctrine, as to show that the idea, that the crew may be entitled to something beyond their wages, is not such a novelty in our jurisprudence, as was supposed at the argument. In the case of the Two Catherines [supra], the vessel had performed her outward voyage and earned freight, and was wrecked, and the cargo totally lost on her return, in Narragansett bay, near her home port. The libel was framed with a double aspect, claiming, in the alternative, wages or salvage. The question, what was due to the crew, appears to have been elaborately argued at the bar, and was profoundly examined by the court. The conclusion of the court was, that no wages were due, but that the crew were entitled to salvage against the materials, which they had saved of the vessel. The court held, that there was no principle of law which authorized the position, that the character of seamen creates an incapacity to assume the character of salvors, and that the salvage should never be less than the amount of wages, which would have been due had no disaster happened, but may, according to the circumstances of the case, be more. I am aware of the language used by the same learned judge, in delivering the opinion of the court in the case of Hobart v. Drogan, 10 Pet. [35 U. S.] 122. But it does not appear to me to be inconsistent with the decision of this case, nor to take from its authority.

In the case of Taylor v. The Cato [Case No. 13,786], the ship was lost at sea, and the crew taken from the wreck by another vessel. Part of the crew of the Cato assisted that of the salvor vessel in saving a portion of the cargo, and they were allowed to claim, as subordinate and auxiliary salvors, one-half the share that was allowed to the crew of the salvor ship. Judge Peters observed, in delivering his opinion in that case, that "the third article of the laws of Oleron has been produced, together with the commentaries upon it, to show that seamen, saving from a wreck, are entitled to a reward, when sufficient property is saved, beyond the amount of their wages." "I have," he says, "never disputed the doctrine in cases to which it seemed applicable." In another part of his opinion he adverts to a previous decision he had made in the case of The Belle Creole [Id. 17,165], upon a state of facts similar to those of the Cato, and says, "I do not exactly recollect by what rule I estimated the quantum of wages I ordered to be paid out of the surplus, to the officers and crew of the Belle Creole, but I think it was beyond the amount of wages." I shall have occasion, presently, to remark particularly on the third article of the laws of Oleron, and it will be seen how it applies to the present case. The case of Weeks v. The Catherine Maria [Id. 17,351], was that of a vessel foundered at sea. A part of the cargo was saved by the aid of another vessel, in which the crew were brought home. Salvage was allowed to the crew of the salvor vessel, and the crew of the lost vessel were allowed their wages from the property saved, which was part of the cargo, not only to the time of the abandonment of the ship, but to the time when the goods were brought into port and were taken into the custody of the marshal, under the process of the court. In the case of Adams v.

The Sophia [Id. 65], the vessel was wrecked on her return voyage to Philadelphia, on the capes of the Delaware. The cargo was entirely lost, but some of the spars and rigging of the vessel were saved. The seamen filed a libel against the relics of the vessel for their wages, and the mate a separate libel, claiming salvage. The court held that the claim for wages could not be sustained, on the ground that freight is the mother of wages and that, when the freight is entirely lost, no wages eo nomine are due. But it was further decided, that although nothing could be recovered as wages, the seamen were entitled to claim as salvors, and that the amount, which would have been due as wages had the disaster not happened, might be recovered as salvage. The libel of the seamen was, therefore, dismissed, and the mate recovered the amount of his wages under the title of salvage.

All these cases clearly sustain the principle, that the seamen, in the event of shipwreck, are entitled to claim against the property which they have saved, in the quality of salvors. It is true that in the case from Gilpin, this seems to be treated as a substitute for the claim of wages, and to be measured by the amount which would be due if the disaster had not occurred. In the other cases, it is clear that the court thought it might exceed that amount, and in that of the Catherine Maria, more was in fact awarded. And if the claim is valid for salvage, it would seem, as in all other cases of salvage, it must be discretionary as to the amount, to be determined by the particular circumstances of the case. But all these cases are open to one general remark, which may be thought to detract something from their authority in support of the principle contended for in the case at bar; it is this, that it seems to have been tacitly assumed that the wages were lost by the calamity which prevented the earning of freight, and, therefore, if the seamen could not be rewarded for their services in the way of salvage, they could claim nothing. Undoubtedly it was formerly the doctrine of the English courts, that freight was the only fund out of which wages could be claimed, and of course when freight was not earned no wages were due. Holt, Shipp. 275. But that is now overruled in England (The Neptune, 1 Hagg. Adm. 227), and it was never received in this country but with material qualifications. Freight is, indeed, the natural fund for the payment of wages, and the seamen have a privileged claim against it. It is a right which does not stand merely on a dry rule of positive law, but is derived from the nature of things, for it is in part the product of their own labor. But, by the maritime law, the ship is as much pledged for wages as the freight. When the interests of third parties are involved, as between underwriters when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight ought first to be exhausted, and the vessel resorted to only as a subsidiary fund when the freight proved insufficient. This was the opinion of Emerigon (Traité des Assurances, art. 17 §§ 11, 53), and, in a proper case, the court may, perhaps, have the power of marshaling the funds to meet the claims of natural justice. But, at all events, the seamen are to be paid their wages, when enough for that purpose is saved of the ship or freight. Pitman v. Hooper [Case No. 11,185]. It is not pretended that these authorities establish the principle as a settled rule of jurisprudence in this country, that upon shipwreck, when part of the property has been saved to the owners by the exertions of the crew, they are entitled to an allowance in the nature of salvage, beyond the amount of their wages. But to me they seem to prove, at least, that the opposite rule is not established, and that the question is fairly open to be decided upon principle and the authority of the general maritime law.

We will now inquire what grounds it has for its support in the general doctrines of that law. The policy of connecting the interest of the crew with the safety of the ship and cargo is deeply imbedded in the principles of the maritime law. The ship and freight are the only pledge they have for their wages. Their lien upon these and every part of them attaches as a privileged hypothecation, tota in toto et tota in qualibet parte, or, as it has been emphatically expressed, to the last plank of the ship and to the last fragment of the freight. Jugemens D'Oleron, art 3; Consulat de la Mer. c. 132 (Pardessus' Ed. 92); Emerigon des Assurances, c. 16, §§ 11, 2; Pitman v. Hooper [supra]. But this is the whole of their security. If the ship and freight are wholly lost, there is a total loss of wages; and though the ship may be lost on the most distant and inhospitable shore of the ocean, they are not only left penniless to find their way home as they can, but when, through many hardships, they have arrived there, however long and perilous their service may have been, they have no personal claim against the owner, unless freight, in the course of the voyage, has been saved and put on shore. Upon the common principles of the contract of hiring service or labor, the title of the laborer to his reward depends upon the faithful performance of the service for which he is engaged, and is not liable to be defeated by the accidents of fortune. 2 Kent, Comm. 590; Poth. Cont. de Louage, No. 423. The principle which attaches the right to wages to the fortune of the vessel, or, in other words, makes the right dependent on the successful issue of the enterprise for which the men are hired, is a peculiar feature of the modern maritime law. No trace of such a principle is to be found in the Roman law nor in the maritime legislation of the Eastern Empire nor in that an-

cient compilation which goes under the name of the Rhodian laws. 1 Pard. Lois Mar. p. 325, note 3. It owes its origin to the necessities and peculiar hazards which maritime commerce had to encounter in the middle ages, when to the dangers of the winds and waves were added the more formidable perils of piracy and robbery. The principle having been then established, and found by experience to be favorable to the general interest and security of commerce, it has been preserved in the maritime jurisprudence of Europe, when the special necessities in which it had its birth have ceased to exist.

It is, then, to the maritime customs and usages of the middle ages, in which this restriction upon the right of wages had its origin, that we are to look for its nature and quality, as well as for any countervailing advantages to the seamen, by which this abridgement of the rights naturally resulting from their contract was compensated, and the scales of justice, which had been made to incline in favor of the employer, were equitably readjusted. If we retain the harsher principles of the old law, it is but just that we should also preserve the temperaments by which its severity and apparent injustice were mitigated.

The earliest monument of the maritime jurisprudence of the middle ages which remains, unless we accept the Consulate of the Sea, is the Judgments of Oleron.[2] The rule is there stated in these terms: "When a vessel is lost, in whatever place it may be, the seamen are bound to save all they can of the wreck and cargo. In this case the master shall pay them their reasonable wages and the expenses of their return home, so far as the value saved is sufficient; and if he has not money enough, he may pledge the objects saved to bring them back to their country. If the seamen refuse to labor for the salvage, there is nothing due them, and on the contrary when the ship is lost, they lose also their wages." Article 3. The rule cannot well be more explicitly declared than in this article. If the ship is totally lost, the seamen lose their wages; but, against the effects which their exertions have rescued from destruction, they have a claim not only for the full amount of their wages, for that I understand to be meant by their reasonable wages, but also for a further sum to defray their expenses home. Thus we see that in the very origin of the custom which restricted the right of seamen for their wages to the effects which they saved, it was connected with another of allowing them against these effects an additional reward for their labor in saving them. The Judgments or Roles, or, as they are more frequently called in this country, the Laws of Oleron, do not appear, at first especially, to have been sanctioned by any direct act of legislation. They are, apparently, a collection of maritime usages to which custom had given the force of law; but they have at all times been referred to as of high authority by all the most commercial nations of Europe. They were the earliest digest of maritime law in the western part of Europe, and from the general wisdom and equity of their decisions, as well as from other causes, they seem, in one form or another, to have been early incorporated into the maritime jurisprudence of all the western nations of that continent. Being a work of French origin, they were received as common law in Aquitaine, Brittany, Normandy, and the whole extent of the Atlantic coast of France. In England they early acquired nearly the same authority from an opinion there entertained, that they were originally compiled and published by Richard I., in his character of Duke of Aquitaine, on his return from the Holy Land. In the latter part of the twelfth century they were adopted by Alphonso the Wise, King of Castile and Leon, and thus became the law of the northern coast of Spain. 1 Pard. Lois Mar. pp. 301, 306; 2 Pard. Lois Mar. p. 29; 1 Bl. Comm. 418; 2 Bl. Comm. 423. They were at an early period translated and adopted as the maritime law of Flanders, under the names of the Judgments of Damme and the Laws of West Capelle. 1 Pard. Lois Mar. c. 9. The third article above quoted is in its substance incorporated into the ordinance of Philip II., of 1563 (part 4, art. 12). 4 Pard. Lois Mar. 24. In the more northern countries, this Code does not appear to have been received as common law; but the general principles and usages which it established, were incorporated into their own ordinances. The whole of the first twenty-five, which were the primitive articles, are transferred to the ordinance of Wisbuy, from the fifteenth to the thirty-ninth article. The seventeenth article of the Laws of Wisbuy is almost a literal translation of the third of Oleron. The Hanseatic ordinance, without copying so closely the article of Oleron, arrives at nearly the same conclusion. In case of shipwreck, the crew are required to assist the master in saving the wreck and cargo, for an equitable compensation in salvage, to be taken from the wreck and the merchandise, according to the judgment of arbiters. If the master has not money, he shall carry the seamen back to their country, if they choose to follow him. But if the seamen do not assist, the master is not bound to pay them anything, and those who have not done their duty are liable to corporal punishment. When the ship perishes, the whole that is saved is pledged to pay the totality of the wages. Ord. 1614, tit. 4, art. 29, and tit. 9, art. 5; Ord. 1591, art. 45. The law of Denmark requires the master and crew to save the ship and her rigging as well as the cargo, and a compensation shall be paid them according to the opinion of good men. On the other hand, the freight due from the shippers on the merchandise saved,

[2] [See note at end of this case.]

as well as the wages of the crew, shall be paid in proportion to the part of the voyage performed. The mariner who will not aid in saving the ship and cargo shall lose his wages, even what has been advanced, and be regarded as infamous. Code Frederic II. (1561) art. 24; 3 Pard. Lois Mar. p. 250. The same rules are established by the laws of Hamburgh. The crew are bound to exert themselves to save the vessel and cargo for an equitable recompense, and if they refuse their assistance, the master shall pay them neither their wages nor anything else. St. 1603, tit. 17, art. 1; 3 Pard. Lois Mar. 325. The law of Lubec substantially agrees with that of Hamburgh. It requires the master and crew to exert themselves to save the vessel and cargo, and allows them an equitable compensation, to be determined by arbiters. He who does not assist shall be paid nothing, and shall besides be deprived of his wages. Official Code (1586) tit. 3, art. 3; 3 Pard. Lois Mar. 444. The Prussian law also enjoins the same duties upon the crew, and requires the merchant to pay them a liberal reward, "honestum premium viri boni arbitrio." Code Duchy of Prussia (1620) lib. 4, tit. 12, art. 3, § 3. The Maritime Code of Charles XI. of Sweden, as well as several of the ordinances of the northern nations, prescribes particularly the course to be pursued by the master on these occasions. He shall first save the crew, then the rigging of the ship, and lastly the cargo, for the saving of which he shall employ the boat and the services of his crew, for an equitable compensation. When the ship and cargo are entirely lost, the master and crew can demand nothing that is due to them. But if they save of the wreck the amount of their wages, they shall be paid without deduction. No one shall have a reward for a salvage who has not aided; and he who has saved effects may detain them until he is paid. Code Car. XI. (1667) pt. 5, c. 2; 3 Pard. Lois Mar. 170. And finally, the maritime legislation of Russia inculcates the same principles, imposing on the crew the obligation of saving what they can from the wreck, and giving them an equitable compensation for the salvage. St. Riga (1672) tit. 5, art. 1; 3 Pard. Lois Mar. 520. The French ordinance of marine, of 1681, was framed upon a review of all the antecedent maritime legislation of Europe, improved and corrected, it is said, by information sought from practical men in every part of the continent. And so admirably was the task executed by the great man who digested it, that from its first publication it was generally acknowledged as constituting in some sort the text of the commercial law of all nations. In this celebrated Code we find the same principles established and confirmed. When the ship and merchandise are entirely lost, it is followed by an entire loss of wages. But if any part of the vessel is saved, the seamen engaged for the voyage or by the month shall be paid their wages. If merchandise only is saved, they shall be paid their wages in proportion to the freight received. But at all events they shall be paid for their days employed in saving the wreck and the effects shipwrecked. Liv. 3, tit. 4, arts. 8, 9. The same principles are preserved in Code de Commerce, art. 261.

It is certainly a little remarkable, in passing to the southern coast of Europe, that we find but very slight traces of a custom that seems from the earliest times to have prevailed on the Atlantic coast, that of allowing to the crew something in the nature of salvage from the property they save from the wreck. There is one chapter in the Consulate of the Sea, from which perhaps a custom may be inferred of allowing to seamen the expenses of their return home, when the vessel is lost on a foreign coast. It provides that when a ship sails to the countries of the Saracens, and falls into the hands of enemies, or is lost by the fortune of the seas, if the master receive no freight, he shall not be bound to pay the seamen anything. "The master," says the Consulate, "who by one of the causes mentioned loses his vessel, is not obliged to furnish the means of passage nor provisions for the seamen till their return to a Christian country, because he has lost all he had, and peradventure more." Chapter 228, p. 194 (Pardessus' Ed.) The reason given for exempting the master from the charge in this case, leaves room for the conjecture, that if part of the wreck had been saved by the crew, they might, by custom, be entitled to some allowance from it. The law of Genoa provides, when any disaster happens to a Genoese vessel, that the crew shall be bound to remain with the master and assist in the salvage, and that the master shall provide for their board and pay them double wages while they are employed in this service. Statutum, 1441, c. 94; 4 Pard. Lois Mar. 519. This is all I have been able to find in the legislation of those countries which border on the Mediterranean, indicating the existence of such a custom; while the ordinance of Peter IV. of Arragon and Valentia, by its silence, seems to negative it. It allows the seamen their wages in these cases to the time of the expiration of their service, provided they exert themselves to save the wreck and cargo, but nothing more, and visits upon their refusal to aid, the penalty of the forfeiture of all wages, even of that which has been paid in advance. Ord. 1440, art. 17; 5 Pard. Lois Mar. 357.

From this review of the maritime legislation and jurisprudence of Europe, and more particularly of the western nations of Europe commencing with the Judgments of Oleron, in the twelfth, to nearly the close of the seventeenth century, we find, either by positive ordinances, or by immemorial usages having the force of law, one prevailing rule applying to the case of shipwreck upon the whole extent of the Atlantic coast. It required the ship's company, in case of dis-

aster, to exert themselves to the utmost of their ability to save as much as possible of the ship and cargo, generally under the penalty, for the refusal or neglect to perform this duty, of a forfeiture of wages, and in some cases of additional punishment; but restricting their claim for wages to the effects which they save, and allowing them, against those effects, some reward beyond the amount of their wages stipulated by the contract. These principles seem to have been incorporated into the early law of every maritime state on the Atlantic coast, from the extreme west of the Spanish peninsula to Sweden, including the ports of the Baltic. Such a general concurrence, of itself, raises a strong presumption that they are, taken together, founded in justice and wisdom. But independent of the authority of general usage, these principles appear to me to have their foundation in just and enlightened views of public policy, their object being to connect the fortune of the crew with that of the vessel, and thus fortify the obligations of social duty by the ties of pecuniary interest. They are strongly maintained by Mr. Justice Story, in the case of the Two Catherines, before referred to. "In my judgment," says he, "there is not any principle of law, which authorizes the position, that the character of seamen creates an incapacity to assume that of salvors; and I cannot but view the establishment of such a doctrine as mischievous to the interests of commerce, inconsistent with natural equity, and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice." The Two Catherines [Case No. 14,288]. The rule which restricts the claims of seamen for wages, to the effects which they save, is one of naked policy; but that which allows them against these effects some reward beyond their wages, seems to be a principle of natural equity, that is, that when property has been rescued and saved to the owner from extraordinary perils by extraordinary exertions, the fund which is thus saved owes something to the hand which has preserved it. If it be said, that the services by which it was saved were due under the contract, the nature of that contract ought also to be considered. Upon principles of public policy, contrary to natural justice and the general law of the contract of hiring in all other cases, if the ship is totally lost without any fault of the mariner, he loses his entire wages. But if a mechanic is hired to build a house, and before it is finished the building is destroyed by an earthquake or burnt by lightning, he is not, on this account, the less entitled to his wages. Dig. 19, 12, 59. Or if workmen are employed to build a dike, and before the work is accepted by the employer it is destroyed, not from any fault of the workmen, but from the defect of the soil, as any other extraneous cause, the laborer is still entitled to his hire. Id. 19, 2, 62. The loss in such cases falls upon the owner or employer; and justly, for the whole profits, on the successful issue of the enterprise, would have gone to him. It is not so with the seaman. He can be paid only from the fund which he has brought home to the owner; and his compensation is made dependent on the accidents of fortune, as well as on his fidelity. It is no more than a just compensation for this inequality of the contract, when by extraordinary exertions of skill and intrepidity he has saved the fortune of his employer from extraordinary perils, that these labors should be acknowledged by some reward beyond his stipulated wages. And the policy of the principle appears to me to be as clear as its justice. It is a reward held out to induce the crew to persevere and exert the utmost of their skill and courage, even beyond what a court might think itself justified in requiring under their contract, to save what otherwise would be irretrievably lost to the owner. If they can look to nothing beyond their wages, they will naturally be inclined to relax their efforts, when enough has been saved for that purpose. They will also turn their attention exclusively to saving that which is pledged for their wages, that is, the ship, to the neglect of the cargo. An observation of Judge Peters, whose extensive experience as a maritime judge entitles his opinion on subjects of this kind to great consideration, is well deserving of attention. In the case of The Cato, he remarked: "There is a mistake evidenced by some of the counsel in this and other salvage cases, as to the principles regulating the payment of wages to the seamen in the cases of wreck. The old law was that they were payable only out of such parts of the wreck of the ship, her cables and furniture, as were saved; but it was found that under this impression the mariners were occupied in saving those articles from which they derived an advantage, and, to insure this, they suffered the goods to perish. Modern authorities are clear that both ship and cargo, or such parts as are saved, are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials and furniture saved, should be exhausted before the cargo be made answerable." The mind of Judge Peters seems to have been vibrating between wages and salvage. Sometimes he calls the claim by one name and sometimes by the other. It seems to me that the seamen, in these cases, have two distinct claims, one for wages and another for salvage. Their wages are to be paid exclusively from the materials of the ship, they being pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the

property saved, and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case.

Upon the whole, after the best consideration that I have been able to give to the subject, it appears to me that on these melancholy occasions the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done they are always entitled to their full wages if enough is saved for that purpose; but if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely sufficient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving anything remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of property saved. It is not, however, intended to be said that they can claim as general salvors, that is as persons who being under no obligation to the ship engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate. Such a ruling might sometimes increase the hazards instead of contributing to the safety of commerce. A crew, who had from any cause become dissatisfied with their officers or owners, might be willing to see the vessel placed in danger, at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her. But they are to be allowed a reasonable compensation pro opera et labore, as the rule is laid down in many of the old ordinances boni viri arbitrio. If the disaster happens in a foreign country, it ought to be at least a sum sufficient to pay the expenses of their return home. Such, I think, are the principles of the general maritime law. And if they have not been directly, and to their full extent, sanctioned by any judicial decisions in this country, the reasoning of the courts, in the cases which have been cited, appears to lead to the same conclusion.

But it was contended at the argument, whatever may be the doctrines of the general maritime law on this subject, that it has been superseded in this country by the acts of congress, which provide for sending home destitute seamen from foreign countries, at the public expense. The argument proceeds on the ground that the only motive for this allowance is, to furnish the seamen the means of returning home. But the maritime law, as we have seen, places it upon a broader foundation, that of general commercial policy, as well as the intrinsic equity of the claim. It never could have been the intention of these statutes, made for the benefit and relief of seamen, to abridge any of the rights derived from their service under the general maritime law. They have their origin in a great principle of public policy, that of preserving to their country the services of this most useful but most improvident and often destitute class of citizens.

The case at bar was not one of absolute shipwreck, but rather what has been called semi-naufragium. This vessel was brought into port in so damaged a condition, and requiring so large an outlay in repairs to refit her for sea, that for the interest of the owners she was sold as a wreck. Between the owners and the crew she must be considered, for the purposes of this case, either as a wreck, or not a wreck. Upon the latter hypothesis the sale must be considered as voluntary, and then the two months' wages, under the statute, will be due. On the other, the principles of the maritime law will apply. Between the owners and the crew, it appears to me, in the present case, that the true measure of justice will be to consider her to be what the owners treated her as being, a wreck. And as the libellant faithfully performed his duty, so long as his service was required, he is entitled to the benefit of the rule, that in addition to his wages the master shall provide for his expenses home. I shall allow for this purpose one month's additional wages.

NOTE. It is impossible now to determine the precise date of the first publication either of the Judgments of Oleron, or of the Consulate. The common opinion is, that the Consulate is the oldest. But we think that Pardessus, after a very full and elaborate examination of all the evidence on the subject now existing, has shown, not perhaps to a certainty, but with a high degree of probability, that the original articles of the Laws of Oleron, that is, the first twenty-five, were promulgated, and in force, as customary law, long before the existence of the Consulate, in the form in which we now have it. The other articles were added afterwards, at different times and in different places. It is said by Cleirac, in his preface to the Judgments of Oleron, that they were established by Eleonora, duchess of Guienne, on her return from the Holy Land, and were afterwards republished and augmented by her son, Richard I., of England, on his return from the same country. This would carry back the first publication to 1152, and the republication to 1192. Cleirac cites no authority for his statement, but gives it, apparently, as the commonly received opinion of the time; and, on his authority alone, it has been repeated by succeeding writers. His work was published in 1647, five centuries after the supposed establishment of this Code by Eleonora. It is abundantly shown by Pardessus, in his introduction to these laws, that the story of Cleirac is a fable. For instance, Richard did not return from the Holy Land by the way of Aquitaine. He was shipwrecked on his return, at Aquilea, seized and confined as a prisoner by order of the Emperor, Henry VI., from December, 1192, to 1194; and there seems to be about as little reason for believing that these laws were originally framed by Eleonora, as there is that they were republished by her son. Pardessus supposes that the first publication of these laws was in the latter part of the eleventh century, and before the year 1200. But the first certain evidence we have of their existence, is in 1266. They were then translated by order of Alphonso X., king

of Castile, incorporated into a Code under the name of Partidas, and ordered to be observed in all suits between navigators. 1 Pard. Lois Mar. p. 201. They must have been in existence for a considerable period, and have acquired an extensive authority as a common law of the sea, before they would be formally adopted into the legislation of another country. It seems to be equally uncertain where they were first promulgated. All the editions bear the attestation, "Witness the Seal of the Isle of Oleron, 1266;" but as they were certainly published before that time, this is probably only a notarial certificate of a copy taken from one in the public archives of that place. They bear no internal marks of having been originally made at Oleron, and they in fact constituted the common law, not only of the ports of Aquitaine, to which Oleron belonged, but of the ports of Brittany, Normandy, and the whole western coast of France. There is quite as much uncertainty as to the precise epoch of the appearance of the Consulate of the Sea. It was probably some time in the fourteenth century. The first document in which it is mentioned is an ordinance of the magistrates of Barcelona, in 1435. Some of the editions of the Consulate contain a document which declares that it was adopted as law by the public authorities of a large number of states on the Mediterranean sea, commencing with the year 1095, and ending in 1270. But this document is manifestly spurious. The original Consulate was written in the Romanesque language, a dialect of the Provencal and Catalan, which was the common language of the southern coasts of France and Spain. It may, therefore, safely be presumed that it had its origin in one of these countries, and probably the author, or authors, if there were more than one, belonged to Marseilles or Barcelona, as the usages, moneys, and measures mentioned in the Consulate were common to these two ports. But the work itself shows that it was not all produced at once, but additions were made from time to time. Pardessus thinks that the probabilities are in favor of Barcelona; the language in which it is written is in fact still spoken in that part of Spain. In comparing the Roles of Oleron with the Consulate, one can hardly doubt that the former are the more ancient. They have all the marks of a primitive compilation, a first rude and imperfect essay toward a digest of the law of the seas. The whole of the primitive Roles is comprised in twenty-five short articles, treating but few subjects, and those in a style of great simplicity, with very little development. But the Consulate is extended to two hundred and fifty-two chapters, and was evidently intended as a complete and systematic digest of the whole law, as far as it was then established in practice. Principles are largely developed, with distinctions and limitations, showing that the law must then have arrived to a state of great maturity. Most of the original articles of the Laws of Oleron are found in the Consulate, and some of them in the same words. Cleirac has inferred from this fact that the compilers of the Laws of Oleron borrowed from the Consulate. But if they had possessed this rich and copious collection, is it probable that they would have confined themselves to so small a number of articles? It is scarcely credible that they should not have taken more. Besides, when the articles of Oleron appear in the Consulate, they are found improved and more fully developed, showing that they were probably borrowed from that source, and were altered and amended to conform to the jurisprudence of that time. The Consulate must have been written at a time when the science of maritime law was in a much more advanced state than it was at the era of the Roles of Oleron. Pardessus has shown, in his introduction to these two compilations, that the Consulate must have been nearly two centuries posterior to the Roles. Many, however, of the laws and customs from which the authors of that work have derived their materials, may have existed, and probably did exist, as customs in the Mediterranean, before the epoch of the Laws of Oleron.

DAWS (JOHNSON v.). See Case No. 7,382.

Case No. 3,667.

DAWSON v. BOYD.

[Cited in Norwood v. Sutton, Case No. 10,365, and in Clarke v. Druet, Id. 2,850. Nowhere reported; opinion not now accessible.]

Case No. 3,668.

DAWSON v. DANIEL.

[2 Flip. 301.][1]

Circuit Court, W. D. Tennessee. Nov. Term, 1878.

JUDGMENT OF ANOTHER STATE SUED ON HERE — JUDGMENT BY DEFAULT — WHEN SET ASIDE — THE RULE AS TO A STAY OF PROCEEDINGS WHERE JUDGMENT HAS BEEN RENDERED IN ANOTHER STATE, AND SUIT BROUGHT HERE UPON IT.

1. The judgments of other states are conclusive when sued on here, and this court cannot for any purpose look to the merits, even where it may have been an illegal contract.

2. Judgment by default will not be set aside, unless the defendant can show that he was guilty of no negligence in suffering the judgment, and has a meritorious defense.

3. If the plaintiff can get no execution on his judgment in the other state, by reason of a supersedeas, the court may well be asked here to stay proceedings, unless it appears to have been a useless appeal or writ of error, in which case the stay may be refused. The rule in England and here is the same, which is not to stay proceedings where a suit is brought upon a judgment, unless that judgment has been appealed from and a supersedeas has been procured.

4. The practice in England and America as to stay of executions and suits on judgments, fully discussed.

[A. H. H.] Dawson obtained judgment against [Richard C.] Daniel in New York, from which appeal was taken but no supersedeas of execution was produced. Suit was brought on this judgment in the circuit court of the United States, at Memphis, and on account of some oversight or misapprehension of counsel, judgment was taken by default; the evidence offered being a duly exemplified copy of the New York judgment. Defendant thereupon offered affidavits and moved to vacate such judgment and for a stay of proceedings, alleging that it was obtained on account of an oversight or misapprehension of counsel, who understood they had further time to plead; that there were merits in the defense; that Dawson was insolvent, and if the judgment were permitted to stand, and the New York court should reverse it on the appeal they would be remediless; and that it was in the discretion of the court here

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

to interpose a stay of proceedings until the appeal was disposed of in New York.

Geo. Gantt and Wm. S. Flippin, for the motion.

Humes & Poston, against the motion.

HAMMOND, District Judge. This is a motion to set aside a judgment by default taken last term but continued over by this motion till now. Judgments by default will not be set aside, unless the defendant can show that he was guilty of no negligence in suffering the judgment and has a meritorious defense. Otherwise, the process of the court requiring parties to appear and answer suit goes for naught, and the court is the victim of the caprices of parties. Freem. Judgm. §§ 102, 108, 541; Memphis & O. R. Co. v. Dowd, 9 Heisk. 179; Chester v. Apperson, 4 Heisk. 639.

The judgments of other states are conclusive when sued on here, and this court cannot look to the merits for any purpose, not even where it may have been on an illegal contract. Hunt v. Lyle, 8 Yerg. 142; Freem. Judgm. §§ 433, 575, 576; Earthman v. Jones, 2 Yerg. 484.

The only merits insisted on here is that a writ of error has been prosecuted in New York to the judgment, and it is said, Dawson being insolvent, this court will exercise a discretion and stay further proceedings to await the result of the writ of error.

It is conceded that the writ of error, as taken, does not supersede execution, but it is insisted this court has discretion, notwithstanding, to stay proceedings. If bail bond had been given in New York the judgment there would have been superseded. Code N. Y. 1871, §§ 335, 348.

In England, a suit upon a judgment was not favored for the reason that it was vexatious, inasmuch as the plaintiff could have his execution on the original judgment. Entwistle v. Shepherd, 2 Term R. 78. Yet, the right of suit was undeniable, and this notwithstanding a writ of error was pending. 7 Vin. Abr. 351, 352; 20 Vin. Abr. 67; 110 E. C. L. 11. It is obvious the rule of disfavor to such suits in England does not apply to suits on foreign judgments or to suits from other states in this country. Where a writ of error has been sued out and bail bond given, it operates as a supersedeas in England, as it does here and in New York. In those cases only, so far as I can find, did the court ever stay proceedings in a suit upon the judgment, where bail had been put in and fi. fa. was stayed. It was in the discretion of the court to do this or not, and it was generally controlled by the fact, whether the writ of error was for delay or not. If it was a litigated case, the court looked with disfavor on the second suit. If it was a writ of error for delay merely, the court would favor the second suit and not stay proceedings. The rule to stay proceedings could not be had till bail was put in, which shows conclusively that the proceedings would not be stayed, unless the execution had been superseded and the plaintiff was protected against delay by bond. 3 Bac. Abr. 356; 9 Bac. Abr. 284; Meriton v. Stevens, Willes, 277; Entwistle v. Shepherd, 2 Term R. 78; Christie v. Richardson, 3 Term R. 78; Pool v. Charnock, Id. 79; Benwell v. Blank, Id. 643; Smith v. Shepherd, 5 Term R. 9; Bicknell v. Langstaff, 6 Term R. 455. The American rule is the same, and it is a just rule; it is the logical result of the requirement that we shall treat the judgments of another state as conclusive. But if the plaintiff can get no execution there, by reason of a supersedeas, the court here may well be asked to stay proceedings, unless it appears to have been a useless and vexatious appeal or writ of error, in which case the stay might be refused. Taylor v. Shew, 39 Cal. 536, and other cases cited; Freem. Judgm. §§ 433, 576, 602; Suydam v. Hoyt, 1 Dutch. [25 N. J. Law] 232.

Motion denied.

NOTE. There is one question not passed upon by the learned judge, which occurs to the mind in reading the foregoing opinion, and that is the propriety of adjourning from court to court motions for new trials. It was not necessary to the decision of the motion in this cause, and hence was passed over. It may be well to state in this connection that this motion was adjourned over by the predecessor of Judge Hammond. The practice of so adjourning motions seems to have obtained in Missouri and Tennessee, to some extent, but is believed to be seldom practiced in other states. It is not recognized in England, and not favored at all in many of the states. Its adoption opens the door to making other testimony, much to the prejudice of one party or the other, and there are other inconveniences which readily occur to the mind of the reader. It may be safely affirmed that the great weight of authority is against the practice, and there is nothing to be said in its favor. See Freem. Judgm. §§ 90, 96.

[NOTE. This case was further heard on a motion for a venditioni exponas to compel a sale of property levied on by the marshal. See Case No. 3,669.]

Case No. 3,669.

DAWSON v. DANIEL.

[2 Flip. 305; 8 Cent. Law J. 185; 11 Chi. Leg. News, 200; 7 Reporter, 457; 4 Cin. Law Bul. 136.] [1]

Circuit Court, W. D. Tennessee. Nov. Term, 1878.

EXECUTION—WATCHMAN—WHAT CONSTITUTES ABANDONMENT.

1. Execution is not void because it issues prematurely. If issued while motion for a new trial stands adjourned, the irregularity is cured as soon as such motion is denied, and this is especially so where the order of adjournment provided that the same was granted, without prejudice to plaintiff.

2. Semble, that the proper practice to prevent the issuance of an execution, where motion for

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Reporter, 457, contains only a partial report.]

a new trial is not disposed of, is to ask and obtain stay of execution.

3. Watchman: His withdrawal by levying officer no abandonment of levy. His presence not necessary to hold title.

[Followed in Steers v. Daniel, 4 Fed. 594. Cited in Freeman v. Dawson, 110 U. S. 267, 4 Sup. Ct. 94.]

4. To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done, which shows a determination in the individual not to have a benefit which is designed for him.

Humes & Poston, for plaintiff.

Geo. Gantt, Mr. Patterson, and Wm. S. Flippin, for defendant.

L. D. McKissick and Mr. Turley, for bank.

HAMMOND, District Judge. The plaintiff recovered judgment by default, against the defendant, on the 6th day of June, 1878, for $2,610.69 and costs. At the same term, and on the 13th day of June, 1878, the defendant moved to set the judgment aside, and for leave to plead; whereupon the court made the following order: "In this cause the application of defendant to vacate the judgment rendered herein at the present term of this court, is continued to the next term of the court without prejudice to either party."

After the adjournment of the term, and on the 5th day of July, 1878, execution issued on this judgment, which, coming into the hands of the marshal, was, by him, on the 9th day of July, 1878, levied on certain leasehold property belonging to the defendant, and it was advertised for sale. The marshal indorsed his levy on the writ at the time he made it, but, on the 17th day of August, 1878, returned it into court, with the following indorsement annexed to that on the levy. "And on the 17th of August, 1878, in obedience to an order of court, issued by Hon. John Baxter, I return this writ without further proceedings thereunder."

The plaintiff now moves for a venditioni exponas to compel a sale of the property. The defendant resists the motion on two grounds: First, that the execution prematurely issued, and is void; and secondly, that the levy has been abandoned by the marshal. It appears by the affidavits filed, that the marshal, when he made the levy, placed a watchman in charge of the property, and when he returned the writ, he withdrew him, and left the property as it was before.

The letter of the circuit judge to the clerk of the court, dated Knoxville, August 5, 1878, and his letter of the same date to Messrs. Gantt & Patterson, attorneys for defendant, transmitting the letter to the clerk to them, are offered in evidence by defendant, in opposition to the motion, and are relied upon, together with the recalling the execution, and as evidence of an abandonment by the marshal of the levy, and also as evidence of an adjudication by the circuit judge of the questions involved in the motion.

If I supposed the action of the circuit judge was intended to be a decision of the rights of the parties, I should certainly enforce it by my judgment on this motion, whatever my own opinion might be. But it is apparent that it was not so intended, and could not have been. It does not purport to be an adjudication at all; certainly not upon the right of property as affected by the levy, but only a letter of advice to the clerk. He says to the clerk: "My suggestion is that you issue a paper to the marshal, reciting the fact that the executions were issued without authority, and request him to return the same unexecuted." In the letter to the attorneys, after suggesting to them that the application made to him is informal and unknown to the practice of the court, he expresses the opinion that the executions issued prematurely and should be recalled, and that the clerk and marshal may possibly be liable for any action they have taken; but it seems to me he carefully avoids doing anything more than to suggest to those officers that under the circumstances, they should proceed no further. By no possible construction can this be construed into an adjudication that because the execution was prematurely issued the levy was void, nor could he have intended that the clerk and marshal should personally have assumed the responsibility of an abandonment of the levy. It is not even an adjudication that the execution was prematurely issued, but simply a suggestion of a mode by which this and all other questions involved might be adjourned into the court for its determination, when all parties should be present; and he distinctly declines to determine the question as an ex parte application, such as was made to him.

At this present term of the court, the motion of the defendant to vacate the judgment was heard and overruled [Case No. 3,668], and now the question is whether or not a venditioni exponas shall issue.

It may be assumed that the execution did issue prematurely, but unless that fact rendered it void, the levy is good. Did it have that effect? In the case of Hapgood v. Goddard, 26 Vt. 401, it is said by the court that "ordinarily courts of law refuse to set aside executions when that, and that only has been done which is required to be done now, although done prematurely."

In the case of Stephens v. Brown, 56 Mo 28, cited by defendant's counsel, and in Freem. Ex'ns, §§ 24, 25, on the point that it is error to issue execution before a motion for a new trial is determined, we find a precedent for this case. The defendant in that case filed a motion for a new trial, which was continued under advisement till the next term, and in the meantime execution issued, and the plaintiff was put in possession of the land. At the next term the motion for a new trial was overruled. He filed a motion to quash the execution, because prematurely issued, and that was overruled. The defendant appealed, and the supreme court of Mis-

souri say: "It was erroneous to issue an execution before the motion for a new trial had been disposed of, but as the case resulted in favor of the plaintiff, this error caused no injury to the defendant." And the judgment refusing to quash the execution was affirmed.

In Mollison v. Eaton, 15 Minn. 426 [Gil. 383], it was held a harmless irregularity to issue execution before the judgment was docketed, although a statute positively required a judgment to be docketed in another county before execution could issue. It was not such an irregularity as made the judgment void, and the levy was allowed to prevail over a warrant of seizure from the bankrupt court.

It may well be doubted whether the plaintiff did not have the right to issue this execution at the time he did. It was ruled in the order of continuance itself that it was not to operate to his prejudice. I have been unable to find the question decided in Tennessee. I do find elsewhere that the rule is that, unless the order of continuance directs a stay of execution, the plaintiff may issue the execution immediately at the risk of having it rendered a nullity by the decision of the motion for a new trial in favor of the defendant. Erie R. Co. v. Ackerson, 33 N. J. Law, 33. But I do not decide this here, as it is unnecessary to the determination of the rights of the parties. The levy was not void because the execution issued prematurely, and now that the motion for a new trial has been overruled, the plaintiff should not, because of a mere irregularity, be deprived of the fruits of his diligence. Nor do I think the levy was abandoned by the marshal. He only stopped at the point to which the proceedings had progressed, when it was arrested by the letter to the clerk. The service of a watchman was not necessary to his title, and his withdrawal was unimportant. The supreme court of Tennessee, in the case of Breedlove v. Stump, 3 Yerg. 257–276, has declared the rule for all cases where abandonment of a right is relied on thus: "To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done which shows a determination in the individual not to have a benefit which is designed for him."

The question is argued by counsel on both sides whether this is real or personal property, on the assumption that unless it is real property, a venditioni exponas cannot issue. The writ is used to compel a sale of personalty levied on, as well as a sale of realty. It is true that the sheriff may, in case of a levy on personalty, go on and sell after the return of the fieri facias without a venditioni exponas, while in case of a levy on realty he cannot; but in either case it is proper to issue a venditioni exponas whenever it becomes necessary to enforce a sale. Campbell v. Cobb, 2 Sneed, 18; Overton v. Perkins, Mart. & Y. 375, 10 Yerg. 328; Thompson v. Phillips [Case No. 13,974]; Tidd, Pr. 1020; Freem. Ex'ns, §§ 57, 58.

It is therefore unnecessary that I should decide the question argued as to whether the leasehold is real or personal property. Motion granted.

NOTE. There were two judgments involving the same facts.

Case No. 3,670.

DAWSON v. FOLLEN.

[2 Wash. C. C. 311;[1] 1 Robb Pat. Cas. 9.]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

ACTION FOR INFRINGEMENT OF PATENT—ORIGINAL INVENTION—ANTICIPATION.

1. In an action for a violation of a patent granted by the United States for an alleged original invention, the plaintiff must satisfy the jury that he was the original inventor, in relation to every part of the world.

[Cited in Whitney v. Emmett, Case No. 17,585.]

2. Although no proof was made that the patentee knew that the discovery had been made prior to his, still he could not recover, if, in fact, he was not the original inventor.

[Cited in Sewall v. Jones, 91 U. S. 180.]

The action was brought for a violation of the plaintiff's patent right for making suspenders [granted to him (J. Dawson) November 6, 1806.] The case was fully proved on the part of the plaintiff. But the defendant introduced a number of witnesses, who proved in the most positive manner, that suspenders, precisely similar to the plaintiff's, had been used in England and France, before the plaintiff pretended to have made the discovery, and still longer before his patent issued. Some evidence was given, that the plaintiff had in his possession one of those suspenders, before he obtained his patent, and of course knew that they had been invented in Europe. The question was left to the jury, under the charge of the court.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent), informed the jury, that to entitle the plaintiff to recover, they must be satisfied that he was the original inventor, not only in relation to the United States, but to other parts of the world; in which respect, the act of congress differed from the law of England on this subject. That even if there were no proof that the plaintiff was acquainted with the circumstance, that the discovery had before been made, still he could not recover, if in truth he was not the original inventor. Upon the evidence, the charge was strongly against the plaintiff. Verdict for defendant.

DAWSON (MERRILL v.). See Case No. 9,469.

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

Case No. 3,671.

DAWSON v. RANKIN.

[5 Am. Law Rev. (1870) 753.]

Circuit Court, S. D. Georgia.

JURISDICTION OF FEDERAL COURTS — ACTION ON SUPERSEDEAS BOND—NONRESIDENT CREDITORS.

[A nonresident creditor who obtains judgment in a state court, from which an appeal, with supersedeas, is taken to the state supreme court, may, after affirmance of the judgment, if it is not paid, sue the principal and surety jointly on the supersedeas bond in the federal court.]

In this case a decision was rendered by WOODS, Circuit Judge, on the 15th of April last, overruling the defendants' motion to dismiss for want of jurisdiction, and ordering them to plead. The facts were these: A judgment was obtained in the state court, Muscogee county. Defendants appealed to the supreme court, and gave bond for $33,000, with Salisbury as security. The judgment was affirmed. The plaintiff and security failed to pay the judgment (this being an old debt, the relief laws of the state embarrassed plaintiff), and plaintiff then transferred the jurisdiction by suing the principal and security in the United States circuit court. A motion was made to dismiss on the ground that plaintiff had his judgment in the state court, and remedies under his execution. The court ruled that the supersedeas bond was a new contract; that Salisbury had not yet been sued in the state court; that by the bond plaintiff had the right to enforce the same against principal and security jointly or severally. He had elected, as he had the right to do, to sue jointly. The effect of this decision will be to enable many plaintiffs who are nonresidents to escape the operation of the relief law.

DAWSON (STREET v.). See Case No. 13,533.

DAWSON (UNITED STATES v.). See Case No. 14,933.

DAWSON (WASHINGTON v.). See Case No. 17,227.

DAWSON BANK (KENT v.). See Case No. 7,714.

Case No. 3,671a.

In re DAY.

[Betts, Scr. Bk. 105.]

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

DISCHARGE OF BANKRUPT—WITNESSES.

[A creditor of a voluntary bankrupt is a competent witness for other creditors opposing the bankrupt's discharge.]

[In bankruptcy. Petition for the discharge of Anthony Day, a bankrupt.]

It being considered by THE COURT that a creditor of a bankrupt whose application is voluntary is a competent witness to support objections filed by other creditors to the bankrupt's petition for a discharge, it is ordered that the exception to the decision of the commissioner overruling objections to the admissibility of such proof be disallowed.

[1] [Date not given.]

DAY v. The ANGELINA. See Case No. 7,967.

Case No. 3,672.

DAY et al. v. BANKERS' & BROKERS' TEL. CO.

[9 Blatchf. 345; 1 O. G. 551; 5 Fish. Pat. Cas. 268; Merw. Pat. Inv. 200.][1]

Circuit Court, S. D. New York. 1872.

PATENTS—NOVELTY—INTERPRETATION—TELEGRAPHIC APPARATUS.

1. The second claim of the reissued letters patent for an "improvement in electro-magnetic telegraph," granted to Samuel F. Day, March 23, 1869, namely, "the arrangement of the sounding box, C, the lever, D, and the sounding post, G, of a magnetic telegraph, in combination with each other, in the manner hereinbefore described, and to the effect stated," is void, for want of novelty.

2. The combination covered by such second claim is one which is capable of being used either in a local current, or in a main line current, and is not claimed merely when used where a local battery is dispensed with.

3. The use of such combination in a local current would be an infringement of the claim; and the prior use of the arrangement in a local current is an answer to the claim.

[Cited in Peters v. Active Manuf'g Co., 21 Fed. 321.]

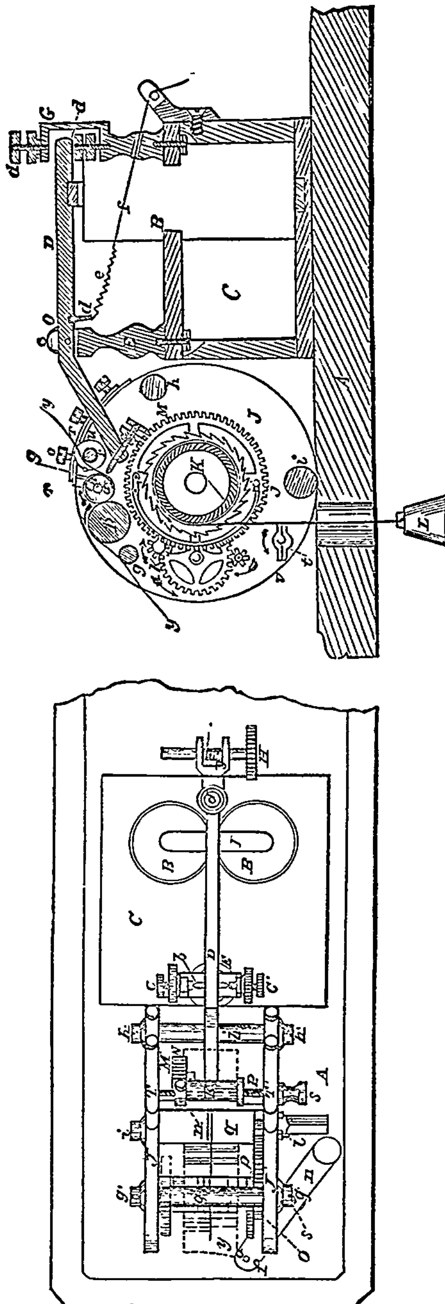
4. The combination claimed is the arrangement of the sounding box, lever, and sounding post, relatively to each other, so that the blow of the armature will be struck directly towards the box, so as to produce a vibration of the box, and consequent sound, by direct action, and so that the sound produced by the blow will be more audible than if the blow were not struck at all in connection with a box or hollow base, but were struck in connection with a solid base, or were struck in connection with a box or hollow base, but not directly towards it.

5. Such an arrangement existed previously, though in a small instrument used only in a local current, the box and the magnet being small, and the sound feeble; but the absolute parts, and their relative arrangement, and their action, and their effect, remaining the same, it required no invention to make the box larger, to produce more sound, so as to use it in a longer circuit, with a larger and heavier magnet.

In equity. Final hearing on pleadings and proofs.

Suit brought upon letters patent [No. 42,842] for an "improvement in electro-magnetic telegraph," granted to complainant, Samuel F. Day, May 24, 1864, and reissued March 23, 1869 [No. 3,335].

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 200, contains only a partial report.]



The first of the foregoing engravings represents a sectional, and the second a plan or top view of the apparatus. It is believed that, by reference to them, in connection with the ample quotations from the specification in the opinion of the court, the nature of the invention can be readily understood.

Thomas P. How, for complainants.
Charles H. Wesson, for defendants.

BLATCHFORD, District Judge. This suit is founded on reissued letters patent granted to Samuel F. Day, one of the plaintiffs, March 23d, 1869, for an "improvement in electro-magnetic telegraph," on the surrender of original letters patent granted to him May 24th, 1864. The second claim of the patent is the only one in question in this suit. The specification says: "This invention relates to a certain improvement in Morse's electro-magnetic telegraph, which dispenses with the use of local batteries and relays at the several stations on the line; and it consists, in part, in the adaptation to, and combination of, an indenting register with the main line. Said invention also consists in the arrangement, in combination with the other parts of the instrument, of a sounding box, in the manner hereinafter set forth, by which the audibility of the sound produced by the blow of the registering lever is very much increased, thus enabling the operator to catch the sounds with much greater facility, in case he desires to read a message by sound." The specification then proceeds to describe the construction of the apparatus, with references to the drawings. So far as the improvement covered by the second claim is concerned, the arrangement is this: There are two electro magnets placed in a vertical position, and surrounded by a sounding box, C. D is a lever, with a pin or arm projecting downward from its under side. This lever is attached to an arbor and is centred between two thumb-screws, which terminate in a standard, E. An adjustable thumb-screw, with a steel point, F, is attached to that portion of the lever, D, which is represented in the drawings as being bent downward. The opposite end of the lever terminates between a standard, G, provided with suitable thumb-screws for adjusting said lever according to the strength of battery on the main line. The lever, D, is hung on the standard, E, at about two-thirds its length, taken from the right hand end of the lever. A spiral spring is made to fasten on the arm or pin of the lever, D, the tension of which is regulated by a thumb-screw, around the shaft of which a fine cord is wound, which cord passes through the centre of the standard, G, and connects with said spiral spring. The object of such spiral spring is to withdraw the armature on the lever, D, from the electro-magnets, when the circuit is broken. The apparatus is provided with clock-work machinery, to feed continuously paper which is to be marked by the indenting register. When the circuit is closed, and the armature is attracted to the magnets, the steel point, F, is forced into the moving paper, and produces on it strokes or dots. The specification then states, that it is necessary to the success of the instrument in a main line current, not only that the fulcrum of the lever, D, should be placed as near as practicable to that end of the lever which carries the steel point, F, but that the magnets should, instead of being made of No. 22 wire, be made

of No. 32 wire, and instead of being made of a weight of from four to eight ounces of wire, be increased to from twenty ounces to two pounds in weight, and that the length of the cores should be increased to about three inches, and their diameter to three-eighths or one-half of an inch. The specification proceeds: "By constructing my apparatus in this manner, I am enabled to work an indenting registering instrument in a main line circuit of any ordinary length, without the intervention or aid of a local battery, and by this means I entirely avoid the expense and trouble of the latter. This might, perhaps, be done by the change in the construction of the magnet, without changing the lever from an equal beam, but I prefer to construct the lever in the manner described, as it very materially aids in the accomplishment of the result. The combination with a registering instrument, of a magnet constructed as I have described, enables the line current to operate upon the instrument with great intensity, and this intensity well supplies the place of the volume derived from the local battery, by which it is now customary to work such instruments. The object of the improvement being to work an indenting-registering instrument by the power of the main line current, it is obvious that the nature and gist of the invention consist in giving to the parts such a construction as to cause this current to act upon the instrument with sufficient intensity to properly indent the paper for ordinary business purposes, on a line of ordinary or equivalent construction and length, in such a manner as to be available for the ordinary purposes of telegraphing, and that the line of distinction between this invention and the old form and manner of construction, is found in the adaptation of the instrument to the successful accomplishment of this purpose, of which it was before incapable. It will be observed, that the fulcrum post, E, and the sounding post, G, are set upon the top of the box, C, instead of being attached directly to the bed-plate of the machine, as in the construction now in common use. The object of this improvement is to make the sound produced by the blow of the lever more audible, which result it accomplishes in a very satisfactory manner, thus enabling the operator, if qualified, to read by sound, if desirable, under circumstances in which it would otherwise be difficult, if not impossible. It will be observed, that the sounding post, or part upon which the blow is struck, is so attached to the sounding box, C, and the other parts are so arranged in connection with it, that the blow is struck directly towards the box, in such a manner as to produce vibration thereof by direct action; that is to say, a tangential line, drawn from the arc in which the armature vibrates, at the point at which the blow is given, would intersect the box, making the action of the blow direct, in producing the vibration and consequent sound. It is only in this way that the full effect of the blow, in producing the sound for reading the message, can be realized. I am aware that an instrument has before been constructed, in which the coils have been placed longitudinally above a similar box, and the blow struck in a line parallel to the top of the box, and passing outside of and above said box; but this does not accomplish the purpose of my invention, as the action of the blow is not and cannot be direct, but is only incidental, and does not have that effect in developing sound from the box, which a direct blow would have." The claims are these: (1.) "I claim combining with an indenting telegraphic registering instrument, a magnet constructed according to the proportions described in the foregoing specification, or substantially so, so as to accomplish the result stated, by means substantially the same, that is to say, so as to give sufficiency of intensity and power of action to produce uniformly legible indentations in the paper, in an ordinary line current, without the aid of a local battery, as hereinbefore set forth." (2.) "I also claim the arrangement of the sounding box, C, the lever, D, and the sounding post, G, of a magnetic telegraph, in combination with each other, in the manner hereinbefore described, and to the effect stated."

The principal defence urged, in respect to the second claim of the patent, which is the only one alleged to have been infringed, is its want of novelty.

There can be no doubt, from the language of the specification and claim, and from the evidence, that, while the combination specified in the first claim is one for use only in a main line current, when a local battery is dispensed with, the arrangement or combination covered by the second claim is one which is capable of being used either in a local current or in a main line current, and is not claimed merely when used where a local battery is dispensed with. The combination in the second claim is claimed "in the manner hereinbefore described, and to the effect stated." The "manner" is the arrangement of the sounding box, lever, and sounding post, relatively to each other, so that the blow of the armature will be struck directly towards the box, so as to produce a vibration of the box, and consequent sound, by direct action. The "effect" is, to make the sound produced by the blow more audible than if the blow were not struck at all in connection with a box or hollow base, but were struck in connection with a solid base, or were struck in connection with a box or hollow base, but not directly towards it. This arrangement or combination, in the second claim, is applicable as well to a local current, produced by a local battery, as to a main line current, where a local battery is not used; and the use of the arrangement in a local current would undoubtedly be an infringement of the claim. Hence, the

prior use of the arrangement in a local current is an answer to the claim.

The evidence is clear, that the arrangement or combination, in the second claim, of the sounding box, lever, and sounding post, with the blow struck directly towards the box, was in use, as a successful, practical telegraphic instrument, a considerable time before the invention of Day. To say nothing of any other apparatus, that represented by Exhibit No. 6 was so in use. It produced the "effect" stated in the specification, of making "the sound produced by the blow of the lever more audible" than it would be with a solid base. It was known by the name of the "Chester Sounder." It had, and could have, no other object than to make more sound than would be made by a solid base, the base being a box made hollow, and the blow being struck directly towards the box. The instrument was small, and the box was small, because it was intended for use, and was used, only in a local current, and the magnet was small, and the sound was feeble, at most. But the moment the occasion arose for using an instrument that would make more sound, the production of more sound, by making the box larger, was obvious, and was no invention. It was only the difference between a large drum and a small drum. The absolute parts, and their relative arrangement, and their action, and the effect, are the same in the patent as in the Chester sounder, only the sound is louder, because the box is larger. The Chester sounder produced more sound with its box than if the base had been solid. Day's apparatus produces more sound than Chester's, but only because the box is larger. The difference is one merely in degree, not in patentable substance.

The date of the existence of the Chester sounder is carried back to 1858 or 1859—a time anterior to the invention of Day. In the shape in which it then existed, it continued to be used until quite recently. It was a complete and successful instrument, and was used in telegraph offices in various parts of the United States, in local circuits. The instrument was placed upon a box, the coils were set in a perpendicular position, the lever was horizontal, the blow was struck on the end of a sounding post, in a direction towards the box, and the sounding post and the supports of the lever centres were fastened to a metallic plate, which plate was screwed to the top of the box. When the circuit was closed, the lever was drawn down, and struck the sounding post, and the blow produced a sound which was louder, because the sounding post was attached to a box, instead of being attached to a solid base. The combination of parts, their arrangement relatively to each other, the direction of the blow, and the effect in sound, were the same, in substance and in kind, as in the combination covered by the second claim of the Day patent. The instrument was not practically applicable to a long line or main circuit, but only to a local circuit, or a line a few miles in length. But the difference between a main circuit and a local circuit is merely one of length. It is shown that, the larger and heavier the magnet, the greater the range of length of line on which the Chester sounder would work, and the larger the box, the louder the sound. I cannot resist the conclusion, from the evidence, that Day's sounder is merely the Chester sounder, adapted, indeed, for use on a main circuit, by having a larger magnet and a larger box and its other parts proportionally enlarged, but the combination of parts, their mode of operation, and their result in kind, as claimed in the second claim of the patent, remaining the same as in the Chester sounder. It may, perhaps, be, that Day invented something, in connection with the sounder, which he can patent by a proper claim. But, what he has patented, in his second claim, existed before, in the Chester sounder. He merely claims the sounding box, lever, and sounding post, in combination with each other, to make a louder sound when the lever strikes the sounding post, by reason of the apparatus being set on a hollow box, instead of a solid base, and the blow struck directly towards the box. The three parts are not claimed in combination with any particular magnet, or with any other part of the apparatus. They are not claimed in combination with a larger magnet, to work in a main line circuit, (if such a claim could be made.) but are claimed only in combination with each other, to make a louder or more audible sound in any circuit, long or short, and with any size of magnet—to develop sound from a box, by a blow struck directly towards the box.

The result is, that the bill must be dismissed, with costs.

Case No. 3,673.

DAY v. BOSTON BELTING CO.

EXAMINATION OF WITNESSES—IMPERTINENT QUESTIONS—PROTECTION.

1. The law gives no color to the practice which not unfrequently appears in judicial proceedings, of besetting a witness with impertinent inquiries, which are not shown to have any legitimate bearing upon the case.

2. Whether a witness may claim exemption from answering a question, because his knowledge of the matter inquired of was obtained by him as an attorney in such character; query.

[NOTE. Cited in Law, Dig. 299, to the points stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 3,674.

DAY v. BOSTON BELTING CO.

[Brunner, Col. Cas. 585; 16 Law Rep. 330.][1]

Circuit Court, D. Massachusetts. Sept. 17, 1853.

MOTION FOR PRELIMINARY INJUNCTION—PRACTICE.

A motion for an interlocutory injunction is heard on affidavits alone, without the right of cross-examination.

[Cited in Morris v. Lowell Manuf'g Co., Case No. 9,833.]

This was an application [by Horace H. Day] to the court to grant an injunction against the use of the machinery used in the defendants' India rubber manufactory. The plaintiff claimed to be the owner of a patent granted to E. N. Chaffee, in 1836, for the use of machinery in preparing India rubber and spreading it upon cloths, etc. This case at a former day had been set down for hearing at this time, and both parties had been ordered to file the affidavits of the facts upon which they relied.

Upon the coming in of the court, the counsel for Mr. Day moved the court to have the case postponed, in order that they might be prepared for the argument of the case, and said that they had not had sufficient time to read the proofs offered by the defendants.

The defendants' counsel resisted this motion, and urged that the trial should then proceed, inasmuch as it was the day fixed upon by the court at a previous day, in accordance with the request of the plaintiff's counsel, and because the proofs had been filed at the time ordered by the court.

This motion for delay was refused by the court.

The plaintiff's counsel also asked for leave to file affidavits in answer to the proofs filed by the defendants, and gave as a reason that they were taken by surprise, from the grounds taken in defense of the case.

The defendants' counsel insisted that, according to the established practice of the court, the plaintiff had no right to file affidavits in rebuttal of the affidavits filed by the defendants; that the established practice in patent cases was for the plaintiff to file such affidavits as he relied upon, and then for the defendant to file his proofs in answer. The question was fully discussed by the counsel, and the court, SPRAGUE, J., overruled the motion, and laid down the rule as to the practice.

E. F. Hodges, N. Richardson, and Mr. Jenckes, for plaintiff.

H. F. Durant, for defendants.

THE COURT said, in substance: "According to the practice of this court, the complainant is not, as a matter of right, entitled to further time to file affidavits. The nature of this application for a preliminary injunction is peculiar. It is not a final setlement of the legal rights of the parties; they do not come here with what are strictly to be called legal proofs, but with affidavits alone, and upon which neither party has the right of cross-examination. The object of granting a preliminary injunction is simply to hold the parties in statu quo, until the legal rights can be ascertained. One material question always is, and this question is of importance upon this very question of asking for delay, whether the defendants are responsible. There is no suggestion that the defendants are not amply able to respond to the plaintiff, should he ultimately recover in this case. The process of injunction is summary, and the manner of exhibiting the evidence is settled by our practice. In England the practice is to move for an injunction ex parte, and there is no hearing; then the defendant moves to dissolve the injunction, and in that stage of the case, the parties are heard by the court; but even then the proofs are not open to the other side until the hearing. Here the practice is more liberal, and the affidavits are filed before the day of hearing. The rule of practice is that the complainant must file the affidavits upon which he relies by a certain day, and then the defendant files his affidavits in reply by another appointed day, and this is the end of the evidence. I will not say that, in a case of entire surprise, an opportunity would not be given for a reply. I do not think this is such a case. I remember that when the case was first before the court, Mr. Durant gave notice to the plaintiff's counsel that he would take every possible point in the defense. I think when the plaintiff's counsel were thus notified, they should have been prepared."

After this opinion was given, the plaintiff's counsel asked for a few moments to consult upon the case, and then said they should withdraw their motion for an injunction. The defendants then said they were very anxious for a hearing; and although they could not prevent the plaintiff from withdrawing his motion, they would consent to his filing further proof rather than not have the question argued.

THE COURT said it was in the power of the plaintiff to withdraw his motion, but that he might have his election to have the motion withdrawn and pay the costs, or to let the case stand for a fortnight.

The plaintiff thereupon elected to have the case stand, and it was assigned for the 30th instant.

[NOTE. For other cases involving this patent, see note to Goodyear v. Railroads, Case No. 5,563.]

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 3,675.

DAY v. BUFFINTON.

[3 Cliff. 376; 11 Int. Rev. Rec. 205; 5 Am. Law Rev. 176; 2 Leg. Gaz. 249.][1]

Circuit Court, D. Massachusetts. May Term, 1871.[2]

INCOME TAX—JUDGES' SALARIES—CONSTITUTIONAL LAW.

The salary of a judge of a court of record, payable out of the treasury of a state, is not legally taxable, as income under the internal revenue laws of the United States; the government of the United States having no power under the constitution to levy such tax.

[Explained in Sweatt v. Boston, H. & E. R. Co., Case No. 13,684. Cited in Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 282.]

[See note at end of case.]

This was an action of contract [by Joseph M. Day against James Buffinton] to recover the amount of taxes assessed under the internal revenue laws of the United States, upon the plaintiff's salary as judge of probate and insolvency for the county of Barnstable, in the commonwealth of Massachusetts.

It was argued before CLIFFORD, Circuit Justice, and LOWELL, District Judge, at the October term, 1869, upon the following agreed facts: "That the plaintiff was, during the years 1866 and 1867, a judicial officer of said commonwealth, to wit, a judge of the court of probate and insolvency for said county of Barnstable, which said court is a court of record. That the defendant was, in the year 1867, the United States collector of internal revenue for the first congressional district in said commonwealth, and that said county of Barnstable is within said first congressional district. That in said years 1866 and 1867, the United States assessor of internal revenue for said first congressional district, against the written protests of the plaintiff, made before assessment, assessed upon his salary as judge, as aforesaid, taxes amounting in all to $61.51. That against the written protests of the plaintiff, before collection thereof, delivered to the defendant, the defendant collected said taxes of the plaintiff. That the plaintiff's salary as judge, as aforesaid, is fixed by law, and is payable out of the treasury of said commonwealth, and that the plaintiff has in all respects complied with the provisions of the revenue laws of the United States prescribing the conditions under which actions may be brought for the recovery of taxes illegally assessed under said laws."

D. Foster, for plaintiff.

G. S. Hillard and J. C. Ropes, for defendant.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 5 Am. Law Rev. 176, contains only a partial report.]

[2] [Affirmed in 11 Wall. (78 U. S.) 113.]

Dwight Foster, for plaintiff.

The question before the court is whether the salary of a judge of a court of record, payable out of the treasury of the state of Massachusetts, is legally taxable as income under the internal revenue laws of the United States.

"The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other within their respective spheres." Ableman v. Booth, 21 How. [62 U. S.] 516. The sphere of action appropriated to each is as far beyond the reach of the other "as if the line of division was traced by landmarks and monuments visible to the eye. . . . . Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other either in the means employed or functions exercised." Bank of Commerce v. New York City, 2 Black [67 U. S.] 635. "The people of each state compose a state having its own government and endowed with all the functions essential to separate and independent existence. In many articles of the constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized." Lane Co. v. Oregon, 7 Wall. [74 U. S.] 76. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, ... are propositions not to be denied." McCulloch v. Maryland, 4 Wheat. [17 U. S.] 430. "The right of taxation when it exists is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy." Austin v. Alderman, 7 Wall. [74 U. S.] 699. The precise converse of the question now under discussion was decided in Dobbins v. Commissioners of Erie Co., 16 Pet. [41 U. S.] 435. There, under a law of the state of Pennsylvania, a tax was imposed on "the emoluments of the office" of the captain of a United States revenue cutter. It was said by the court to be "levied on a valuation of the income of the office." Page 445. And it was held that this could not be done constitutionally.

The general principles relied upon in the present cause are affirmed in an unbroken series of adjudications commencing, half a century ago, with McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316, and coming down to Society for Savings v. Coite, 6 Wall. [73 U. S.] 594, and other cases in the same volume, in which the opinions of the court were delivered by Mr. Justice Clifford. See, also, Weston v. Charleston, 2 Pet. [27 U. S.] 449; Bank Tax Case, 2 Wall. [69 U. S.] 200; Van Allen v. Assessors, 3 Wall. [70 U.

S.] 573. It is clearly established by Weston v. Charleston, and Dobbin v. Commissioners of Erie Co., that no valid distinction can be drawn between the taxation of an office itself eo nomine and the taxation in a general assessment upon incomes of the salary or emoluments of an office, which are the legal compensation for the performance of official duties, and are presumed to be only such adequate remuneration as is requisite to secure the services of a competent incumbent. In each case it is held to be a fatal objection to the power to lay such a tax; that if admitted to exist at all there can be no limit to the extent to which the imposition may be carried. The office taxed exists only at the mercy of the taxing power. In the cases heretofore decided by the supreme court of the United States, the taxes adjudged invalid have been imposed by state legislation upon instrumentalities of the federal government, and there has existed an additional obstacle in the fact that the federal government is declared by the constitution to be supreme within its sphere of action. But this has been adverted to and relied upon by the court only as a cumulative argument, and by no means as the principal or essential foundation of the decisions which have been made. The right of the state to exist as a body politic, to have a government with executive, legislative and judicial departments, to have state offices filled and their duties performed, does not depend upon the will or forbearance of congress. But if state offices or their emoluments are taxable at all by the federal government, that taxation may be carried to the point of destruction. To admit the principle is to admit the power of congress to tax every state government out of existence. The act of congress (July 1, 1862, 12 Stat. 483) which required stamps to be affixed to writs and other original processes in courts of record was held by the highest tribunals of several states to be unconstitutional in its application to state courts. Warren v. Paul, 22 Ind. 276; Union Bank v. Hill, 3 Cold. 325; Jones v. Keep's Estate, 19 Wis. 369; Fifield v. Close, 15 Mich. 505. And this provision was repealed by congress soon after these decisions were published. It is believed that the reasoning of these respectable authorities will be found to be fully applicable to the case at bar. See, also, Carpenter v. Snelling, 97 Mass. 452.

In the case at bar there is no attempt to impugn the constitutionality of an act of congress. We are dealing only with a question of construction. The court is merely called upon to limit the application of general language by excluding from its operation a description of income, which there is no reason to believe that congress intended to embrace. The internal revenue laws do not in terms impose any tax on state offices, or their emoluments, or the income derived therefrom; and, considering the well-settled and universally known principles of constitutional law on this subject, it is fair to conclude that if such an intention had existed it would have been expressed in special and explicit provisions of the act. U. S. v. Coombs, 12 Pet. [37 U. S.] 72. "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character." U. S. v. Kirby, 7 Wall. [74 U. S.] 486.

John C. Ropes, for defendant.

By section 8 of the first article of the constitution of the United States, it is provided, that "congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." In pursuance of this provision of the constitution, the statutes of the 30th of June, 1864, of the 3d of March, 1865, and the 2d of March, 1867, were passed by the thirty-eighth and thirty-ninth congresses. 13 Stat. p. 281, § 116; Id. p. 479, § 1; 14 Stat. p. 137, § 9; Id. p. 477, § 13. These statutes impose a tax of five per centum on the gains, profits, and income of every person residing in the United States, derived from any source whatever. Under these statutes the plaintiff was assessed upon his salary, as judge of probate, paid him by the state of Massachusetts. This tax he seeks to recover back in this action.

The question is, whether the United States government can lawfully impose a tax upon a salary paid by a state to an officer of that state.

I. It is obvious, in the first place, that the constitution and the statutes make out a prima facie case for the government. The only limitation imposed in terms by the constitution on the general power of taxation is, that the taxes shall be uniform throughout the country. That this limitation has been duly observed in laying the tax in question is not denied.

II. But it is urged that there is an implied limitation to the power of taxation granted by the constitution, namely, that it shall not be so exercised as to destroy or even impair the (so-called) sovereignty of the states, or in any way injuriously to affect the state governments; and further, that this tax, if assessed upon state officials, is in direct conflict with this limitation, and is therefore unconstitutional.

1. We deny that there is any such implied limitation. There is no necessary implication of this nature growing out of the relations of the states to the federal government. The same people that through the federal government lay the tax in question, establish, in the different states, the officers and the insti-

tutions upon the income and gains of which the tax is assessed. The tax thus imposed by the people of all the states, acting through their representatives in congress, is uniform throughout all the states. Taxation and representation go together. There is an implied limitation on the power of a state to tax, however, in that a state cannot tax the institutions and officers of the federal government. Here there is necessarily to be implied a restriction on the power of the states, for such taxes are not uniform or equal throughout the country; nor are they imposed by the same power which creates the offices and institutions taxed; and they render it possible for one state to hinder and obstruct the workings of the superior and independent sovereignty of the United States. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316; Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Weston v. Charleston, 2 Pet. [27 U. S.] 449; Dobbin v. Commissioners of Erie Co., 16 Pet. [41 U. S.] 435; Story, Const. § 1053; Cooley, Const. Lim. 479–481; Bank of Commerce v. New York City, 2 Black [67 U. S.] 620; 1 Kent, Comm. 425–429; Bank Tax Case, 2 Wall. [69 U. S.] 200.

The claim that the banks, offices of trust and profit, bonds, etc. of the state governments are, by the converse application of the principles laid down in the cases cited above, exempted from taxation by the United States government, is not tenable. The result would be to exempt from federal taxation an enormous amount of property; for not only would state bonds be exempt, but also all railroad and other bonds guaranteed by states, all bonds of municipal corporations,—the creatures of the state governments,—and, in fact, it is difficult to say where the line could be drawn. The power of taxation granted by the constitution to the general government would in great measure be rendered nugatory.

To support this enormous claim of exemption from national taxes, it is urged that "the states are to exist with independent powers and institutions within their spheres," just as "the federal government is to exist with independent powers and institutions within its sphere;" and that, consequently, the federal government cannot tax the agencies and instruments used by the states to carry on government within their own proper spheres.

See remarks of Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. [17 U. S.] 429, 436; Warren v. Paul, 22 Ind. 279; State v. Tax Collector, 2 Bailey, 654. See, also, People v. Commissioners of Taxes, 23 N. Y. 192, reversed in 2 Black [67 U. S.] 620; Fifield v. Close, 15 Mich. 509. But this is mere theory, not law. The real and only subject for inquiry in such cases is, not whether the person or thing affected is part and parcel of the machinery of a state government, but whether the federal government is acting under one of its enumerated (or necessarily implied) powers. Thus, if a state bank or railroad is taxed, the question is, not whether these institutions are part of the fiscal machinery of the state, but whether the constitution gives to the federal government the power of taxation. So, if the United States take, for instance, a state jail under the right of eminent domain, the question is, not whether the property taken is part of the apparatus of the state for the prevention of crime, but whether the right of eminent domain belongs to the federal government. This is the only rule absolutely free from embarrassment in its application, and the only rule proper to be observed in investigating the extent of the sovereign powers granted to the general government. If the act done is within the scope of one of these sovereign powers, there is in law, and can be, no limitation in its exercise. The extent to which it shall be exercised rests entirely in the discretion of congress.

If the foregoing views are sound, all the persons in the United States, whoever they may be; all the property in the United States, to whomsoever it may belong and however acquired; all the offices and all the officers of the state governments; all the state banks and all the state securities,—are subject absolutely to the discretion of congress in the exercise of the general power of taxation vested in the federal government. Howell v. Maryland, 3 Gill, 14; Jones v. Keep's Estate, 19 Wis. 369, 381; besides the cases before cited.

No implied restriction on the power of the government arises in law from the fact that the power of taxation granted by the constitution to the federal government may be so wielded as to injure or even destroy the state government. Such risks are always taken when a general government is established; as for instance, when the people of Massachusetts, inhabitants of towns and cities, established, in 1780, a state government, with powers similarly liable to effect, by their abuse, the virtual destruction of municipal government. See remarks of Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. [17 U. S.] 428, and in Providence Bank v. Billings, 4 Pet. [29 U. S.] 515, 562, 563. The only safety against the abuse of this power to the injury of the state governments is in the discretion of congress, and especially in the fact that the people of the states and the people of the United States are one and the same people. There is no more danger of the abuse of the power of taxation by the general government than of the abuse of the other great powers given to it, such as the power to raise and maintain armies to call out the militia, to make treaties, or even the implied right of eminent domain. The discretionary power in any government must be vested somewhere. In our government it is vested in the United States. Const. art. 6.

2. But if the court shall be of opinion that there is such a limitation to the taxing power of the federal government, as that it

shall not be exercised so as to destroy or even impair the (so-called) sovereignty of the states, or in any way injuriously to affect the state governments, then we deny that the tax in question in this suit conflicts with that limitation either theoretically or practically.

The tax in question is a general income tax, affecting the income of probate judges only incidentally, and not aimed at the office. Even supposing that state offices and officers should be held exempted from federal taxation by a converse application of the principles laid down in Dobbins v. Commissioners, 16 Pet. [41 U. S.] 435, yet that does not settle this case. It has never been decided that a state may not lawfully tax the income of an officer of the general government. Such a tax has been considered in Weston v. Charleston, 2 Pet. [27 U. S.] 449, 483, and in Melcher v. Boston, 9 Metc. [Mass.] 77. See, also, the opinion of the court of appeals of New York in People v. Commissioners of Taxes, 23 N. Y. 192, and the arguments of counsel and opinions in State v. Tax Collector, 2 Bailey, 654. We claim, then, that theoretically the tax in question does not conflict with the exercise by a state of all its lawful powers. But practically the case presents no difficulty whatever. The incomes of all United States officers, except the president and the judges of the supreme court, are taxed to the same extent as are the incomes of all state officers. It is impossible for the court to say that such a tax, so uniform and so indiscriminate, is, in any intelligible and legal sense, calculated to impair the exercise of the constitutional powers of the states.

Mr. Foster, in reply.

Two propositions are undeniable: First, that, within the sphere of their jurisdiction, the states are just as independent of the federal government as the government, within its sphere, is independent of the states. Second, that a government, the processes and instrumentalities of which are liable to taxation by another sovereignty, cannot be in any sense independent of it. These two propositions cover the case.

The defendant's argument in effect concedes that when one government has the power to tax another, the one liable to be taxed must necessarily be subject and subordinate to the one which has the power to tax. According to his theory we do not live under a complex system of state and federal governments each independent within its sphere, but the continued existence of the states depends on the moderation and forbearance of the United States in the exercise of its taxing powers. This cannot be.

CLIFFORD, Circuit Justice. Taxes were assessed against the plaintiff under the internal revenue laws of the United States upon his salary as judge of probate and insolvency for the county of Barnstable in this state for the years 1866 and 1867, and, having paid the same under protest, he brought an action of assumpsit against the defendant as the collector of such taxes for the first collection district, to recover back the amount so paid, both assessments amounting to the sum of $61.50. The agreed statement shows that the salary of the plaintiff as such judge is fixed by law, and that it is payable out of the treasury of the state, and that he made due protest before the taxes were assessed and at the time he made the payments.

Five per centum on the excess over $600, and not exceeding $5,000, was required to be levied, collected, and paid annually by the act of the 30th of June, 1864, as amended by the act of the 3d of March, 1865, upon the annual gains, profits, and income of every person residing in the United States . . . . whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation . . . . or from any other source whatever. 13 Stat. p. 281, § 116; as amended, Id. p. 479, § 1. The first assessment was made under that provision, and the second was made under a provision in all respects similar, except that the exemption was $1,000 instead of $600, as in the former act. 14 Stat. p. 477, § 13. Power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States, is conferred by the constitution, and the only limitation annexed in terms to that clause of the instrument is that all duties, imposts, and excises shall be uniform throughout the United States. But the powers granted to congress are not in all cases exclusive of similar powers existing in the states, unless where the constitution has so provided, or the exercise of a like power is prohibited to the states, or there would be a direct or necessarily implied repugnancy in the exercise of it by the states. Exclusive authority over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, dockyards, and other needful buildings, is delegated to congress, and it follows as a necessary consequence that the state legislatures cannot exercise any power or jurisdiction over such places, as the exclusive authority over them is vested in the national government. State authorities cannot coin money, emit bills of credit, or make anything but gold and silver a tender in payment of debts, as they are prohibited from so doing by the constitution, nor shall any state without the consent of the congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. Const. art. 1, § 10. Laws establishing rules of naturalization are required to be uniform, and it is held that the power to pass such laws is

vested exclusively in congress, as the exercise of such a power by the states would be incompatible with that condition as annexed to the exercise of that power. Houston v. Moore, 5 Wheat. [18 U. S.] 23; Chirac v. Chirac, 2 Wheat. [15 U. S.] 259.

Cases arise where it is held that the mere grant of power to congress, unaccompanied by any legislation under the grant, does not imply a prohibition on the states to exercise the same power. Such cases, however, are not numerous, and whenever the nature of the power granted or the terms in which the grant is made are of a character to show that the framers of the constitution intended that it should be exclusively exercised by congress, the subject is as completely taken from the state legislatures as if the constitution contained an express prohibition to that effect. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213. Undoubtedly the power of congress to lay and collect taxes, duties, imposts, and excises is coextensive with the territory of the United States, but when properly construed it does not interfere with the power of the states to levy taxes for the support of their own governments, nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the federal government. Loughborough v. Blake, 5 Wheat. [18 U. S.] 317; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Waring v. The Mayor, 8 Wall. [75 U. S.] 121. State power to lay and collect taxes, for the support of their government, may reach every subject over which the sovereign power of the state extends. They cannot tax imports nor exports without the consent of congress, as they are prohibited from so doing by the constitution. Want of authority in the states to tax the securities of the United States issued in the exercise of the admitted power of congress to borrow money on the credit of the United States is equally certain, although there is no prohibition in the constitution establishing any such rule. Hamilton Co. v. Massachusetts, 6 Wall. [73 U. S.] 639; Society for Savings v. Coite, 6 Wall. [73 U. S.] 594.

All subjects over which the sovereign power of a state extends are as a general rule proper objects of taxation, but the power of a state of the Union to lay taxes does not extend to the instruments of the national government, nor to the constitutional means employed by congress to carry into execution the powers conferred in the federal constitution. Tax laws of the states cannot restrain the action of the national government, nor can they abridge the operation of any law which congress may constitutionally pass. They may extend to every object of value within the sovereignty of the state belonging to the citizens, but they cannot reach the instruments and means of the federal government, nor the administration of justice in the federal courts, nor the collection of the public revenues, nor interfere with any constitutional regulation enacted by congress. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 429; Brown v. Maryland, 12 Wheat. [25 U. S.] 448.

Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as part of itself, and hence it follows that the power to tax may be exercised at the same time upon the same objects of private property by the state and by the United States without inconsistency or repugnancy. Society for Savings v. Coite, 6 Wall. [73 U. S.] 606; Providence Bank v. Billings, 4 Pet. [29 U. S.] 563. Such power exists in the state as one conferred or not prohibited by the state constitution, and in the federal government under an express grant. Such powers are therefore perfectly consistent, though the two governments, in exercising the same, act entirely independent of each other, as applied to the property of the citizens.

Congress in its discretion fixes by law the compensation to be allowed to federal officers; and having exercised that discretion, and fixed the amount of compensation, the law of congress confers upon the officer the right to receive that amount when he has performed the duties devolved upon the office; and the settled rule of decision in the supreme court is that any law of a state imposing a tax upon such an office diminishing the recompense allowed to such officer is in conflict with the law of congress which defines and secures to the officer the prescribed compensation. Dobbins v. Commissioners, 16 Pet. [41 U. S.] 447.

Taxation by the states of the kind mentioned is declared to be unconstitutional, because the exercise of such a power is an appropriation of the revenue, levied and collected to pay the debts and provide for the common defence and general welfare of the United States, to the support of the state government, and because the levying and collection of such taxes constitute a direct interference with the means provided by congress to carry into effect every power granted in the constitution. Prior to the date of that decision the supreme court had decided that the states could not tax the public securities without the consent of congress, nor levy any tax upon imports, and the court was equally unanimous and decisive in opinion that a state law imposing a tax upon the salary of a federal officer was unconstitutional and void. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 429; Weston v. Charleston, 2 Pet. [27 U. S.] 449; Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738.

The argument for the plaintiff is, that the converse of the proposition is equally true,—that a law of congress taxing the salary of a state officer is equally unauthorized as an appropriation of the revenue raised by the legislature to defray the necessary expenses of the state, and that it is equally unwarranted as

an unauthorized interference with the operations of the state governments. Perfect concurrence in the rule exempting the salary of the federal officer from taxation by the states is expressed by the defendant, but he denies that the converse of that proposition has any foundation whatever. Federal officers and the instruments and means of the federal government, it is conceded, are exempt from state taxation, but it is denied that the federal government is subject to any such implied prohibition, even in the case before the court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the states which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties. Disguised as it may be, the theory of the defendant is that the law imposing the tax is valid, because congress in enacting the law imposing it exercised a paramount power over the revenues of the state raised and appropriated for the purposes declared in the agreed statement.

The proposition of the defendant is in substance and effect that the states cannot tax the instruments and means of the government of the United States, because the federal government is supreme, but that the latter may tax the instruments and means of the state governments, because, as he assumes, the states are subordinate to the United States in the same unqualified sense as the counties of a state are to the paramount authority by which they were created. Unquestionably the constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the constitution, but the same instrument also provides that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other.

Counties and other municipal corporations were created by the states; but the states were not created by the United States, as the states existed as independent sovereignties before even the Union was formed, and they continued to be such from the date of the Declaration of Independence until the articles of confederation were ratified; and even then it was provided in the second article that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by the confederation expressly delegated to the United States in congress assembled." Few in number and restricted in operation as the powers granted to the United States in the articles of confederation were, still they were sufficient, with the co-operation of the several states, to carry the country through the war of the Revolution, and to enable the patriots of that day to lay the foundations of our public liberty and national independence. Though the powers granted were sufficient for the time, still when peace came they were soon found to be wholly inadequate to the exigencies of the new government in the relations which it sustained to the several states.

Such powers as the confederation possessed operated only upon the states as corporations, and not upon the people of the states; and the system of government as adopted made no provision for an executive of any kind, nor for a judiciary except in certain matters of prize, and for the trial of piracies and felonies committed upon the high seas. Radical defects existed also in the principles of the system, as the congress could not lay and collect taxes for the support of the government, nor was it vested with any power to compel the states to contribute to the common treasury their just proportions of the amount necessary to defray the expenses incurred for the common defence and general welfare. Difficulties and defects of the kind, too numerous to mention in this investigation, led to the formation and adoption of the present constitution, which, as recited in the preamble, was ordained and established, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Perpetuity was as much the object which the framers of the instrument had in view as any other of the high purposes therein described, as their declared aim was to secure the blessings of liberty to their posterity as well as to themselves and their constituents. They did not attempt to amend the old system, but they ordained a new one, vesting the powers of government in three separate departments, to wit, the legislative, the executive, and the judicial, and providing that the powers granted should operate not merely upon the states as under the confederation, but upon the whole people, and investing the new government with the most ample powers to enforce the prohibitions of the constitution, and the laws passed by congress in pursuance of its provisions.

Evidence to show that the union of the states as perfected in the constitution was

intended to be indissoluble, pervades every part of the instrument, as is sufficiently shown from the extent of the powers granted, and the amplitude of the means provided to carry them into effect. Congress may legislate for all the purposes specified in the express grants conferring such powers, and may pass all laws necessary and proper "for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or office thereof."

Provision is also made that the president shall take care that the laws be faithfully executed, and that the judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority. The intended permanency of the new government is portrayed in every one of these provisions, to which it would seem that nothing need be added to show that the doctrine of secession is a wicked heresy; but, if more be needed, it is found in section 4 of the fourth article of the constitution, which provides that the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion and . . . . domestic violence. None of these views, however, as to the nature and objects of the federal constitution or the permanent and indissoluble character of the new government are controverted by either party in this case, and for that reason they need not be further considered at the present time. Conceded as they are, they may be assumed as truths which cannot be contested; but it does not follow that the government ordained by the constitution is a government of unlimited powers. On the contrary, the settled construction is that the government of the United States is one of limited powers, which is shown to a demonstration by the tenth amendment, which reserves to the states respectively or to the people all power not delegated to the United States by the constitution, nor prohibited by it to the states. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 421; Hepburn v. Griswold, 8 Wall. [75 U. S.] 614; 2 Story, Const. 142.

Power to lay and collect taxes was possessed by the states even before the Union was formed, and many years before the constitution was ordained. Massachusetts adopted her constitution in 1780, and the same with certain alterations and additions is still in full force. Authority was therein given, and in that respect it is unchanged, empowering the legislature "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and person resident and estates lying within the said commonwealth, and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever brought into, produced, manufactured, or being within the same." Provident Inst. v. Massachusetts, 6 Wall. [73 U. S.] 623.

Since the constitution was adopted, the states cannot lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, not because congress may lay and collect taxes, duties, imposts, and excises, but because the constitution expressly provides that no state shall exercise that power without the consent of congress. Article 1, § 10. Want of authority in the states to tax the securities of the United States, issued in the exercise of the admitted power of congress to borrow money on the credit of the United States, is equally certain, although there is no express prohibition in the constitution to that effect. Outside of those restrictions, however, the power of the states to tax extends to all objects except the instruments and means of the federal government within the sovereign power of the state. Hamilton Co. v. Massachusetts, 6 Wall. [73 U. S.] 639. "Taxes" are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, or, as another text-writer defines the word, a tax is a contribution imposes by the government for the service of the state. Cooley, Const. Lim. 479; Blackw. Tax Titles, 1. Moneys derived from state taxes are as much designed for public purposes or for the service of the state, as moneys raised under the law of congress, and are just as essential to the support and maintenance of our complicated system of government, as it is an obvious truth that no constitutional government can long continue to exist without that power, or if despoiled of the avails which accrue from its exercise. Officers, legislative, executive, and judicial, are as essential to the existence of the state governments as they are in conducting the affairs of the United States, and it is just as necessary that they should be compensated at the public expense. Comparatively few limitations can safely be annexed to the power of taxation, as the exercise of the power is essential to the very existence of government, and the extent of the demand for its exercise cannot be foreseen, but there is a plain repugnance in conferring upon one government a power to tax the revenues of another in a system of government like that existing in our country, where the constitution of each of the two governments recognizes the other as a part of the system, and where each rests upon the admitted principle that both are to be perpetual.

Influenced by these considerations, our conclusion is that the established rule which prohibits the states from taxing the instruments and means of the federal government also withdraws the revenues of the state from the taxing power conferred by the constitution of the United States. Power to tax for state purposes is as much an exclu-

sive power in the states as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. Fifield v. Close, 15 Mich. 505; Warren v. Paul, 22 Ind. 279; Jones v. Keep's Estate, 19 Wis. 369; Union Bank v. Hill, 3 Cold. 325.

Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively or to the people, and it follows that the states in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the states, nor can the exclusive powers possessed by the states be exercised by the federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, "separate and district sovereignties, acting separately and independently of each other within their respective spheres," just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." Ableman v. Booth, 21 How. [62 U. S.] 516; McCulloch v. Maryland, 4 Wheat. [17 U. S.] 429; Austin v. Aldermen, 7 Wall. [74 U. S.] 699.

Pursuant to the constitution, congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the states, subject to the prohibitions of the constitution, express and implied, may lay and collect taxes and excises for the support of their respective state governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the states have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 431. Grant that the theory of the defendant is correct, and complete subjugation of all state authority must necessarily follow; as congress, if they may tax one state office, may tax every other office known to the constitution and laws of a state. They may tax the salary of the governor, and the travel and per diem of the members of the legislature, as well as the salaries of the judges of the state courts. Revenue may be collected by the states; but, if the views of the defendant are correct, it may be absorbed by the taxing power of congress as fast as it is paid into the treasury of the state, and the state may be left as destitute of means to defray its current expenses as if the power to lay and collect taxes and excises did not exist. Bank Tax Case, 2 Wall. [69 U. S.] 200; Van Allen v. Assessors, 3 Wall. [70 U. S.] 573.

Suggestion is made that the theory assumed by the plaintiff, if sustained by the court, will exempt a large amount of property from federal taxation; but the decisive answer to that suggestion at the present time, is that the decision of the court is confined to the case presented in the agreed statement. Such a tax, in our opinion, is as indefensible in principle as if levied upon the office held by the plaintiff, or directly upon the revenues of the state before they are paid out of the state treasury, as the tax levied and collected operates to that extent as a reduction of the compensation allowed to the officer,—the effect of which is to require a corresponding addition to his salary. Public officers cannot and ought not to be expected to perform official services without reasonable compensation; and if not, then it is clear that the effect of such a tax is the same as it would be if levied upon the office instead of the officer, or the salary annexed to the office. According to the agreement of the parties, judgment must be entered for the plaintiff in the sum of $61.50.

[NOTE. On a writ of error sued out by the collector, this judgment was affirmed by the supreme court, Mr. Justice Bradley dissenting. The court, speaking through Mr. Justice Nelson, after explaining the relations between the state and federal governments, says: "Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax; and more especially those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws." Buffington v. Day, 11 Wall. (78 U. S.) 113.]

Case No. 3,676.

DAY v. CANDEE et al.

[3 Fish. Pat. Cas. 9.][1]

Circuit Court, D. Connecticut. Sept. Term, 1853.

PATENTS—ASSIGNMENT AND LICENSE — CONTRACT TO CONVEY PROSPECTIVE EXTENDED TERM — POWER OF ATTORNEY — REVOCATION OF CONTRACT—INJUNCTIONS.

1. A patentee can not convey an extended patent before the extension. He may, however, agree, upon a valuable consideration, to convey such right whenever it shall be vested in him. This was the effect of the agreement between Chaffee and Goodyear, dated May 23, 1850.

2. A court of equity will protect the equitable rights of defendants, although the complainant is the owner of the legal title.

3. A power of attorney, which gives to the agent a veto upon the acts of his principal, is equivalent to a power coupled with an interest.

4. A power of attorney, which provides that the patent shall inure to the benefit of others, is, in equity at least, equivalent to a formal assignment, and is not revocable. Such a power of attorney is coupled with an interest.

5. The patent could not inure to the benefit of the licensees unless either a legal or an equitable right was transferred.

6. If a beneficial equitable interest vested in Judson and the licensees of Goodyear under the contract of September 3, 1850, they could not be divested in equity of that interest by the temporary withholding of the quarterly payments provided for in that agreement.

7. The consideration for the contract was the agreement to pay, and not the actual payment. A failure to pay would not therefore authorize the revocation of the contract.

8. Where by granting an injunction there would be a greater probability of producing incalculable mischief than there would be of preventing it, neither an absolute nor conditional injunction ought to be granted.

[Cited in Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896.]

In equity. This was a motion for a preliminary injunction to restrain the defendants from infringing letters patent for "improvement in the process and machinery for the manufacture of India rubber," granted to Edwin M. Chaffee, August 31, 1836, extended for seven years from August 31, 1850, and, as was claimed, assigned to the complainant July 1, 1853. The defendants were licensees of Charles Goodyear, who claimed the right to use, and to license others to use, the invention of Chaffee during the original and extended terms of the patent, under two contracts dated respectively May 23, 1850, and September 5, 1850. These contracts and a supplementary agreement between Chaffee and William Judson, who acted as the attorney in fact of Goodyear, are given below, and, with the statement of facts in the opinion, sufficiently set forth the questions involved in the controversy.

Agreement of May 23, 1850:

"This agreement, made by and between Edwin M. Chaffee and Charles Goodyear, witnesseth, that the said Chaffee, for and in consideration of the sum of three thousand dollars, to be paid to him, as hereinafter specified, hath sold, assigned, and set over, and by these presents doth hereby assign and transfer all his right, title, and interest in and to the improvement or invention of compounding and mixing gum lac or shellac with India rubber, either with or without sulphur or other ingredients, and heat. And the said Chaffee further agrees to apply, either with or in behalf of said Goodyear, for patents in the United States for said invention, at the expense of said Goodyear; said Chaffee further agrees, that said Goodyear may proceed to take out patents in all foreign countries, for his said Goodyear's benefit, said Goodyear paying the expenses of the same for said improvements in shellac, and said Chaffee agreeing to execute the necessary papers therefor. The said Goodyear, on his part, agrees to pay to the said Chaffee the sum of three thousand dollars, upon the following terms, viz.: one-half of the aforesaid sum, or fifteen hundred dollars, at the time of the issuing of a patent for said improvements in the United States, or if a patent should be previously granted as a renewal of his, said Chaffee's patent, for India-rubber machinery, then the aforesaid sum of fifteen hundred dollars shall be paid to the said Chaffee upon the assignment of said patent for said machinery to said Goodyear, the remaining one-half of said three thousand dollars to be paid within one year from the date hereof. In the event of neither of the aforesaid patents being obtained, then the first-named sum of fifteen hundred dollars is also to be paid within one year from the date hereof. And said Chaffee, upon his part, agrees further, that upon the issuing of one or both of the aforesaid patents for shellac and machinery, he will immediately assign them to the said Goodyear. And it is further mutually agreed, that if at that time the aforesaid three thousand dollars shall not have been paid, the said Goodyear shall make such a lien, transfer, or conveyance of his right, title, and interest in said patent to said Chaffee, as shall prevent any valid transfer of any rights or interests in said patents by the said Goodyear, until the said three thousand dollars shall be paid by the said Goodyear. It is further understood, that said Chaffee may reserve to himself the right to use the said India-rubber machinery in any business which he may hereafter carry on; and it is further understood, that if the said patent for India rubber machinery is not extended, then the whole sum of three thousand dollars shall be paid for, or secured upon, the patent and improvement for shellac. In witness whereof, we have hereunto set our hand and seals, this 23d day of May, A. D. 1850.

"Edwin M. Chaffee. [L. S.]
"Charles Goodyear. [L. S.]

"Witness: James A. Dorr."

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

Agreement of September 5, 1850:

"Whereas, I, Edwin M. Chaffee, have lately procured an extension of my patent, dated August 31, 1836, from seven years from the expiration thereof, the expenses of which have been large, by reason of the opposition thereto—but which expenses have not yet been ascertained, and cannot be at present; and whereas, said patent, at the time it was extended, stood in the name of Charles Goodyear, and was held for his benefit, and the benefit of those who had a license, or who had a right to use his metallic or vulcanized India rubber, or India rubber prepared and cured according to and under his patent, dated June 15, 1844, and reissued December 25, 1849; and whereas, said Charles Goodyear agreed with me, for himself and others using my said patent under him, that they would be at the expense of applying for said extension of said patent, and make me an allowance for the use thereof, in case the same should be extended, at and after the rate of twelve hundred dollars per annum, to commence on the 31st of August, 1850, and payable quarterly, that is to say, three hundred dollars on the first day of December, March, June, and September in each and every year during the present or any further extension of said patent, and during any reissue of the same, and until said patent or any reissue thereof shall be set aside as void in the highest court to which the same can be carried; and whereas, William Judson, Esq., has had the management of said application for said extension, and has paid and become liable to pay the expenses thereof, and agreed to guarantee me the payment of said sums of money, according to the terms, and at the times above specified: Now I do hereby, in consideration of the premises, and to place my patent so that in case of my death or other accident or event, it may inure to the benefit of said Charles Goodyear and those who hold a right to the use of said patent, under and in connection with his licensees, according to the understanding of the parties interested, nominate, constitute, and appoint said Wm. Judson, my trustee and attorney irrevocable, to hold said patent and have the control thereof, so that no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained. And the said Judson, for himself and those interested, agrees with me, said Chaffee, my executors, administrators, and assigns, that the expenses of extending said patent, shall all be paid without charge to me; and further, that I shall be paid said sums of money, at the times and according to the terms above recited; and said Judson, and those for whom he acts, are to be at all the expenses of sustaining and defending said patent, without any charge to me. And it is further expressly understood and agreed, that I am to have the right to use said patent and improvement in any business which I may carry on. As witness my hand and seal, this 5th day of September, 1850.

"Edwin M. Chaffee. [L. S.]

"Witness: Geo. Woodman."

Agreement of November 12, 1851:

"Whereas, it was agreed by and between William Judson and E. M. Chaffee, by an article under hand and seal, and dated the 5th day of September, 1850, which agreement was recorded at the patent office, September 11, 1850, on what terms said Chaffee would continue to hold said patent for the benefit of said Judson and Charles Goodyear, and his licensees; and whereas, in said agreement there was an omission to state that if said licensees continued to use the improvements in said patent named, they should each one contribute and pay said Judson his proportion of the expenses and services expended in obtaining the renewal of said patent, which it was intended that said licensees should pay under said Judson, in case they continued the use of said improvements for which said patent was issued, after the extension thereof; and whereas, there was no such direct, absolute stipulation, on the part of said Judson, to pay said Chaffee the sum of fifteen hundred dollars per annum, in quarterly payments, on the usual quarter days, as said Chaffee claimed, and now insists shall be inserted in said agreement; and whereas, it is now agreed by said Chaffee and said Judson, that said agreement shall be so modified as to secure the objects more fully intended to be secured by said agreement: Now it is agreed, that said licensees shall each pay his share of the services and expenses to said Judson, as the condition on which they shall have the license of said Judson to use said improvements; and that on the payment of his or their share or proportion of the services and expenses aforesaid, said Judson shall be authorized to give each a license to use said improvement, on their paying as aforesaid, severally, each for himself, or his firm, or company. And said agreement is further so altered, that said Judson hereby agrees to pay said Chaffee fifteen hundred dollars, in quarterly payments each year, on the usual and customary quarter days, on the time set forth in the agreement aforesaid, to which this is an addition and alteration, commencing the quarterly payments on the first day of March next. And I agree with said Judson that he may use my name in the commencement and prosecution of all suits he may have occasion to commence to sustain said patent, or recover damages for any infringement or infringements thereof, or for any other purpose in relation to the same, or the use thereof, he holding me harmless from any costs by reason thereof, and he to have all the benefits which may be derived from such suits. Sealed and delivered this 12th day of November, 1851, in the presence of

"William Judson. [L. S.]

"The word 'February' erased, and the word 'March' inserted before execution.

"Edwin M. Chaffee. [L. S.]

"Benjamin H. Jarvis.

"Received and recorded November 27, 1851."

C. R. Ingersoll and N. Richardson, for complainant.

R. D. Hubbard and R. S. Baldwin, for defendants.

INGERSOLL, District Judge. The complainant, claiming to have, by assignment from Edwin M. Chaffee, the exclusive right to the extended patent originally granted to Chaffee, August 31, 1836, for grinding India rubber without a solvent, and extended to him for seven years from August 31, 1850, and that the defendants are using the thing patented without any license or lawful right, has brought his bill in equity to this court in which he seeks the interposition of the court to restrain and enjoin the defendants against the further use of the invention thus secured to Chaffee and his assigns by such extended patent.

In the bill, the complainant, among other things, alleges, that before August 31, 1836, one Edwin M. Chaffee, of the state of Massachusetts, became and was the first and original inventor of a new and useful improvement in the process and machinery for the manufacture of India rubber, for which, he, the said Chaffee, on August 31, obtained a patent by which there was granted and secured to him, for the term of fourteen years from that date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said improvement so invented by and so patented to him. That he, the said Chaffee, previous to August 31, 1850, made application to the commissioner of patents for an extension of said patent, for the term of seven years from the last mentioned day, which was granted to him, and that said extension inured to his sole and exclusive benefit. That in the year 1845, Charles Goodyear, by some contract, lien, or assignment, claimed to have become the owner of said patent so granted to the said Chaffee in the year 1836, and that before the extension thereof, and before the same was extended, in 1850, he conveyed the same, by license or sale, to a combination of individuals, among whom were the defendants. That since the extension of the original patent, the defendants have had no right, title, or interest in said extended patent, and no license or permission from the said Chaffee to use the improvement or invention so patented and secured to said Chaffee, for the extended term of seven years from August 31, 1850. That the defendants, since the last mentioned date, and since the term for which the original patent was granted has expired, and since the same was extended, have been using the improvement and invention of the said Chaffee, so patented to him, without any license or permission from the said Chaffee, or from any one having right to give such license or permission. That the said Chaffee, on July 1, 1853, by his deed of assignment of that date, in writing, duly executed and recorded in the patent office, for a valuable consideration to him paid, did assign, transfer, and convey to the complainant all his, the said Chaffee's, title to said invention and said patent for said extended term of seven years; and that the defendants are using said invention so patented, without any license or permission, and persist in so using the same, though called upon to desist. In the bill the complainant claims and prays, upon the aforesaid facts therein stated, that this court would grant a writ of injunction, directed to the defendants, commanding and enjoining them, and each of them, not to manufacture India rubber by any of the processes or machinery as patented to the said Chaffee in the said letters patent. There is no allegation in the bill that the defendants had no right to use the improvement patented to the said Chaffee, during the continuance of the original patent. It is substantially admitted, that up to August 31, 1850, they had such right so to use the same; that up to that time, they were duly licensed, by the person or persons in whom the right secured by the patent was vested, to use the same. But the complaint is, that since the expiration of the original patent, and since the same was extended, they had no such right, either in law or in equity. That from the time the patent was extended to July 1, 1853, when the rights which the said Chaffee then had to the said extended patent were transferred and assigned to the complainant, they were not licensed or otherwise authorized to use the improvements secured by the extended patent, either by the said Chaffee, or by any one acting under his authority, and that since the transfer of the right which the said Chaffee had in the extended patent to the complainant, they have not been authorized to use the same in any way, either by the complainant, or by any one acting under his authority. And that during the whole of the period from the time the patent was extended, they have been using the thing or process secured to Chaffee and his assigns, by the extended patent, without right or excuse, contrary to the mind and will of the said Chaffee, up to the time of the assignment of the extended patent to the complainant, and contrary to the mind and will of the complainant since that time.

The bill, therefore, upon the face of it, shows a good cause of complaint. Upon the face of it, there is shown, on the part of the complainant, a right to demand equitable relief. And the allegations contained therein, if true, would authorize the court, and make it their duty, to grant the injunction as prayed for. The question, therefore, to be determined is, are these allegations, thus

set forth in the bill, true? The defendants admit that a portion of these allegations are true. But they claim that another portion of them, and a material portion of them, are not true. They admit that Chaffee was the original inventor of the improvement patented—that it is a useful improvement—that on August 31, 1836, he obtained a patent for the same, by which the exclusive right to such improvement was secured to him for the term of fourteen years—that he afterward obtained an extended patent for seven years, from August 31, 1850, and that said extended patent was a valid one. They admit that during the existence of the original patent, Charles Goodyear, by assignment, became the owner of such original patent, and that up to August 31, 1850, they used the improvement patented, under him and by his license and authority. They admit that since August 31, 1850, they have been using the improvement patented, and that they are now using the same, and that the right which Chaffee had in the extended patent on July 1, 1853, if he had any, was on that day assigned to the complainant. But they deny that since the expiration of the original patent, and since the same was extended, they "have had no right, title, or interest in said extended patent, and no license or permission" to use the same. They claim that ever since said patent was extended, they have had a right to use the same, and now have such right. That for all that period they have had, and now have, not only an equitable right, but a legal right to use the same. And this question of right must be determined upon the proofs which have been exhibited on the hearing of the motion.

When the motion for a preliminary injunction was filed, and before any affidavits had been taken, it was conceded by the complainant's counsel, that the rights of the complainant, as against the defendants, were only such as the said Chaffee's would have been, if the assignment by Chaffee to the complainant had not been made; and that no greater success ought to attend the complainant's application than would have attended an application on the part of Chaffee, had not that assignment been made, and the case had been presented by him, Chaffee, asking relief in his behalf. And without such concession, such, upon the evidence, would be the rule to be adopted. Indeed, the complainant's bill is framed upon the ground that he is entitled to that which Chaffee would have been entitled to, had he not made the assignment, and to that only. For it seeks not only to enjoin the defendants against using the invention patented, but to recover the damages, which the complainant says, before the assignment, Chaffee was entitled to, by the use made by the defendants of the improvement patented before that time. The case, therefore, upon this motion for a preliminary injunction, will be considered as it would have been considered if no assignment had been made by Chaffee to the complainant, and he, Chaffee, was the party filing the bill.

That we may more perfectly understand the import of the agreement upon which the defendants rely for the right which they claim to have to use the improvement patented, and the transactions which took place at the time when that agreement was entered into, and subsequent thereto, it is necessary to notice some previous contracts and matters to which Goodyear, Chaffee, and the defendants were immediate parties, or in which they were interested.

After the original patent of August 31, 1836, had been granted to Chaffee, he, by an instrument under his hand and seal, and dated December 8, of the same year, transferred all his right to that patent, to the Roxbury India Rubber Company, a corporation established by the laws of the state of Massachusetts, and subsequent to that transfer, and during the existence of that patent, by various assignments through intermediate parties, the right to that patent, and the whole right to the same, became, and was vested in Charles Goodyear. While Goodyear was the owner of that patent, and while he was the owner of other India-rubber patents, which he had either as original inventor or as assignee, there was, on July 1, 1848, a contract and agreement entered into between him of the first part, and Leverett Candee as the general partner in a special partnership located at New Haven, and doing business under the name and firm of Leverett Candee, the Hayward Rubber Company, the Newark India Rubber Manufacturing Company, and Ford & Company, by which, in consideration of certain payments then made, and certain other payments to be thereafter made by the said parties of the second part, to the said party of the first part, the said party of the first part sold and assigned to them the sole and exclusive right to use all his preparations of India rubber, and all his improvements in the preparation and use of India rubber in the manufacture of boots and shoes of all kinds, and all right or interest which he then had to the same, or which at any time thereafter he should have, either as inventor or assignee, or by virtue of any contract, embracing all preparations of India rubber, whether then known and patented or to be thereafter known or patented, and all benefits and advantages covenanted or in any way secured, or to be secured, under any license or agreement, for the use of such improvements in the manufacture of boots and shoes; by which the defendants and their associates obtained a beneficial interest in the patent granted to the said Chaffee by his letters patent dated August 31, 1836, a beneficial interest in any contract in relation to any extended patent which Goodyear might thereafter make with the said Chaffee.

While the defendant had such beneficial interest in the patent issued August 31, 1836, and a short time before it expired, to wit: on May 23, 1850, there was a contract, in writing, entered into between Goodyear and Chaffee, by which Chaffee sold and assigned to Goodyear all the right and title to an improvement or invention which he, Chaffee, claimed, and which had not then been patented, for compounding and mixing gum lac or shellac with India rubber, either with or without sulphur or other ingredient and heat, and agreed to apply with, or in behalf of, Goodyear for a patent for the same at the expense of Goodyear. It was agreed by said contract, that Goodyear might take out patents for the same in all foreign countries for his, Goodyear's, benefit, he, Goodyear, paying the expenses of the same. It was agreed further by Chaffee, upon the issuing of an extended patent for that which had been patented, to wit: by the patent of August 31, 1836, or a patent for his invention for compounding and mixing gum lac or shellac with India rubber, either with or without sulphur or other ingredient and heat, that he would immediately assign them to Goodyear. And it was agreed by Goodyear to pay Chaffee three thousand dollars, one-half, to wit: fifteen hundred dollars to be paid at the time of the issuing of the patent for compounding and mixing gum lac or shellac, in the United States, if it should be issued, or if a renewed patent, in extension of the letters patent issued August 31, 1836, should first be granted, then the aforesaid sum of fifteen hundred dollars should be paid to Chaffee upon the assignment of said extended patent by Chaffee, and the remaining sum of fifteen hundred dollars in one year from the date of said contract. And it was further agreed by said contract, that in case Goodyear should not pay the sums agreed to be paid by him at the times when they were payable, that he would make such lien, transfer, or conveyance of his right, title, and interest in said patents to Chaffee as should prevent any valid transfer of any rights or interests in said patents by him, until said payments were made. And by said contract, the right was reserved to Chaffee, notwithstanding the assignment, which was, by the terms of the contract to be made, to use the extended patent in any business which he might carry on. By this contract, he, Chaffee, did all he could to give to and invest in Goodyear all his right to the new improvement or invention of compounding and mixing gum lac or shellac with India rubber, and to an extended patent of the patent of August 31, 1836, which might be granted. He had a right to convey in his new improvement and invention—he, therefore, conveyed that right. He had no right to convey in any extended patent; for no such right to such extended patent was then vested in him. He did, however, all that he could. He agreed, upon a valuable consideration, to convey such right whenever it should be vested in him; reserving to himself only the privilege to use the right which might be given by an extended patent, in any business which he might carry on. The whole right, reserving this privilege, was to be conveyed to Goodyear. Goodyear was to be at the expense of obtaining a new patent, but there was no obligation on the part of Goodyear, by the contract, to be at any of the expense in obtaining the extended patent. There is no proof that any patent was ever granted for the improvement of compounding and mixing gum lac, shellac, with India rubber, or that any application was made for one. But an application was made for an extended patent for the India-rubber machinery, and the same was granted.

There was then nothing by the terms of this contract to be paid by Goodyear to Chaffee, until the assignment of said extended patent by Chaffee to him. When it should be assigned, then fifteen hundred dollars was to be paid. Without an assignment, or that which Goodyear should receive in lieu thereof, nothing was to be paid. He was to pay the fifteen hundred dollars upon the execution of an assignment, and not before, and not upon the execution of a power authorizing some one to make it. By this contract there was an absolute obligation on the part of Chaffee to assign and convey the extended patent to Goodyear; he was bound, in law, to convey, and nothing would, in law, absolve him from this obligation but the neglect or refusal of Goodyear to pay the fifteen hundred dollars which was to be paid when the assignment was to be made, or the refusal of Goodyear to make the lien as was by the contract agreed, or some other act on the part of Goodyear to excuse or discharge him, Chaffee, from this obligation. And the contract, when it should be performed by Chaffee, was, by virtue of the agreement entered into on July 1, 1848, between Goodyear and the defendants and their associates, to inure to their benefit. The terms of this contract should be particularly borne in mind in considering this case. And it should be borne in mind, too, when such assignment should be made to Goodyear, or to any one in trust for him, that such assignment would inure to the benefit of the defendants. They had paid their money that it should so inure. Immediately after this contract was entered into, Chaffee, with a view to faithfully carry out the provisions therein contained, went to Washington to obtain an extended patent. William Judson, the general attorney to Goodyear, also went, to further the object which both parties had in view, to obtain such extension. The application for an extension had to be in the name of Chaffee, and Judson was his agent in furthering that application. An extended patent for seven years was granted, bearing date August

31, 1850, and on September 5 of the same year, an agreement by Chaffee and Judson as the nominal parties, was entered into, upon which the defendants principally rely for the right which they claim to use the thing secured by the extended patent in the way they are using it.

That agreement, which was signed by Chaffee, and by him alone, but which was, on the day it bears date, delivered to Judson, after reciting that Chaffee had procured an extension of his patent, dated August 31, 1850, for seven years from the last-mentioned day—that the expenses for procuring the extension had been large, and could not then be ascertained—that when it was extended, it stood in the name of Charles Goodyear, for the benefit of certain licensees; that Charles Goodyear, for himself and others, the licensees, had agreed to be at the expense of obtaining the extended patent, and to make him, Chaffee, an allowance for the use thereof, at the rate of twelve hundred dollars a year; that William Judson had had the management of the application for the extension, and had paid and agreed to pay the expenses thereof, and had agreed to guarantee to him, Chaffee, the payment of said annual sums, stipulated that he, Chaffee, did, in consideration thereof and for these reasons, and in order that the extended patent might inure to the benefit of the said Charles Goodyear and these defendants, and the other licensees under the original patent, appoint William Judson his trustee and attorney, irrevocable, to hold said extended patent, and have the control thereof, so that no one should have a right to use the same except those who had a right to use the original patent, without the written consent of Judson first had and obtained. And by that contract, Judson, for himself and those interested, to wit: Goodyear and the other licensees, agreed to be at all the expense of obtaining the extended patent, without charge to him, Chaffee, and to pay him the said annual sums. And the expense of sustaining and defending the patent was to be borne by Judson and those for whom he professed to act, to wit: Goodyear and the other licensees. And, by that contract, Chaffee reserved to himself the right to use the patent in any business which he might carry on. And there was no other right to the patent, in him, by express agreement reserved. And the great question is, what is the construction to be put upon this contract which the defendants say gives them the right to use the extended patent in the way they are and have been using it?

Contemporaneous with this contract, or within a few days thereafter, there was paid to Chaffee, by the defendants and their associates, who, with them, entered into the contract with Goodyear, of July 1, 1848, above recited, the sum of fifteen hundred dollars. There is no proof that there was any written agreement by which the sum of fifteen hundred dollars was to be paid to Chaffee at one time, by Goodyear, or by the defendants and their associates, licensees under Goodyear, except the written agreement entered into between Goodyear and Chaffee on May 23, 1853, and by that agreement such payment was to be made only upon the assignment of the extended patent by Chaffee, reserving to himself, notwithstanding such assignment, the right to use the same in any business which he might carry on. The defendants claim that by virtue of the contract of September 5, 1850, they had a right to use the patent in the way they are using it. They rest their claim on two grounds: First. They claim that by that contract Chaffee was divested of all legal title to the patent; that the legal title was transferred to Judson for himself, and in trust for the use and benefit of the defendants and the other licensees under Goodyear. Secondly. They claim if Chaffee by that contract was not divested of the strict legal title to the extended patent, that by virtue thereof they acquired a beneficial, vested, equitable interest in the same, and which beneficial, vested, equitable interest they now retain, and of which they can not be deprived by any act of Chaffee. And that the act of Chaffee of the date of July 1, 1853, by which he attempts to "annul, cancel, and render void and of no effect" the said contract of September 5, 1850, should have no effect upon their rights thus vested in them.

The complainant claims that the said contract of September 5, 1850, was no legal transfer of any legal right in the patent to Judson; that it was no equitable transfer of any beneficial, vested, equitable interest in the same to the defendants; that it was a mere power of attorney, not coupled with any interest that could deprive Chaffee of the right at any time to revoke it; and that having that right, he did, on July 1, 1853, revoke it. That there was a large debt due from Chaffee to Judson, for expenses which he had paid and which he had agreed to pay, and which had otherwise accrued, and that the object of the contract was merely to enable and empower Judson to collect that debt by granting licenses to the defendants and to the other contracting parties in the contract with Goodyear, of July 1, 1848, upon their paying, as a condition precedent for such licenses, their respective portions of such debt, and to enable Judson to put a "veto" upon any licenses which Chaffee might grant to any other persons. And particularly, he claims that this should be the construction of this contract when taken in connection with an agreement made by and between Judson and Chaffee, on November 12, 1851, and to be hereafter noticed. This contract of September 5, 1850, is something more than a mere power of attorney, as claimed by the complainant, revocable at his pleasure by any act done by

him during his life, or by his death. I do not decide the question whether or not, by this contract, the strict legal title in this extended patent was transferred by Chaffee to Judson. The necessities of the case do not require that it should be decided. For if these defendants, by this contract, are vested with an equitable right to use the patent (if, in good conscience they are entitled to use it), as the complainant has come into this court asking for equity, and by so doing is bound not only to do equity, but permit the defendants to avail themselves of their equitable rights, if they have such equitable rights, they are to be protected in the enjoyment of them, notwithstanding the strict legal title to the patent may be vested in him, the complainant.

To the question then, what is the equitable construction of this contract? To determine this, we must ascertain, if we can, what was the intention of Chaffee when he executed it. The complainant, as has been already stated, claims that it was a mere power of attorney, for certain purposes, and not coupled with any interest, and therefore, revocable by Chaffee. If it was a power, and if it was coupled with an interest, then Chaffee could not revoke it; and no one claiming under Chaffee could revoke it. The law, on the subject of what powers are revocable and what are irrevocable, what are powers coupled with an interest and what are not, is well laid down in the case of Hunt v. Rousemanier's Adm'rs, 8 Wheat. [21 U. S.] 174, and as it is there laid down will not be questioned.

The bill in that case stated that Rousemanier, the intestate of the defendants, applied to the plaintiff for the loan of fourteen hundred and fifty dollars, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the ship Nereus, then at sea, as collateral security. The money was lent and the notes were executed for the same. Neither the bill of sale nor mortgage was given. A few days after the notes were executed, Rousemanier executed a power of attorney authorizing the plaintiff to make and execute a bill of sale of three-quarters of the vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. The instrument also contained a proviso, that the power was given as a collateral security for the payment of the notes, and was to be void on their payment. The notes were not paid, and Rousemanier died. Chief Justice Marshall, in giving the opinion of the court in that case, says: "This instrument contains no words of conveyance or assignment, but is a simple power of attorney. As the power of one man to act for another depends on the will and license of that other, the power ceases when this will or this permission is withdrawn. The general rule, therefore, is, that a letter of attorney may at any time be revoked by the party who makes it, and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modifications. When a letter of attorney forms a part of the contract, and is a security for money, or for the performance of any act which is valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. Although a letter of attorney depends from its nature on the will of the person making it, and may, in general, be recalled by his will, yet, if he binds himself for a consideration in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousemanier could not, therefore, during his life, by any act of his own, have revoked this letter of attorney. If a power is coupled with an interest, it survives the person giving it, and may be executed after his death. A power coupled with an interest, is an interest in the subject on which the power is to be exercised, and not merely an interest in that which is produced by the power."

Let, then, the contract now under consideration be tested by the law, as laid down by Chief Justice Marshall. In the contract of September 5, 1850, in consideration of the sum of fifteen hundred dollars paid to Chaffee by the defendants and their associates, the licensees under Goodyear, or by Judson for them, at the time of the execution thereof, or within a few days thereafter, and in consideration that Judson had paid and had become liable to pay all the expenses of procuring the extended patent, which, as expressed in the contract, had been large, and which, if we are to credit the statements of the complainant's counsel as made in the argument, amounted to many thousand dollars, and in consideration that he, Chaffee, should be at no charge for these expenses, that he should be free from such charge, and for the other considerations named in the agreement, the contract, such as it was, was entered into. And the object, on the face of it, was and is so expressed to be, to place the patent so that it may inure to the benefit of Goodyear and the licensees, and continue in the condition in which, by the contract, it was placed, unaffected by his, Chaffee's, "death or other event." For this consideration which he receives, and which Judson and these defendants and others paid, he binds himself in terms that the condition in which by that contract the patent was placed, should not be altered by his death or by any event. His will was, for the consideration which he received, that the patent should be placed in the condition in which the contract placed it; and he bound himself "not to change that will." Then what does Chief Justice Marshall say to a case thus circumstanced? He says, in the case in Wheaton already referred to: "Although a letter of attorney may, in general, be revoked by the will of the party executing it, yet, if he binds himself

for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. He can not, therefore, during his life, by any act of his own, revoke it." From this agreement of September 5, 1850, it would appear that it was the intention of the parties that after the same was executed there should be no debt or claim, or "charge," in favor of Judson, for any of the expenses which had accrued in obtaining an extension of the patent against Chaffee; but that Judson should pay the same and that Chaffee should be free therefrom. The contract is express on the part of Judson, "that the expenses of extending said patent shall all be paid without charge" to Chaffee. That Judson had paid and become liable to pay the expenses thereof. That Judson should pay the whole of them, and that there should be no "charge" to Chaffee for what he had paid, or for what he should pay. That so far as they had been ascertained, they had been paid by Judson, and that that portion of them which had not been ascertained should be paid by him.

If, then, the understanding of the parties was that there should be no "charge" in favor of Judson against Chaffee for any of the expenses in obtaining the extended patent, but that he, Judson, should pay the whole, then it follows, as there was no "charge" in favor of Judson against Chaffee to be secured, that the object of the contract was something else than according to the claim of the complainant, to enable and empower Judson to collect a debt or "charge" in favor of Judson against Chaffee, by granting licenses to the defendants, and to the other contracting parties in the contract with Goodyear of the date of July 1, 1848, upon their paying as a condition precedent for such licenses, their respective portions of such debt or "charge," and to enable Judson to put a "veto" upon any licenses which Chaffee might grant to any other persons. The complainant admits that by the contract of September 5, 1850, there was to be a "veto" power in Judson upon any licenses which Chaffee might grant to any persons other than the defendants and their associates, contracting parties with Goodyear. And if this "veto" power did exist in him, then it follows that the instrument of September 5, 1850, call it by what name you may, was something more than a simple power of attorney, coupled with no interest made for the purpose, as claimed by the complainant. For such a "veto" power could not exist in a mere power of attorney, "coupled with no interest." If it was merely such power of attorney, Chaffee would still have had a right to grant as many licenses as he pleased without the consent of Judson.

The great object of a court of equity is, in construing a contract, to ascertain the intention of the parties to it. In the contract of May 23, 1850, between Goodyear and Chaffee, the intent of the parties is clear, that Chaffee, if an extended patent should be obtained, was to assign the same to Goodyear, reserving the right to use the same in any business which he might carry on, upon the payment by Goodyear to Chaffee of the sum of fifteen hundred dollars upon the assignment of the same, and upon his, Goodyear's, agreement to pay the further sum of fifteen hundred dollars in one year from the date of said agreement, he, Goodyear, agreeing further to secure Chaffee such payment by a lien on the patent. All that Chaffee was to receive was three thousand dollars; and Goodyear was to have the whole right to the patent, Chaffee reserving a right only to use it in his business. This was the contract. And the patent, when so assigned, was, by virtue of an agreement between Goodyear and the defendants and their associates, to inure to them. Goodyear never refused or neglected to perform his part of the agreement. Chaffee pretends that he did. Chaffee says that he, Goodyear, refused to perform what he had agreed to perform, and that was the reason why he did not convey to Goodyear, as he had agreed that he would. Goodyear was to pay nothing until the assignment was made, and then he was to pay fifteen hundred dollars. And the fair construction of the contract of September 5, 1850, is that by it he, Chaffee, agreed in substance to do what he had agreed to do by the contract with Goodyear of May 23, 1850; though by the contract of May 23 he was to receive as a consideration only three thousand dollars, while by the contract of September 5 he was to receive as a consideration a much larger sum. By the contract of May 23 he agreed to assign the whole patent to Goodyear, reserving to himself only the right to use the same in any business which he might carry on. By the contract of September 5, he agrees, upon a valuable consideration paid, to place his patent so that in case of his death, or in any event, it might inure to the benefit of Goodyear, and those who had a right to the use of the patent under and in connection with his licensees, reserving to himself the right, as was reserved in the contract of May 23, to use the same in any business which he might carry on. And in order to carry out this agreement more effectually, he appoints Judson his attorney and trustee, irrevocable, to hold said patent and have the control thereof, so that it might thus inure, as he had agreed, upon a valuable consideration paid, it should inure. He was paid a valuable consideration that it might so inure, and he agreed for that valuable consideration paid, that it should so inure. For that valuable consideration paid, and for a further sum agreed to be paid, and for other considerations, he agreed with Judson that the whole patent should inure for the benefit of others, reserving only the right to use it himself in his business. It was to inure to them during the existence of the patent, so as not to be affected by any subsequent act of his, or by his death, or by any other event. And it could not so inure unless either a legal

or an equitable right to the patent was transferred. Therefore, as Chaffee intended that it should so inure, and as it could not so inure unless either a legal or an equitable right was transferred, he intended by that contract that either a legal or equitable right to it should be transferred, and, as that was his intention, he agreed that such right should be so transferred.

Where one, having a right, for a valuable consideration paid, agrees with another person that that other person shall have the enjoyment of that right, and gives a power of attorney to enable such other person to possess and enforce that right, he who makes such agreement and gives such power of attorney, shall not by law be permitted to revoke that power so as to deprive the other party of the right, which, for such valuable consideration, the party making the power had agreed that the other party should have and enjoy. It is not necessary that there should be a formal assignment of the right. If there is an agreement, upon a valuable consideration paid, that the party should have the benefit of the right—that it should inure to him, and for that purpose a power of attorney is executed, that is, at least in a court of equity, equivalent to a formal assignment. In such a case, the power of attorney is a power coupled with an interest, not merely in the execution of the power; not merely an interest in that which is produced by the power, but in the thing itself. Raymond v. Squire, 11 Johns. 47. If the obligee in a bond for the payment of a sum of money, agrees with a third person, upon a valuable consideration paid, say the amount in the bond named, that that bond should inure to the benefit of such third person, and should give a power of attorney to such third person in order that he might have the control of such bond, to hold the same, and he to be at all the expense of a suit upon the bond, without charge to the obligee, it would not be in the power of the obligee in such bond, by any act of his, to deprive such third person of the benefit of such bond which he had agreed should inure to such third person. And it makes no difference whether the subject on which the contract is to operate, for the benefit of one of the parties in interest, be a bond or a patent. The provision in the contract of September 5, that "Judson and those for whom he acts, are to be at all the expense of sustaining and defending the patent, without any charge to" him, Chaffee, shows that it was the intention of the contracting parties that Judson, and those for whom he was acting, were to have an irrevocable interest in the subject they were contracting about. For why should they be at such expense, unless they had an interest to be secured by subjecting themselves to such expense? And the further provision, expressly made, that Chaffee was to "have the right to use the patent and improvement in any business which he might carry on," tends strongly to show, that without such provision, that the parties supposed he would, after the contract should be executed, have no such right.

It is claimed by the complainant, that this contract of September 5, was modified, altered, and explained by a subsequent agreement, made by and between Judson and Chaffee, on November 12, 1851, and that when taken in connection with the latter agreement, the construction of it should be different from that which has been given to it. These defendants never gave their consent to the agreement of November 12. They never authorized it. They knew nothing of it at the time. They never ratified it. They knew nothing of it until a very recent period. They do not now claim under it. And if they had rights secured to them by the contract of September 5, 1850, and by the consideration which they paid for that contract, those rights are not to be affected by any subsequent agreement between Judson and Chaffee, to which they have never given their consent.

But suppose that the contract of September 5, 1850, and the defendants' right under that contract were to be affected by the agreement of November 12, the question then would be, should a different construction be given to the contract of September 5, when considered in connection with the agreement of November 12, than that which has been given to it, considered separately. Although only twelve hundred dollars was the sum which, by the contract of the said September 5, was, by the terms of it, to be annually paid to Chaffee, in quarterly payments, yet from the date of that contract up to November 12, 1851, the sum of fifteen hundred dollars had been the annual payment which had actually been made—and in looking at the agreement of November 12, the parties to it appear to have had two objects in view. One was, to reduce to writing what had been tacitly acquiesced in without such writing, that the annual payment to Chaffee should be fifteen hundred dollars, instead of twelve hundred dollars. And the other was to enable Judson to compel the defendants and their associates, the contracting parties with Goodyear in the contract of July 1, 1848, to pay their respective portions of the expenses of obtaining the extended patent in case they, or either of them, should refuse to pay, by withholding from them their licenses. And if I am right in the view heretofore taken of the contract of the said September 5, that after such contract Judson had no "charge," and could have no "charge" against Chaffee for any expenses which he had paid, or which he might pay, and which he was bound to pay in obtaining the extension, then Chaffee had no interest in this latter provision, and the above-named object was its only object. In this view of the case, it was made for the sole benefit of Judson. Chaffee had no interest in it. He had an interest that there

should be no "charge" against him for any portion of those expenses. That interest was secured by the said contract of September 5. By that contract Judson was to have no "charge" against him for any portion of such expenses, and as Judson had no "charge" against him for those expenses, he had no interest in having the expenses paid by the defendants and their associates to Judson. By such payment he was not the gainer. By the non-payment he was not the loser. The provision was exclusively for the benefit of Judson. It being for his exclusive benefit, it could be waived by him; and Chaffee could not complain if it was so waived.

I do not deem it necessary, therefore, to go into an examination of the question of fact whether or not the defendants paid to Judson their portion of these expenses. Much testimony by way of affidavit has been taken on this subject. The complainant claims thay did not pay Judson. The defendants claim that they did. But whether they did or did not, Chaffee has no cause of complaint. And if they were not paid by the defendants to Judson, and Judson had any cause of complaint, he had waived it.

There is one additional provision in this agreement of November 12, 1851, which shows that the construction put upon the contract of September 5, 1850, is the correct one. It is that Judson may use his, Chaffee's, name in the prosecution of all suits for the recovery of damages, for any infringement of the patent, and have all the benefits which may be derived from such suits. If the benefits by way of damages for an infringement of the patent were one hundred thousand dollars, Judson was to have the whole, and Chaffee was to have no portion of them. It is difficult for me to conceive why such a provision should have been made, unless the parties supposed that Chaffee had been divested of all right in equity to the patent, except the right to use it in the business which he might carry on.

The complainant further claims, that the instrument in writing executed by Chaffee on September 5, 1850, was upon the condition that the contract, for the annual payments to be made to him quarterly, should be kept and performed according to the terms of that instrument; that such annual payments were not regularly made; that Judson and those for whom he acted when that instrument of September 5 was entered into, neglected and refused to make such annual payments; that they were in default in this respect; that being in such default, he, the said Chaffee, had a right to revoke the instrument so executed by him; that having such right, he did so revoke it, by a notice in writing to Judson of the date of July 1, 1853. This latter claim is not strenuously urged; but as it has been urged, it becomes necessary to notice it. The annual payments of fifteen hundred dollars a year, to be made punctually up to December 1, 1852. It has been claimed by the defendants, that Chaffee has, in fact, received all that he was entitled to receive by virtue of the contract of September 5. But for the purposes of this case, I assume that the quarterly payments to be made were not made subsequent to December 1, 1852, and that he has not received of such payments all that he is entitled to. When the payment which was to have been made on March 1, 1853, became due, for certain reasons, the same was not made; and the payment that was due on June 1, 1853, for certain reasons, was not made. On June 23, 1853, Judson wrote Chaffee, in which letter, after stating the reasons which prompted him to withhold temporarily the quarterly payments which had become payable, he authorized Chaffee to draw on him at sight for such quarterly payments then due. And after that letter was written, and this authority to draw was given, the said Chaffee, on July 1, 1853, undertook, by a notice in writing to Judson, to "revoke, annul, cancel, and render void and of no effect," the instrument executed by him on September 5, 1850, and on the same day assigned all the right which he had to the patent to the complainant. I do not think that this claim of the complainant can be sustained. If I am right in the construction given to the contract of September 5, that by it a beneficial, equitable interest in the patent was vested in Judson and the defendants, then it would seem to follow that they could not be divested in equity of that beneficial, equitable interest, by the temporary withholding as above stated, of the quarterly payments. But it is not necessary to enlarge upon this part of the case, as this claim has not been strenuously urged. The actual payment at the precise time appointed, of these quarterly sums, was no part of the consideration upon which Chaffee agreed as he did agree by that contract. The agreement to pay them was part of the consideration, and not the actual payment at the time appointed. Chaffee relied for what he did upon an agreement to pay, and a failure to pay at the precise time would not authorize Chaffee to revoke the contract, and thereby to divest Judson and the defendants of the equitable interest, which, by the contract of September 5, they had acquired.

Other considerations have been pressed upon the attention of the court, sustained by numerous affidavits, to show that the defendants have now the right to use the patent, in the way they are using it. But, after the view which has been taken of the case, it is not deemed necessary to go into a thorough examination of them. And in disposing of this motion, I do not undertake to decide what are the strict legal rights of the parties; nor do I undertake to

say that the equitable rights of the parties, upon a more full hearing—upon a more thorough examination, when proofs to be used upon the final trial are taken, can not be made to appear different from what they now appear upon the hearing of this motion. All that I decide is, that upon this motion, the right on the part of the complainant and the violation of right on the part of the defendants, do not appear so clear, plain, palpable, manifest, as to authorize a court to grant an injunction against the defendants to prohibit them from any further using the patent, the rights to which are in controversy. The view I have taken of the case admonishes me, that by granting an injunction there would be a greater probability of producing incalculable mischief than there would be of preventing it; and that neither an absolute nor conditional injunction ought to be granted. The motion, therefore, is denied.

[NOTE. For other cases involving this patent, see note to Day v. Union India-Rubber Co., Case No. 3,691.]

DAY v. CARY. See Case No. 5,562.

DAY (DOUGHTY v.). See Case No. 4,026.

Case No. 3,677.

DAY et al. v. EMERSON et al.

[5 Biss. 56.][1]

Circuit Court, D. Wisconsin. Aug. Term, 1858.

MONEY IN MARSHAL'S HANDS.

Where the marshal has money in his hands, the balance of proceeds of sale of property claimed by a party other than the execution debtor, and to recover which such party has brought suit against him, the court will not order him to pay the money into court pending such suit, there being no proof of collusion or danger of loss.

[This was a bill in equity by Calvin Day and others against Francis Emerson and others.]

MILLER, District Judge. In this bill, Charles Windt is made a party defendant. He is alleged to have money in his hands which should be applied as the funds of the judgment debtors, Francis Emerson and Charles F. Foster, to the payment of these complainants' debts and set out in this judgment creditors' bill. Windt filed his answer, in which he states that, as deputy marshal, he levied on goods by virtue of an execution against these defendants, which were claimed by Simon P. Candee, and he sold the same under said execution; and after paying off that execution out of the proceeds of sale, there remained in his hands a surplus of $538. He also states that Candee brought suit against him for taking said goods, which suit is still pending. And he prays that he may be permitted to retain the money until the final determination of the suit. The complainants have moved verbally, for an order that Windt deposit that money in court to await the final disposition of the suit. There is no allegation that the funds are not safe in Windt's hands, supported by affidavit, nor is it alleged that notice of this motion was served on him. Primarily, he should be entitled to retain it, as in the event of that suit being determined against him, he would be obliged to pay back to Candee this money. Candee would in that event have the first and paramount right to the money, with interest. If this court were to order the money deposited here, Windt would be deprived of making interest out of it during the pendency of that suit. We have no evidence of collusion between Candee and Windt in regard of that suit, or that it is delayed for Windt's benefit in retaining the money in his hands; nor that Windt is not responsible for it on a final decree in this court against him.

The application cannot be considered in its present shape.

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

Case No. 3,678.

DAY v. GOODYEAR.

REISSUE OF PATENTS—REVIEW OF COMMISSIONER'S ACTION—INJUNCTION AGAINST ACTION AT LAW—WHEN ISSUED.

1. The action of the commissioner of patents in the reissue of letters patent is not re-examinable elsewhere, unless a clear case of fraud is made out.

[Cited in Hussey v. Bradley, Case No. 6,946.]

2. A suit in equity to obtain an injunction to restrain proceedings in an action at law will not be sustained when the allegations set up a defence, as fraud, which is a proper case for the consideration of a jury, and when the facts charged are met and denied by the defendant, such denial being sufficient to prevent the issuing of an injunction.

3. The surrender of Goodyear's original patent for vulcanized rubber, of June 15th, 1844, and the reissued patent, December 25th, 1849, was legal, and the reissued patent is not void upon its face.

Before GRIER, Circuit Justice.

[NOTE. Cited in Law, Pat. Dig. 265, 548, 617, to the points stated as above. Nowhere more fully reported; opinion not now accessible.]

DAY (GOODYEAR v.). See Cases Nos. 5,556–5,569.

Case No. 3,679.

DAY v. HACKLEY.

[2 Cranch, C. C. 251.][1]

Circuit Court, District of Columbia. Oct. Term, 1821.

ACTION OF DEBT—BAIL—PRACTICE.

1. In order to hold the defendant to bail in debt on a bond, it need not be produced until

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

oyer demanded, if there be a sufficient affidavit of debt.

2. The court will not decide upon the merits, on a motion to appear without bail.

Debt on a bond. The plaintiff made affidavit that the defendant is justly indebted to him in the sum of $2,000, and upwards, on his bond. The declaration and a copy of the bond were filed.

Mr. Lear, moved for leave to appear for defendant without special bail; and contended that the original bond ought to be produced; and that, if produced, it would appear that it was of more than twelve years' standing, and therefore, according to the Maryland statute, could not support an action.

Mr. Caldwell, for plaintiff, opposed the motion.

THE COURT (nem. con.) said that the affidavit is sufficient. The plaintiff is not bound to produce the bond until oyer is demanded, and THE COURT will not now go into the merits of the case as to the validity of the bond.

Case No. 3,680.

DAY v. HARTSHORN.

[See Case No. 3,683.]

Case No. 3,681.

DAY v. HARTSHORN.

[The case digested under above title in Law, Pat. Dig. 332, 393, 468, is evidently the same as Case No. 3,683.]

Case No. 3,682.

DAY v. HARTSHORN.

[The case digested under above title in Law, Pat. Dig. 397, is evidently the same as Case No. 3,683.]

Case No. 3,683.

DAY v. HARTSHORN.

[3 Fish. Pat. Cas. 32.] [1]

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

INFRINGEMENT OF PATENT—VERDICT AS FOUNDATION FOR INJUNCTION—LICENSEES.

1. Where a case has been tried at law, with a verdict for the plaintiff, and a motion for a new trial is made, it is the practice to refuse an injunction until after the determination of the motion.

2. A bill of exceptions and a writ of error sued out, should have the same effect as a motion for a new trial, upon an application for an injunction, though either may be disregarded by the judge if his conscience is satisfied.

3. Neither the verdict at law nor finding of the jury, in a feigned issue, are ever conclusive upon the judge sitting in equity, upon a motion for an injunction.

4. It would not follow that a judge ought to grant an injunction, although he might not set aside the verdict of the jury. In the one case the jury are the judges of the facts, in the other the chancellor must judge for himself.

5. Where a licensee undertakes to use a patent without paying the license fee, whether the license thereby becomes voidable at law or not, equity will so far enjoin him, that unless he will pay he shall not be allowed to use.

[Bill by Horace H. Day against Isaac Hartshorn for infringement of letters patent No. 16, granted to E. M. Chaffee, August 31, 1836.]

This was a motion for an injunction founded upon the verdict of the jury in a suit at law, between the same parties, which resulted in a verdict for the plaintiff. The case presented a state of facts essentially the same as that in Day v. Candee [Case No. 3676].

T. A. Jenckes and N. Richardson, for complainant.

J. S. Pitman, S. Ames, C. S. Bradley, and J. T. Brady, for defendant.

PITMAN, District Judge. Since the verdict, in this court, for the plaintiff, in the suit at law between these parties, a motion for an injunction has been again made by the plaintiff, and it has been urged upon the court that, after a verdict at law for the plaintiff in a patent cause, it was the imperative duty of a court of equity to grant an injunction, notwithstanding the pendency of a writ of error; and that such has been the invariable practice of the courts of the United States. On the other hand, it was contended that the legal rights of the parties had not been determined by the verdict, that grave questions of law were raised by the bill of exceptions, and that the court had a right to refuse the injunction, and ought to do so, until the determination of these questions by the supreme court of the United States, unless the court was satisfied that these questions were so clearly in favor of the plaintiff that the injunction should be granted, notwithstanding the writ of error.

It was admitted by the plaintiff's counsel, that where there was a motion for a new trial, the practice was not to grant an injunction until the determination of this motion, but contended that the pendency of a writ of error furnished no ground for a refusal to grant the injunction.

After the first hearing of this motion, to satisfy myself what was, or what should be, the practice in such a case, and it having been suggested by the counsel for the plaintiff that notwithstanding Judge Curtis declined to sit in this cause, there was no impropriety in my consulting him on the general question of practice, if I was so disposed, I did consult him, and also the presiding judge of the second circuit.

Judge Curtis referred me to the case of Many v. Sizer [Case No. 9,056], tried in the

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

Massachusetts district, before Judge Sprague, in which he was for the plaintiff. Judge Sprague charged the jury upon the law of the case, in conformity with the opinion of Judge Nelson in a trial of a cause before him, on the same patent. Exceptions to the charge of Judge Sprague were taken, with a view to carry the questions to the supreme court. After the verdict and judgment, a motion was made for an injunction before Judges Woodbury and Sprague—they differed as to the law, and the motion was refused. Neither judge considered that the verdict was conclusive. Judge Sprague, who was opposed to the injunction, said if the defendant should neglect to sue out or prosecute his writ of error, the application could be renewed.

Judge Curtis thought that a verdict and judgment, where there is a bill of exceptions, and a writ of error sued out, as the courts of the United States are organized, could not be distinguished from a verdict where there is a motion for a new trial, as respects the effect of a verdict upon a motion for a temporary injunction. Either the motion for a new trial or the writ of error may be disregarded by the judge, if his conscience is satisfied, but ordinarily neither should be, and, as he thought, the one no more than the other.

Judge Nelson said: "Where there has been a trial at law in a patent case before me, and the verdict for the plaintiff, if I am satisfied with the verdict, my practice is, if an application is made in the equity suit for an injunction, founded on the verdict, to grant it. But, if the verdict is not satisfactory, and the motion for the injunction is opposed, I invariably refuse it; and this, whether a motion for a new trial has been made before me in the suit at law or not. The trial at law having been before me, I claim to judge of the facts for myself, on the application for the further remedy of the injunction. I do not understand that the verdict at law, or finding in case of a feigned issue, is ever conclusive upon the judge, sitting in equity, on the application for the injunction."

After I had received these communications from these learned judges, it being suggested to me, by one of the counsel for the plaintiff, that the closing counsel, from a suggestion which I made to him at the hearing, was not heard upon one point so fully as he intended, I stated that I was willing to hear all that either party wished to say upon all the points, and the motion was then re-argued before me, upon all the points which they considered material, by both parties. At the close of this argument, one of the counsel for the plaintiff stated to me, that in the case of Day v. New England Car Co. [Case No. 3,686], pending in the southern district of New York, a motion for an injunction would be made and heard before, probably, I might be ready to deliver my opinion on this motion. I considered this at least an intimation of a wish that I would suspend my opinion until that motion was determined, and was desirous of doing so, that I might have the benefit of the opinion of the two learned judges of that court upon some of the same questions which I had to decide alone. The motion in New York not having been heard as soon as the plaintiff's counsel expected, but having been put off until the latter part of September, I waited in the hope that I might then be enlightened by its determination; but that court having, in September, as I understand, refused to hear this motion for a preliminary injunction, and reserved all the questions involved in the same until the final hearing of the cause in equity, I am now obliged, after the further consideration which I have recently given to it, to express my opinion upon this motion.

Upon the trial of the case at law, the defendants not only set up all the defenses usually set up in patent causes, but denied the right of the plaintiff under the assignment from Chaffee, the patentee, as set up by him, on the ground that Chaffee had previously conveyed it to Judson, in trust for Goodyear and his licensees, under certain agreements, which still remained in full force. Upon the argument of this motion for an injunction, I stated that I saw no reason to be dissatisfied with the verdict as to the rights of Chaffee as inventor and patentee. Upon the part of the case connected with the agreements between Chaffee and Goodyear, and Chaffee and Judson, my doubts arose.

The verdict of the jury was a general verdict for the plaintiff upon the general issue; no questions were asked on what points the verdict was founded; if, therefore, there had been a motion to set aside the verdict, as against law and evidence, it could not have been done, if the verdict could have been sustained upon any point.

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Since the trial of the case at law, and the argument of this motion, I have had more doubts upon one of the leading points on which I charged the jury for the plaintiff, viz.: whether the agreements between Judson and Chaffee were revocable at law by Chaffee, by the non-performance on the part of Judson. I have no doubt that where a licensee undertakes to use a patent without paying for it the amount specified in the license, that equity will so far enjoin him, whether the license thereby becomes voidable at law or not, that unless he will pay he shall not be allowed to use. And these considerations induced me to order the conditional injunction which I did, when the bill in this case was first filed and the defendants presented so imperfectly their case before me. The views which I then took remained with me, and influenced me, no doubt, in the construction of the agreements on the trial. I do not say that my opinion

has entirely changed on this point, but it has been so much shaken by the learned arguments of the gentleman who closed this motion on the part of the defendant, that I should not be satisfied that I had done right if I should disregard the writ of error, and grant the injunction.

But not having been satisfied with the verdict as to one part of the case, and having fully heard the parties upon all the points connected therewith, I deemed it proper to state my views in relation to the same. It was argued before me that if I was not satisfied with the verdict, yet if I would not have set it aside if a motion had been made for a new trial, that then I ought to grant the injunction. If I have the right in a court of equity to examine the evidence in a cause which is tried before me at law, and to draw my own conclusions when I am asked to grant an injunction, and ought to refuse it if I am not satisfied with the verdict, then, though I might hesitate to set the verdict aside, because I was not satisfied with the same, especially after the modern decisions on this subject, yet it would not follow that I ought to grant an injunction. The jury draw their own conclusions from the evidence, and it is their right so to do; and because I might not draw the same conclusions, this of itself is not sufficient to justify me in setting the verdict aside if they have evidence to judge from. If I should do so, I should substitute myself as judge of the facts, in a trial at law, which the parties and the law have submitted to the jury. But when I am applied to in equity, where I am judge of the facts as well as law, and required to perform an act which calls upon me to draw my own conclusions from the evidence which I heard upon the trial, there my own judgment upon the law and the evidence must determine my action, and not the judgment of the jury. I will not set aside a verdict because I differed from the jury upon the evidence, because the verdict is theirs, and they act upon their conscience. But when I have to act upon my own conscience, then I can not suffer the jury to control me, in my province, for the same reason that I should deem it improper for me to control them in their province. There are cases where, though I might be dissatisfied with the verdict, yet not so much so but that I might think it proper to suffer the verdict to be the basis for an injunction. But such is not this case; and though I do not say whether I would or would not have set the verdict aside, if a motion had been made for a new trial, and ought not to say whether I would or would not, when I am not asked to do so, unless the verdict is imperative and conclusive upon me, as it is not, unless Judges Nelson, Curtis, Sprague, and the late Judge Woodbury, have been mistaken in the law and practice in the courts of the United States; then I am called upon to act and draw my own conclusions, the same as if this evidence had been submitted to me on the trial of a bill in equity.

Another view was presented, at the argument, by the counsel for the defendant, to show that the verdict ought not to be conclusive, as settling the right of the plaintiff to an injunction: that the verdict can only settle legal rights, and can not control the court of chancery in the administration of equitable principles; and one of these is, that it will not enforce a forfeiture at law. Upon this point many authorities were cited. In the course of the argument, in order to show what relief was granted in the courts of the United States, where there had been a contract between the parties for the use of a patented machine, which was sought to be avoided in equity, for non-performance by the licensee, the cases of Brooks v. Stolley [Case No. 1,962] and Woodworth v. Weed [Id. 18,022] were referred to.

In the case of Brooks v. Stolley [supra], the plaintiffs applied to Judge McLean for an injunction to restrain the defendant from using a certain planing machine, claimed by the complainants under Woodworth's patent; the bill stated that they had granted a license to the defendant to run the same, upon paying one dollar and twenty-five cents for every thousand feet of boards he should plane, payable Monday of every week; that for a short time the defendant complied with the contract by making payment, but had failed to do so for some time, and had refused to do so, though he still continued to run the machine; and on this ground an injunction was prayed for. The defendant admitted the failure to make payment, and averred that the complainants had, in several respects, violated the contract on their part, and that he was deceived as to the import of certain parts of the contract. In the contract, the performance of its stipulations by the defendant was expressly made a condition to his continued use of the machine. In this case, Judge McLean said: "An injunction is prayed, which, in effect, will annul the contract. Now, although it may be admitted that the defendant, as the facts of the case stand, could not successfully invoke in his behalf the action of a court of equity, or of law, yet under the relief asked by the complainants, a somewhat different view may be taken. Are the complainants entitled to an absolute injunction which shall annihilate the contract? It appears to me that short of this, adequate relief may be given. In this respect the case is altogether different from an ordinary case of infringement, where no contract has been made by the parties. In that case an absolute injunction is the only adequate relief; but in the case under consideration, the complainants have licensed the defendant to use the patented right under certain conditions. If the use go beyond these conditions, there is an infringement

which must stand on the general ground unaffected by the contract; and as to such an use the injunction should be absolute. On this ground the jurisdiction in this case is sustainable; and having jurisdiction, the court may decide other matters between the parties." In this case the court did not order an absolute injunction, but granted an injunction unless the defendant should pay the complainants according to his contract, and perform all the other conditions of his contract.

In the case of Woodworth v. Weed [supra], before Judge Nelson, the plaintiff filed his bill against the defendant, setting forth that as patentee, under the Woodworth patent, he entered into an agreement with the defendant whereby he granted to him a license to construct and use one of the Woodworth planing machines, for which the defendant agreed to give his promissory notes, in all amounting to four hundred dollars; two for fifty dollars each, and three for one hundred dollars each; payable at different and specified times; the defendants further agreeing that in case said notes were not paid when they or either of them fell due, then the said license and permission should be void, and the same should revert to said Woodworth. The bill set forth that the defendant constructed and ever since used said machine, and gave his notes, four of which, amounting to three hundred dollars, were due and unpaid. The bill stated that the license and permission to use the machine had become void, and that, according to the terms and conditions of the license, the defendant had no longer any right to use it, and prayed for an injunction to restrain its use. In this case, Judge Nelson said: "From the terms of the agreement, the license was forfeited the moment one of the notes became due and was unpaid, and it was optional with the plaintiff to resort to his remedy, at common law, to enforce the collection of the notes, or to treat the rights of the defendant as forfeited under the stipulation in the agreement." "The stipulation is to be considered as a double security given by the defendant to the plaintiff for the payment of the consideration money." In this case Judge Nelson did not grant the injunction prayed for in the bill absolutely, but made such an order as was made by Judge McLean in the case of Brooks v. Stolley [supra]. He made an order "granting the injunction unless the defendant within sixty days paid to the plaintiff the principal and interest due upon the notes mentioned in the bill which had fallen due, and the plaintiff's costs."

When the motion to dissolve the injunction in the case of Day v. New England Car Co. [supra], which had been granted by Judge Betts, was argued before the circuit court in New York, Judge Nelson referred to the case of Woodworth v. Weed [supra]. The injunction was dissolved by the consent of both judges, and all further proceedings suspended in the bill in equity, until the trial of the case at law. No reasons were stated by the court for the dissolution of the injunction. After a very long trial before Judge Betts, of the case at law, the death of one of the jury put an end to the trial before that jury, and no trial has yet been had, and recently this court has refused to hear the motion for a preliminary injunction, as I have stated. If the plaintiff in that case in New York had stated in his bill the agreements between Judson and Chaffee, and prayed for an injunction on the ground that the same had become void by reason of the non-performance on the part of Judson, then the circuit court in New York would have had the power to have made the same conditional order as was made in the cases already stated, and then upon the payment of the annuity by Judson, which was in arrear, the rights of Judson and Goodyear and his licensees would have continued. But the plaintiff did not choose to state anything about these agreements in his bill, in Connecticut, in New York, or in this district.

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Whatever effect at law should be given to the letter of Judson, of June 23, 1853, and his authorizing Chaffee to draw upon him for the quarterly payments then due, I have always considered that, in equity, it should be considered as protecting the rights of Judson and Goodyear and his licensees, and that, until Chaffee had drawn for this amount (the usual way in which he had received payment), and payment had been refused, he had no right in equity to revoke, for the temporary withholding of these quarterly payments. On the trial at law, I was requested to instruct the jury, that after this letter of Judson, Chaffee had no right to revoke, but I did not do so because I did not consider, at law, that this authority to draw was equivalent to payment, not being a legal tender. And this is one of the questions embraced in the exceptions. But this motion for an injunction is addressed to a court of equity, and should be refused if upon equitable principles it ought not to be granted.

It was suggested by the counsel for the plaintiff on the argument of this motion before me, in reply to the argument on the other side, that equity would not aid to enforce a forfeiture; that it would be time enough to answer this argument when Mr. Judson or the defendants brought a bill to be relieved from the forfeiture. In the cases decided by Mr. Justice Nelson and Mr. Justice McLean, which have been cited, there was no bill filed by the licensee to be relieved from the forfeiture. But it was deemed sufficient by the learned judges, in those cases, that the complainant sought for an injunction, on the ground of forfeiture, to enable them to decree as they did, upon a bill which set forth the contract. And is the complainant in this case to protect himself by not stating the contract in his bill? Is he not bound to state all the facts known

to him in his bill? And if the patentee seeks for an injunction on the ground of an infringement, and states nothing about a contract which authorized the use, and such a contract by the answer appears, he must, by the rules and decisions of the supreme court of the United States, amend his bill before he can be allowed to impeach the contract, or go out of court. See the case of Piatt v. Vattier, 9 Pet. [34 U. S.] 415, 416, and the 45th of the equity rules of the supreme court.

If in a court of equity an absolute injunction would be refused upon a bill praying for an injunction, on the ground that the defendant had not performed the conditions of his contract, which authorized the use of a machine, but would allow the use upon the future fulfillment of his contract, and only a conditional injunction would be granted, is not this a good reason why a verdict, founded upon such a forfeiture, should not be considered as a sufficient reason to induce a court of equity to grant an absolute injunction? Having the whole case before me upon the evidence upon which it was tried at law, if I am not satisfied with the verdict, or if it presents a case in which in equity an absolute injunction should not be granted, then I ought not to grant it. It is true, these defendants are not parties to these agreements of September 5, 1850, and November 12, 1851, but I was of the opinion that under their agreement with the Shoe Associates and Judson, since the extension, the Shoe Associates having the exclusive right to use the Chaffee patent for the manufacture of boots and shoes, under the contract with Goodyear, previous to the extension, and under the agreement between Judson and Chaffee, since the extension, that the defendants had a right to use it in the manufacture of boots and shoes under the Shoe Associates, and by their license, to participate in their monopoly. But whether this be correct or not, the plaintiff has no right to recover in this case if the agreements between Judson and Chaffee are still subsisting. If, therefore, the evidence in the case at law, presents a case in which in equity an absolute injunction would not be granted, if the case had been properly presented there, then in this case such an injunction ought not to be granted, and the plaintiff should not derive any benefit from the fact that he has not chosen to state anything, in his bill, in relation to the agreements between Chaffee and Judson.

If on July 1, 1853, Chaffee had applied to a court of equity for an injunction against any of the licensees of Goodyear, who were using his patent under the agreement between Chaffee and Judson, on the ground of the nonpayment of the sums stipulated to be paid him for such use, then he would have obtained an order for an injunction, unless payment of the amount in arrear was made, and the future payments continued, but the contract would have been held a subsisting contract and the rights of all parties under it preserved under such payment.

Mr. Chaffee did not choose to take this course. Acting by the advice of counsel, he treated this contract as forfeited at law for non-payment, he revoked it for non-payment, and sold and conveyed his patent to the plaintiff. It is admitted that the plaintiff has no more right under this conveyance than Chaffee had when he conveyed it; the plaintiff stands in the shoes of Chaffee. Is it in the power of Chaffee to vary his own rights, or the rights of Goodyear and his licensees under this agreement, in a court of equity, by making a revocation and a conveyance to the plaintiff, who frames his bill so as to treat the licensees of Goodyear as common infringers, and thus endeavors to obtain an absolute injunction against them; when, if Chaffee, or the plaintiff, had come into a court of equity, and had stated, in his bill, the whole case under this agreement, such an order would have been made as might have preserved the rights of all the parties under the contract, and insured its future performance? If a court of equity shall consider that this revocation ought not to have been made, and the contract treated as utterly void, then it will give no effect to the revocation, and the court, if it can not grant such an injunction under the bill, as, upon a performance in future, may preserve the rights of all the parties, it will at least refuse to grant an absolute injunction.

Whether, therefore, I consider the evidence and the law of this case in regard to the legal rights of the parties, or the relief which ought to be granted upon the proper presentation of such a case in equity, as the evidence on the trial at law presented, I can not grant the unconditional injunction which is asked for in this case. The motion of the plaintiff is denied, but without costs.

[NOTE. For other cases involving this patent, see note to Day v. Union India-Rubber Co., Case No. 3,691.]

DAY (KENTUCKY SILVER MIN. CO. v.). See Case No. 7,719.

Case No. 3,684.

DAY v. LYONS.

[Cited in Law, Dig. 549, as following Day v. Stellman, Case No. 3,6 0. Nowhere reported; opinion not now accessible.]

Case No. 3,685.

DAY v. NEWARK INDIA-RUBBER MANUF'G CO.

[1 Blatchf. 628;[1] 1 Fish. Pat. Rep. 394.]

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

FEDERAL COURTS—JURISDICTION IN PATENT CASES—TERRITORIAL LIMITS—HABITAT OF CORPORATION—FOREIGN ATTACHMENT—STATE PRACTICE.

1. Although the circuit courts of the United States have jurisdiction of all cases at law and

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in equity arising under the patent laws for infringements of patents, without regard to the citizenship of the parties or the amount in controversy; yet, under section 11 of the judiciary act of 1789 (1 Stat. 78), in order to give jurisdiction, the defendant must be an inhabitant of the district in which the suit is brought, or be found within it at the time of serving the original process, whatever may be the nature or character of that process.

[Cited in Winter v. Ludlow, Case No. 17,-891; Atkins v. Fibre Disintegrating Co., Id. 602; Ex parte Schollenberger, 96 U. S. 378; Brownell v. Troy & B. R. Co., 3 Fed. 761.]

2. Where a manufacturing corporation, chartered by New-Jersey, and having its place of business and manufactory in that state, had a store in New-York conducted by its agents, where its goods were sold, and a suit was commenced against it in this court by attaching its goods found in that store, and serving a summons on its president at New York: yet, *held*, that the corporation was not an inhabitant of this district, or found within it at the time of serving the process, and that this court had no jurisdiction of the action.

[Cited in Decker v. New York Belting Co., Case No. 3,727; Fonda v. British-American Assur. Co., Id. 4,904; Williams v. Empire Transp. Co., Id. 17,720; Walker v. Lea, 47 Fed. 649.]

3. A corporate body created by a sister state can have no corporate existence beyond the limits of the territory of that state.

[Cited in Pomeroy v. New York & N. H. R. Co., Case No. 11,261; Main v. Second Nat. Bank, Id. 8,976; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. (87 U. S.) 148; Williams v. Empire Transp. Co., Case No. 17,-720; Runkle v. Lamar Inv. Co., 2 Fed. 13; Boston Electric Co. v. Electric Gas-Lighting Co., 23 Fed. 839; Zambrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. 452.]

4. This court would, under section 11 of the judiciary act of 1789, have no jurisdiction in suits against foreign corporations, even where the state practice of New-York, if adopted by it, would authorize the institution of such suits by attaching their goods within the jurisdiction of the court.

[Cited in Myers v. Dorr, Case No. 9,988; Southern Atlantic Tel. Co. v. N. O., M. & T. R. Co., Id. 13,185; Cummings v. Grand Trunk Ry. Co., Id. 3,475; Stillwell v. Empire Fire Ins. Co., Id. 13,449; Brownell v. Troy & B. R. Co., 3 Fed. 763.]

5. This court has not, heretofore, by any of its rules, adopted the practice of the state courts of New-York which provides for commencing suits against foreign corporations by attachment.

[Cited in New England Ins. Co. v. Detroit & C. Steam Nav. Co., Case No. 10,154.]

This was a motion on the part of the defendants [the Newark India-Rubber Manufacturing Company] to quash a writ of foreign attachment and a summons issued out of this court against them by the plaintiff [Horace H. Day] for an alleged infringement of certain letters patent. Under the writ a large amount of their goods had been seized in the city of New York, and were in the possession of the marshal. The writ was issued in pursuance of an act of the legislature of the state of New-York, providing for the commencement of suits against foreign corporations by process of attachment against any property belonging to them that may be found within the state. 2 Rev. St. p. 459, § 15, etc. The defendants were a corporation created by the legislature of the state of New-Jersey, for the manufacture of India-rubber goods; and their place of carrying on the manufacture and of business was at the city of Newark in that state. They had a store in the city of New-York, where their manufactured articles were received for the purposes of sale, which store was conducted by their agents. The goods seized by virtue of the attachment were found in this store, under the circumstances stated; and the summons was served at New-York upon the president of the company who resided at Newark, but was at the time casually in New-York on business. The plaintiff was a resident of the state of New-Jersey.

Francis B. Cutting and Edgar S. Van Winkle, for plaintiff.

Seth P. Staples and Edward Sandford, for defendants.

NELSON, Circuit Justice. The seventeenth section of the patent act of July 4th, 1836 (5 Stat. 124), provides, that all actions arising under any law of the United States granting to inventors the exclusive right to their inventions shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court. The jurisdiction of the circuit courts embraces, therefore, all cases both at law and in equity arising under the patent laws for infringements of letters patent, without regard to the citizenship of the parties, or the amount in controversy. But, the eleventh section of the judiciary act of 1789 (1 Stat. 78), which provides for service of process in the commencement of suits in this court, is as applicable to this class of cases as to any other in which jurisdiction may exist. That provision is as follows: "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

In the case of Toland v. Sprague, 12 Pet. [37 U. S.] 300, which was the case of a foreign attachment issued by the circuit court of the United States for the eastern district of Pennsylvania, agreeably to the practice of the courts of that state, which had been adopted by the circuit court, it was held, after a full examination: 1. That, by the

general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That, independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of congress adopting the state process, adopt the forms and modes of service only, so far as the persons are rightfully within the reach of such process, and do not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to process in personam; and that, even where a person is amenable to process in personam, an attachment against his property cannot be issued, except as part of or together with process to be served upon his person.

In that case the plaintiff was a citizen of the state of Pennsylvania; and the defendant was a citizen of Massachusetts, but was, and had been for many years a resident of Gibraltar. The attachment was levied on his goods found in the district of Pennsylvania. The defendant appeared and defended the suit, which gave the circuit court jurisdiction; otherwise it would have been denied. The same point had been previously ruled by Judge Story in the case of Picquet v. Swan [Case No. 11,134], and in which it was also held, that the judiciary act of 1789 does not contemplate compulsory process against any person in any district, unless he is an inhabitant of the district, or is found within it at the time of serving the writ.

And, in the case of Richmond v. Dreyfous [Id. 11,799], it was held by the same learned judge, that a foreign attachment cannot be maintained in the circuit court of the United States against the principal defendant, unless he is an inhabitant of the district where the suit is brought, or is found within it at the time of the service of the process; and that service upon trustees or garnishees within the district is not sufficient to found a judgment against the principal. That case arose in the district of Rhode-Island, and the goods of the principal defendant, who was a citizen of and a resident in the state of Pennsylvania, were attached within the district, according to the statute of the former state regulating proceedings in cases of foreign attachments. The proceedings were quashed for want of jurisdiction.

Upon the provisions of the eleventh section of the judiciary act above referred to, therefore, and the expositions given to it in the several cases in which it has come under the observation of the courts, it must be regarded as settled, that, in order to give jurisdiction to the circuit courts of the United States, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this, whether the suit be commenced by writ, summons, or attachment, or whatever may be the nature or character of the process used. No exception is found in the act of congress providing for the commencement of suits in these courts, nor in the judicial expositions given to it. And the simple question in this case, therefore, is, whether or not the defendants, as a corporate body, or in their corporate existence, have been brought within either of the alternatives provided for in the act, so that the service of the process, as disclosed in the papers before us, can give to this court jurisdiction of the case. Are they inhabitants of this district, within the meaning of the act of congress, or were they found within it at the time of the service of the attachment and summons?

Assuming that it has been shown on the part of the plaintiff, that the president of the corporation or any of its officers were inhabitants of or were found within this district at the time of the service, or that the goods attached were the property of the corporation and were found within it, the objection to the jurisdiction still exists; for, the party against whom the suit is brought is the corporation created by the legislature of the state of New-Jersey. This is the body charged with the infringement of the plaintiff's patent, and against whom the suit has been instituted; and it is this body that must be shown to be an inhabitant of the district or be found within it, in order to give the jurisdiction. Now, we think it is quite clear, that a corporate body created by the law of a sister state can have no corporate existence beyond the limits of the territory within which the law creating it can operate; and, that, when and where the law ceases to have any force and effect, this legal entity and mere creature of the law ceases to have any existence. If the law should be abrogated by the legislature creating it, it would cease to exist in the jurisdiction within which it was created, the law bringing it into existence and upholding it being no longer in force; and, for the like reason, it can never have any legal being or existence extra-territorial, where the law creating it never had any operation or force.

We do not intend, nor have we time, in the pressure of the business of a circuit, to go into an illustration of this general principle by a reference to the character, powers, and faculties of these institutions, or to define the limits of the operation of the laws of the states, upon which their existence depends; but, shall content ourselves by stating the general principle, and briefly referring to what was said by the chief justice in delivering the opinion of the court in the case of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 588. Referring to the argument in that case on the part of the defendants, that a corporation, from the very nature of its being, could have no authority to contract out of the lim-

its of the state within which it was created, as the laws of a state had no extra-territorial operation, he observed: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another."

The court held in that case that, though the bank, as a corporation, must be regarded as an artificial being, existing only in the state in which it was created, yet it was as competent, within the scope of its powers, to make contracts in another sovereignty through its agents, as a natural person, if permitted by the laws of that government to exercise the faculties with which it was endowed. It is upon this principle, doubtless, that the defendants have established and are maintaining a depot for the sale of their manufactured articles in the city of New-York, which is conducted by their agents and under their authority.

Without pursuing the examination of the case further, we are satisfied for the reasons stated, that neither the levying of the writ of attachment upon the goods of the defendants in this district, nor the service of the summons upon their president within it, nor both together, have the effect to give jurisdiction to the court in this case against the defendants; and further, that, according to the true construction of the eleventh section of the judiciary act of 1789, the court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the state practice, if adopted by it, would authorize the institution of such suits by the attachment of their goods found within the jurisdiction.

We have not deemed it important, in the view we have taken of the case, to enquire whether or not this court has heretofore, by any of its rules, adopted the practice of the state courts in cases of foreign attachment; but will simply state our conclusion, which is, that it has not, and that, upon this ground, the proceeding by attachment would be irregular and should be set aside. As the ground first stated goes to the jurisdiction of the court, we have preferred placing our decision upon it, as it reaches beyond the question in respect to the nature and character of the process by which the suit was commenced.

We shall, therefore, direct that a rule be entered quashing the writ of attachment and the summons which have been unadvisedly issued in the case.

Case No. 3,686.

DAY v. NEW ENGLAND CAR CO.

[3 Blatchf. 154.][1]

Circuit Court, S. D. New York. Feb. Term, 1854.

PATENTS—INFRINGEMENT SUITS—PROVISIONAL INJUNCTION—PRACTICE.

1. The course of practice stated, on a motion for a provisional injunction to restrain the infringement of letters patent.

[Cited in Day v. Hartshorn, Case No. 3,683.]

2. Under rule 107 of this court, in equity, and the amendatory rule of this court, of May, 1846, (1 Blatchf. C. C. 656) the court, or a judge out of court, has power to permit the plaintiff, on such a motion, where the defendant sets up a license in defence, to put in proofs in rebuttal of the proofs put in by the defendant.

3. The order to admit such rebutting proofs, when made by the court, is regular although not made till such rebutting proofs are received.

4. But the defendant cannot reply to such rebutting proofs by further proofs on his part.

This was an application [by Horace H. Day] for a provisional injunction [against the New England Car-Spring Company] to restrain the infringement of letters patent [No. 16] granted and extended to one Chaffee. The facts are stated in the opinion of the court.

Edwin W. Stoughton and Nathaniel Richardson, for plaintiff.

Charles O'Conor and Edward N. Dickerson, for defendants.

BETTS, District Judge. The bill in this case prays an injunction against the defendants, to restrain them from violating the plaintiff's patent right.

When the motion for the injunction was brought on, the plaintiff's counsel read the bill, and an affidavit proving a violation of the patent right by the defendants, and rested his case. The defendants read affidavits, to prove that they were using the patented contrivance under a license. The bill alleges the first and original discovery or invention by the patentee, the granting of the patent, its extension, the use of the patent by the patentee for a considerable period, and its utility. It then charges that the extended patent has been duly assigned to the plaintiff by the patentee, and that no license or permission has been given by the patentee, or the plaintiff, to the defendants, to use it; and avers their violation of the plaintiff's right, and prays an injunction against them.

Under the rules of equity pleading, independently of the positive rules of this court, in order to meet the case made by the plaintiff for the interposition of the court by injunction, the defendants must disprove the invention, or the right of the plaintiff as as-

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signee, or the infringement of the patent; or else prove that they are using the invention under the license of the plaintiff, or of the patentee, granted prior to the right of the plaintiff. Otherwise, the plaintiff will be entitled to an injunction on his proofs.

It was not necessary for the defendants to give to the plaintiff previous notice of their defence. They are entitled to make it by answer or depositions, when the motion for an injunction is brought on. But then, on their part, the defence must be complete and final as to the interlocutory proceeding.

They set up, in defence, that the patentee, both before his extended patent was obtained, and after it was granted, and prior to its assignment to the plaintiff, entered into written contracts or arrangements, by virtue of which one Goodyear, or one Judson, became possessed of the entire right and property of the patentee in the invention, or of authority to dispose of it; and that they, the defendants, have acquired and own a license granted by Goodyear to other parties, and another given by Judson to the defendants, to use the patented discovery.

The plaintiff, after that evidence was read, proposed to read affidavits to countervail the allegations in the defendants' proofs, and to disprove the validity of their alleged licenses. This was objected to by the defendants, on the ground that the plaintiff had no right, either under the existing rules of the court, or under the general principles of practice, to read affidavits in addition to those put in with his bill. But the court decided that, under rule 107 of this court, the plaintiff was entitled to put in additional proofs, and ordered the affidavits to be read. The further hearing of the cause was then postponed to this day. The counsel for the defendants now move the court to rescind the order permitting the plaintiff to read additional affidavits, or else to allow them to file further proofs, in reply to the additional evidence put in by the plaintiff, on the ground that the rule of May, 1843 (1 Blatchf. C. C. 656), amending rule 107, was not brought to the notice of the court when that order was made.

But, in my opinion, that order was perfectly regular, and was in consonance with the provisions of both of those rules, and with the established practice of this court. The order to admit suppletory proofs in reply to evidence given for the defence, need not, when made by the court, be made any particular length of time anterior to the reception of the proofs, but may be simultaneous with their admission. In practice, there will necessarily be an interval of time, when the order is made by a judge out of court. But neither the letter nor the spirit of the rule looks to such interval of time when the court in session grants the permission. The application to the court, and the order of the court thereon, will, in the ordinary course of proceedings, be at the time of the hearing. The rules require no more than that the court, or one of the judges, shall, on satisfactory cause shown, allow proofs in reply to be given by a plaintiff. The cause for suppletory proofs in this case is apparent upon the papers of the defendants, because they set up a license as their defence; and there is no necessity for extraneous evidence from the plaintiff, to satisfy the court of the propriety of permitting him to go beyond the evidence furnished by him in the first instance, in order to meet this justification. I consider this case, therefore, to be clearly within the spirit of rule 107, and of the amendatory rule of May, 1846.

The defendants argue, that they are subjected to an oppressive restriction, in being debarred from giving evidence in answer to the additional proofs read by the plaintiff, and are in that way surprised out of a meritorious defence. This view scarcely comports with the assertion of the counsel for the defendants, that it is matter of notoriety that the plaintiff has no shadow of just title to the patent, and that the defendants well knew the character of this prosecution, and what the title of the plaintiff was. Because, if the plaintiff also knew what the defence was, and undertook so to frame his bill as to put them to the assertion of their license as a defence, and to hold them to that defence alone, the defendants would seem to have been acting under sufficient notice of the plaintiff's case, and might have met the trick they charge to have been thus sprung upon them, by making, by affidavits, in the first instance, the case which they consider to be conclusive in their favor and against the plaintiff. It may not, however, be inappropriate to remark, that whatever notoriety these parties or their litigation may have in this section of the country or elsewhere, the litigants and the litigation are wholly new and strange to me. I know nothing more of the rights of the parties than they have chosen to exhibit upon the papers in court. They stand here, the plaintiff seeking to enforce and protect an alleged patent right, and the defendants resisting that effort with the assertion that they are licensees. The case between these parties is to be regarded here in no other light than as if any patentee had filed a bill for the violation of his patent, and the party complained of had justified his conduct under a license. It would then be the right of the plaintiff to disprove the existence of such license without resorting to a new suit, and without, by giving such suppletory proof, opening to the defendant the privilege of contesting it by contradictory affidavits.

There is no surprise, therefore, to the defendants, according to their own avowal on this motion. There might be more color of equity in their application, if they showed that they showed that they had no knowledge or expectation that the plaintiff would contest the validity of their license, and, for

that reason, had not supported it, in the first instance, by the proofs in their possession. They might, under such circumstances, have invoked the equitable powers of the court, to stop the proceedings, and compel the plaintiff to charge in his bill the invalidity of the license which he knew the defendants possessed and meant to uphold. But there is no pretence of such ignorance on the part of the defendants. If each party chose to exercise the strategies of pleading, and try to call out the case of his adversary without disclosing his own, each must take to himself the consequences of the manoeuvre.

The rules of proceeding applicable to injunctions must govern this case. The plaintiff has set out his rights and his injuries by his bill; and the defendants must be prepared to make their entire defence thereto, by showing, in the first instance, by their answer or by affidavits, a want of right in the plaintiff or a superior right in themselves. The law allows the plaintiff to obviate such defence by suppletory or rebutting evidence, and precludes the defendants from replying to such rebutting evidence by further proofs on their part. This is alike the rule at law and in equity. No court permits a defendant to make a new defence to proofs or arguments made in reply to his own. He has one hearing or chance alone, and must abide the advantage placed in the hands of a plaintiff. But this disadvantage to a defendant is not perpetual. These defendants can file their answer to the bill, and move to dissolve the injunction; or they can appeal to the discretion of the court to award only a qualified one, or, instead of peremptorily stopping their manufactory, to place them under bonds to indemnify the plaintiff in such damages as he may prove he has sustained by their doings.

As this case stands, the defendants can meet it upon this motion only by showing, from the depositions and documents now before the court, that the plaintiff has no title to the patent in question, or that a paramount legal or equitable right thereto is vested in them. This I understand to be, in a proceeding, by injunction bill, to stay waste or to prevent the infringement of patent rights, the established practice of this court and of the English court of chancery. Rule 107 of this court, in equity; rule of this court, of May, 1846, Fed. Cas. Append.; 3 Daniell, Ch. Pr. 1885, 1886, and notes; 2 Waterman's Eden, Inj. 384, 385, and notes.

The motion on the part of the defendants to read affidavits answering those read by the plaintiff in reply to theirs in defence, is accordingly denied, and the plaintiff is at liberty to proceed upon his application for an injunction.

[NOTE. See Case No. 3,687 for an opinion in an action at law between the same parties for infringement of the same patent. For other case involving this patent, see note to Day v. India-Rubber Co., Case No. 3,691.]

Case No. 3,687.

DAY v. NEW ENGLAND CAR CO.

[3 Blatchf. 179.][1]

Circuit Court, S. D. New York. May Term, 1854.

PATENTS—ACTION AT LAW FOR INFRINGEMENT—SPECIAL PLEAS.

1. Where, in an action on the case for the infringement of letters patent, brought by an assignee of the patentee, the defendant, with the general issue, without any notice of special matter, pleaded special pleas, not impeaching the validity of the patent, or denying the use by him of the patented invention, but setting up a license under the patentee paramount to the right of the plaintiff: *Held*, that the special pleas were well pleaded, and could not be stricken out on motion.

[Cited in Hubbell v. De Land, 14 Fed. 473.]

2. It seems, that the supreme court of the United States has decided, that in an action at law for the infringement of a patent, a defendant is not limited to the plea of the general issue, even if his defence rests on matters which he may, under section 15 of the act of July 4, 1836 (5 Stat. 123), give in evidence under the general issue, but that he may plead those matters specially.

3. The case of Wilder v. Gayler [Case No. 17,649] questioned, as being in conflict with Evans v. Eaton, 3 Wheat. [16 U. S.] 454, and with Grant v. Raymond, 6 Pet. [31 U. S.] 218.

This was an action on the case [by Horace H. Day against the New England Car-Spring Company] for the infringement of letters patent granted to Edwin M. Chaffee, on the 31st of August, 1836, and extended for seven years from the 31st of August, 1850. On the 1st of July, 1853, the patentee assigned the entire patent to the plaintiff. The defendants interposed a plea of not guilty, without any notice of special matter, and also four special pleas in bar.

The first special plea counted upon a contract in writing, for the assignment of the expected extension of the patent, entered into between the patentee and one Charles Goodyear, on the 23d of May, 1850, and before the assignment of the patent to the plaintiff, by which it was stipulated, that the patent, when extended, should be assigned to Goodyear, upon the terms therein stated; and the plea averred that the defendants used the patented improvement, with the license and permission of Goodyear, at the times in the declaration mentioned.

The second special plea averred the making of the above-mentioned contract by the patentee with Goodyear, and also that, before the assignment to the plaintiff, and on the 5th of September, 1850, the patentee made a contract in writing, in respect to the extended patent, with one William Judson, which contract was set forth in the plea; and that, on the 12th of November, 1851, the patentee made another contract in writing with Judson, in relation to the extended patent, and before the assignment thereof to the plaintiff, which contract was also set forth in the plea;

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and that both of those contracts were recorded in the patent office before such assignment to the plaintiff was made. It then averred the use of the patented discovery by the defendants, by the license and permission of Goodyear and Judson.

The third special plea counted upon the written agreements between the patentee and Judson, before referred to, and set them forth, and averred that the defendants used the improvements of the patentee with the license and permission of Judson.

The fourth special plea counted upon the contract before referred to, entered into on the 23d of May, 1850, between the patentee and Goodyear, and set forth, and averred that, by means thereof, the assignment of the patent to the plaintiff was wholly inoperative and void.

The plaintiff obtained an order for the defendants to show cause why the special pleas should not be stricken out, upon the ground that the matters therein contained might be given in evidence under the general issue.

Edwin W. Stoughton and Nathaniel Richardson, for plaintiff.

James T. Brady, for defendants.

BETTS, District Judge. It is probably true, as a general proposition, that, in actions on the case, the defendant may plead specially many matters which he might give in evidence under the general issue (1 Chit. Pl. 489; Gould, Pl. pp. 333, 334, §§ 55, 56; Steph. Pl. pp. 226–229), particularly when color is given for pleading more than the general issue (Steph. Pl. pp. 415, 416). Without, however, discussing the point upon the general doctrines of the common law applicable to pleading, this court is bound to administer its proceedings in conformity to the principles laid down, in regard to this form of action, by the supreme court of the United States. And that court has explicitly declared, in Evans v. Eaton, 3 Wheat. [16 U. S.] 454, that in actions at law for the infringement of patent rights, a defendant is not limited, in his defence, to the plea of the general issue allowed by the statute, even if his defence rests upon matters which the statute authorizes to be given in evidence under the general issue, but that he may, at his option, plead those particulars specially. In that case, the court says: "It has been already observed, that the notice is substituted for a special plea; it is farther to be observed, that it is a substitute to which the defendant is not obliged to resort. The notice is to be given only when it is intended to offer the special matter in evidence on the general issue. The defendant is not obliged to pursue this course. He may still plead specially, and then the plea is the only notice which the plaintiff can claim." In Grant v. Raymond, 6 Pet. [31 U. S.] 218, the court repeats the same doctrine. This principle is the fundamental law of pleading in the courts of the United States, in common law actions for the infringement of patent rights. Phil. Pat. 396, 400; Curt. Pat. §§ 271, 272.

The decision of this court, in Wilder v. Gayler [Case No. 17,649], relied upon by the plaintiff to sanction this motion, if in conflict with that doctrine, must necessarily yield to the paramount authority of the supreme court. The pleas are not set forth in the report of that case, but the remarks of the court would imply, that each one rested on averments tantamount to the defences which the defendant might have made under his general issue, with notice. The pleas were of that character in the subsequent case of Paton v. Rennie [Id. 10,799], in which this court, in September, 1853, ordered the special pleas to be stricken from the record with costs, and it is plain that the court made the order in that case in reproof of the practice of pleading special pleas, when all the matters thereof might be given in evidence under the general issue. In that case, there was no notice with the general issue. Still, there would be difficulty in discriminating those cases, in this court, from the rule laid down by the supreme court, even if the pleas in those cases did amount to the general issue, for that rule leaves it absolutely to the option of the defendant to rely upon the general issue, or to plead specially, although the facts specially pleaded be such as are by the statute permitted to be given in evidence under the general issue; and although the special pleas would thus have no other effect than the general issue with notice. It is true, that the question was not directly raised in those cases, in the supreme court, whether a defendant may plead specially matters amounting to the general issue. But the point is certainly strongly implied, because, both under the 6th section of the act of February 21, 1793 (1 Stat. 322), and under the 15th section of the act of July 4, 1836 (5 Stat. 123), the defendant is allowed to give notice, under the general issue, of facts to be proved, which show that the patentee acquired no title under his patent, which question of title is necessarily a primary and vital point involved in the general issue.

I am not, however, required to disregard the decision in Wilder v. Gayler [supra], in determining this motion, because the special pleas in question cannot, with propriety, be declared to amount to the general issue. They do not deny the facts which constitute the ground of the plaintiff's demand. They propound matters of fact and law, which the defendants aver bar that operation, in favor of the plaintiff's right, which the facts alleged by him might otherwise have. In that manner, the pleas may work the effect of the general issue, as they maintain that, on the facts and law, the plaintiff does not possess the right he claims; and, in that sense, they may be also said to involve the general issue, because, either by permission of the statute, or at common law, the defence made by them might be admissible under the general issue.

Still, as I understand the doctrine laid down by the supreme court, those are instances in which a defendant has his election to rely upon the general issue, or to plead his defences specially.

These pleas are without two cardinal features of the general issue. They do not impeach the validity of the patent, nor do they deny the use of the patented discovery by the defendants. The defendants are estopped, by the pleas, from controverting either of these facts. The defence propounded by them is not inconsistent with those allegations in the declaration. On the contrary, it claims a right in the defendants to continue in the use of the patented discovery, from the fact of a title to such use, derived by them through the patentee; and seeks to avoid the title of the plaintiff, acquired by direct assignment from the patentee, by alleging matters outside of that assignment, which prevent its passing any title to him, either because of the incapacity of the patentee in that respect to make such grant, or because of an outstanding paramount right in others. These implied admissions of the right of the patentee, through whom the plaintiff makes title, are sufficient in law to afford color for the avoidance set forth by the special pleas. This is not the time for the court to pass upon the sufficiency of the pleas to the ends proposed by them. It can legitimately consider only whether that mode of defence is, within the meaning of the rules of pleading, no more than a simple denial of the plaintiff's right of action, and thus amounts to the general issue. The aim of the pleas is to put forth allegations in avoidance of the plaintiff's right, and in justification of the defendants' proceedings. Special pleas may be employed for that purpose, even in actions of assumpsit, as a release (Lawes, Pl. 637); and more particularly in actions of tort, in respect to property admitted to be in the plaintiff, as a license to do the act complained of (1 Chit. Pl. 494).

In my opinion, the pleas in question are authorized by law. The motion on the part of the plaintiff is, therefore, denied; but, as it was countenanced by express decisions of this court on the point of practice, costs are not granted to the defendants.

[NOTE. A subsequent opinion was delivered in this case on questions of law raised at the trial. Case No. 3,688. For opinion upon an application for a provisional injunction, in a suit in equity between the same parties in respect to the same patent, see Case No. 3,686. Other cases involving this patent are enumerated in a note to Day v. Union India-Rubber Co., Case No. 3,691.]

Case No. 3,688.

DAY v. NEW ENGLAND CAR-SPRING CO.

[3 Liv. Law Mag. 44.]

Circuit Court, D. New York. Oct., 1854.

ADMISSIBILITY OF PAROL EVIDENCE TO SET ASIDE A SEALED INSTRUMENT—RIGHTS OF ASSIGNEES.

1. In a suit for the infringement of a patent right, the defendants, to defeat the plaintiff's claim, alleged an assignment made to the defendants by William Judson, as the trustee and attorney of E. M. Chaffee, the patentee. *Held*, on the trial, that it was competent for the plaintiff to introduce evidence to show that the instrument from Chaffee to Judson was obtained by means of fraudulent representations and practices, and that the plaintiff might impeach such instrument, and prevent its operation in the case against him, by proving that it had been so procured by Judson from Chaffee.

2. An assignee claimed to be a purchaser without notice of fraud, and for a valuable consideration, and therefore exempt from the general rule allowing his title to be impeached the same as when in the hands of the vendor. *Held*, that the fact of his being an innocent purchaser must be proved to and found by the jury.

[This was an action at law by Horace H. Day against the New England Car-Spring Company for an injunction of the alleged infringement of a patent. A motion to strike out the special pleas filed by defendants was heretofore denied. Case No. 3,687.]

BETTS, District Judge. On the trial of the above cause in this court at the last term, points of law as to the admissibility and competency of parol evidence were raised, and, after a labored discussion by counsel, were decided by the court adversely to objections taken by the defendants' counsel. The court at the time stated orally its views of the law applicable to the case, but intimated that, because of the earnestness and confidence with which the objections to the testimony had been urged, the reasons governing the decision, with a reference to authorities supposed to support it, would be given in writing at the earliest opportunity. The trial continued several weeks subsequently, and was terminated suddenly in midsummer by the death of one of the jurors empaneled in the cause. My absence from the city after that until September, and the pressure of more urgent avocations since my return, have withdrawn my attention from the subject, until, finding the cause upon the calendar for trial at this term, and probably to be tried before me alone, when the same question will doubtless again arise, I have thought it proper to put in writing now the reasons which influenced the former decision, and which will probably induce me to adhere to it until the points can be solemnly considered at term.

The suit was to recover damages for an alleged infringement of extended letters patent. A patent originally granted to Edwin M. Chaffee was renewed, and extended to him for a term of seven years from the 30th of August, 1850. On the 1st of July, 1853, the patentee assigned all his right in the patent to the plaintiff. The defendants were proved to be using the patented right in this city, and that it was of great value in the aid of the manufacture of India-rubber goods. The defendants claimed the right to such use under a license or assignment made to them in writing by William

Judson, under his hand and seal, for the consideration of $20,000, and bearing date November 20, 1851. The license by recital stated the issuing of the original letters patent to Chaffee, August 31, 1836, their extension to him for seven years from the expiration, and added: "And whereas said Chaffee, by an article under hand and seal, and dated the 5th day of September, 1850, upon the consideration and for the purposes therein expressed, did nominate, constitute, and appoint William Judson his trustee and attorney irrevocable, to hold said patent, and have the control thereof, as therein provided,"—then added the granting clause as follows: "Now, therefore, I, the said William Judson, in consideration of $20,000 to me in hand paid, do give and grant to the New England Car-Spring Company a full, absolute, and exclusive license to use the improvements secured to said Chaffee in and by said patent, and so extended as aforesaid, in the manufacture of India-rubber springs," etc., etc.,—embracing the business pursued by the defendants. George Woodman was the subscribing witness to the article of Sept. 5, 1850, referred to in the above license, and was called by the defendants to prove its execution. He was examined, with guarded precision of language and interrogatory, as to those particulars which constitute the formal execution of an agreement in writing under seal; that is, to the presence of the witness and of the the parties, the capacity of the obligor, and the signing, sealing, and delivering of the article by him, and its attestation by the witness with his subscription.

The counsel for the plaintiff was proceeding with a cross-examination of the witness when the counsel for the defendants inquired what facts he proposed to prove by the examination. The reply, in substance, was that he expected to prove by him and other witnesses that Judson, at the time the article was executed to him, was the attorney and professional adviser of Chaffee, and that the instrument was obtained from Chaffee by Judson by means of fraudulent representations and practices.

The defendants' counsel objected to the competency of such evidence on a trial at law, and insisted that a specialty could only be impeached for fraud by bill in equity filed against all parties having an interest in the instrument, and claiming, with allegations and appropriate prayers, to have it set aside or canceled for such cause. It was, moreover, insisted that, the defendants being purchasers of their title from Judson for a valuable consideration, their rights could not be affected if there was fraud in the transaction between Judson and Chaffee, and that the plaintiff was not a party entitled to interpose the objection made to the instrument. I do not suppose I give the exact terms in which the proposal of the plaintiff's counsel, or the objections of the defendants, were made, both being stated verbally, and no written proposition being laid by either counsel before the court; but I am persuaded the substance of the offer, and of the objections to it, is correctly stated; and, in respect to the competency of a court of law to take cognizance of the charge of fraud, there is no ground to doubt that the scope and bearing of the defendants' objection was correctly apprehended, for that was read to the court from Cowen & Hill's Notes to Phillips on Evidence (volume 3, p. 1449, note 969), and was emphatically adopted by the defendants' counsel as the position of the defense, which is "that no fraud whatever can be set up in a court of law, to affect the operation of a sealed instrument, save such as relates to the execution." It is to be observed that the proposition of the plaintiff was to discredit the paper offered in evidence, by proof that it was contaminated with fraud. He asked no judgment of the court specially against the instrument, to set it aside, annul, or cancel it; but he claimed the right to submit to the jury the question of fact, upon evidence, whether the instrument had been fraudulently procured by Judson from Chaffee.

The argument proceeded upon both sides on the assumption that this proposition, in its broadest scope, was before the court, and was not restricted by any qualification or criticism of the terms in which it was propounded. So I understood it, and consequently both parties were entitled to the judgment of the court upon it, in that sense. I endeavored to make my decision so comprehensive as to cover the whole question. And it may be further remarked that, if the decision is sound in law, neither party is to be affected for want of justice in the reasoning or aptness of the analogies employed by the court in rendering it.

The posture of the case seems to render appropriate a statement of some legal principles, which may be regarded elementary and trite.

The first is upon the effect of fraud in respect to written contracts, or grants infected with it. Does it take from them all legal vitality, or do they have operation according to their import until rescinded or abrogated by a direct judgment of nullity against them? To my understanding of the authorities upon that point, they speak with one voice, and pronounce all contracts, specialties, and transactions tainted with fraud, void in law. Fermon's Case, 3 Coke, 77; Com. Dig. "Covin," A, and B 1; 1 Burrows, 390; 4 Durn. & E. [Term R.] 63, 64; Com. Cont. 58; Chit. Cont. (Perkins' Ed.) § 587; 2 Saund. Pl. & Ev. 527; Starkie, Ev. pt. 4, p. 586. This is clearly the English rule, and the American authorities coincide with it to the largest extent. 1 Greenl. Ev. § 284; Story, Cont. §§ 495, 496; 2 Kent, Comm. (6th Ed.) 484, note. This position is not a speculative one of compilers or

elementary writers. The courts declare it emphatically in their judgments. The supreme court of the United States says, "Fraud vitiates any, even the most solemn transactions, and an asserted title to property founded on it is utterly void." "Where fraud is satisfactorily proved, it overthrows all the sanctity even of public documents, and destroys them as proof." [U. S. v. The Amistad] 15 Pet. [40 U. S.] 594. To like effect are [Gregg v. Sayre's Lessee] 8 Pet. [33 U. S.] 244; [U. S. v. Laub] 12 Pet. [37 U. S.] 1. Judge Story says the general rule is, "when a fraud is perpetrated by one of the parties to the transaction upon the other, then the transaction, be it what it may, an act in pais, a deed, an authority, a conveyance, or any other instrument, is utterly void." Bottomley v. U. S. [Case No. 1,688]. "Take the case where one party obtains a license, contract, obligation, conveyance, or other instrument, from another by fraud, imposition, or undue influence upon the latter, the transaction is constantly treated as a mere nullity between them. In contemplation of law it never had any existence." The doctrine is adopted with equal explicitness by the supreme court of this state. Kent, C. J., says, "Fraud will invalidate and annul every contract and every conveyance affected with it." 10 Johns. 463. The same principle is recognized in other cases (3 Johns. 235; 6 Johns. 111; 20 Johns. 49, 51; 1 Johns. Ch. 429), and is repeated and reaffirmed in numerous subsequent decisions (15 Johns. 147; 13 Wend. 570; 23 Wend. 268; 1 Hill, 302; Id. 311). The decisions in courts of high character in other states are of the same import. 18 Pick. 95; 22 Pick. 546, and cases cited; 8 Gill & J. 621, on appeal; 5 Gilman, 573.

The second point of familiar law is that courts of law have concurrent jurisdiction with courts of equity in questions of fraud. This doctrine is imbedded in the earliest authorities, and is acquiesced in and affirmed down to the most recent. Blackstone lays it down as an elementary principle. 3 Bl.Comm. 431. Lord Mansfield adopts it as an unquestioned rule of decision. 1 Burrows, 390. The supreme courts of the United States recognize and declare it in repeated instances. They say "it has been often ruled in that court and is a well established principle." [Gregg v. Sayre's Lessee] 8 Pet. [33 U. S.] 252; [Lessee of Swayze v. Burke] 12 Pet. [37 U. S.] 23; [Gaines v. Chew] 2 How. [43 U. S.] 645; 18 Pick. 95. Chief Justice Kent says, "Courts of law have concurrent jurisdiction with chancery in all cases of fraud." 10 Johns. 462. Spencer, J., reiterates the doctrine (18 Johns. 404), and it is adopted and affirmed in 4 Cow. 220. Some cases suggest a qualification to the universality of this concurrent jurisdiction over fraud, in the instance of presumptive or implied frauds, because courts of law only act in the matter and relieve against frauds when established by proof, but courts of equity may infer or presume fraud in transactions without other evidence than the relation of the parties to the transaction to each other, as, for instance, in the conveyance taken by an attorney from his client. 1 Story, Eq. Jur. 310, 311; 4 Cow. 220.

Upon these two elementary dogmas of the law,—that fraud entering into a contract or transaction renders it a nullity, and that this court on a trial at law has cognizance of the question of fraud raised in the present case,—I shall endeavor to show from the English authorities, the adjudications of the supreme court of the United States, the decisions of the supreme court of the state of New York, contained in the reports of Johnson, Cowen, Wendell, and Hill, and the decisions of sister states, that the plaintiff was entitled to give oral proof to the court and jury that the article of September 5, 1850, was procured by Judson from Chaffee by means of fraudulent representations and practices. And also, if the jury believe the fact is proved, then that the instrument can have no operation or effect in this cause against the title of the plaintiff.

I do not intend to comment at large upon the cases cited by the counsel for the defendants from the decisions of the courts of this state, holding that a deed or specialty cannot be impeached at law by proof that there was fraud perpetrated in its consideration, because the offer of evidence made by the plaintiff was no way limited to fraud in the consideration of the article of September 5, 1850. It did not allude to any fraud in that particular, nor did the offer specify how the fraud was committed, or in what feature of the instrument it existed. If any description of fraud could then destroy the operation of the deed, the plaintiff, under his offer of evidence, would be entitled to prove such a fraud. But this point should not be passed by without the remark that the doctrine of the New York courts, that a deed or sealed instrument is valid at law, notwithstanding it was obtained upon a covinous and fraudulent consideration, is, by the supreme court of Massachusetts, upon a very able and learned review of the principles of the common law, denied to be in consonance with those principles (18 Pick. 107), and that the supreme court of this state has subsequently, under the sanction of an act of the legislature, with apparent alacrity, renounced the doctrine as one founded upon artificial and technical considerations, and now holds that contracts, sealed or unsealed, stand upon the same footing, and the defense of fraud applicable to one is equally applicable to the other (14 Wend. 195). The court say the notion that there is greater solemnity in the execution of an instrument with a seal attached to it seems to be repudiated. The party is no longer estopped by his seal from showing the truth; there is now no magic in a wafer. Johnson v. Miln, 14 Wend. 195.

The same principle in respect to agreements, with or without seal, is recognized in Oakley v. Boormen, 21 Wend. 591, 594, and it is admitted by the court that the contract, when attempted to be enforced, may be defeated if there were fraud, mistake, or illegality in its concoction. I regard it therefore settled upon authority that no distinction exists between sealed instruments and unsealed ones contaminated with fraud, both being alike void, and that the jurisdiction of courts of law extends equally to each; and it might seem a necessary sequent from these premises that neither of them could be set up as evidence of title, or have any operation in a court of law, any more than if forged; but I do not design to put the case upon a mere deduction of logic, and shall attempt to show that the procedures of courts of law, in the exercise of their jurisdiction in this particular, authorized and sanctioned the admission of the evidence received by the court in this instance.

In Bright v. Eynon, 1 Burrows, 390, a release or discharge of the plaintiff's demand was set up on a trial at law, and, to an offer of evidence that it was fraudulently obtained, it was objected that the relief lay in equity, if such were the fact. Lord Mansfield and the court held that fraud and covin avoid every kind of act, and may be proved on a trial at law, and thus defeat the instrument. Doe v. Martin, on ejectment: The defense was a deed executed to the defendants by an agent of the lessor under a power. It was proved on the trial that the deed was fraudulently given by the one having the power, and the court of king's bench held the deed void at law, although the principal had not concurred in the fraudulent act of his agent. 4 Durn. & E. [Term R.] 63-91. Hayne v. Maltby: Under a plea of fraud to an action of a patentee, because he was not the original discoverer of the thing patented and assigned to the defendant; the court held that the assignment was fraudulent and void. The same defense could have been made under the general issue; a plea or replication of fraud amounts to a special non est factum, and in modern practice is not used. 4 Maule & S. 338; 12 Johns. 430.

The elementary writers lay down the rule, as universal, that where fraud is the defense—to a specialty—non est factum is the proper plea, and evidence of the fraud can be given under it at trial without notice. 1 Chit. Pl. 563; Com. Dig. pl. 2 W, 18; 2 Starkie, Ev. (by Metcalf) 555; 1 Greenl. Ev. § 284; 2 Greenl. Ev. § 331; Adams, Eject. 286.

In Gregg v. Sayre's Lessee the defense on the trial was that a deed relied on by the lessor had been fraudulently obtained. The court held the evidence rightly admitted, and that it was the province of the jury to determine whether the acts done were fraudulent. 8 Pet. [33 U. S.] 244. The same principle is declared in Lessee of Swayze v. Burke, 12 Pet. [37 U. S.] 11. In Boyce's Ex'rs v. Grundy, the party affected by a fraudulent deed permitted a recovery to be had upon it in an action at law, and then instituted his suit in equity to get rid of it. The supreme court say, "The defense of fraud against the deed was good at law, and ought to have been made there." 3 Pet. [28 U. S.] 210. In Rhoades v. Selin [Case No. 11,740], in ejectment, in the United States circuit court, the defendant set up as defense against the plaintiff a conveyance of the property to him under a purchase at public sale made by order of the orphans' court. The plaintiff offered evidence, in avoidance of the deed, that a fraud was committed by the purchaser in obtaining the land. The plaintiff objected to the evidence, insisting that the allegation of fraud to defeat a deed could only be inquired into in a court of equity. Judge Washington overruled the objection, holding that the jurisdiction of a court of law in such case was as old as the common law, and admitted the evidence impeaching the deed.

It may be said of the courts of this state, in the language of Chief Justice Shaw, 18 Pick. 107, that in them it has been rather acted on as a settled rule of law, than discussed and adjudged as a controverted point in particular cases, that fraud is a good defense at law against a deed. Instances in which the doctrine has been plainly recognized and applied are frequent and pointed. Allison v. Matthieu, 3 Johns. 235, was trover for goods. Chief Justice Kent admitted on the trial evidence that the defendant had purchased or procured the goods from the plaintiff by fraudulent means. The supreme court affirmed the ruling at nisi prius, and declared "that fraud might be proved on a trial at law, and would violate and avoid the sale." This doctrine is ratified repeatedly. 15 Johns. 147; 13 Wend. 570; 1 Hill, 102; Id. 311. Jackson v. Rumsey was ejectment by a devisee to recover lands devised. Among other things the defendant offered to prove that the will had been obtained by unfair practices of the devisee. This evidence was rejected at the circuit. Judge Kent, in delivering the opinion of the court reversing that decision, and ordering a new trial, says "that questions of fraud in obtaining a will are appropriately triable at law." 3 Johns. Cas. 234. Hallenback v. De Witt recognizes the same principle. It was covenant on a specialty to which non est factum was pleaded. The defense on the trial was, that the instrument was contaminated with fraud, and the jury, on that evidence, found a verdict for the defendant. The court set aside the verdict because the proof was not sufficient to support the charge. No intimation was made that oral evidence was incompetent or was improperly admitted to prove the alleged fraud. 2 Johns. 404. Willson v. Force, 6 Johns. 111, was a de-

fense of fraud in the consideration of a special contract. The plaintiff agreed to take in payment for property sold a promissory note of a third person. On a suit for the value of the property the defendant set up that special contract in bar of the action. The plaintiff offered to prove on the trial that the defendant knew at the time that the maker of the note was insolvent. The court below rejected the evidence. The supreme court, on error, reversed the judgment, and held that the evidence ought to have been received, because it went to prove fraud in the defendant in the special contract, and declared it a well-settled principle of law that "fraudulent representations will vitiate any contract." Jackson v. Burgott, 10 Johns. 457, was ejectment. The parties claimed title under the same grantor. The defendant held under a deed regularly executed and recorded, and having priority of registry. The plaintiff denied the validity of the prior registry, because it had been fraudulently obtained. The court adjudged the first registered conveyance fraudulent and void, and gave judgment for the plaintiff, because of the fraud. Jackson v. Ferguson, 12 Johns. 469: This was ejectment by a party holding a sheriff's deed given on a sale of the lands upon execution against Morrison. Morrison acquired them from Frear. After his conveyance to Morrison, Frear had deeded them to Ferguson, the defendant. On the trial the defendant proved that the conveyance to Morrison was fraudulently obtained, and the court gave judgment for the defendant, on the ground that Morrison's title was fraudulent and void. Jackson v. Crafts, 18 Johns. 110, was ejectment, by a purchaser, under foreclosure of a mortgage at law. One ground of defense at the trial was evidence that the sale and conveyance had been fraudulently made. The verdict was for the plaintiff, but the court set it aside; and one point upon which the decision was placed was that the proceeding of the mortgage sale was unfair and fraudulent, and to sanction such proceeding would be subversive of justice. So in Jackson v. Sternberg, 20 Johns. 49-51, it is treated as established law that fraud practiced in obtaining a deed vitiates and renders the conveyance void, and that the fraud may be proved by parol on trial of an ejectment for the recovery of the lands conveyed. Sandford v. Handy, 23 Wend. 260, was covenant on a sealed instrument, and, on non est factum pleaded, the defendant offered at the trial parol evidence to prove that the deed had been procured by the plaintiff's agent by means of fraudulent representations. The judge excluded the evidence at nisi prius. Judge Nelson, in delivering the opinion of the supreme court, held that in law fraudulent representations of an agent were of the same effect as if made by the principal, and that it was competent for the defendant to prove the fraud by parol evidence on a trial at law. The verdict was set aside and a new trial ordered.

In my judgment, all the cases cited from the New York courts in the note to Phillips, as before referred to, and relied upon by the defendants, as excluding the proof offered in this case, concur in the principle above laid down, that every written conveyance or agreement mixed with fraud, whether in the contracting part or the execution, and whether it be offered to support an action or a defense, may be impeached and defeated for that cause on a trial at law; and I confidently invoke those cases as affording strong and direct support to the decision made on this trial. I am persuaded it will be found that Vrooman v. Phelps, 2 Johns. 177; Dorlan v. Sammis, Id. 179, note; Van Valkenburgh v. Rouk, 12 Johns. 337; Dorr v. Munsell, 13 Johns. 430; Parker v. Parmele, 20 Johns. 134; Franchot v. Leach, 5 Cow. 506; Champion v. White, Id. 509; 9 Cow. 307; Belden v. Davies, 2 Hall, 433; 3 Sandf. 1,—the cases so relied upon, either in direct terms or by indubitable implication, admit the general doctrine that fraud vitiates and destroys any written instrument, and may be proved on a trial at law, with only the exception that the rule did not at the time those decisions were made apply to fraud in the consideration of specialties; and with the qualification that fraud, to render a specialty void, must be some fraud in the execution of the deed. It is to be borne in mind that it matters not to the plaintiff whether the fraud necessary to prevent the operation of the instrument in question must consist in one relating to the consideration, or the terms or stipulations of the deed, or be mixed with its execution in the ordinary acceptation of that term, because the offer of evidence on his part covered any and every description of fraud which could, in contemplation of law, work the defeat of the instrument. It seems plain, however, that the counsel for the defendants understood a fraud relating to the execution of this instrument to be something connected with the act of signing, sealing, or delivering it, for his proof of its execution was limited to those particulars, and his effort was understood to be directed to restraining the cross-examination of the subscribing witness to them solely. In ruling that the evidence need not be so restricted, the court adopted and had reference to that as the legal and appropriate signification of the expression, and held that fraud or covin practiced in obtaining the stipulations, agreements, or grants in the deed would destroy it, and that the evidence of fraud need not be confined to acts relating to the execution of the instruments.

In my judgment, the cases already cited demonstrate that a cheat or fraud practiced by Judson upon Chaffee, in procuring the agreements or grants in the article in question, or by fraudulently misrepresenting their import and effect, rendered it void just

as effectually as would the adding a seal to it by Judson after it was delivered to him, and without the knowledge of Chaffee, or obtaining his signature to a paper fraudulently substituted in place of the one he intended to sign. With the greatest respect for the courts of this state, I cannot but think they have used the term "execution" in an unusual sense, in comprehending within it any acts other than the formalities necessary to constitute a specialty, and particularly in applying it—as most of the cases cited by the counsel for the defendants manifestly do—to every other vital constituent of a deed, except its consideration; for no one of them intimates that a deed can be sustained when contaminated by fraud in any particular other than its consideration. In Jackson v. Burgott, 10 Johns. 457; Jackson v. Crafts, 18 Johns. 110; Jackson v. Miln, 14 Wend. 195; Sanford v. Handy, 23 Wend. 260; [Boyce's Ex'rs v. Grundy] 3 Pet. [28 U. S.] 210; [Gregg v. Sayre's Lessee] 8 Pet. [33 U. S.] 244; [U. S. v. Laub] 12 Pet. [37 U. S.] 1; Rhoades v. Selin [Case No. 11,740]; 4 Durn. & E. [Term R.] 67,—the deeds were all duly and properly executed; yet they were all defeated by proof on trial of fraudulent representations or practices employed in relation to the stipulations or granting parts. The rule laid down by me is also clearly authorized and sanctioned by decisions in the highest courts of other states. The court of appeals in Maryland decided, on full consideration, that a specialty might be defeated by proof on trial in a court of law, where it was offered in evidence that it had been fraudulently obtained. Pocock v. Hendricks, 8 Gill & J. 421. The supreme court of Illinois, in a case carefully examined, held that, upon principles of the common law, a patent for lands granted by the United States could be defeated by proof that it had been procured by fraudulent representations. The patent was offered in evidence in ejectment, in support of title to the lands, and parol evidence of the fraud was admitted at the trial to defeat it. Rogers v. Brent, 6 Gilman, 573. So, in New Jersey, the supreme court, in error, decided that parol evidence of false and fraudulent representations used in obtaining a specialty could be given under the general issue on the trial of the cause. and would be sufficient to defeat the action Armstrong v. Hall, Coxe [1 N. J. Law] 178. The same principle is reasserted in that court in Curtis v. Hall, 1 South. [4 N. J. Law] 148, 361. The decisions in Massachusetts are direct, full, and explicit in support of the same doctrine. Hazard v. Irwin, 18 Pick. 95, 104, 107; Holbrooke v. Burt, 22 Pick. 546, and cases cited in those decisions. The same principle is recognized in 4 Metc. [Mass.] 513; 11 Metc. [Mass.] 330.

The argument of the defendants' counsel, that resort must be had to equity to impeach a specialty for fraud, was based upon the decision of the court of errors in James v. McKernon, 6 Johns. 543, and he contended that the court in that judgment fixed the rule to be that a deed can only be avoided for fraud by means of a bill filed for that purpose, and with allegations and prayer appropriate to that end. I do not purpose to enter at large into the discussion of what is necessary to be done, in equity, when a party seeks to resist the operation of a specialty because of fraud. This is an action at law, and directions to govern proceedings in equity have no authority here, unless dictated by a court assuming to regulate the procedure of all other tribunals, and having authority so to do. But, to my judgment, the decision in James v. McKernon has no such bearing as is claimed for it in the argument. It purports to settle no other point than that a court of chancery, upon a bill filed for discovery and account only, and in defense to which action the defendant by answer sets up a sealed agreement, cannot decree a rescission of that agreement because vitiated with fraud; nor can the court on such state of the pleadings take proof of fraud to that end, it being a cardinal principle of equity practice, that the proofs and decree must be in consonance with the allegations of the bill. The chancellor in the court below admitted evidence that fraud had been practiced in procuring the agreement, and decreed that it be set aside, and the court of errors on appeal reversed that decree. The chancery practice may have imposed upon the plaintiff the necessity of replying to the answer so interposed, and excluded him from the privilege of impeaching the deed without framing an issue of fraud in avoidance of the bar made to the suit by the answer. But the case no way determines—if the defendant had only denied he had effects of the plaintiff in his hands, or that the plaintiff was entitled to an account from him, and had given the deed in evidence at the hearing to prove his release or discharge from the demand—that the plaintiff might not then have defeated the release or discharge by proving it fraudulent. If the case imports any doctrine of that character, then I apprehend the principle is overturned, or at least neutralized, by a later decision of the same court. Ferris v. Crawford, 2 Denio, 595, 604. In this case the court unanimously held that a release under seal might be impeached, and its operation be defeated in chancery, for fraud, without any bill filed charging the fraud, or praying to abrogate it or set it aside. But if the system of chancery pleading did exact a special replication to the answer in the case of James v. McKernon, or that new allegations should be introduced into the bill, so that a direct issue be formed upon the charge of fraud made against the agreement, that practice is not exacted at law, and to a plea in the present case of the article of September 5, 1850, as a link in the

defendant's title, the plaintiff would not have been bound to reply that the article was obtained by fraud, for if so pleaded, the proper conclusion to the plea would be, "Et sic non est factum," and whatever may be evidence under special plea of non est factum is so under the general issue. Thompson v. Rock, 4 Maule & S. 338. The same doctrine is embraced in Van Valkenburgh v. Rouk, 12 Johns. 338; 1 Chit. Pl. 479.

It was urged most strenuously for the defendants that the plaintiff must resort to a court of equity to impeach the instrument, because that court alone possessed the right to set it aside or adjudge it void, and because there only could Judson, and others having interests connected with the instrument, come in as parties, and prevent their rights being compromitted by a decision against its validity. It might, perhaps, be a sufficient answer to these objections to say the plaintiff, in seeking redress, is not bound to look to or shelter interests of parties adversary to his own; and that, if others have equities under the instrument which can be upheld in chancery, this suit at law, the finding of the jury upon the question of fraud, or the rejection of the instrument as evidence upon such finding, in no way bars or impedes the prosecution by them in equity of their rights in that respect, nor does it impose any disadvantage upon Judson or such other parties which they would not encounter in equity. The evidence in that court to establish fraud need be no other or higher than in this. Oral evidence is adequate to impeach or abrogate a specialty in equity; and Judson, with all others setting up interests in connection with the instrument, and in hostility to those of the plaintiff, might be concluded by a single hearing in that court, because the result might be the rescission and canceling of the instrument, while its impeachment on one trial at law does not prevent them coming in to support it on every subsequent trial in which its validity may be called in question. The proceedings in equity, however, need not demand any action of the court upon the instrument itself, and in such case, if interposed by the defendants as evidence of their right or title, it, in my judgment, would stand upon the same footing there as on a trial before a jury, and its impeachment would be in the same manner and to the same extent in either court. The instrument would, after such impeachment in a particular case, be in as full force everywhere else as it ever was. 2 Denio, 604. In this point of view a court of law acts upon the instrument and gives relief against it, upon the same evidence and to the same extent as a court of equity, for in both the fact that it is contaminated with fraud "overthrows and destroys it as proof." [U. S. v. The Amistad] 15 Pet. [40 U. S.] 594. And the court does no more than refuse to give effect to it for that cause. 2 Denio, 604. Chancellor Kent says the rules of evidence, particularly in respect to fraud, are the same in courts of law and equity. Stevens v. Cooper, 1 Johns. Ch. 429. So are the elementary authorities. Spence, Eq. Jur. 555; 1 Story, Eq. Jur. § 160; 3 Bl. Comm. 436. The supreme court of this state also declares the same doctrine, with the distinction that at law the fraud must be proved, while a court of equity may infer it from the nature of the transaction and the situation of the parties. Jackson v. King, 4 Cow. 220. That a conveyance or agreement is obtained by an attorney from his client is a prominent instance in which courts of equity will imply and presume without proof that the transaction is fraudulent. 1 Story, Eq. Jur. §§ 310-313. In Lowe v. Blake, the court of chancery of South Carolina admitted parol evidence to impeach a release under seal for fraud when offered in evidence to set aside an attachment for debt, without requiring the plaintiff to proceed against it by bill, or take any issue upon the point of fraud by pleading, and the decision was affirmed by the court of appeals. 3 Desaus. Eq. 269. The court of errors in this state also decided unanimously that a release under seal might be impeached for fraud by parol evidence by a party opposing a motion founded upon it, and without sending it to law, or taking any affirmative proceedings in chancery to vacate or rescind it. Ferris v. Crawford, 2 Denio, 595. Bronson, C. J., in assigning the reason of the court, says: "The chancellor was not asked to set the release aside, nor has it been set aside by the chancellor. It is in as full force now as it ever was. The chancellor has only refused to give effect to the release, and it would be strange, indeed, if any court could not do that when an instrument obtained by wicked means for wicked ends is brought forward as a ground for either making or opposing a motion" (Id. 604); and adds, "Whether the vice chancellor held there was no fraud, or that he ought not to inquire into it, he was equally in error" (Id. 605).

These authorities, in my judgment, sufficiently indicate that in a proceeding in equity or law, when an instrument in writing is interposed by either party, affecting a question on trial, and the party against whom it is produced does not ask to set it aside, nor seek to annul or vacate it, but only to impeach it as evidence because tainted with fraud, and thus to prevent its operating in the particular cause, he can do so by evidence on the trial without any form of pleading or any suit demanding specifically the abrogation of the instrument. This is palpably a sufficient and reasonable remedy. The plaintiff is not called upon to protect the interests of other and unknown parties under or against the instrument, nor, at his own expense, have it annulled or abated as a public nuisance. He is only concerned to prevent its exercising an influence injurious to him personally. All his concern with it is satisfied if it be shown not to be a credible witness

against him. Why, with more propriety can he be compelled to institute a suit in chancery against all the world who may chance to set up interests in connection with such instrument, in order to vacate or cancel it, than he would be to have a false witness indicted and convicted of perjury, to prevent his testifying in a particular case? It answers all the ends of the party to impeach the credit of the witness, and after that, as the court of errors say in regard to a specialty impeached for fraud, he would stand as to others just as good a witness as he was before. In this manner the relief against a fraudulent instrument set up on trial would be to the same extent and obtained in the same manner in a court of law and court of equity, and that is all I deem necessary to say now in vindication of the position taken on the trial of this cause, and of the remarks made in deciding the point of evidence. But, whether the illustration so used by the court was founded upon sound principles or not, it no way affects the rights of the plaintiff. He did not maintain an identity in the functions of the two courts. He claimed no decision on that proposition. All the necessity of his case demanded was that the court should admit the evidence to the jury, and that he might by their verdict defeat the operation of the instrument, if proved to be a fraudulent one; and it was indifferent to the result of this litigation whether his relief would thereby be to the same or a different extent from what the proof might have secured him, if the controversy had been in equity.

The defendants took a further exception to the evidence offered at trial, that the plaintiff, being an assignee, was not a competent party to set up the fraud imputed to the instrument, and that the defendants, not being connected with the transaction between Chaffee and Judson, but purchasers subsequently, and for a valuable consideration, cannot be prejudiced if the deed was mixed with fraud. As a general proposition, an assignee, in being chargeable with the liability of his assignor, takes also all his legal and equitable rights and privileges, and can avail himself of the same means to sustain his title, and repel any attack upon it, as the law allows the assignor to employ. So, also, as a general rule, an assignee or purchaser comes only into the place and title of his vendor, and the title he holds may be impeached in his hands the same as when it remained with his assignor. If he claims an exemption from that rule, because he is a purchaser without notice of the fraud, and for a valuable consideration, or the plaintiff claims he is chargeable because he purchased with notice, that particular, with whichever party the affirmative evidence may lie, rests upon a fact which must be proved to and found by the jury. The province of the court is not to exonerate an assignee from the effects of the fraud, nor charge him with it as matter of law, but only to instruct the jury what particulars they must inquire into and determine as a foundation for the judgment of the court. In this instance it is enough to say that no evidence was before the court, other than the license or assignment to the defendants, that they were bona fide purchasers, and that the question was not submitted to the decision of the court, whether in law a recital of purchase and consideration paid conferred on the defendants the privilege of purchasers without notice, until the contrary was proved; nor did the defendant demand the judgment of the court whether there was any testimony in the cause which the plaintiff was entitled to submit to the jury as evidence of notice to the defendants of the fraud alleged; nor, when all the evidence was in, did the defendants then raise the question whether at law it was sufficient to authorize the jury to find the defendants were connected with the transaction between Judson and Chaffee, or had notice of the manner in which the deed was procured.

I think, upon the whole case, that there is prima facie ample authority in support of the decision at nisi prius that the plaintiff might impeach the instrument of Sept. 5, 1830, and prevent its operation in the case against him, by proving it had been procured by Judson from Chaffee by fraudulent representations or practices.

[NOTE. For other cases involving this patent, see note to Day v. Union India-Rubber Co., Case No. 3,691.]

Case No. 3,689.

DAY et al. v. PHELPS et al.

[6 Chi. Leg. News, 61.]

Circuit Court, D. Indiana. Nov. Term, 1872.

BILL OF REVIEW—RELIEF AGAINST DEFAULT DECREE—ESTOPPEL—SERVICE OF PROCESS.

1. Where, on a bill filed against numerous defendants to enforce subscriptions to the capital stock of a railroad company, all who contested their liability were successful, and all parties had for years considered any liability at an end, a court of equity will go to the verge of its authority to prevent the operation of a decree against defendants who were never regularly served with process, and for whom counsel without authority and without their knowledge entered an appearance and filed pleadings, but did not follow the defense.

2. Service on a defendant by leaving a copy of the process at his residence, it not appearing that it was left with any person, was not a valid service under the 13th rule of practice in the courts of equity of the United States.

3. The fact of giving bail after decree is not necessarily estoppel and release of all errors.

4. Where it is evident from the pleadings and evidence in the original case that there was no just claim against the petitioners in review, and that they had the same equities as the other defendants, all of whom had been released and discharged, the court may consider such facts even on a bill of review, in order to prevent the enforcement of such decree.

In equity. These were two bills of review filed by Silas C. Day and Ezekiel R. Day

against John Phelps, Putnam, Burke, and others, and growing out of a decree rendered in this court in July, 1869, in the case of New Albany v. Burke, reported in 11 Wall. [78 U. S.] 96, where some of the facts are stated. It is there said that there was a decree rendered against the railroad company and the city, and the bill was dismissed as to the other defendants. This is not quite correct, as a decree was rendered also against these complainants at the same time—against Silas C. Day for $3,026, and against Ezekiel R. Day for $6,230—although it was provided that no execution should issue against them if the city of New Albany paid the amount found due to the complainants in that suit. In fact, however, executions issued against the Days, and they gave what is termed in the Indiana practice "replevin bail." These decrees were for subscriptions to the stock of the New Albany and Sandusky City Junction Railroad Company, though as to others who were in precisely the same condition the bill was dismissed. Ezekiel R. Day appeared by counsel, and what purported to be an answer and cross-bill was filed by counsel, the contents of which, he alleges, were unknown to him prior to the decree. This answer and cross-bill set forth that besides the $5,000 on the list of the stock which others (as to whom the bill was dismissed) had subscribed, he had subscribed a much larger sum, all of which and a portion of the $5,000 he had paid. To this answer and cross-bill a demurrer was sustained, and there appeared no further pleading by him up to the date of the decree. Prior to the decree a reference was made to a master, who reported that E. R. Day owed on his stock subscription the amount for which the decree was rendered, $6,230, but the language of the decree is, "And that there is due to said railroad company from Ezekiel R. Day, upon his subscription to the stock of said railroad company, as stated in said bill and in his answer, for principal and interest, the sum of six thousand two hundred and thirty dollars." In fact, the bill alleged that the amount was $4,700, with interest from January 1, 1855. The following was the marshal's return to the subpoena on S. C. Day: "Feb. 11, 1868. Served by * * * copy left at the residence of S. C. Day." On the 28th of March, 1868, appearance was entered by counsel for many defendants, including S. C. Day. But this was without authority from him, and it satisfactorily appeared that he never employed counsel, and the bill of review for him alleged that he never was in fact served with process, and never knew that it had been left at his residence. There was no other appearance or pleading by S. C. Day, and on the day the decree was rendered he was defaulted. The recital in the decree as to him was "that there is due to said railroad company from Silas C. Day, the sum of three thousand and twenty-six dollars upon his subscription to the stock of said railroad company, as stated in said bill of complaint." The city of New Albany and the other defendants appealed from the decree, and the complainants in that suit took a cross-appeal because the court had dismissed the bill as to the defendants other than the city and railroad company. But the supreme court took no notice of the argument on this point or of the cross-appeal, but reversed the decree and remanded the cause, with instructions to dismiss the bill as to the city of New Albany, on two grounds: First, that a settlement and compromise which the city had made with the railroad company was valid; second, that the complainants had been guilty of laches in filing their bill.

The bill in the case of S. C. Day was founded on these alleged errors: 1. That there was no jurisdiction of the person, and no sufficient service of subpoena. 2. That the circuit court of Floyd county, where there had been litigation connected with the subject matter of the controversy, had exclusive jurisdiction of the case. 3. That the record did not sufficiently show an indebtedness to the railroad company. 4. That Putnam, Burke et al., had lost their supposed equity by laches. The bill in the case of E. R. Day was founded on the same alleged errors, except the first. Further facts are stated in the opinion.

Baker, Hord & Hendricks and Joseph E. McDonald, for petitioner in review.

Putnam, Burke & Porter and Harrison & Hines, for respondents.

DRUMMOND, Circuit Judge. There are some things which we may assume as true in our investigations of the questions growing out of these bills of review. One is, that the decrees rendered against the Days were for their subscriptions to the stock of the railroad, made under what were termed the "articles of association," which provided for the transfer to the city of all the stock taken by the subscribers except three hundred dollars. Other subscribers with the Days had answered, and this court held them not liable. If the Days had put in the same answer, they also must have been held free from liability. Another is, that all the parties, the railroad, the city, and the subscribers, treated all the stock, except the three hundred dollars to each subscriber, as transferred, and merged in the subscription of four hundred thousand dollars of stock made by the city. A third and a corollary to the foregoing is, that as early as 1854 or 1855, if not some years before, and prior to the judgment on which the creditors' bill was filed, the railroad company ceased to regard the association as subscribers to the stock, the three hundred dollars having been paid by each, as indebted to the company for the balance of that stock. And when the company made the compromise and settlement

with the city in August and September, 1857, it was treated as all merged in the stock subscribed by the city, and if the company had afterwards made a claim on the Days for the balance of the stock, it would have been estopped by its own acts from maintaining such claim. And if, when Putnam, Burke and another filed their bill in this court in 1868 as judgment creditors of the railroad company, it could not be sustained against the city, neither could it against the Days. It therefore follows, that when a decree was rendered, in July, 1869, in this court, for the sum of $9,256 in the aggregate against the Days, as for that amount due to the railroad company by them, and to be paid to Putnam, Burke, et al., there was in fact nothing due to the company. And the question is, whether Putnam, Burke, et al. have obtained any technical advantage by the decree of this court, which will prevent a chancellor from doing equity to the plaintiffs in these bills of review? The case is peculiar in this, that all the other defendants, except the plaintiffs in these bills of review, and upon some of whom no greater liability rested, stand discharged by the judgment of this court and of the supreme court of the United States.

It should be borne in mind that these bills of review were filed long before the decision of the principal case by the supreme court, and when it was not known what the opinion of that court would be. Notwithstanding what has been said about the supposed indebtedness of these plaintiffs to the railroad company, yet being bills of review, these things only are open for examination—errors on the face of the record, or new evidence, which by the exercise of reasonable diligence could not have been known. The rule in force at the time the subpoena was issued to S. C. Day, required the officer to deliver a copy to the defendant personally, or to leave a copy at his dwelling-house or usual place of abode, with some free white person, a member or resident in the family. The service was not in compliance with the rule, for it did not appear, by its terms, that a copy of the subpoena was left with any one. The evidence shows he was absent at the time, and he states he had no knowledge that a subpoena was left at his house, or that his appearance was entered. The appearance by counsel seems to have been an inadvertence, and the counsel say they had no authority to appear for him. It is clear, therefore, that he was not in court, either by proper service of a subpoena, or by an authorized appearance, and a default and decree should not have been entered. He would undoubtedly have had the right to have the decree opened and his defense admitted, as soon as he knew of the decree. There is, therefore, some force in the objection that this ought to have been done, instead of giving bail to an execution under the statute and practice of the court. But it would be a harsh rule to make the giving of such bail an absolute estoppel, and a release of all errors, when the very purpose might be to enable a party to employ counsel to look into the record and ascertain its condition, and I do not feel inclined to adopt it in this case, even though there might seem to be more delay than was necessary in the application to this court.

Perhaps the second error can scarcely be maintained, as, though it be true that the Floyd circuit court might have had the power to proceed and administer the assets of the railroad company for the benefit of creditors, still it may be said it was not compulsory on the part of the creditors, and that because of this power the creditors were not prevented from making application to this court. But it is not necessary to put the decision on this ground.

When it is said that, in order to sustain a bill of review for error, it must exist in the record, the question naturally occurs, in what part of the record? The answer is, in the bill, answer, other pleadings or decree. A leading authority on this subject, in the supreme court, declares that the evidence at large cannot be examined in order to establish an objection to the decree on the supposed mistake of the court in its conclusions on the evidence. Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 6. But if we assume that the evidence is all in the record, or that according to the English practice, the decree recites the substance of the facts, and there appeared to be no evidence to warrant the decree, conceding that the court cannot act as a court of appeal merely, yet, in such case, there surely would not be much hesitation in reviewing the decision. In this case there was a reference to a master, but he does not state that he took any other evidence than what appears in the record. The decree against the Days refers only to the pleadings. It is quite clear it was founded on the association subscription, for, as to S. C. Day, that was his own liability, and, as to E. R. Day, there was no question of any other. Now, when this court can see, by the answer of the association subscribers, and the evidence in the original case, that there was in fact no just claim on the part of the railroad company against the Days; that they had been released from such claim, if any ever existed, years before the creditors' bill was filed, and even before the judgment was recovered on which it was founded; and that the court dismissed the bill as to persons equally liable with the Days, does such a rule apply? We think not. It is manifest that the mind of the court was not directed to the point, and it may, therefore, be truly said it is not an error founded on any supposed mistake of the court in its deductions from the evidence, but on an inadvertence. (See the answer of Thomas L. Smith, and twenty-seven others, in the original case.) The supreme court decided that the creditors' bill came too late as to the city of New Albany. This was an er-

ror that appeared on the face of the record, and it follows that this court ought, in the opinion of the supreme court, so to have decided. And the question is whether the same law is not applicable to the plaintiffs in these bills of review. This defense was not distinctly made in the answer of the city of New Albany, farther than to mention that the settlement between the railroad company and the city had never been called in question until the creditors' bill, filed by Putnam, Burke, et al., though known to them at the time. But it was one of the grounds on which the supreme court decided the case, and, of course, on which this court ought to have decided it. And it necessarily follows, I think, that as to the Days, this court should have decided it in the same way. It was an objection to rendering a decree for the plaintiff in the original suit, which on the record the court ought to have taken of its own motion. For more than fourteen years before Putnam, Burke, et al. filed their bill in this court, the railroad company had ceased to regard any of the subscribers in the association stock as debtors. When each man paid three hundred dollars after the subscription by the city, the claim was at an end. The charge of laches, therefore, was as applicable to this settlement as to that between the railroad and the city, and even more so, because it was prior in time.

In conclusion it may be said that there is only a technicality on which the decree against the Days can stand; if they are compelled to pay this money, now more than ten thousand dollars, it will be for what was not owed, and a court of equity, ought, I think, under such circumstances, to go to the very verge of its authority to prevent such a result.

DAY (SELIGMAN v.) See Case No. 12,643.

Case No. 3,690.

DAY et al. v. STELLMAN et al.

[1 Fish. Pat. Cas. 487.][1]

Circuit Court. D. Maryland. July Term, 1859.

PAROL EVIDENCE TO CONSTRUE WRITING — PROVINCE OF COURT — TECHNICAL TERMS — ASSIGNMENT AND LICENSE UNDER PATENT.

1. Neither the testimony of witnesses in general, nor of professors, experts or mechanics, can be received, to prove, to the court, what is the proper or legal construction of any instrument of writing.

2. Nevertheless, the court will bring to its aid the testimony of witnesses to explain terms of art, and make itself acquainted with the material with which the writings deal, and with the circumstances under which they were made.

3. The term "shirred" means "wrinkled or contracted." The term "corrugated" means "wrinkled." These terms were known to the trade in connection with the manufacture of India rubber goods, prior to Goodyear's patent of March 9, 1844.

4. If a man owns two rights to manufacture goods by patents of different dates, and sells to A. his right under one specifically, and to B. the right to manufacture goods generally, as a matter of course, the fair construction of the latter grant will be held to be a conveyance of the right to manufacture under both patents.

5. A deed conveys a title, although it may have covenants in it which have not been performed. The covenant does not affect the grant; the grant passes the title, and operates in praesenti.

6. In the deeds from Goodyear to Day, the terms "shirred or corrugated goods" are not limited or restricted to goods manufactured under and in accordance with the "shirred goods" patent issued to Charles Goodyear, March 9, 1844, but they refer to and include elastic or woven rubber goods not manufactured in accordance with said patent.

This was a bill in equity, filed [by Horace H. Day, Alexander Hay, and Charles Goodyear against John Stellman, Christopher Henricks, and Henry G. Farber] to restrain the defendants from infringing upon letters patent for "improvements in the manufacture of India rubber," granted to Charles Goodyear, June 15, 1844, reissued December 25, 1849, and extended for seven years from June 15, 1858, in so far as said letters patent covered the manufacture of shirred, corrugated, or elastic rubber goods. The facts in the case were the same as are set forth in the statement of the case of Goodyear v. Cary [Case No. 5,562].

John H. B. Latrobe, for complainants.
Charles Marshall, for defendants.

GILES, District Judge. The bill was filed on the 16th of December last. It sets forth that letters patent were granted to Charles Goodyear, on June 15, 1844, for a new process of preparing India rubber for manufactures; that said patent was subsequently surrendered on account of defects in its specification; and on December 25, 1844, two new patents were granted to Goodyear: one for an improvement in felting India rubber with cotton fiber (with which we have nothing to do in this case), and the other for an improvement in processes for the manufacture of India rubber; that these two patents were for the term of fourteen years from June 15, 1844; that the commissioner of patents on June 14, 1858, after full argument, granted an extension of said patents for the term of seven years from June 15, 1858; that subsequently Goodyear, by several instruments made in 1846, sold and assigned to Day, one of the complainants, the said patents, so far as related to the preparation and manufacture of shirred or elastic India rubber goods, except in so far as the right to manufacture said goods had been parted with by Goodyear by three several licenses, viz: to Hutchinson & Runyon, Ford & Co., and Onderdonk & Letson, which said licenses were duly assigned to the said Goodyear subsequently, and by him assigned to Day.

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

It then sets forth that in October, 1852, Day assigned all his interest under this contract to Winslow, Syms & Gilbert; that these parties assigned it to the Congress Rubber Company, a corporation of the city of New York, and that said company in 1857, reassigned the interest to Day; so that all the interest conveyed by the contracts of 1846 are now vested in Day, except a small portion which Day parted with to his co-complainant, Hay, on October 1, 1858. The bill further sets forth that Goodyear, on May 4, 1858, conveyed to said Day, "the full, absolute and exclusive license, right, and privilege to make, use, and vend his, the said Goodyear's invention of vulcanized rubber, as described and patented in the reissued patent, granted to him December 25, 1849, for the present and all extended or renewed terms of said patent, as the same may or can be used in the manufacture of all braided, woven, cemented, or sewed fabrics, or such as are or can be covered or protected on one or both sides with substances other than rubber, and in all smooth elastic shirred goods; and also to make and sell India rubber threads of vulcanized rubber, and all threads or sheets of rubber which are or can be made or finished by union with, or to be covered by fibrous substances." It then sets forth that in 1850, Goodyear instituted suits in New Jersey, in equity and at law against Day, which were heard before the circuit court of New Jersey, in which the validity of these patents was maintained, as reported in 2 Wall. Jr. 283 [Case No. 5,569]. It further avers that the defendants in this case have violated the patent of June 15, 1844, as reissued December 25, 1849, and extended June 14, 1858, by selling large quantities of suspenders which are made of vulcanized India rubber, and are shirred or corrugated goods; and it prays an injunction and account.

The defendants, in their answer, set up as their defense, that the complainants, Day & Hay, have no title to the said patent for the purposes set forth in said bill; that by the contracts of 1846, set up in the bill and relied upon by the complainants, Goodyear, on certain conditions, granted to Day the privilege of using vulcanized India rubber in the manufacture and sale of corrugated or shirred India rubber goods, which are described in the patent of March 9, 1844; that the defendants have not since October 2, 1858, sold any corrugated or shirred India rubber goods so made under the patent of March 9; and that they have done nothing to infringe any rights held by the complainants. They admit that they have sold goods composed in part of vulcanized rubber, which the complainants have no right to manufacture and sell, but they claim that the right to manufacture such goods is vested in other parties under certain assignments from Goodyear, and they set up the contract of July 18, 1844, between Goodyear and the Naugatuck India Rubber Company, and several assignments which vested its rights in the Union India Rubber Company. Two agreements have been filed in this cause: one setting the cause down for final hearing, and arranging the terms of a decree, if the court should decide in favor of the complainants, so as to dispense with the trouble and delay of taking an account; and the other in reference to the testimony on which the case has been heard. So that the cause has been heard under these agreements on final hearing, and is now before the court for final decree.

The title of the complainants rests upon the contracts and assignments of 1846, and the deed of assignment of May 24, 1858, and the decision of this cause rests on the construction which the court may give to those instruments.

The first question under the contracts of 1846, is: What did Goodyear assign to Day by the paper of October 29, 1846, the first in the series? The complainants allege that by that paper Goodyear assigned to Day the right to manufacture all India rubber goods that were shirred, and to use in the manufacture thereof, Goodyear's invention of vulcanized rubber, as patented to him on June 15, 1844, and reissued on December 25, 1849. On the other hand, the defendants allege, that the term "shirred or corrugated goods," as used in the contracts of 1846, is limited and was intended to be limited to the goods made under the patent of March 9, 1844, and does not include any other "shirred goods" which might be made of vulcanized rubber.

The first thing which we ascertain in the examination of this contract is, that by its terms, it includes all India rubber goods that are corrugated or shirred; "shirred" being a technical term meaning "wrinkled," or "contracted." Upon the face of the paper, then, it includes all India rubber goods that are made with vulcanized rubber, and that are "wrinkled or corrugated." "Corrugated" is another term which means the same as "wrinkled," in the English language. Now, is there anything in the paper itself, in the surrounding circumstances, or in the subsequent conveyances, to narrow the broad language of the grant? Let us look at it. The grant is "the full, absolute and exclusive right, license, and privilege," to manufacture "shirred or corrugated goods." Now, the term "corrugated" is well known in the English language, and is to be found in all the dictionaries, meaning "wrinkled or contracted." But was the term "shirred" known to the trade, or to any trade prior to March 9, 1844? How stands the testimony on this point?

But, before adverting to it, the court would remark, that while the interpretation and construction of all written instruments is for the court, it nevertheless will bring to its aid the testimony of witnesses to explain terms of art, and make itself acquainted with the material with which the contracts deal, and with the circumstances under which they

were made; but neither the testimony of witnesses in general, nor of professors, experts or mechanics, can be received, to prove to the court, what is the proper or legal construction of any instrument of writing. Such evidence is inadmissible. The supreme court, in the case of Corning v. Burden, 15 How. [56 U. S.] 270, held this language: "The refusal of the court to hear the opinion of experts as to the construction of the patent, was proper. Experts may be examined as to the meaning of terms of art, on the principle of 'cuique in sua arte credendum;' but not as to the construction of written instruments." And in the case of Winans v. New York & E. R. Co., 21 How. [62 U. S.] 100, the court say: "The testimony of experts, which was rejected, had no relevancy to the facts on which the jury were to pass, but seemed rather to be intended to instruct the court on some mechanical facts, or principles, on which the court needed no instruction, or to teach them what was the true construction of the patent. Experts may be examined to explain terms of art, and the state of the art, at any given time. They may explain to the court and jury the machines, models, or drawings exhibited. They may point out the differences or identity of the mechanical devices involved in their construction. The maxim of 'cuique in sua arte credendum,' permits them to be examined as to questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them, if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence. Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses, and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue." Greenleaf on Evidence very clearly points out the cases in which the court will bring in the aid of the testimony of witnesses to assist in construing written instruments. 2 Greenl. Ev. 282. "From the examples given in the two preceding sections, it is thus apparent that the rule excludes only parol evidence of the language of the parties, contradicting, varying, or adding to that which is contained in the written instrument; and this, because they have themselves commited to writing all which they deemed necessary to give full expression to their meaning, and because of the mischief which would result, if verbal testimony were in such cases received. It is also to be kept in mind, that though the first question in all cases of contract is one of interpretation and intention, yet the question, as we have already remarked, is not what the parties may have secretly and in fact intended, but what meaning did they intend to convey by the words they employed in the written instrument. To ascertain the meaning of these words, it is obvious that parol evidence of extraneous facts and circumstances may in some cases be admitted to a very great extent, without in any wise infringing the spirit of the rule under consideration." Also, in section 286, he says: "As it is a leading rule in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive, if considered in the abstract." Also, in section 295, he says: "But, in resorting to usage for the meaning of particular words in a contract, a distinction is to be observed between local and technical words and other words. In regard to words which are purely technical or local—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade—parol evidence is always receivable, to define and explain their meaning among those who use them."

With these rules in reference to parol testimony, I have looked through the whole of the testimony in this case—having read it twice very carefully—and it has left this impression upon my mind: that the term "shirred," or "shirred goods," was well known to the trade in New York prior to 1844, and that these goods were of various kinds. I think there are more than forty witnesses whose testimony bore directly on this question—some who had sold, some who had used these goods, and some who had manufactured them; and others who had imported them; and they describe the various kinds. Many of these witnesses were dealers in India rubber, and some were milliners; and their testimony was full and clear, that the term "shirred or corrugated goods" was well known prior to 1844. There is some conflict between this testimony and the testimony of some of defendants' witnesses on this point. But, in regard to many of the witnesses for the defendants, this remark will apply; that they are interested to defeat the complainants' claim: how far the court can not say; but many of them are manufacturers of those woven elastic goods

of vulcanized rubber. Under what right they manufacture them, they do not show; but clearly, if the complainants' claim can be maintained, these parties are infringing their rights; therefore, their testimony should be received with great caution, if not entirely rejected.

Another remark will apply to a large part of the testimony of the defendants' witnesses, and it is this: that they testify that there is a marked difference between the woven elastic goods and the goods made under the patent of March 9, 1844. That is apparent to the eye, and no one denies it. The court, being satisfied that this term "shirred" was well known, endeavored, if possible, to trace it out and see where it came from. The term used in the contract is "shirred or corrugated goods." "Corrugated," as I have already remarked, is an English word well known, meaning wrinkled, and it would, therefore, read just as well "shirred or wrinkled goods." The word "corrugated" is added to explain what might otherwise be unintelligible to the uninitiated—to explain the word "shirred." It is used so, no doubt, in the patents and other instruments where it has been incorporated. I looked through all the French and English dictionaries in vain for the word "shirred." I could not find it. The nearest word I have found resembling it—and I have no doubt it comes from that—was a word in the dictionary of the Scotch language, which is "to shirp," which means to "shrivel" or "shrink up." Probably when the word crossed the Tweed and came south, they dropped the "p" and called it "shir."

We now come to the contract of October 29, 1846. What did Goodyear mean by the words "shirred goods"? Did he mean the goods manufactured under his patent of March 9, 1844, or did he mean all "shirred goods," such as were imported, and then known to the trade?

I have looked through the documentary evidence in this case to see if I could not be relieved from any conflict of testimony of witnesses by the unvarying and undeviating record of the written instruments. Where interests are so complicated and valuable as these interests of the India rubber manufacture are, the court would repose with much greater safety on any light which it might receive from the written instruments in the cause, contemporaneous with all these contracts, or any collateral ones, than from the testimony of witnesses taken post litam motam; and the court found a piece of evidence, which was very full on that subject, in the application of Goodyear for an extension of his patent. I read from this to show that wherever Goodyear intended to limit the manufacture of "shirred goods" to his patent of March 9, 1844, he so designated it by words limiting the grant to that kind of "shirred goods." He has given an account in the schedule attached to his application, to show what he had realized from his patent of June 15, 1844, which he was then seeking to have extended; and he says, at folio 220: "In 1844, the applicant sold to Mr. David L. Suydam the exclusive right to use his improvement in making shirred goods, for which Suydam paid $15,000." He does not say "the right to manufacture shirred goods." Had it been that language it would have been very strong for the defendants. Now we know what that exclusive right was, which was conveyed to Suydam. It was the right to manufacture goods under the patent of March 9, 1844. "About a year afterward, the applicant bought this right back from Suydam. * * * Shortly after, applicant sold three concurrent rights to make 'shirred goods,' one to John R. Ford, another to the Newark India Rubber Manufacturing Company, and a third to Onderdonk & Letson. * * * When the settlement of 1846 was made with Day, the concurrent rights were surrendered, that the shirred goods monopoly might be given to said Day." Entirely different language. And then he goes on with the different other rights he has sold, to-wit: "The right to make boots and shoes, the right to make baby-jumpers, the right to make door springs, the right to make springs for railroad cars, the right to make clothing, the right to make paper holders or bands, the right to make belting," etc. Now, unless Day owned the full and absolute monopoly, as he claims he did, to make shirred goods, no other party had it, for not a dollar was received by Goodyear from any other person according to this schedule, for manufacturing shirred goods of any description, or any article that will come under that designation. He says, Day got a monopoly of the shirred goods, and at the head of the recapitulation, he says: "For shirred goods, $24,000." Now, if Day had not the whole monopoly to make woven and sewed, as well as cemented goods, no one had it. Goodyear then ignored it when he made application for the extension of his patent. Moreover, at folio 65, after speaking of the controversies between himself and Day and the settlement in 1846, he says: "That one effect of such agreements was, to transfer to said Day, the entire right of your applicant to the manufacture of shirred goods." (Could language be more expressive than that?) "That Day paid your applicant $5,000 bonus for such right, and agreed to pay a tariff of three cents for each square yard of goods made under the same." Referring back to the contract, it will be seen that Day agreed that all goods he made should be considered as made under the contract of 1846. Then Goodyear says at folio 74: "That notwithstanding such agreement, said Day afterward proceeded to infringe anew upon the rights

of your applicant, and your applicant was obliged to commence several suits against him, among others, two in the circuit court of the United States, for the district of New Jersey, one at law and the other in equity. Such suits were pending for a long time, were severely contested, and very expensive."

Now, if we look at the bill in New Jersey we shall see what patent it was that Day was charged with infringing. In that bill, Goodyear sets forth the contest between them, Day's infringement, and the contracts of 1846; but the infringement of which Goodyear complains, is thus set forth: "Soon after said settlement and said license, said Day commenced using the improvements specified in said patents, for the preparation of India rubber for manufacturing purposes other than those permitted by his license, in violation of said patents, and made large quantities of India rubber." For what? Cemented or sewed, or woven elastic goods? No. There is not a syllable on that subject. But he says, that he made large quantities for "car-springs, packing, hose, boots and shoes, sheet-gum, paper bands, suspender ends, and other articles prepared by the use of sulphur, and also by the use of sulphur and a high degree of artificial heat." Now, the testimony in this case shows beyond all question, that Day had, all this time, been making woven elastic as well as cemented goods, and yet Goodyear complains against Day in the circuit court of New Jersey for the violation of his patents under the contracts of 1846, by manufacturing and using vulcanized rubber to make other articles than he was warranted in making under those contracts, and the articles I have just enumerated are the only ones that he specifies. He makes no complaint of his manufacturing woven or sewed elastic goods. Is it not, then, perfectly clear, that, so far as the acts of Goodyear were concerned, in none of those acts is there any indication that he meant, when he used the general term "shirred or corrugated goods," in the contracts of 1846, to limit them to the articles made under the patent of March 9, 1844? On the contrary, is there not every thing to convince the court that he meant to include all kinds of shirred or corrugated goods? In fact, does he not say —is not that the very language of his application for the extension of his patent—that he had sold that "monopoly" to Day?

If we look also at the specification in the patent of Dupont & Hyatt, it is perfectly apparent that the term "shirred" or "shirred goods" was one that was well known, and that therefore the word was no invention of Goodyear when he took out his patent. But is there anything in the patent itself of March 9, 1844, to make the use of this term "shirred or corrugated," by Goodyear, pass only the right to manufacture goods under that patent? As I have just remarked, Goodyear did not invent the word "shirred," and surely "corrugated" was a word that he could have found in every dictionary of the English language. "Shirred," the testimony proves, was a term known and applied to an innumerable variety of goods. Does Goodyear pretend, in the patent of March 9, 1844, that he invented it? Not at all. Now let us construe the patent altogether. It is true, he says at the commencement of his specification, that I have invented a new and useful manufacture, which "I denominate corrugated or shirred India rubber goods." But look at what he really patents. Does he patent a new manufacture? What does he call it in his application to the patent office for an extension, when he speaks of having sold it to Suydam? A new "improvement." What does he say below in his claim? Does it read thus? "Having for the purpose of putting the public in possesion of my invention, fully described the nature of my manufacture, which I call shirred or corrugated goods." If that had been the language used, there would have been some force in the construction claimed by the defendants. But the language is this: "Having, etc., fully described the nature of my new manufacture of corrugated goods." Then there was a manufacture before; that is admitted. That is apparent on the face of this patent. He continues: "And having also set forth the manner in which I manufacture the same, what I claim as new therein (implying that there was something like it before), and desire to secure by letters patent, is, the forming of such goods by the stretching of strips or threads of India rubber to such extent as may be desired, and the covering of said strips on the opposite sides, with the laminae of cloth, leather, or any other suitable material, which laminae are to be united to each other, and to the threads or strips of cloth, by means of India rubber cement, the same being effected so as to produce the manufactured article such as herein set forth." Now what is his patent? It is a new process of making a manufacture that was known before. Instead of making corrugated goods by sewing or weaving, which was a dilatory process, he makes them more easily and quickly by cementing. That is what he patents—a new manufacture of corrugated goods. It was a new and useful improvement in a known manufacture, and therefore patentable by the law of 1836 [5 Stat. 117]. I hold it therefore clear, from the language of the patent, from the testimony in the cause, and from the language of Goodyear himself in his application to the commissioner of patents, that he did not intend to limit his grant in the contracts of 1846, to the goods made under the patent of March 9, 1844.

Let us now see if there is anything in the collateral testimony to show that there could have been any other intention, on the part of Goodyear, when he used these words.

In Goodyear's assignment, on September 28, 1858, to the Union India Rubber Company, there is one portion which struck my mind forcibly, in connection with this question. He goes on to say: "Now, in consideration of the premises, and of the sum of $30,000 paid to the party of the first part by the parties of the second part, the receipt whereof is hereby acknowledged, and of the tariffs herein specified, the party of the first part has granted, bargained, sold and conveyed unto the parties of the second part * * * the full, absolute, and exclusive license, right and privilege to make, use, and vend to others to be used, the invention of vulcanized India rubber, * * * so far as the same may or can be used in the manufacture of all braided, woven, cemented, or sewed fabrics, or such as are or can be covered or protected on one or both sides, with substances other than rubber, and in all smooth elastic shirred goods." I cite this for the purpose of asking this question: Why, if there were not other shirred goods made than those under the patent of March 9, did he put these words in here? Because it is admitted that Day held the right to shirred goods at this time. Does it not show that there were other shirred goods than those made under the patent of March 9, 1844? I cite it for that purpose, and that alone.

Let us now look at the three licenses referred to in the contract of 1846. The first is the license to Hutchinson & Runyon, on August 12, 1845. It conveys to them "a free license to manufacture, use, and vend shirred or corrugated goods of every description, in so far as the said Charles Goodyear may have any rights or privileges." Shirred goods of every description. Now, in the contract of October 29, 1846, between Goodyear and Day, the language is, to make, use, and vend "all shirred or corrugated goods," except so far as Goodyear has parted with the right by three licenses; therefore, it is important to ascertain what those three licenses contain. Goodyear conveys to Hutchinson & Runyon the right to use his inventions in the manufacture of shirred or corrugated goods of every description, in so far as he has a right to sell. Now, he had the right to sell his inventions, under his patents of March 9, 1844. But there are some things that he had not a right to do. He had no monopoly in woven goods made of common gum, but he could sell the right to make cemented goods of common rubber, and of vulcanized rubber, and he could sell the right to make woven goods of vulcanized rubber; and, therefore, he puts that qualification in. He says, also, in his license to Hutchinson & Runyon, that they shall pay him at the rate of ten cents per square yard for all said shirred goods which they or their assigns shall make, by or under, not the patent of 1844, but "by or under any inventions, improvements, or letters patent before mentioned." Now, can any one doubt about that construction? I have not a shadow of doubt that he intended to give to Hutchinson & Runyon, by this license, the right to manufacture all kinds of shirred goods, whether they were cemented, sewed, or woven; and to use in their manufacture his vulcanized rubber. That is the language. It could not be plainer. They are to pay Goodyear ten cents per square yard on all shirred goods which they or their assigns shall make or cause to be made "by or under any of the inventions, improvements, or letters patent before mentioned." That is to say, if Hutchinson & Runyon make woven shirred goods, of vulcanized rubber, they are bound to pay ten cents a square yard, because they are making them under the patent of June 15, 1844; for they contract to pay for all such goods that they make under any of the patents, of which this is one. I do not think the English language could be plainer. On December 9, 1846, Hutchinson & Runyon reconveyed to Goodyear this license, in general terms, for the manufacture "of shirred or corrugated India rubber goods." The license to Onderdonk & Letson was granted in September, 1845. It is also a license to manufacture, use, and vend shirred or corrugated goods of every description, in so far as Goodyear may have any rights and privileges relating thereto. It seems to be a copy of the other, and is substantially the same. This was reconveyed to Goodyear on December 1, 1846. The third license, to Ford & Co., is also in the same general language. They all seem to be copies of each other. This was reconveyed to Goodyear on December 3, 1846.

There was a reference made by the counsel for the defendants in his argument, to the release of one of those licenses by the Newark Rubber Company—the Hutchinson & Runyon license—which professes to release only the right to make the goods under the patent of March 9. The release bears no date, but was recorded on December 9, 1846; and the covenant on the part of the company is this: "And the said company covenants and agrees to and with the said Charles Goodyear, that they will not manufacture shirred or corrugated India rubber goods, in violation of the patent for said manufacture, issued to Charles Goodyear on the 9th of March, 1844." The granting part is: "Know all men by these presents, that the Newark India Rubber Manufacturing Company, in consideration of one dollar, to them paid by Charles Goodyear, has assigned to the said Charles Goodyear and his assigns, all their interest in the within instrument, and every clause, article, or thing therein contained." The assignment is, therefore, general; it is merely the covenant, that they will not manufacture shirred or corrugated goods, that refers to the patent of March 9. But it is something remarkable that on the same day they made a general release and a general covenant, as follows: "For and in consideration of one

dollar, to us in hand paid by Charles Goodyear, and in consideration of other good causes us thereunto moving, we hereby assign, transfer, and set over to said Charles Goodyear, his executors, administrators, and assigns, the within license, right, and privilege, and the assignment thereof to us, and all right granted, or intended to be granted thereby, or incidental thereto, in as full and ample a manner as we now hold and possess the same. And we also stipulate, covenant, and agree that we will not, after the 1st day of January, one thousand eight hundred and forty-seven, directly or indirectly manufacture, or be concerned in the manufacture, of shirred or corrugated India rubber goods." So it appears that, finding their error, they corrected it. One release is indorsed on the assignment, and the other on the original license.

I think, so far as I have been able to draw any inference from these licenses, that they all strengthen the conclusion to which I have arrived—that in the contract of October 29, 1846, the term "shirred or corrugated goods" meant all kinds of shirred or corrugated goods, whether cemented, woven, or sewed, and is not limited to the goods made under the patent of March 9, 1844. And this is further apparent when we look at the license to Suydam. The argument for the defendants is, that Goodyear, when he used these words in the instrument of October 29, intended only the goods made under the patent of March 9. On May 24, 1844, Goodyear sold to Suydam the right to manufacture shirred goods under the patent of March 9. The language expressly limits his right to those goods alone. It is not, "I sell the right to make shirred or corrugated goods," but it recites: "All my right, title, and interest in and to two certain patents, granted to me by the United States of America, both dated the 9th day of March, 1844, for an improvement in India rubber fabrics." Now I hold it to be very clear that if a man owns two rights to manufacture goods, by patents of different dates, and he sells to A his right under one specifically, and to B the right to manufacture the goods generally, as a matter of course the fair construction of the latter grant will be held to be a conveyance of the right to manufacture under both patents; because in the first grant, when he intends to limit it to one, he so recites on the face of the grant, and in the second, he does not.

It would be useless for me to go over all the ground so very ably occupied by the learned counsel on both sides; indeed, I am not able to do justice to it; but I hold the title of Day to be clear under the contract of October 29, 1846, to use vulcanized rubber in the manufacture of all shirred goods, whether they be cemented, sewed, or woven.

But I will say a word or two on the deed of May 24, 1858. It certainly embraces all the articles concerning which this controversy has arisen, by express terms. If not granted to Day by the contracts of 1846, they passed by the terms of the deed of 1858. I do not speak now about the validity of it—whether it operates in praesenti or in futuro—but on its face it uses terms which will embrace these articles. It grants to Day the right to use Goodyear's invention of vulcanized rubber for the present and all extended or renewed terms of said patent, as the same may or can be used in the manufacture of all "braided, woven, cemented, or sewed fabrics, or such as are or can be covered or protected on one or both sides with substances other than rubber, and in all smooth, elastic shirred goods." Now, if Goodyear had the right to make this grant when he made it, the title would of course pass under it. Is it not a perfect deed in itself? This deed was attacked on the ground that it was not valid. But it is a deed under seal; it was given for a consideration, and it speaks in praesenti. A deed conveys a title, although it may have covenants in it which have not been performed. There are things which rest in grant and things which rest in covenant. In almost every lease or deed, if not in every one, there is something that rests in grant and something that rests in covenant. The words in this grant are: "I hereby sell, license, and convey." There it is in praesenti; it operates as a grant. Then it says: "I agree to confirm." That is a covenant for further assurance. Then it says: "I hereby authorize and empower the said Day to use my name to prosecute and defend the rights and privileges hereby granted." Then it provides: "And the terms and conditions upon which this license shall be held and enjoyed, as to bonuses, not exceeding, in the whole, the sum of thirty thousand dollars, and the tariffs, not exceeding five cents a pound on the product, shall be fixed and determined by Nathaniel Hayward and Thomas A. Jenckes, whose award in the premises shall be final, and shall be made within three months from the 15th day of June next."

Now I am not called upon to give a construction to this covenant in this deed, as to what might be its effect. But Goodyear made it, and with it he made a grant in praesenti. If the covenant fails by his laches, the grant nevertheless stands. The covenant does not affect the grant; the grant passes the title and operates in praesenti. The covenant may have become impossible by the expiration of the time, but yet the grant stands. Is not that a well known principle in the common law? If, by the expiration of time such a covenant becomes impossible, the grant stands.

But had Goodyear this right on May 24, 1858? That depends upon the construction which you give to the license of Goodyear to the Naugatuck Company on July 18, 1844. Did that license carry the right of the Naugatuck Company into the extended term of the patent of June 15, 1844?

Now, if the supreme court have decided that question, there would be an end of it.

But I do not consider that question as decided in 20 How. [61 U. S. 216]. Courts are called upon only to decide questions that are before them. A judge, sometimes, in giving an opinion uses language, which, although it is always entitled to consideration and respect, yet in reference to questions that were not before the court, and the decision of which was not necessary to the decision of the questions before it, is not of binding authority. The case in 19 How. [60 U. S. 222] was this: Day complained of the violation of the Chaffee patent by the Union Company. Of course he could not recover unless he could satisfy the court that he was the owner of that patent. The court decided that he was not the owner.

There is a point in that decision which I will read in reference to the question of the validity of the deed of 1858. In the case of Day v. Hartshorn [Case No. 3,683], the court had decided that the Chaffee patent was in Judson for the benefit of Goodyear. They speak of two contracts that Judson made, but the decision rests upon the last contract of November 12. In that case of Day v. Hartshorn, it will be found that Chaffee attempted to set aside his contracts with Judson, because the contracts had not been performed. I read from 19 How. [60 U. S.] 222, in reference to my last statement in regard to the operation of the deed of 1858: "From the terms and intent of the agreement the remedy of the breach could rest only upon the personal obligation of Judson, as by the previous one of September 6, the interest in the patent had passed to Goodyear and his licensees, and no default or act of Judson could affect them. Chaffee chose to be satisfied with the covenant of Judson, without stipulation or condition as it respected the other parties, and he must be content with it." So the court decided in that case that the Chaffee patent was in Judson for the benefit of Goodyear.

Day again complains of the Union Company for a violation of the same patent, claiming title in himself by the same instrument. The court say in this case of Day v. Union Co., 20 How. [61 U. S.] 216, "The court held in the case of Hartshorn v. Day, 19 How. [60 U. S.] 222, that under the agreement of September 5, 1850, between Judson and Chaffee, the patentee, the entire ownership in the patent, legal and equitable, passed to Judson for the benefit of Goodyear, and those holding rights under him, and on that ground decided in favor of the licensees. Now, in this case, the licenses under Goodyear, to manufacture cloth of the description claimed, are as broad and ample as were those of the defendants in the case just mentioned. Goodyear became the sole owner of the Chaffee patent as early as June 28, 1844, and on the 18th July following gave a license to the Naugatuck Company to manufacture cloths, with certain exceptions, under all his patents—those in which he was then interested, or in which he might thereafter be interested, issued or to be issued, and also in all renewals of patents. He also gave a like extensive license, on March 28, 1847, to W. E. & John Rider, for manufacturing ships' letter and mail bags."

Now, I have a most profound respect for the learned judge who delivered this opinion; but as the case turned not upon this question, but upon other points, these licenses have to be critically examined; because it will be found on looking at the licenses referred to by the court, that they are different in language and in terms from the Naugatuck license. But what does the judge say, when he comes to the point on which the case was decided? "All these various licenses afterward became consolidated in the Union India Rubber Company, the defendants in this suit, and present therefore, a complete defense to the suit, if Goodyear was the true owner of the Chaffee-renewed patent." (And they decided that he was.) "The license of the defendants, therefore, in this case, stands upon two grounds, either of which would seem to constitute a sufficient defense to the suit for infringement: First, authority from Goodyear, the owner of the renewed term of the patent; and, second, the express recognition of Chaffee, the patentee of the right of these parties, as licensees of Goodyear, to use the improvement. And we may add to these grounds of defense, that, upon the interpretation of the court, in the case of Hartshorn v. Day [supra], of the several agreements relating to this patent, and especially that of September 5, 1850, Day took no interest in it under the assignment of Chaffee, of July 1, 1853, he having previous to that time parted with all his interest for the benefit of Goodyear and his licensees."

Those are the grounds upon which the court put it. There was no question before them about the renewed or extended term of the patent of June 15, 1844, and I presume it was never argued. It was another patent, entirely—the Chaffee patent—and the decision is put upon the ground that the complainant, Day, had no right whatever, if the patent was violated, to recover; and that was sufficient to decide that case. But the court went on and decided that the defendants had a right to the extended term of the Chaffee patent, under the license from the Naugatuck Company. Now, what is that license? "That the said Charles Goodyear, in consideration of the payments and stipulations herein provided, hath given and granted * * * unto the said Naugatuck India Rubber Company, a full and absolute license to use any and all his preparations of India rubber, and improvements in the preparation of India rubber for manufacturing cloths or any other article of merchandise, or any article to which the same may be applicable, for and during the unexpired term of all patents issued to him bearing any date whatsoever." There is a full

sentence. He gives it to them during the term of all patents issued to him bearing any date whatsoever. "And for and during the unexpired term or terms of any other patent, patents, or renewals of patents owned by him (that is, that he then owned), or in which he may have an interest, issued or to be issued." That was to cover cases where he might have had an interest in a patent which had not been issued, and the courts have decided that you can sell an interest in a patent that is to be issued.

Now read it the other way, as the counsel for the defendants would have it read. "For and during the unexpired term of all patents issued to him bearing any date whatsoever, and renewals of patents owned by him, or in which he may have an interest, issued or to be issued." You would have him using the word "issued" twice, because he has granted above, the right to the use of his patents issued to him bearing any date whatsoever, which is a full grant; and then he grants to them in a different sentence, the use "for and during the unexpired term or terms of any other patent or patents, or renewals of patents owned by him." Does not the word "renewals," in this sentence, refer to patents that were owned by him but not issued to him—because there was the Chaffee patent, which was owned by but not issued to him—or to those in which he might have an interest for the invention to be patented?

Now let us look at the license to Trotter. See the difference in the language. It is a license to use any of the "machinery, compositions, and methods of manufacturing and preparing India rubber * * * which the said party of the first part now has or may hereafter have, by virtue of any patent or patents, or otherwise, for and during the unexpired term or terms of any such patent or patents, or renewal or renewals thereof, which are or may be owned by him, or in which he may have an interest, or of which he may become possessed." That is different language entirely.

The next is the license to Riders & Trotter. This contains an express provision that it shall continue during "the unexpired term or terms of said patents, or any of them, or the renewals thereof." That, therefore, is very clear. He intended to convey whatever he did convey to them during the renewal of all patents; for he says so in express language. It is to continue during the unexpired term or terms of said patents, any of them, or the renewals thereof.

In the agreement of Goodyear with the Union Company of April 23, 1858, he speaks of the patent about to expire, and this is cited by the counsel for the defendants to show that the Naugatuck license was intended to extend into the extended term of the patent of June 15, 1844, by this agreement. Now, let us look at this a moment. It says: "That whereas the parties of the second part have certain rights and interests in the patents of the party of the first part, * * * under an agreement made by the party of the first part with the Naugatuck India Rubber Company, * * * with Jonathan Trotter, * * * with William Rider & Brothers, * * * and an agreement made by William Rider & Brothers and Jonathan Trotter; * * * and whereas the patent of the party of the first part, dated June 15, 1844, * * * is about to expire, and application has been made for an extension thereof. Now, in order to fix, define, and render certain the rights and obligations of the parties," they proceed to arrange the tariff respecting cloth when made into clothing. Now, was that made under the Naugatuck license? Not at all; but under the Trotter license. They are to pay two cents per square yard of cloth in the piece, or when made up, one and a half cents a pound on India rubber sold in sheets or otherwise, and two and a half cents a pound for other articles not herein specified. All those goods are made under the license to Riders & Trotter, and not under the Naugatuck license; so that there is no argument to be drawn, as I conceive, from that agreement of Goodyear, to show that the Naugatuck license covered the extended term of that patent.

I am, therefore, disposed to think, from this review of these instruments, and of the deed of May 24, 1858, that that deed would have conveyed an interest to Day in the articles, the infringement of which has been complained of. But it is not necessary to do so in this case. I place the title of Day on the contract of 1846; and from the best attention I have been able to give to it, I have heard nothing in the argument, and I have seen nothing in the documentary or parol evidence, to convince me that the terms "shirred or corrugated," in the contract of October 29, 1846, should be limited or restricted to the goods made under the patent of March 9, 1844.

I, therefore, will sign a decree against the defendants, restraining them, as prayed for in the bill.

[NOTE. For other cases involving this patent, see note to Goodyear v. Railroad, Case No. 5,563.

[The decision in this case was followed in the opinion of McCaleb District Judge, in Day v. Lyons, Case No. 3,684.]

DAY (SUYDAM v.). See Case No. 13,654.

Case No. 3,691.

DAY v. UNION INDIA-RUBBER CO.

[3 Blatchf. 488.] [1]

Circuit Court, S. D. New York. Aug. Term, 1856. [2]

EXTENSIONS OF PATENTS — RIGHTS OF ASSIGNEES AND LICENSEES—INTERPRETATION OF PATENTS.

1. The cases of Wilson v. Rousseau, 4 How. [45 U. S.] 646, Wilson v. Simpson, 9 How. [50 U. S.] 109, and Bloomer v. McQuewan, 14 How. [55 U. S.] 539, commented on.

2. Various special acts of congress extending patents, commented on, with reference to their provisions in favor of assignees, grantees, and licensees under the original terms of the patents.

3. The language of the 18th section of said act of July 4, 1836, considered. The effect of that section is, to continue to those who were assignees or grantees of the right to use a patented invention during the original term of the patent, the right to use it during an extension of the patent under that section, whether such right arose from the purchase of a machine, or from a direct assignment or grant of a limited or unlimited right to use.

[Cited in Wood v. Michigan Southern & N. I. R. Co., Case No. 17,957; Wetherill v. Passaic Zinc Co., Id. 17,465.]

4. But such right is limited to a right to use, although the person holding it may also have held, during the original term, an exclusive right to use, to make and to vend.

5. And such right is secured only to the extent of the respective interests of the assignees and grantees therein.

6. If, before the extension, the right to use was limited to a single state, county, town, or smaller district, it continues, during the extension, subject to the same limitations; and if the right was to use a specified number of machines, within a particular district, the limit in number and restriction of place continues.

7. If the only right to use was one which resulted from the purchase of a machine, the right to use is co-extensive with the existence of the machine, and expires with it.

8. Under said 18th section, the assignees and grantees of the right to use a patented process, are continued in the right to use it during an extension of the patent, equally with the assignees and grantees of the right to use a patented machine.

9. The case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, commented on.

10. Chaffee's patent of August 31st, 1836, relative to India rubber, covers both the process described in the specification, and the machinery described as that to be used in carrying on the process.

11. Where, at the expiration of the original term of that patent, A. had a right to use the patented invention for the manufacture of certain articles, and continued, during an extension of the patent granted under the 18th section of the act of July 4, 1836 (5 Stat. 124), to use the invention, in the manufacture of those articles, in the manner and to the extent he was entitled to use it at the time the original term expired; *held*, that A. had the right to continue such use, as against B., the assignee of the patent for the extended term.

12. A. had such right, whether the patent were to be construed as being for a process, and a machine to be used in such process—or for a process alone—or for a machine alone—and whether the machinery used by A. under the patent was or was not in existence prior to the commencement of the extended term.

13. The case of Wilson v. Turner [Case No. 17,845], cited and approved.

[14. Cited in Holiday v. Mattheson, 24 Fed. 186, to the point that a purchaser acquires the right of unrestricted ownership in the article he buys, as against the vendor.]

In equity. The bill in this case [by Horace H. Day against the Union India-Rubber Company] was founded upon letters patent [No. 16] granted to Edwin M. Chaffee, August 31st, 1836, for "a new and useful improvement in the application of undissolved caoutchouc to cloths, leather, and other articles, in coloring the same without the aid of a solvent, and in the machinery used in the process." The patent was subsequently extended for seven years from the 31st of August, 1850, under the provisions of the 18th section of the patent act of July 4, 1836 (5 Stat. 124). The rights held by the patentee under the extension were assigned to the plaintiff, by an assignment bearing date July 1st, 1853. It appeared, by the evidence, that at the expiration of the original term of the patent, the defendants had a right to use the invention patented, for the manufacture of certain articles which derived their principal value from the use of India rubber prepared and applied to the manufacture of such articles under the patent in question, with others; and that, since the expiration of the original term, and during the extended term, the defendants had continued to use the invention in the manufacture of such articles, in the manner and to the extent they were entitled to use the invention before and at the time the original term expired.

Edwin W. Stoughton, Clarence A. Seward, and Nathaniel Richardson, for plaintiff.

William Curtis Noyes and George C. Goddard, for defendants.

HALL, District Judge. The plaintiff's counsel insisted, upon the argument, that the patent was for a process and not for a machine. Such may, perhaps, be the true construction of the patent. I am inclined to think, however, that the patent covers both the process described in the specification, and the machinery described as that to be used in carrying on the process. It may, without doubt, be properly conceded that the patent is not for the described machinery alone; and that, if the machinery is patented, its use is but auxiliary to the carrying on of the process, which is the primary and most important subject of the patent.

It was further insisted by the plaintiff's counsel, that, as the patent was for a process and not for a machine, the defendants, as assignees or grantees "of the right to use the thing patented" during the original term of the patent, had no right to cont nue such use after the extension of the patent; and that,

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

[2] [Affirmed in 20 How. (61 U. S.) 216.]

if it had been a patent for a machine only, the plaintiff would still have been entitled to a decree, because the evidence established the fact that the defendants had used, since the extension, a machine which was not in existence at the expiration of the original term.

It is unnecessary, in the view which I have taken of this case, to enter upon an elaborate discussion of these and many other questions which were argued by the counsel for the respective parties, for I shall hold that the defendants have a right, under the provisions of the 18th section of the act of July 4, 1836, to use "the thing patented" by Chaffee, whether the patent be for a process and a machine to be used in such process—or for a process alone—or for a machine alone, and whether the machinery used by the defendants was or was not in existence prior to the renewal of the patent.

My general views in regard to the purposes and intentions of congress in adopting the provisions of this 18th section which relate to the rights of assignees, agree with those which are very clearly stated in the opinion delivered by Mr. Chief Justice Taney in the case of Wilson v. Turner [Case No. 17,845]. As I understand that opinion, it furnishes abundant evidence, that at the time that decision was made, the learned chief justice maintained the position, that by the section above mentioned, the right to use the thing patented was continued to the assignees and grantees of such right for the original term, without regard to the question whether the patent was for a process or a machine, or to the question whether the particular machine used was or was not in existence at the time the original term expired.

I am well aware, that in the well-considered opinions of Mr. Justice Nelson in Wilson v. Rousseau, 4 How. [45 U. S.] 646, of Mr. Justice Wayne in Wilson v. Simpson, 9 How. [50 U. S.] 109, and of Mr. Chief Justice Taney in Bloomer v. McQuewan, 14 How. [55 U. S.] 539, there are many expressions which appear to indicate that those learned judges considered that the right of an assignee or grantee of the right to use the thing patented during the original term, was limited to the use of machines which such assignee or grantee had in operation, or in being, at the time the extended term commenced. But those cases were all decided in favor of the defendants, who claimed under the 18th section before referred to, and the precise question now presented was not necessarily decided in any one of them. Nor am I aware that the supreme court have ever made any decision by which they have judicially declared that the rights of such assignees or grantees must be so limited; or indeed made any decision necessarily inconsistent with the view I have taken of this case.

In the case of Wilson v. Rousseau [supra] the counsel for the respective parties severally maintained extreme positions upon the question of the construction of the section, and the supreme court considered that there were well-founded objections to the adoption of either. Mr. Justice Nelson, in delivering the opinion of the court, declared that the interpretation of the language of the section which was then urged by the counsel for the defendants, would subvert, at once, the whole object and purpose of the enactment; and that, to adopt the construction of the counsel for the plaintiff, was to make the clause virtually a dead letter. Both of these constructions were, therefore, repudiated, and it was declared that the benefit conferred by the clause in question, was limited "to the naked right to use the thing patented; not an exclusive right even for that, which might denote m[illegible]oly; nor any right at all, much less exclusive, to make and vend."

It is true that Mr. Justice Nelson, after referring to the proceedings and inquiry which are required as preliminary to the renewal of a patent, says: "It is obvious, therefore, that congress had not at all in view protection to assignees." But this remark must be referred to the proceedings and inquiry before mentioned; for the learned judge could not have intended to apply it to the clause now under consideration, which declares, in express terms, that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein." Most certainly, the learned judge did not intend to say that this language was not designed for the protection of assignees. And I cannot doubt it was intended to protect them fully against a claim, which might otherwise have been set up under the renewed patent, that they could not continue the use of the thing patented without a new license, grant or assignment for the extended term.

It is also true, that in other parts of Mr. Justice Nelson's opinion, the right of assignees and grantees under the clause in question is said to be the right to use the patented machine or machines in which they were interested at the time of the extension. And such seems to have been the understanding of the learned justice who delivered the opinion of the court in the case of Wilson v. Simpson [supra]. But, in neither of those cases was the question now presented necessarily discussed or determined; and the judges of the circuit courts ought not to hold themselves bound, and the rights of parties concluded, by the language of a judge of the appellate court, however eminent he may be, unless such language was strictly applicable to the case then before the court. If the question now presented had been discussed in behalf of parties in adverse interest, and had been necessarily considered and decided, it would be my duty to follow such decision. But, as this precise question has never been so discussed, or necessarily considered and determined, I feel bound to act upon my own judgment of the rights of the parties—a judg-

ment formed upon deliberate consideration, and in spite of a strong disinclination to adopt a conclusion adverse to the dicta of the learned justices to whose opinions I have referred.

The case of Bloomer v. McQuewan [supra] necessarily decides nothing for or against the present defendants. But it appears to me, that the reasoning of the learned chief justice affords some support to the position which I have determined to take in this suit, especially when considered in connection with the reasoning of Mr. Justice Nelson in Wilson v. Rousseau. In the last mentioned case, one of the reasons given for repudiating the construction contended for by the plaintiff's counsel was, that it would render useless the clause in question, and that there would be no subject matter upon which it could have reasonable operation and effect. And, if I understand the clear and cogent reasoning of the chief justice in Bloomer v. McQuewan, he fully demonstrates that the clause is useless and unnecessary, in respect to machines in existence and operation, under the authority of the patentee, at the time of the expiration of the original term of the patent. If, as is there said, the purchaser of a machine, for the purpose of using it in the ordinary pursuits of life, exercises, in using such machine, no rights created by the act of congress, and does not derive title to it by virtue of the franchise or exclusive privilege granted to the patentee, if the machine is no longer within the limits of the monopoly, and if no special act of congress passed after such purchase could deprive the purchaser of the right to use such machine, because the right had become vested, and entitled to the protection of the 5th amendment to the constitution of the United States, it is certainly difficult to perceive what additional strength or efficiency could be given to the right to use by the clause in question.

If we look to the previous and contemporary legislation of congress, in renewing particular patents by special and private acts, and to the peculiar language of the clause now under consideration, it is, I think, quite clear, that the construction contended for by the plaintiff's counsel ought not to be adopted.

The section under consideration contained the first enactment by virtue of which the power to renew and extend patents was conferred upon the administrative officers of the government. Prior to that enactment, congress had passed no general law authorizing such extension, but had, from time to time, passed special acts extending or renewing particular patents. Several of those acts are now before me, and will be referred to in the order in which they received the approval of the executive.

The act approved January 21, 1808, entitled, "An act for the relief of Oliver Evans" (6 Stat. 70), authorized the issue, in the form prescribed by the general patent act, of letters patent for his invention, discovery and improvements in the art of manufacturing flour and meal, and in the several machines which he had discovered, invented, improved and applied to that purpose. This act, though authorizing the issue of original letters patent, was, in fact, intended to authorize letters patent for inventions which had been before patented, and which prior patent had been adjudged to be void by the circuit court of the United States for the district of Pennsylvania. Evans v. Jordan, 9 Cranch [13 U. S.] 199, 204. Under these circumstances, the act specially provided, that no person who might have theretofore paid Evans for a license to use his improvements, should be obliged to renew the license, or be subject to damages for not renewing the same; and that no person who should have used the improvements, or have erected the same for use, before the issuing of the patent, should be liable for damages therefor. From this it will appear, that the prior licensees were the persons to whom protection was first given by the provisions of the act.

An act approved February 7, 1815 (6 Stat. 147), extended the rights and privileges of the same Oliver Evans, under a patent issued on the 14th of February, 1804, for his improvements on steam-engines. This act contained a provision, that he should not charge or receive, for the privilege of constructing or using his improvements during the extended term, any greater sum than he had hitherto charged for a like privilege, under his patent then in force.

The patent granted to Jethro Wood, for improvements in the construction of the plough, was extended by an act of congress, approved May 19, 1832 (6 Stat. 486). This act contained two provisos—First, that all rights and privileges before sold by the patentee, to make, use, or vend his improvements, should enure to and be enjoyed by the purchasers respectively, as fully, and upon the same condition, for the extended, as for the existing term; and second, that the price at which the same had been usually sold by the patentee, should not be advanced upon future purchasers.

Three several patents granted to James Barron, for certain improvements therein mentioned, were extended by an act of congress, approved July 2, 1836 (6 Stat. 678), but two days before the approval of the act in which the 18th section, before referred to, is found. This act contained a proviso, that all rights and privileges theretofore sold or granted by the patentee, to make, construct, use, or vend the improvements, or either of them, and not forfeited by the purchasers or grantees, should enure to and be employed by such purchasers or grantees respectively, as fully and upon the same conditions, during the extended period, as for the term which existed when such sale or grant was made; and also a proviso, that those who had bona fide erected or constructed any manufacture or machine for

the purpose of putting the improvements, or either of them, in use, after the expiration of the patents so extended, or were then erecting or constructing any manufacture or machine for that purpose, should have the right of using such improvement or improvements so erected or constructed, or then being erected or constructed.

The act approved February 6, 1839 (6 Stat. 748), renewing and extending the patent of Thomas Blanchard, contained similar provisions.

These acts furnish abundant evidence, that congress, in renewing patents, have been quite as careful to protect the rights and interests of assignees and grantees of the right to use the thing patented, which existed independently of the ownership of the machines patented, as to protect the rights and interests of those who merely owned such machines, and had no right to use the thing patented, other than that impliedly granted by the sale of such patented machines.

The 18th section of the act of 1836, when first reported, did not contain the clause now under consideration—perhaps because it was considered that the declaration that the patent should, after the extension, have the same effect, in law, as though it had been originally granted for twenty-one years, would sufficiently protect the rights of assignees. The clause was subsequently inserted in an amendment. I have not been able to find any report of the debate, if any, had upon this amendment; nor have I been able to find any statement of the purpose or intention of the mover in offering the amendment. It will, however, be seen, that the language is different from that previously adopted for similar purposes in the special acts above referred to; that it is more compact and more general in its terms; and that no separate provision is made either for the assignees, grantees, or licensees under the original letters patent, or for those who had purchased or rightfully constructed the patented machine. Whatever provision is made for either of those classes is to be found only in the general language; and, in my judgment, the language used is broad enough to cover, and was intended to cover and protect, the right to use held by both. If it is to be confined to either, the language can be more appropriately applied to the assignees and grantees of the right to use, who have become such by a direct assignment or grant, irrespective of the sale of a machine or machines, than to those whose right rests upon the tacit grant of the right to use the specific machine sold, which results, by implication of law, from the sale of a particular machine by or under the authority of the patentee.

The term "assignee," when applied to the holder of a right to use a patented invention, is certainly suggestive of the idea of one holding under a direct assignment of the right or privilege to use such invention, rather than of a mere owner of a particular machine, who obtained his right under a sale, and not under an assignment. And the use and connection of the terms, "assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein," seem also to convey the impression that something more than the mere ownership of existing machines was intended; and that they were intended to embrace all classes of such assignees and grantees, and all inventions, whether of machines, processes, or compositions of matter, and to embrace rights and interests which were different in extent either of time or territory, or both.

If the owners of machines were the only persons to whom it was intended to extend protection, the language most likely to be adopted to express such an intention, would express that intention clearly, and express no other. And an intention so simple would naturally be expressed in direct and explicit language, the interpretation of which would be obvious and certain. If, however, other and more extended and varied interests were intended to be embraced, more general language would, necessarily, be adopted, or the length of the clause would be increased, by inserting general or special references to the different classes of cases to which it was intended such protection should extend.

The clause immediately succeeding, which provides that "no extension of a patent shall be granted after the expiration of the term for which it was originally issued," was said, in Wilson v. Rousseau, 4 How. [45 U. S.] 646, to strengthen the view, that the clause now under consideration was limited, in its effect and operation, to the persons using the machines at the time of the new grant; and it was said that the object of the provision just quoted, was "obviously to guard against the injustice which might otherwise occur to a person who had gone to the expense of procuring the patented article, or changed his business, upon the faith of using or dealing with it after the monopoly had expired, which would be arrested by the operation of the new grant;" that, "to avoid this consequence, it is provided, that the extension must take place before the expiration of the patent, if at all;" that "it would be somewhat remarkable, if congress should have been thus careful of a class of persons who had merely gone to the expense of providing themselves with the patented article for use, or as a matter of trade, after the monopoly had ceased, and would be disappointed and exposed to loss if it was again renewed, and at the same time had overlooked the class who, in addition to this expense and change of business, had bought the right from the patentee, and were in the use and enjoyment of the machine, or whatever it might be, at the time of the renewal;" and that "those provisions are in juxtaposition, and, we think, are but parts of the same policy, looking to the protection of individual citi-

zens from any special wrong and injustice on account of the operation of the new grant."

Can it be possible that it would not be a part of the same policy to protect assignees and grantees of the right to use, who had paid for such right, changed their business, and made investments, with the view of using the invention, upon the faith of their existing right to continue the use of the patented invention after the patent should expire; and that those who had fairly and properly contributed their full share to the remuneration of the patentee, would be left entirely at his mercy, and completely within his power, from the time his monopoly was renewed, while those who had contributed nothing to such remuneration would be carefully protected against loss? Is it possible that no such protection was intended to be extended whenever the patent was for a process, or when, by fire, or other accident, the machines which the party had a right to use were destroyed just prior to the expiration of the original term? In this connection, it must be observed, that the authority to renew, conferred by the section, extends to patents issued before the passage of the act which contains it; and that the clause inserted for the protection of assignees and grantees was intended to protect, alike and equally, the assignees and grantees of the right to use patented inventions, whether they become such assignees or grantees before or after the passage of such act. If congress was careful to prevent injustice in the cases referred to by the learned justice in Wilson v. Rousseau [supra], it can hardly be supposed that it was less careful of the rights of those who had paid the patentee or his grantee, to his full satisfaction, for the right to use the invention patented during the whole period of his monopoly, and had made investments, and changed their business, in the full confidence that, when the patent should expire, they would be entitled to the unrestrained use of such invention, and would be able, for a considerable period after the expiration of the patent, to avail themselves of the advantages of their previous investments, as well as of their superior skill and greater experience in securing fair profits, notwithstanding the increased competition which the termination of the monopoly would be likely soon to create.

But, it may be said, that the clause under consideration is more important in respect to patents subsequently issued or assigned; that the construction to be put upon it should be mainly determined by considerations connected with the interests of those claiming under such patents or assignments; and that assignees and grantees of the right to use, obtaining their rights after the passage of the act, purchase with reference to this provision, and either pay a less price, because the right purchased expires with the original term of the patent, or pay a higher price, and secure at once the right to use under both the original and extended terms.

While it must be conceded that the injustice produced by the construction sought to be maintained by the plaintiff, is most manifest in respect to persons who had become assignees and grantees of the right to use a patented invention prior to the passage of the act of 1836, I do not perceive that there is any reason for adopting such construction, even as against those who subsequently became such assignees and grantees.

Congress legislates upon the subject of patents under the provision of the constitution which declares that congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The patent acts have been passed for the promotion of the useful arts, for the ultimate benefit of the public, and not for the sole benefit of inventors and patentees. It is the policy of the government, and the intention of the acts of congress, to promote the progress of the useful arts by offering rewards for useful inventions. These rewards have been hitherto offered in the form of special and exclusive privileges for a limited time. It is for the ultimate benefit of the public that such privileges are granted, allowed to operate, and protected for limited times, for the direct benefit of inventors and their assignees and grantees. But there is another and less remote public object to be attained by the privileges and protection thus afforded. These privileges are granted for the additional purpose of inducing inventors, and their assignees and grantees, to make the required expenditures and investments in order to put the patented inventions in practice, and thereby to give the public the benefits to be derived from a sucessful use of the inventions, at the earliest day, and to the fullest extent, required by the public interests. The value of most inventions is, at first, quite uncertain, and the success of those undertaking to put them in practice is by no means sure. In very few cases can the inventor hold and exercise all the privileges conferred by his patent; and his own and the public interests alike require that he should sell, assign, or grant portions of such privileges to others. If the purchaser of such privileges must necessarily pay an increased price, in order to secure a right to use the invention during an extended term which may never be granted, or incur the risk of being placed at the mercy of the patentee, and subject to such extortionate demands as the cupidity, caprice, or malice of the patentee may suggest, as soon as the original term has expired, the patentee will find fewer persons disposed to purchase, and he will receive, during the original term, less remuneration. The public will, therefore, suffer by the delay in bringing the invention into practical and general use, and by the

greater probability that persons using the invention will be compelled, for an extended term of seven years, to pay tribute to the patentee. As the value and success of patented inventions is thus, at best, exceedingly doubtful and uncertain, making it already sufficiently difficult to find business men and capitalists willing to take the risk of purchasing a right to use an invention, and of making the other investments necessary to put it in practice, courts should not, unnecessarily, interpose additional obstacles in the way of such purchases, or needlessly aid in preventing a patentee from receiving, at the earliest possible period, a full remuneration for his time, ingenuity, and expense bestowed upon his invention, whilst the public is, at the same time, realizing the earliest and greatest benefits from its use under the patent, and securing, without injustice to the patentee, its free use immediately after the original term of the patent has expired.

There is another consideration which should, perhaps, have some weight in determining this question of construction. The renewal or extension is granted only because the patentee has not received a sufficient remuneration for the time, ingenuity and expense bestowed upon his invention. It is for this reason only that he is authorized to make further demands upon the public; and this reason for renewal does not generally exist, unless the just rights of the patentee have been infringed, and his profits under the patent have been expended in the prosecution of suits to establish and maintain his rights. His assignees and grantees, having recognized his rights, and paid the agreed remuneration for the right to use his invention, have already contributed their shares towards his remuneration, and should therefore be permitted to continue the use of the invention after the expiration of the original term of the patent, precisely as though it had not been renewed, instead of being placed on the same footing with those who have resisted and infringed the legal rights of the patentee.

The terms of the clause under consideration are certainly broad and general and appropriate enough to secure the just rights of all who can be regarded as assignees or grantees of the right to use the patented invention, whether under a purchase of a machine, or a direct assignment or grant of a limited or unlimited right to use; and the equities of the case and the policy of the patent laws require, that the clause should be so construed as to give such security. The protection which it affords is limited to those who have a right to use; and, in the construction and operation of the clause, it may well be limited, and, I think, should be limited, to the exercise of that particular right, although the persons holding that right may also have held, during the original term, the exclusive right to use, to make, and to vend. This right to use is protected, continued and secured, only to the extent of the respective interests of such assignees and grantees therein; and, if the right to use before the extension was limited to a single state, county, town, or smaller district, it continues, under this clause, subject to the same limitations. If the right was to use only one, two, four, six, or any other number of machines, within a particular district, the limit in number and restriction of place still continues. If the only right to use was one which resulted from the purchase and ownership of a machine, the right to use is coextensive with the existence of such machine and necessarily expires with it, for no other right to use has ever been granted or assigned to such owner.

The language of the clause thus clearly including all classes of assignees and grantees of the right to use the thing patented, I can see no reason for adopting a construction which imposes a limitation or restriction not found in, or suggested by, the language used, and which would, in my judgment, be opposed to the general policy of the patent laws, injurious to the public, and manifestly and grossly unjust to the large and meritorious class of persons, who, after making due compensation to the patentee for his ingenuity, time, and expense bestowed upon his invention, according to the extent of the interests purchased, have changed their business, and made investments, at considerable risk, for the purpose of putting such invention in practice. I can see no reason for holding that a statute which declares, that the benefit of the renewal of a patent "shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein," must be construed as though it read, that all the restraints, prohibitions, disabilities, and incapacities thereby created, should extend to such assignees and grantees, and as though it expressly declared, that the only right which should remain to such assignees and grantees, should be one guaranteed by the constitution of the United States, and which, consequently, could not, by any possibility, be divested by an act of congress.

But it is said, that in this case, the patent is for a process, and not for a machine, and that, therefore, the clause in respect to the rights of assignees and grantees does not apply. There is, certainly, nothing in the language used, to indicate that the assignees and grantees of the right to use a patented process are not to be protected, equally with the assignees and grantees of the right to use a patented machine. The use of the term "thing patented," instead of "machine patented," is evidence of an intention to embrace more, by the more general term, than would have been embraced by the more specific and restricted term; and I can see no reason whatever for the distinction now insisted upon, if I am right in my conclusions in regard to the true construction of the clause in question. The language used is the broad-

est and most general that could have been used, to embrace patents of every class, and, in my judgment, the right to use the "thing patented" is equally secured, whether the patent is for a process, a machine, or a manufacture.

In the case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, referred to with approbation (or at least without disapprobation) in Wilson v. Rousseau, the defendants claimed a right to use a patented process, under the 7th section of the act of March 3, 1839 (5 Stat. 354), which declares "that every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application, by the inventor or discoverer, for a patent, shall be held to possess the right to use and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention." The supreme court held, that the defendants, who had used the invention before the patent with the inventor's consent, founded upon a sufficient consideration, had a right to continue the use of the invention after the inventor had obtained a patent and assigned it to the plaintiffs. I am unable to see any ground for adopting in this case the construction insisted upon by the plaintiff's counsel—a construction entirely different from that which the ordinary interpretation of the clause in question seems necessarily to require—when the supreme court, in McClurg v. Kingsland (for reasons similar to those which seem to require that the language of congress should be allowed to extend to all the cases within the scope of its language by the ordinary rules of interpretation), construed language much more restrictive and specific, so as to embrace cases which were not embraced by the literal terms of the statute then under construction.

It is impossible not to see that the language of the statute under which the defendants in McClurg v. Kingsland [supra] rested their defence, afforded much stronger grounds for excluding from its operation a mere process, or for holding that the right could not exist independently of the existence of the specific machine with which it was acquired, than can be found in the language used in the 18th section of the act of 1836. There is no indication, in this act of 1836, that any distinction between a patent for a machine and a patent for a process was intended. But, under the act of 1839, upon which the question decided in McClurg v. Kingsland arose, the persons who are to have the continued right to use, notwithstanding the subsequent patent, are those "who have purchased or constructed any newly invented machine, manufacture, or composition of matter;" and the right expressly conferred is only the right to use "the specific machine, manufacture, or composition of matter, so made or purchased." In the same connection, the right to vend to others to be used is given to the same extent (if the literal expressions of the section are to control) as the right to use; and it can hardly be supposed that this right would be extended beyond the specific article so made or purchased. The language of the act of 1839, therefore, affords some grounds for the conclusion, that the right to use, given by that act, must expire with the specific machine, manufacture, or composition of matter which was made or purchased prior to the patent, although the court did not consider such grounds sufficient to justify them in adopting a construction which was opposed to the general policy of the patent laws, and would probably defeat the real intention of the national legislature.

In fine, my conclusion is, that if the question presented in this case had been fully discussed and necessarily considered by the court in the case of Wilson v. Rousseau, the right claimed by the defendants in this suit would have been recognized and established; and that the language which appears to sustain the doctrines insisted upon by the plaintiff's counsel, then and since used by the justices of that court, has been so used, without the learned justices who used the same having considered the class of cases to which the case now under consideration belongs.

If I am right in these conclusions, the bill in this cause must necessarily be dismissed. If the defendants have the right to use, the plaintiff cannot restrain that use by injunction, or have a decree against the defendants for the profits of such use. If the machine used was one which its previous owner had a right to use only in other territory, and had no right to sell, it can make no difference; for this suit respects only the right to use. Even if the defendants have constructed a new machine without right, and in violation of the renewed monopoly to make and vend, the plaintiff must bring his action at law for damages, instead of his bill in equity for an injunction, and an account for use and profits.

The plaintiff's bill must be dismissed, with costs.

This case was taken, by appeal, to the supreme court of the United States, where it is reported as Day v. Union India-Rubber Co., 20 How. [61 U. S.] 216. The decree of the court below was affirmed, but the supreme court did not pass upon any of the questions discussed in this opinion.

[NOTE. For other cases involving this patent, see Day v. New England Car Co., Case No. 3,686; Day v. New England Car-Spring Co., Id. 3,687; Day v. Candee, Id. 3,676; Day v. Union India-Rubber Co., 20 How. (61 U. S.) 216; Day v. Boston Belting Co., Case No. 3,674; Day v. Hartshorn, Id. 3,683; Hartshorn v. Day, 19 How. (60 U. S.) 211; Chaffee v. Boston Belting Co., 22 How. (63 U. S.) 217.]

DAY (UNITED STATES v.). See Case No. 14,934.

Case No. 3,692.

DAY et al. v. WALLS.

[35 Leg. Int. 468.][1]

District Court, E. D. Pennsylvania. Nov. 30, 1878.

TRADE-MARKS—JURISDICTION OF DISTRICT COURT.

[This was a suit by Day & Frick against P. Walls.]

Mr. Buckley, for complainants.
Peirce Archer, Jr., for defendant.

Held by CADWALADER, District Judge, following the case of Leidersdorf v. Flint [Case No. 8,219], that the United States district court has no jurisdiction to entertain conflicts over trade-marks.

DAYTON (LEVERINGE v.). See Case No. 8,288.

Case No. 3,693.

DAYTON v. WRIGHT et al.

[2 Ban. & A. 449;[2] 11 O. G. 197.]

Circuit Court, N. D. Illinois. Oct. Term, 1876.

RES JUDICATA—PARTIES AND PRIVIES—DECREE IN PATENT CASE.

1. Wright and another defendant were enjoined by the circuit court in another circuit from manufacturing a sieve infringing Mann's patent. Pendente lite Mann died; the suit was revived by his executor; the defendants were decree to have infringed Mann's patent, and the case was referred to a master to assess damages. Complainant purchased the patent, and, before the master's report came in, filed this bill in this court against Wright and one Herring, whom, since the decree in the former suit, Wright had associated with him in same manufacture here: *Held*, that complainant is in privity to the decree in the former suit, and that Wright and his present partner Herring are also in privity thereto, so that each of them is bound thereby.

2. The defendants in this case denied the validity of the patent, and alleged some instances of prior use not set up in the former case, but only cumulative upon the same point: *Held*, that the parties and subject-matter, being before the court in the former case, the defendants would be bound by its decree, and that as only an interlocutory decree had been entered therein, this court must presume that if new evidence had been discovered material to the issue, the former case would be opened and the new proof let in on proper application to that court.

[This was a bill in equity by George E. Dayton against George Wright and others for the alleged infringement of letters patent No. 130,514, granted to one R. J. Mann, August 13, 1872. On motion to dissolve a preliminary injunction.]

Coburn & Thacher, for complainant.
West & Bond, for defendants.

BLODGETT, District Judge. This is an application to dissolve an injunction which was granted some time since, enjoining the defendants, George Wright & Co., from manufacturing a certain kind of sieve, which, it is alleged, was in violation of the patent granted to one Mann, and now held by the complainant.

It appears from the pleadings and proofs, that a patent, in due form, was granted to Mann for a specific method of constructing a wire sieve with a metallic rim, the device consisting of the mode by which the wire-gauze was fastened into the rim. During his life-time Mann commenced a suit in the United States circuit court for the western district of Missouri, against Wright and another defendant, to enjoin an alleged infringement of this patent. Wright and his codefendant answered the bill filed in that court, and two issues were made up—First, whether there was an infringement; second, whether the device of Mann was novel and patentable. Pending this suit Mann died, and the suit was revived by his executor. Testimony was taken, and the case was brought to a hearing a few months since, and a decree made finding that the defendants had infringed the patent, and that the patent was valid. The case was then referred to a master for the purpose of assessing the damages, and it would seem, from the record produced here, to be still awaiting the master's report. After the entry of this decree, this bill was filed against the defendant, Wright, and his codefendant, who since said trial had engaged in the same manufacture here. The complainant has purchased from Mann's administrator the right to this patent, and now holds the same.

I have no doubt, therefore, but that he stands in full privity to this decree, and that the defendant, Wright, is also bound by the decree as a privy thereto. I am also of the opinion that the other defendant, Wright's present partner, is so far in privity with the former case by his partnership relation to Wright, that he is also bound by this decree, as I do not think Mr. Wright can escape the force of the decree by associating another person with him.

The defendants now seek to reopen the whole controversy by denying the validity of the patent, alleging some instances of prior use of the device not set up in the former case, but, at most, only cumulative upon the same point. This, I think, cannot be allowed. The parties and subject-matter were properly before the Missouri court, and must be held bound by its decree, so long as the same remains in force. That being only in one sense an interlocutory decree, this court must presume that if new evidence has been discovered material to the issue, the case would be opened, and the new proof let in on proper application to that court.

Entertaining these views, I must refuse to dissolve this injunction, leaving the injunction in force until a final hearing of the case, and a more full argument.

DAYTON, The L. P. See Case No. 7,192.

[1] [Reprinted by permission.]

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

Case No. 3,694.

The D. C. SALISBURY.

[Olc. 71.][1]

District Court, S. D. New York. Nov. Term, 1844.

MARITIME LIENS—WHAT ARE MARITIME SERVICES—VESSEL TOWED ON TIDE WATERS—WAGES OF MASTER.

1. A mariner, rendering services on board of a vessel carrying coal between Philadelphia and New-York, upon tide waters, though she be stripped of sails and masts, and be towed by steamboats, may proceed in rem against such vessel for his wages.

2. Every service rendered by a mariner, contributing, in contemplation of law, to the management, safety or benefit of the vessel, is so far maritime as to carry a privilege against the vessel.

[Cited in The Norfolk, Case No. 10,297.]

3. The services will be deemed maritime if substantially performed on waters within the ebb or flow of the tide.

[Cited in The General Cass, Case No. 5,307; The Atlantic, 53 Fed. 609.]

4. If the services of libellant were those of master, or were merely those of taking and discharging cargo at the wharves, and in no way connected with the navigation of the vessel, the lien would be denied.

A. Nash, for libellant.

G. R. J. Bowdoin, for claimant.

BETTS, District Judge. The boat was arrested in rem for services by the libellant on board, in loading, navigating and unlading her. It was admitted by the respondent that five dollars was due for his labor; and the question raised and discussed by counsel is, whether the libellant for this claim has a lien upon the vessel which can be enforced in this court. The boat is of about forty-four tons burden, and is licensed and enrolled as a coasting vessel. Her employment, since the libellant was attached to her, has been in transporting coal from Philadelphia to New-York by the way of the Delaware river and the Raritan canal and river. She is towed by steamboats to, through and from the canal, and the men on board perform no other seamen service in her navigation on tide waters than aiding in steering her at particular times of tide, and occasionally at particular points on the passage. The case is distinguishable from that of Davis v. The Enterprise [Case No. 3,632], decided in this court in October, 1842, and the cases before Judge Randall, in the Pennsylvania district court, cited on the argument, for in each of those cases the hiring was essentially for services on canals, and those rendered on tide water were merely incidental. Here, so far as the circumstance of the locus affects the question, the principal service was to be rendered in navigating to and from the canal on tide waters. In reducing the controversy to this point, there is left for consideration only the inquiry, whether these particular services were of a maritime character, and on board a vessel subject to the maritime privilege.

The claimant contends that the circumstance of the boat not being self-impelled takes her out of the class of vessels subject to liens for wages. If she was used chiefly on a canal or internal waters, or only as a lighter in removing cargo to or from a vessel, or in carrying produce to market and managed by landsmen; or if she was one of those small floats or craft attached to other vessels, and employed in no other way than as adjuncts or assistants to such vessels, the boatmen might have a difficulty in maintaining a lien upon her for their labor. Should this be so in respect to equivocal cases of that class, it seems to me there is a difference between them, and one where a vessel has all the properties of a sea vessel except the use of self-propelling means; and that an exemption from lien placed on the latter circumstance must be attended with great perplexity and ambiguity in its application. If a vessel of forty-four tons burden, employed in carrying freights coastwise from one state to another, because having no sails or propelling machinery is excluded from the class of maritime vessels, what principle would bring one of ten or twenty times that burden, under like circumstances, within the class? Or upon what basis is the rule to be established, that upon vessels not having, or not using self-propelling means, the boatmen or hands can have no lien, while upon the other class they shall have a charge, with the right of enforcing it in admiralty?

I assume it will not be controverted, that a ship or schooner, brig or sloop, with all her rigging and tackle on board, would be subject to the lien of her crew for wages, though towed by a steam vessel from Philadelphia to New-York, and never, in any way, on the voyage, employing her sails, or even having her rudder moved by the crew. The kind or amount of duty performed by the men on shipboard in no way determines the character of their remedy. They are there to serve as directed, and those engaged in the lowest and least valuable grades of service have a common privilege for the recovery of their wages with pilots, sub-officers and sailing masters. And in relation to the craft itself, there is no distinction between one so equipped, and the like vessel stripped of sails and masts. And accordingly, should it become the course of the coal-trade between Philadelphia and New-York to dismantle of rigging and spars the large vessels now employed in that navigation, and using only their hulls, have them towed by steam-tugs, the men engaged in the management of such vessels would be no less entitled, because of that change of apparel and method of management, to proceed against them in rem for the security of their wages. It is never a question how far one shipped to sea duty actually aids in the navigation of a vessel,

[1] [Reported by Edward R. Olcott, Esq.]

or in what way his services are rendered, in order to determine his right to a lien. If he is attached to her, ready to render such services as may be required of him in his place, it is sufficient; every service rendered on board which contributes, in contemplation of law, to the management, safety or benefit of the vessel, has a maritime character and privilege. Thus stewards, carpenters, chambermaids and surgeons have their lien for wages the same as if stationed before the mast; the law regarding the ship's complement as all ministering to the aid and protection of the vessel on her voyage, and never stopping to ascertain or inquire the quality or value of the service of the one in comparison with that of another.

In the case of the steamboat Thomas Jefferson, the supreme court held that the service was to be deemed maritime, if substantially performed on waters within the ebb and flow of the tide. 10 Wheat. [23 U. S.] 428. This was no doubt decided essentially in respect to services, admitted to be of a maritime character, if performed at sea; but yet the case carries an import beyond any special regard to the kind of labor, and implies that the ship's company any way employed in duty on board on tide waters, are entitled to the privilege. Judge Hopkinson struggled earnestly to discover a rule which should fix with precision the discrimination between services essentially maritime, and those claimed to be such from being merely performed on shipboard at sea or on tide water,—Thackarey v. The Farmer [Case No. 13,852]; Trainer v. The Superior, [Case No. 14,136],—and was free to acknowledge his want of satisfaction with the effort. He may have suggested instances not falling within the doctrine, but his admission of the scope of the rule is ample enough to embrace the case of a crew attached to a licensed coaster, passing from state to state through tide water. He concedes that it applies to river craft navigating the Delaware on tide water, and its force would not be diminished if the vessel, adding thereto the transit of a canal, performed another tide water voyage to the place of her destination. I suppose that there is no ground for question that this coal boat, employed as a freighter, would be subject to a lien for the libellant's wages on board, if she had been worked on her voyage by aid of his bodily labor, with oars or setting-poles; for the law does not impart to a service on shipboard the character of maritime, for the reason that it is applied to the vessel in any special manner, or that she is moved by its agency or otherwise; nor that the service requires nautical experience, or skill, or aid on the part of the crew; it is so only because the vessel is on a sea voyage, and the crew is employed some way to assist in furthering it. I cannot perceive that there is any difference in principle whether the means of motion are derived from or controlled by the crew, or are contributed aliunde. The quality, or quantity, or source of the motive power might enhance, diminish or dispense with the labor of the crew, but could supply no criterion by which to determine whether their services during the passage were maritime in character; and I cannot, in view of the principles recognized in the adjudged cases, discover any principle governing the question other than the simple one before indicated, that the vessel is engaged in a maritime voyage, and that the party seeking a lien upon her was hired and rendered services on board connected with her employment.

In the case of The Ontario [case unreported], decided in this court in 1838, and affirmed on appeal to the circuit court, the lien was denied for two reasons: (1) That the libellant, if connected with the boat in any manner, was so as master, and not as a hand or mariner; and (2) because the services were merely those of taking in and discharging the cargo at the wharves, and in no way connected with the navigation of the vessel on tide water. But it seems to me, upon the brief sketch of facts furnished in this case, that I am to regard the libellant as hired to perform all the services on board this vessel required in her loading and unloading, and in effecting her passage up the Delaware, on tide water, down the Raritan, through the Kills, and across New-York Bay, all also tide waters. In this shape of the case, his right and remedy cannot be affected by the method of her being propelled, or the degree of aid contributed by him to her navigation. The demand is trivial in amount, but the principle which determines it must be the same as would have governed the case had a whole year's wages been in arrear. This case also in some measure illustrates the utility of the rule as applicable to vessels of this description. The answer denies the right of the person hiring the libellant to give him any security on the vessel for his wages; and without this remedy, men of his class might often be put to great difficulty and expense in finding and charging the proper persons with the payment of their earnings. If it is understood that the vessel stands responsible on such contracts to her men, it gives the assurance of prompt and full payment for their labor, and this important and growing branch of trade, as well as others under like circumstances, will have at command all the services that may be demanded to insure its active and profitable prosecution. I shall, therefore, order that the libellant recover five dollars, the balance of wages admitted to be due him, and summary costs, to be taxed.

Case No. 3,694a.

DEACON v. SEWING MACH. CO.

[14 Reporter, 43.] [1]

Circuit Court, E. D. Pennsylvania. June 20, 1882.

PRACTICE—SERVICE OF SUBPOENA IN EQUITY—EQUITY RULES 13 AND 15.

A service of a subpoena in equity by a person other than the marshal, unless specially appointed by the court, is bad, and will be set aside on motion.

In equity. Motion to set aside service. The affidavit of service of the subpoena showed that the subpoena had been served by a clerk.

John H. Sparhawk, Jr., and Edwin F. Pugh, for the motion, cited rules 13 and 15 of the supreme court in equity.

F. Swayne and Geo. E. Buckley, for complainant, acquiesced.

BUTLER, District Judge, in delivering the opinion of the court, said: There is no doubt that all process must be served by the marshal. Service by another person is not sufficient unless he is specially appointed under the rule of court. Motion granted.

Case No. 3,694b.

DEADRICK v. HARRINGTON.

[Hempst. 50.] [2]

Superior Court, Arkansas Territory. Oct., 1827.

JUSTICE JUDGMENT—REVERSAL—FORMAL DEFECTS.

1. Unless it appears that a jury was required, and refused by the justice, the judgment will not be reversed.

2. The expression, "I give judgment," includes the technical and formal words of a judgment, and is sufficient.

Certiorari to Arkansas circuit court.

[This was a suit by J. G. Deadrick against John Harrington.]

Before JOHNSON and TRIMBLE, Judges.

OPINION OF THE COURT. This case was brought before the circuit court of Arkansas county, and certified to this court because the judge of that court had previously appeared as attorney for the plaintiff before the justice of the peace. We think it necessary to notice only two points in this case. The first point was, that it does not appear that the parties dispensed with a trial by jury. To authorize this court to reverse the judgment of the justice, we think, under the statute, it ought to appear that the plaintiff required a jury, and that it was refused. Secondly, the court are satisfied that the judgment entered by the justice is substantially good. The parties are identified, the sum is certain; and the only objection is, that the justice has said, "I give judgment," instead of saying, "It is considered that the defendant have and recover of the plaintiff." In using the word "judgment," the justice has included the more technical and formal words. His language is sufficiently certain, at least, as much so, as if a jury should say, "We find for the defendant." Judgment affirmed.

[1] [Reprinted by permission.]

[2] [Reported by Samuel H. Hempstead, Esq.]

Case No. 3,695.

DEAKIN v. LEA et al.

[11 Biss. 27.] [1]

Circuit Court, N. D. Illinois. Dec. Term, 1879.

REMOVAL OF CAUSES — WHEN ONE PARTY IS A FOREIGNER—REMANDING CAUSE—EFFECT OF ENTERING LIMITED APPEARANCE IN STATE COURT —WHEN CAUSE WILL BE REMANDED—DAMAGES ON INJUNCTION BOND—WHEN AWARDED.

1. If a citizen of a foreign country brings suit in a state court against a citizen of the state, the latter may remove the cause to the federal court under the first clause of section 2 of the act of 1875 [18 Stat. 470].

2. But the last clause of section 2 of the act of 1875 authorizes removal only in suits between citizens of different states, and does not apply to foreigners.

3. Where a subject of Great Britain brought suit in the state court upon a joint and several bond, against a citizen of the state of Illinois and two other subjects of Great Britain; and the citizen of Illinois entered his general appearance in the state court and the two defendants subjects of Great Britain, no service being had, entered their appearance by counsel, in the state court, solely for the purpose of petitioning for a removal of the cause; and thereupon all three defendants did petition for removal, and removal was had, it was *held* that as the bond was executed in a suit in, and under the order of this court the federal court would retain jurisdiction, and would not remand the cause.

4. If a suit has been removed from the state to the federal court it will not be remanded unless it appears to the satisfaction of the court that it has no jurisdiction.

5. Whether a suit can be maintained upon an injunction bond given in the federal court, under a general order of the court, conditioned "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction," when no damages were awarded by the court at the time of the dissolution, in the light of the statutes of Illinois and the decision of the United States supreme court in Bein v. Heath, 12 How. [53 U. S.] 168, discussed but not decided.

6. In such case however if the state court would be compelled under the statutes to sustain the suit, the federal court ought to be bound by the same rule.

C. E. Pope, for plaintiff.

Henry T. Rogers, for defendants.

DRUMMOND, Circuit Judge. Frank Deakin, a subject of the queen of Great Britain and Ireland, brought a suit in the state court on a bond, against Charles W. Lea, James D. Perrins, also subjects of the same sovereign, and John Crerar, a citizen of the state of Illi-

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

nois. The bond was executed in August, 1878, and was given under an order entered in a suit pending in this court, where Lea and Perrins were plaintiffs, and Deakin was defendant [see Case No. 8,154 and 13 Fed. 574], and in consequence of the continuance of an injunction which had been issued by this court against the defendant. The defendant having made application to the court for further security upon the continuance of the injunction, the bond in controversy in this case was given in the penalty of five thousand dollars. The order of the court was simply that a bond should be given by the plaintiffs, with security to be approved by the court. Neither the form nor the condition of the bond was prescribed by the court in its order. The condition of the bond which was actually given was as follows: that the obligors "shall well and truly pay, or cause to be paid to the said Frank Deakin or his assigns all damages and costs that shall be awarded against said Lea and Perrins, complainants, and in favor of said defendant Frank Deakin upon the trial or final hearing of the said cause or upon the dissolution of said injunction by reason of the wrongful or improper issuance of the same."

Crerar entered his general appearance in the state court. Lea and Perrins, by their council, entered an appearance in the state court, as they said, solely for the purpose of petitioning the court for the removal of the cause to this court; and thereupon Crerar filed a demurrer to the declaration in the case, and then all the defendants joined in the petition for the removal of the cause to this court; and they all executed the bond required by law in cases of removal. Under these circumstances, the case came into this court and is now pending here.

An application is now made by the plaintiff in the cause to remand it to the state court on the ground that this court has no jurisdiction. The jurisdiction of this cause must be sustained on one of two grounds; either because of the citizenship of the parties, or on account of the subject matter in controversy. If this suit be considered as an action against Crerar only, and that Lea and Perrins have simply joined him for the purpose of removing the suit to this court, and are not in court for any other purpose, then there can be no doubt that this court would have jurisdiction of the case; for if it had been a suit against him alone, without naming Lea and Perrins, he undoubtedly could have removed the cause to this court under the second section of the act of 1875.

It is claimed now by the counsel of the defendants that the only object of Lea and Perrins was to remove the suit to this court, and that they did not enter their appearance for any other purpose; and that there was, therefore, no general appearance so as to make them subject personally to the jurisdiction of the court. There may be some doubt whether what they have done does not constitute a general appearance in the cause, and whether it is necessary for them to appear, by pleading or otherwise, in order to give this court complete jurisdiction of their persons; but as there may be a doubt as to what is the effect of the action on the part of Lea and Perrins, I do not feel inclined on that account to send the case back to the state court, and particularly when the bond in this case is a several as well as a joint bond, and each party is severally liable for the whole amount of the damages which may be recovered upon it. It is undoubtedly true, however, that the last clause of the second section of the act of 1875 does not provide for a case where there is a separate controversy between a subject of a foreign government and a citizen of one of the United States, but only to a controversy between citizens of different states, and where the suit is sought to be removed by one or more of the plaintiffs or defendants.

Then in relation to the subject matter of the controversy.

The language of the fifth section of the act of 1875 is, if in any suit removed from a state court to the circuit court of the United States it shall appear to the satisfaction of said circuit court after the removal of the cause, that such suit does not really and substantially involve a controversy within the jurisdiction of the said circuit court, then it shall proceed no further in the suit, but shall remand it to the court from which it was removed; so that it has to appear to the satisfaction of the court that it has no jurisdiction of the cause before it can be sent back to the state court. There is some difficulty, I think, in this question. This action is on a bond executed for the benefit of the defendant in the former suit, in consequence of the order of this court. It may be that the bond was not strictly in compliance with the order. It was nevertheless a bond executed because the order of the court was made, and in a suit pending in this court, and was, therefore, an instrument growing out of a controversy in this court, and I am not clear that this court has not jurisdiction of the case on account of the subject matter in controversy here.

The condition of this bond is not in precise conformity with the practice of this court in injunction bonds. At the same time, as I have said, the object of the court and of the parties it is to be presumed, was to give indemnity to the defendant in the cause. I am inclined to think that prior to the passage of the act of 1861 in this state this bond would have been a valid bond, upon which an action would have been maintainable in the courts of this state under the last clause of the condition, "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction."

There are various decisions of the courts of this state, prior to the passage of the act of 1861, in which it was decided that where

language like this was used, viz: "all damages and costs that may be awarded in case of the dissolution of the injunction," it was not necessary that the damages should be awarded by the court in which the cause was pending and in which the bond was given (Ryan v. Anderson, 25 Ill. 372; Hibbard v. McKindley, 28 Ill. 240; Brown v. Gorton, 31 Ill. 417; Edwards v. Edwards, Id. 478; Phelps v. Foster, 18 Ill. 309; Russell v. Rogers, 56 Ill. 176), and that it might properly refer to the case of damages awarded where a suit was brought upon the bond; and it seems to me where they have held otherwise, as they have in some cases since, it was because of the effect given to the act of 1861, by which it was competent for the party, where the injunction was dissolved, to ask the court to assess the damages which he had sustained in consequence of the issuing of the injunction; and since the act of 1874 and the proviso contained therein (Rev. St. Ill. c. 69, § 12) that a failure to assess damages shall not operate as a bar to an action on the bond, and which seems to have been passed in order to meet some of the decisions of the supreme court of this state, it may be, I think, a very questionable matter whether or not, if this bond had been filed in a case in the state court, it would not have been a valid bond, and the breach would not have been complete if there had been damages sustained, although the court did not award any damages upon the dissolution of the injunction. Of course, it is to be understood that the order for the dissolution of the injunction which was issued and during the pendency of which the bond was given, was made by this court.

I think it proper to state that at the time of a consultation between Judge Blodgett and myself as to the effect of the decision of the supreme court of the United States in Bein v. Heath, 12 How. [53 U. S.] 168 (when suits on some of these bonds were pending before him), I was not aware of the proviso in the act of 1874, and I am not now prepared to say how far that fact, if it had been brought to my knowledge, would have modified my opinion as to the effect of the case of Bein v. Heath. At any rate, I am inclined to think, in view of what the supreme court of the United States said in that opinion that it may become a very serious question whether this might not be a valid bond, by virtue of the proviso in the act of 1874, notwithstanding that case, and I should very much like to have the opinion of the supreme court taken upon the order by which as I understand the demurrer was sustained in those cases and the suits dismissed. In the consultation which Judge Blodgett and I had upon that case, before he called my attention to Bein v. Heath, I stated to him I thought that, as at the time this bond was executed it must be presumed that the parties were aware that the court in which the case was pending could not assess any damges, we must also presume that it was contemplated that the damages sustained were to be assessed in an independent suit brought upon the bond; but when the case of Bein v. Heath was examined, it seemed as though there could not well be any escape from the effect of that decision, and that it necessarily ruled the cases then pending before Judge Blodgett.

If this case is sent back to the state court, we must presume that the decision would be such as this court or the supreme court of the United States would render. The only ground upon which it can be claimed that there might be a difference is, as I understand, because it may be presumed that the bond was given under the law of this state, and under the statutes which would apply to it, and therefore that a decision of the state court would be upon a statute of the state, and therefore, it would be bound to give effect to the proviso of the act of 1874. It would only do that upon the ground that it was effectual and binding in a case pending in the federal courts, and if binding here, it ought to be so ruled by this court as well as by the state court.

On the whole I am inclined to retain jurisdiction of the case in this court, and shall, therefore, overrule the motion to remand.

See, also, the succeeding case of Deakin v. Lea [Case No. 3,696].

Case No. 3,696.

DEAKIN v. LEA et al.

[11 Biss. 34;[1] 14 Chi. Leg. News, 297.]

Circuit Court, N. D. Illinois. April 8, 1882.

JURISDICTION OVER PERSON—APPEARING TO PETITION FOR REMOVAL IS GENERAL APPEARANCE—INJUNCTION BONDS—AWARDING DAMAGES—SUIT ON BOND—FEDERAL PRACTICE.

1. If defendants who are not served with process in a suit in a state court enter their appearance by counsel solely for the purpose of joining in a petition for removal to the federal court, "and for no other purpose whatsoever," as expressed, and the cause is removed to the federal court, such appearance so entered will it seems give the court jurisdiction over such defendants for all purposes the same as though process had been personally served upon them.

2. Where upon a general order for an injunction bond in the federal court a bond was given in conformity to the state statutes and practice in the state courts, conditioned to pay all damages and costs that shall be awarded against the complainants and in favor of the defendant, "upon the trial or final hearing of the cause, or upon the dissolution of the injunction," and no damages are awarded by the court upon the final hearing of the case and the dissolution of the injunction, no suit can be maintained upon the bond under the ruling of the United States supreme court in Bein v. Heath, 12 How. [53 U. S.] 168.

[Cited in Lea v. Deakin, 13 Fed. 514.]

3. The fact that suit can be maintained upon a similar bond given in the state court, under the state statutes, does not rule the practice in the federal court.

Charles E. Pope, for plaintiff.

Samuel Appleton, for defendants.

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

DRUMMOND, Circuit Judge. A suit was brought by the plaintiff [Frank Deakin], a subject of the queen of Great Britain, against [Charles W.] Lea and [James D.] Perrins, also subjects of Great Britain, and [John] Crerar, a citizen of Illinois. No one of the defendants was served with process. On the 21st of June, 1879, Lea and Perrins, by their counsel, entered their appearance in the cause solely for the purpose of petitioning the state court in which the suit was brought, for the removal of the cause to this court, "and for no other purpose whatsoever." On the same day, Crerar filed a demurrer to the declaration, and at the same time all three of the defendants petitioned the court for the removal of the cause to this court on the ground that Deakin was an alien and a subject of the queen of Great Britain, and Lea and Perrins were also aliens and subjects of Great Britain, and Crerar was a citizen of Illinois, and gave bond as required by the act of congress.

If Lea and Perrins had not thus appeared, but Crerar only had appeared and moved to transfer the case to this court, I think there could be no doubt of the jurisdiction of the court. The case being in this position, a motion was made in 1879 to remand the cause, which was overruled, partly because of the subject-matter—a bond taken under the order of a court of the United States. [Case No. 3,695.] I think that by the appearance of Lea and Perrins, although for the purpose alone of having the case transferred to this court, when the case came here they were subject to the jurisdiction of this court, and that for all the purposes of jurisdiction it was the same as though process had been personally served upon them. However, it may not be necessary to decide that question according to the view which I take of the case.

This being the status of the case, the counsel have argued the demurrer of Crerar to the declaration. Undoubtedly this is an action against each of these defendants separately; that is to say, each one is liable for any damages that may accrue upon the bond and for which an action is maintainable; and it would therefore be competent if the demurrer were overruled, for Crerar to stand by his demurrer and let judgment go as to him upon the demurrer and for the other two to plead jointly or separately.

The difficulty about this case consists in the peculiar phraseology of the last clause of the second section of the act of 1875 [18 Stat. 470]: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district." It does not give the power of removal in a case where there is a controversy between a citizen of the United States and a citizen or subject of a foreign state or country; but in this class of cases it must be a controversy between citizens of different states of this Union.

Now this is a controversy between a subject of the queen of Great Britain, two subjects of the same country, and a citizen of the state of Illinois, if we assume that all three of the defendants are before the court and subject to its jurisdiction. I shall retain the case for the reasons given when the motion to remand was overruled. See Deakin v. Lea [Case No. 3,695].

As to the merits of the demurrer, my opinion is that the case of Bein v. Heath, 12 How. [53 U. S.] 168, is in the way of maintaining any action on this bond in favor of the plaintiff.

That was a case where the parties gave an injunction bond with a condition such as was prescribed by the practice in the state of Louisiana. The condition of the bond was: "the above bounden Mary Bein and Gilbert S. Hawkins and James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant, in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us in case it should be decided that the said injunction was wrongfully obtained."

The supreme court says, that this being a condition in conformity with the usage or law of Louisiana, there could be no suit maintained upon the bond because, being a bond given in the courts of the United States, it was not in conformity with the practice of the court or according to established principles of equity that an assessment should be made of the damages in that case by the federal court. The language of the court is: "And when an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grant it or not according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not

be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit.

"But the bond in the case before us, is not one to pay the damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the circuit court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it."

Now, the condition of this bond is: "If the above bounden, Charles W. Lea and James D. Perrins, their executors and administrators, and any of them, shall well and truly pay, or cause to be paid to the said Frank Deakin, or his assigns, all damages and costs that shall be awarded against said Lea and Perrins, complainants, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the said cause, or upon the dissolution of said injunction by reason of the wrongful or improper issuance of the same, then the above obligation to be void, otherwise to be and remain in full force and effect." In the opinion which I gave before, I cited several cases decided by the supreme court of this state, in which it had been held that an action could be maintained on a bond of this kind, and the damages assessed in a suit on the bond, before the act was passed authorizing a court of equity to assess damages on the dissolution of an injunction. After that act was passed the supreme court of this state, held that the damages must be assessed by the court on dissolving the injunction in order to entitle the party to maintain a suit, but afterwards, in the Revised Statutes of 1874, the law was changed and there was a proviso declaring, in substance, that the fact that no damages were assessed by the court dissolving the injunction should not preclude a party from maintaining a suit upon the bond; and since that condition was annexed to the statute the appellate court has held that a suit was now maintainable on the bond with a condition such as is contained here, notwithstanding the court which dissolved the injunction did not assess any damages.

That being the state of the law in Illinois, if it were not for the case of Bein v. Heath [supra], I should be inclined to sustain an action upon this bond, notwithstanding the condition; but I do not see very well how I can do so, and it strikes me it will always be an insuperable obstacle in the way of a suit upon this bond, and that it will make no difference whether the decision is made here or in the state courts, for this decision of the supreme court of the United States, will control the one as well as the other, and the state court would have to follow it as we have. I think, upon its authority, I must sustain the demurrer to the declaration. In the language of the supreme court in that case, which in principle is precisely like this, "the contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it."

It was a bond given under the authority of the federal court just as this bond was given. In that case the condition of the bond was prescribed by the court, but it was not followed. In this case the condition of the bond was not prescribed, but the court required that a bond in the penalty of $5,000 should be given, and the bond was given with the amount named. If this decision is to stand, then it seems to me it will be in the way always of a recovery upon this bond.

The demurrer of Crerar will be sustained.

Consult preceding case of Deakin v. Lea [Case No. 3,695], and succeeding case of Lea v. Deakin [13 Fed. 514].

DEAKIN (LEA v.). See Case No. 8,154.

Case No. 3,696a.

DEAKIN v. STANTON.

Circuit Court, N. D. Illinois. Nov. Term, 1879.

[See 3 Fed. 435.]

Case No. 3,697.

DEAKINS v. LEE.

[1 Cranch, C. C. 442.][1]

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

PRACTICE AND PLEADING.

The court will permit the defendant to withdraw the general issue and file a general demurrer.

[This was an action by Deakins v. Lee, special bail for McCarty Fitzhugh.]

E. J. Lee prayed leave to withdraw the plea of nul tiel record, and to demur generally. Granted, and judgment on the demurrer in favor of the plaintiff.

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

Case No. 3,698.

DEALE v. KROFFT.

[4 Cranch, C. C. 448.][1]

Circuit Court, District of Columbia. March Term, 1834.

SET-OFF—DEBTS NOT DUE—PAYMENT — PLEADING —DRAFTS—RIGHTS OF INDORSER.

1. The defendant cannot set off the plaintiff's acceptance of the defendant's draft, not due at the commencement of the action, but due before plea pleaded; nor can it be allowed as payment on the general issue of non assumpsit.

2. If the last indorser take up a draft when due, he may cancel the names of the prior indorsers without impairing his title to recover as indorsee, against the acceptor.

3. Quaere, whether a payment after suit brought can be given in evidence on the general issue of non assumpsit.

Assumpsit on an open account assigned to Preston and Orme, on the 6th of March, 1833, and notice of the assignment given to Krofft on the 12th of March, 1833. The defendant gave notice of a set-off, namely, an acceptance by Deale of a draft at five months by Griffith in favor of Wyeth and Norris, due 28th March, 1833. This suit was brought on the 12th of March, 1833, and the acceptance had become due when the plea was pleaded. It had been discounted with the indorsement of Wyeth and Norris, and of A. & R. R. Griffith, in Baltimore and sent to the Patriotic Bank here for collection, where it was taken up by Griffith, when due, who cancelled the names of the indorsers, and put it into the hands of William Prout, a broker, who passed it to Krofft, who gave him the money for it. Mr. Prout testified that the names of the indorsers were cancelled only to prevent them from being liable, and not to prevent Krofft from recovering the money of Deale upon his acceptance.

Mr. Fendall, Mr. Hellen, and Mr. Brent, for plaintiff, contended that the defendant had not shown any title to the draft, as he was no party to it and could not recover upon it at law.

Mr. Coxe, for defendant, then contended that it was a payment; and that payment after the commencement of the action may be given in evidence on the general issue. Baylies v. Fettyplace, 7 Mass. 325; Phil. Ev.; Bird v. Randall, 3 Burrows, 1345.

THE COURT (MORSELL, Circuit Judge, absent) was of opinion that the cancelling of the names of the indorsers (blank indorsements,) for the purpose of preventing their liability, did not destroy the effect of the indorsements, so as to prevent the title to the bill from passing to the plaintiff. See Nevins v. De Grand. 15 Mass. 436.

THE COURT also decided, that the draft, not being due at the commencement of this action, could not be set off. 2 Saund. Pl. 790; Evans v. Prosser, 3 Term R. 186; Hutchinson v. Reid, 3 Camp. 329; Eland v. Karr, 1 East, 376; Rogerson v. Ladbroke, 1 Bing. 93. But THE COURT said it was not evidence of payment.

Verdict for the plaintiff.

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

Case No. 3,699.

In re DEAN.

[1 N. B. R. 249 (Quarto, 26);[1] 1 Am. Law T. Rep. Bankr. 9.]

District Court, D. Kentucky. 1868.

FEES IN BANKRUPTCY PROCEEDINGS.

Decision as to the fees of registers, clerks, marshals, and assignees, deciding what are legal and what unwarranted and improper.

[Cited in Re Robinson, Case No. 11,937; Re Talbot, Id. 13,727; Re Leachman, Id. 8,157; Re Bininger & Clark, Id. 1,421; Re Noyes, Id. 10,371.]

[In bankruptcy. In the matter of John W. Dean.]

BALLARD, District Judge. In obedience to the order of court made herein, the register has made a taxation of the costs of all the officers of the court, including the assignee, and the bankrupt having filed exceptions to this taxation, the case is now before me on these exceptions. As the case presents many questions of interest common to all the officers in the state who are engaged in the administration of the bankrupt act [of 1867 (14 Stat. 517)], I have thought it best to set out, in writing, my opinion on each exception.

I first notice the exceptions to the bill of the register.

The first item excepted to is the charge of five dollars, "for one day's service under special order form 4, examining papers," &c., August 15, 1867. The 47th section of the act provides that the register shall be paid "for every day's service while actually employed under a special order of the court, a sum not exceeding five dollars." By the 10th section the justices of the supreme court of the United States are required to frame general orders for the following purposes: "For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders," &c. "For regulating the duties of the various officers of said court," &c. In pursuance to this authority the justices of the supreme court have framed general orders and forms. By general order No. 4, it is provided, that "upon the filing of a petition in case of voluntary bankruptcy . . . . the petition shall be referred to one of the registers in such manner as the district court shall direct, ... and thereafter all the proceedings required by the act shall be had before him, except such as are required by the act to be had in the

[1] [Reprinted from 1 N. B. R. 249 (Quarto, 26), by permission.]

district court," &c. General order No. 5, requires "that the time when, and the place where, the registers shall sit upon the matters arising under the several cases referred to them, shall be fixed by special order of the district court, or by the register acting under the authority of a general order, in each case, made by the district court;" and it enumerates what acts he shall perform and what proceedings he shall conduct. Form No. 4 is the form prescribed by the justices of the supreme court, of the order which the district court is required, by general orders 4 and 5, to enter on the filing of the petition in all cases of voluntary bankruptcy. It is entered as of course in every case, and requires the register to do nothing which he is not required to do by the act and the general orders. An order which the general orders require to be entered as of course in every case cannot, in any just sense, be termed a special order. But it is argued, that this order is termed a special order by general order No. 5, and that it must therefore be held to be such within the meaning of section 47. This argument is founded on a mistake. General order No. 5 does not denominate order form No. 4 a special order. It only provides that "the time when, and the place where, the registers shall act upon the matters arising under the several cases referred to them, shall be fixed by special order of the district court, or by the register acting under the authority of a general order in each case made by the district court." It is only "the time when, and the place where," the register shall act, that this rule contemplates may be fixed by special order. It does not contemplate that what service registers shall perform shall be fixed by special order, for that is prescribed in general terms by general order No. 4, and specifically by general order No. 5. Now, order form No. 4 does not specify any particular service that the register shall perform. It only refers the petition to him "to make adjudication thereon, and take such other proceedings therein, as are required by said act." True, it specifies a day on, or before, which the petitioner shall attend before him, and that he shall act at a particular place "upon the matters arising in the case," but it specifies "no special service" except perhaps "to make adjudication," and this specification is unnecessary, since rule 4 of the general orders provides, that when the petition is referred to a register, "thereafter all proceedings, required by the act, shall be had before him, except such as are required by the act to be had in the district court," and section 4 of the act, among other things, provides that it shall be the duty of the register "to make adjudication of bankruptcy." There is no service generally performed by the register in any case except such as is in one sense performed under order form No. 4; for it requires him not only to make adjudication of bankruptcy, but "to take such other proceedings as are required by the act." It follows that if it is such a special order as to entitle the register, under section 47, to five dollars or less for one day's service in making "the adjudication of bankruptcy," it must also be a special order for every day's service performed under it. But, manifestly, this is not so, since section 47 provides specific compensation for nearly every service performed under the order. Besides, general order No. 5 does not require that either the time when, or the place where, the register shall act, shall be fixed by special order. Both may be fixed by the register himself, acting under the authority of a general order. The time is, in fact, so fixed by the terms of order form 4, and the place is also practically so fixed under rule 3 of this court. Now, it cannot be that the register is to be compensated for making adjudication, when the place at which he is to make it is specially fixed in the order of reference, and that he is to receive no compensation when he designates the place himself under a general order of the district court; and yet this proposition must be maintained in order to sustain this claim of the register. Such a position seems to me wholly unreasonable. It makes the compensation of the register, in this particular, depend not on the nature or quantum of service performed, but on the form of the order under which he acts, or rather, on the will of the judge, and thus tends to destroy that uniformity which both the constitution and the bankrupt act contemplate. I am sustained in this opinion by the opinion of the learned district judge of the southern district of New York in Re Bellamy [Cases Nos. 1,266–1,268]. And if I were more doubtful of the correctness of my own opinion than I am, I should be inclined to follow his. I think it exceedingly desirable that the practice in the administration of the bankrupt act should be uniform throughout the United States. The first exception is sustained.

The second charge excepted to is "for copy of order of adjudication furnished to bankrupt—two folios at 10c. and certificate 25c.—$0.45." This charge is in precise accordance with the fee prescribed in general order 30. But I am of the opinion that this provision in general order 30 is an inadvertence, so far as it allows twenty-five cents for certifying a copy of a paper when the certificate consists of only one folio. Section 10 of the act, among other things, authorizes the justices of the supreme court to fix the "fees payable, and the charges and costs to be allowed, except such as are established by this act or by law. . . . not exceeding the rate of fees now allowed by law for similar services in other proceedings." But the fee prescribed in the fee bill act of 1853, for a "certificate" is fifteen cents per folio. The justices of the supreme court had no authority to allow more. As it does not appear that the certificate in this instance contains more than one folio, the fee

for the copy of the order and certificate should be thirty-five cents and not forty-five cents. I may also remark that this charge is not payable out of the fifty dollars deposited with the register, nor out of the estate of the bankrupt, but should be paid by the bankrupt himself. The service was performed for him and for him only, and not in the course of the proceedings, and he should pay for it. No order, however, to this effect can be made on the exception of the bankrupt, because it is not for him to object to payment out of either fund. The exception is sustained so far as to reduce the charge from forty-five cents to thirty-five cents.

The next item excepted to is a charge of forty-five cents for a certified copy of memorandum, of two folios, forwarded to the clerk. Section 4 of the bankrupt act requires the register "to make short memoranda in a docket of his proceedings, and to forward to the clerk a certified copy of said memoranda." No. 30 of the general orders provides that the clerk and register shall have "for every copy of a paper in proceedings in bankruptcy—twenty-five cents for certifying the same, and in addition thereto, ten cents for each folio of one hundred words." I think the memorandum in the docket is a "paper" within the meaning of this order; and therefore that the charge for the certified copy is right, except that it ought to be thirty-five cents instead of forty-five cents, for the reason mentioned when noticing the last exception. The exception is therefore overruled, but the charge, and all similar charges in the fee bill, must be reduced as above indicated.

The next items excepted to are; first, a charge of thirty-five cents for "certified list of creditors who proved debts" furnished to assignee; and secondly, a similar charge for certifying said list to clerk. The exception to the first item is sustained, and to the last overruled. In relation to the first, it is to be observed that the register furnishes the assignee a certified copy of the list of the debts proved, under sections 23 and 27, only when a dividend is ordered, and no dividend has been ordered in this case. In relation to the second, it is to be said that the clerk must give due notice (form 52), and in order to give the notice he must have a list of the creditors who have proved their debts, and it is proper that the register or assignee should furnish it to him. This list is a "paper" within the meaning of general order 30, for the copying and certifying of which the register has the right to charge.

The exception to charge for order form No. 15, and certificate of same, to charge for "order appointing assignees and notice," and to charge for making transfer of estate, are all sustained; and the exceptions to all similar charges are likewise sustained. I see no foundation whatever for the last charge. I think the register should be paid for making the conveyance of the bankrupt's estate to the assignee, and, in fact, for every specific service which he performs, but neither the act nor the general orders provides any compensation for this service; and I am not authorized to tax a fee which is not provided for by law. The register insists that the other charges are properly taxable under the fee bill act of 1853. He says that he performs, in the course of the proceedings, the functions of both judge and clerk, and that he should be paid for the service performed in both capacities—that the clerk is by the act of 1853, entitled to fifteen cents a folio, "for entering any order," and he argues that the first clause of section 47 of the bankrupt act gives him the fees of a clerk when he writes orders, or performs other duties of a clerk. The clause referred to is as follows: "That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the register." Then follows the specification, first, of the fees of the register; and secondly, of the fees of the messenger. It is insisted that this clause means that the register is entitled not only to the fees heretofore enumerated, but to the fees of clerk, in addition, where he performs the duties of clerk. I think this is not its meaning, as might be easily shown by an analysis of its language and by an examination of the general provisions of the whole section. But I cannot stop to make either the one or the other. I simply say that it is very obvious that the whole section is to be construed as prescribing the fees of all the officers of the court, clerk, register, and messenger, and is to be understood as if read thus: The "fees in bankruptcy" shall be as follows: Of the clerk, these "as now established by law." Of the register, these: "For issuing warrants, two dollars," &c. Of the messenger, these: "For service of warrant, two dollars," &c. The enumeration of these fees shall not prevent the judges, under the authority given them in section 10, from reducing them, or from prescribing a tariff of fees for all other services.

The exception to charge for copy of schedules for assignee, is overruled, but the charge for certificate must be reduced from twenty-five cents to fifteen cents. Section 4 of the act requires the register "to furnish the assignee with a certified copy . . . . of the schedules of creditors and assets filed in each case." I think that these schedules are "papers" within the meaning of the second clause of general order No. 30.

The exception to charge for taking bond of the assignee with surety, is overruled with some hesitation. True, section 47 provides a specific fee of two dollars to the register for

every bond with sureties; but it appears in this case that the bond was required by the register and not by the judge, and I am of the opinion that under section 13 of the act, it is the judge only—that is, the district judge—who can require an assignee to execute a bond. Still, as the bond is, perhaps, not void, but valid as a common law, if not as a statutory bond, the register should, I suppose, be paid for taking it.

The exception to charge "for application for second and third meetings of creditors" is overruled, but the charge should, I think, be reduced from two dollars to one dollar, as there was but one application. Section 47 gives the register "for every application for any meeting under this act one dollar." This provision is not very intelligible. It is not certain whether it contemplates an application to, or by, the register, but, as it is more reasonable to pay one for his own services rather than another's, I suppose it means that whenever the register applies to the creditors, that is, orders them to meet, he is entitled to the fee. The court was not, it seems, applied to by the assignee under sections 27 and 28 to call the second and third meetings of creditors, but the register, when he directed order form 51 to be entered, in pursuance of general order No. 25, directed that the second and third meetings of creditors should be had on the day fixed in the order for the creditors to appear and show cause why a discharge should not be granted. Where there are no assets, and I have already said there are none in this case, I do not see any necessity for the second and third meetings of creditors, or that they are required by the act. These meetings, it seems to me, the act contemplates, are to be held only for the purpose of ordering a dividend. But as there are no assets, there could be no dividend. Why then should there be a meeting? The register seems to understand general order No. 25, as requiring the second and third meetings of creditors, even when there are no assets, and such seems to be its most obvious construction, but I think this cannot be its meaning if it be examined in connection with the provisions of the 27th and 28th sections of the bankrupt act. It is therefore ordered that in future proceedings in bankruptcy in this district no meetings of creditors, except the first, shall be ordered where there are no assets, or where no creditor has proven his debts. The exception to charge "for application for final meeting of creditors" is sustained. It appears that the "meeting" here termed a "final meeting" is the possible coming together of creditors in pursuance to the notice contemplated by section 29, to show cause why a discharge should not be granted. I think that this is not a "meeting" at all in contemplation of the act. It is not so denominated. The creditors are not required to "meet" but to "show cause," and this they might do without any "meeting." Nor is any "meeting" in fact held. Moreover, if this was a "meeting," there was no separate application made for it. It was applied for along with the second and third meetings, and for this application a fee has already been allowed.

The exception to charge "for attending second and third, and final meetings under order 51," is sustained so far as to reduce the charge to three dollars. I do not regard order form 51 as a special order, for the reason given when noticing the first exception; and section 47 allows only three dollars for each day in which a meeting is held.

The exception to charge "for final examination of bankrupt, ten folios at twenty cents, and certificate twenty-five cents," is overruled, except that the charge for the certificate should be fifteen cents, and not twenty-five cents as before stated. Section 47 prescribes as a fee to the register for taking depositions, the fees now allowed by law. The act of 1853 allows for taking depositions twenty cents a folio. I think the "final examination" is a deposition within the meaning of the 5th and 26th sections of the act.

The exception to charge five dollars for one day's service, under special order of the 25th November, is overruled. This order was not made as of course in the proceedings. It requires the register to render a service not specifically enjoined on him by either the act or general orders. It requires him to examine the papers and steps, and to report to court on their regularity. I therefore think it is a special order, for service under which the register may, under section 47, be allowed five dollars. It is therefore ordered that he be allowed that sum.

The exception to charge "for discharge" is overruled. Section 47 provides that the registers shall have, as a fee, two dollars for every discharge, when there is no opposition. There was no opposition in this case, and therefore the charge, being expressly provided for, must be sustained. I do not know why the register should be allowed a fee for a discharge, when there is no opposition, and none when there is opposition, nor why he should be allowed a fee in either case, since, by the terms of section 4 of the act, he cannot grant a discharge in any case. But the its reasonableness.
law expressly allows the fee where there is no opposition, and I have nothing to do with

The exception to charges "for stationery," "postage," and "incidental expenses, rent, clerk hire," &c., are all sustained. There is no warrant for these charges, either in the act or the general orders. The register was not required to render, and did not render, any service in this case at any place other than his residence; consequently he has incurred no travelling expenses, and no expenses incident thereto. It is such expenses incurred by the register, and such only that are, I think, provided for by section 5 of the act, and by general order No. 12.

I come now to consider the exceptions to the clerk's fee bill.

The first exception is to charge "filing and entering petition and schedules and oaths A and B @ 10c.—30c."—and it is overruled. The bankrupt contends that the petition and schedules are one paper, and therefore that the fee should be ten cents. I think they are three papers at least.

The exception to charge for "issuing order form 4, one dollar," is sustained. The clerk insists that this order is a process, inasmuch as it requires the register to proceed, and the petitioner to appear before the register; and, therefore, that he may charge one dollar therefor under the act of 1853. I think it is not a process, but simply an order. It is denominated an order in the last clause of general order No. 4, and a copy of it is there required to be sent or delivered to the register. The charge should be as for a copy under the act of 1853 [10 Stat. 161].

The exception to the charge of sixty-five cents for drawing assignment and affixing seal of court to it, is overruled, if the clerk really rendered the service charged for. By the act of 1853, the clerk is entitled to fifteen cents a folio for drawing any bond, making any record, &c., and ten cents a folio for copying same. I think the drawing of the assignment, when really executed by the clerk may, by a liberal construction, be covered by this provision. The statute seems to allow the clerk fifteen cents a folio for drawing all original writings, and ten cents a folio for copies. Of course, if he does not, in fact, perform the service, as is intimated he did not in this case, he is not to be paid.

The exception to charge for "issuing warrant form 45," is overruled. Form No. 45, though in one sense an order, is required to be issued by the clerk under the seal of the court and delivered to the bankrupt. I think, therefore, that it is a process within the meaning of general order No. 2 and of the fee bill act of 1853.

The exception to charge for "certificate of discharge and seal" is overruled. The certificate of discharge is not, as the counsel of bankrupt supposes, the same thing as the order of discharge. The one is entered in the minute or order book of the court, and the other is delivered to the bankrupt.

The exception to charge for "entering on six papers, certificate of day and hour of filing at fifteen cents a folio," is overruled. General order No. 1 requires the clerk to enter upon each petition in bankruptcy the day, and hour of the day, upon which the same shall be filed, and, also, to make a similar note upon any subsequent paper filed with him. When this entry or note is made, it is evidence of the facts stated, and is, for every legal purpose, a certificate. And, I think, it is to be regarded as a certificate within the fee bill act of 1853, for the making of which the clerk may charge fifteen cents for one folio. I do not understand how this charge happens to be made in reference to only six papers. In my opinion this entry should be made on every paper filed with the clerk, whether filed with him in the first instance, or with the register first, and then with him; and I think that every writing is "a paper" within the meaning of this rule, no matter of how many sheets it is composed, which relates to one particular subject. To illustrate: I think the petition is one paper, schedule A and oath another, order form No. 4 another, order form No. 5 another, and so on. I also think that the "filing and entering of each paper" is a service distinct from the certifying "upon" it of the "day and hour" of its filing. In the one case the entry is made in the docket and in the other upon the paper itself. I am therefore inclined to think, and do order that the exceptions to the charges for "filing and entering papers delivered to him by register," be overruled.

I observe a charge in the bill of the clerk "for clerk's certificate and seal to judge's signature to certificate of discharge," which is not excepted to, and which could not be excepted to by the bankrupt, if, as I suppose, this service was rendered at his request. But I think it proper to say, that in my opinion this charge should be paid by the bankrupt himself, and is not payable out of the fifty dollars deposited under section 47, nor out of the estate of the bankrupt. Neither the act nor the general orders require any such certificate, and it is, therefore, not a service rendered in the course of the proceedings in bankruptcy.

The bill of the messenger embraces the following items only:

For service of warrant	$ 2 00
For each written note to creditors in schedule, 10 cents	6 90
For actual and necessary expenses in publication of notices	4 00
Postage	1 97
For copying notices, 483 folios, 10c. per folio	48 30

The marshal says he does not think the law authorizes the last charge, but he is informed that the practice in other districts is to allow it, and, therefore, he submits to the court whether he is or is not entitled to it notwithstanding his own opinion is adverse to it. My information corresponds with that of the marshal so far at least as the practice prevails in some of the districts. I think, therefore, he has very properly submitted the question to the court. I would unhesitatingly allow the charge if I thought it authorized, wholly irrespective of the opinion of the marshal in relation to it. The 47th section of the bankrupt act provides that the messenger shall be paid the following fees: . . . Third. "For each written note to creditor named in the schedule, ten cents." Fourth. "For custody of property, publication of notices, and other services, his actual and necessary expenses," . . . the same to be taxed or adjusted by the court. "For cause shown, and upon hearing thereon, such further allowance may be made as the court in its discretion may determine." I do not

think that this last clause means to authorize the court to make a "further allowance" for the performance of service by the messenger, for which a specific compensation is provided in the act. The law allows the messenger specifically "ten cents for each written note to the creditor named in the schedule," and I see not upon what pretence the court can, under this clause, allow more. But I do not understand that this charge is anywhere attempted to be sustained under this clause, or under any provision of the bankruptcy act. If I am informed correctly, it is claimed under the fee bill act of 1853, which gives the marshal a fee of "ten cents per folio for copies of . . . papers furnished at the request of any party." But I do not see that these notices are copies of any paper. Each notice is an original paper, and each differs from the others, at least in the name of the person to whom it is addressed, and usually in the name of the place to which it is directed. It is true, that the body of all the notices is identical, but this does not make any one a copy of another. No one is any more a copy than another. Therefore, if one is a copy all are copies, and if one is an original all are originals. There can be no copy without an original, and as one must be an original, it follows that all are originals. Moreover, these notices are not "furnished at the request of any party." They are sent by the messenger, because the law requires him to send them, and not because they have been requested by any one; and the law having prescribed a fee of ten cents for each written notice, I think there is not the slightest ground for allowing more under any such pretence as that all but one are copies, or under any pretence whatever. Each of the notices in this case follow precisely the form prescribed by the justices of the supreme court in form No. 6 [Rice, Manual, No. 22],[2] and each contains seven complete folios. The fee of ten cents for each is, therefore, grossly inadequate, but I am not authorized to substitute my judgment for the provisions of the statute.

The register has recommended that the assignee be allowed ten dollars as a reasonable compensation for his services, besides the actual disbursements made by him. The bankrupt objects to this allowance as unauthorized by the act. He does not object to the reasonableness of the allowance, if it is authorized, but he contends that there can be no allowance to an assignee, except "out of money in his hands," and it is admitted that there is no money in his hands in this case. On the other hand, the assignee asks for a larger allowance than ten dollars. The papers show that no assets or effects whatever were surrendered by the bankrupt, and that, in fact, he had nothing except his wearing apparel. Only one creditor proved his debt. And the assignee has had the least possible amount of trouble in attending to his duties in the case. I think, therefore, that the allowance recommenued is reasonable, and cannot be complained of by the assignee. But the question remains, is any allowance authorized? Section 47 provides, that the assignee "shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court." I think it too plain for discussion, that this provision means, that the assignee is to be allowed both his disbursements, and, at all events, a reasonable compensation for his services in all cases, and that he may retain the sum allowed out of money in his hands, if he has any. The assignee is required to give notices by mail and by publication in newspapers, and to perform other services, involving actual expenditures. It is preposterous to suppose, that these disbursements are not to be refunded except where assets come to his hands; and the statute places the allowance of a reasonable compensation for services precisely upon the same footing as the allowance for disbursements. Besides, section 28 provides that he "shall not be obliged to proceed until the necessary funds are advanced or secured." The provision contained in section 28, relating to this subject, does not conflict with the provision in section 17, except so far, perhaps, as to limit the allowance for receiving and paying out money, to a certain per centum graduated by the amount. The actual disbursements made by the assignee have been paid him, by the bankrupt, but he is allowed the further sum of ten dollars. The taxation of the various officers must be reformed so as to accord with the principles announced in this opinion.

[2] [From 1 Am. Law T. Rep. Bankr. 9.]

Case No. 3,700.

In re DEAN et al.

[2 N. B. R. (1874) 89 (Quarto, 29); 15 Pittsb. Leg. J. 581, 583.][1]

District Court, E. D. Missouri.

BANKRUPTCY—FRAUDULENT SALES—REGISTER'S POWERS.

1. A sale of a stock of goods, not made in the usual and ordinary course of business of a debtor, is prima facie evidence of fraud by section 35 of the statute [of 1867 (14 Stat. 534)].

2. The register has power to take affidavits and depositions, in cases not before him, at any time after the petition is filed.

On December 21st, 1867, the petitioners filed their petition to have said [Edwin B.] Dean adjudged a bankrupt, alleging that on November 26th, 1867, said Dean committed divers acts of bankruptcy, in contravention of the provisions of the act of congress approved March 2d, 1867. The acts of bankruptcy alleged in the petition were as follows: That

[1] [Reprinted from 2 N. B. R. 89 (Quarto, 29), by permission.]

on that day, November 26th, he conveyed to his son-in-law, George Kemmel, real estate in Cape Girardeau, of the value of seven thousand dollars, with intent to hinder, delay and defraud his creditors; that on the same day he made and put on record a deed to his father-in-law, C. F. Scheusler, for real estate in Cape Girardeau, of the value of four thousand dollars, with intent to hinder, delay and defraud his creditors; and that on the same day, with like intent, he conveyed to his son-in-law, Thomas F. Garrett, the whole of his stock of merchandise then in his store in Cape Girardeau, of the value of six thousand dollars; and also fraudulently stopped payment of his commercial paper, he being a merchant and trader. Depositions proving the debts of the petitioning creditors and the acts of bankruptcy were filed with the petition. At the same time a petition was also filed praying for an injunction to restrain the said Garrett from selling or disposing of any of the goods conveyed and transferred to him by said Dean; alleging the several acts of bankruptcy; that Dean was insolvent; that on that date, November 26th, he conveyed away all of his property by deeds to different parties; that Garrett knew of Dean's condition and insolvency; that Garrett paid no cash for said stock of goods; that he purchased the same at a discount of twenty-five per cent. below cost, and gave his notes at eighteen months and three years from date in payment; and that said Garrett was himself insolvent and unable to pay his debts, and would not be able to respond in damages to the assignees should said Dean be adjudged a bankrupt.

The court directed a rule to show cause to issue against Dean, and also granted an injunction to restrain Garrett from selling or disposing of the goods until the further order of the court, and made the same returnable on January 6th. On that day Dean appeared and demanded a jury. Garrett filed his answer to the petition with a motion to dissolve the injunction. The hearing of the motion was set down for Thursday, Jan. 16th, when the parties appeared by counsel. The answer of Garrett, alleged that he bought the goods fairly, for a fair consideration, without any knowledge of Dean's insolvency; that the value of the goods was four thousand and eighteen dollars and fifty cents; that twenty-five per cent. less than cost at invoice of five thousand four hundred dollars was but a fair deduction, considering the character and condition of the stock; that he paid three hundred and three dollars and ninety cents in cash, and gave seven notes of five hundred dollars each, two payable in eighteen months with interest, and six payable in thirty-six months, and one for two hundred and fourteen dollars at three years.

The counsel for Garrett read a number of affidavits to show that four thousand and eighteen dollars and fifty cents was the par value of the stock; that Garrett was a good business man and in good credit.

Counsel for petitioner read affidavits to show acts of bankruptcy by Dean; that he was largely indebted, was insolvent; and also offered in evidence copies of the conveyances made by Dean, November 24th, and also affidavits to show that said Dean had stated that he had conveyed away all his property and was worth nothing, and that he intended to secure his children first, friends next, and creditors last. He also read affidavits to show that Garrett was acquainted with Dean's insolvency; that said Garrett had himself failed is 1866, and in 1867 had compromised with his creditors at fifty cents on the dollar, giving long paper of Whitelaw & Garrett (a brother of Thomas F.,) in payment

TREAT, District Judge. It is apparent, from the papers and the evidence presented, that there was a sale of a stock of goods, not made in the usual and ordinary course of business, of the debtor, who was a retail dealer and merchant at Cape Girardeau. The statute (section 35) makes such a sale and transfer prima facie evidence of fraud, and avoids the sale. It appears, from the answer and affidavits filed, that Garrett had been engaged in taking an account of the stock previous to his purchase; that he was present when demand of payment of debts due was made of Dean, and that he therefore knew that Dean was indebted and could not pay his debts; that for a stock of goods, valued, by his own statement, at over four thousand dollars, he paid but three hundred and three dollars in cash, and gave his notes at eighteen months and three years, which, to that extent at least, delayed creditors, and that, as far as Dean was concerned, the transfer was fraudulent and void, and that respondent himself had within a year compromised his own debts, and, therefore, did not appear responsible in damages should Dean be adjudged a bankrupt and an assignee be appointed to take charge of the interest of the creditors. The prima facie case made by the petition was not rebutted and the injunction must be continued. Motion to dissolve injunction overruled.

After the filing of the petitions above referred to, and before service of the rules to show cause, the petitioning creditors proceeded to take depositions at Cape Girardeau, before Alex. Ross, register, having served notice upon both Dean and Garrett.

Respondents, by counsel, moved to suppress the depositions, for the reason that they were taken before the rules to show cause were served upon respondents; and because the register had no authority to take depositions until the cause was referred to him, after a warrant in bankruptcy was issued.

Mr. Whittelsey, for petitioners, referred to section 38 of the act providing that the filing of the petition against the debtors should be deemed to be the commencement of the proceedings, and also as giving authority to the register to take depositions in cases not before him.

TREAT, District Judge. It is apparent, by comparing the different provisions of the act, and section 4 with 38, that registers have power to take affidavits and depositions. Their authority to take proof of debts in all cases, whether pending before them or not, is given by section four. In cases referred to them they act as assistants to the judge and the courts. The filing of the petition is the commencement of proceedings, and after the filing depositions may be taken. In many cases it is essential that the petitioner should take depositions in order to be ready for trial upon the return of the order to show cause. Motion to suppress overruled.

Case No. 3,701.

In re DEAN.

[3 N. B. R. 768 (Quar o, 18?).] [1]

District Court, W. D. Texas. 1870.

BANKRUPTCY—EFFECT OF BANKRUPT'S DISCHARGE—POWERS OF REGISTER.

Where bankrupt had filed his petition in bankruptcy, and in due course obtained a final discharge, certain creditors subsequently filed petitions and insisted before the register that he should grant orders compelling the assignee to sell and convey certain property which had passed out of bankrupt's hands, and over which he had no control, to satisfy judgments which they had obtained against bankrupt, but which register refused to entertain. *Held*, the liens did not exist; but if they did, it was not competent for the creditors to enforce them after the bankrupt had been discharged. The register was right in his conclusions, and they are ratified and confirmed by the court.

[Cited in Re Jones, Case No. 7,449; Re Witkowski, Id. 17,920; Re Dole, Id. 3,964.]

[In bankruptcy. In the matter of Calloway Dean.]

DUVAL, District Judge. Dean filed his petition in bankruptcy on the 26th of December, 1868, and received a final discharge on the 28th day of January, 1870. It appears from the statement of facts and exhibits referred to in this case, that Mr. I. J. Roberts, a creditor of the bankrupt, recovered a judgment against him in the district court of San Augustine county, in the month of October, 1866, for one thousand and thirty-five dollars, and on the 22d day of October, 1869, he filed in the office of the register at Tyler, proof of debt as shown by said judgment, together with certificates of the proper officers, showing that the same had been recorded during the months of October and November, 1866, in the counties of Navarro, Limestone, Freestone, Houston, and Panola. Another creditor, Candy Raquet, recovered a judgment against the bankrupt in the district court of Smith county, on the 27th of November, 1868, for five hundred and forty-one dollars and twenty cents, and on the —— day of ——, 1869, made proof of this debt, with lien as thereby claimed, on about two thousand acres of land, situate in said county of Smith. It further appears that the bankrupt had become involved several years before his bankruptcy; that his wife had died in 1857; that he had subsequently sold, or otherwise disposed of, largely over his half of the community property, and that under these circumstances, and with a view to indemnify the children of his deceased wife (some of whom were minors) for their portion of the community property disposed of by him, he executed a conveyance to them, on the 10th of July, 1868, of all his lands, except five hundred and fifty acres in Harrison county, three hundred and twenty acres in Limestone county, and one hundred acres in San Augustine county, and of which lands one-half only were surrendered in bankruptcy. The deed of conveyance to his children was filed for record on the 8th of December, 1868.

On the 5th of October, 1868, an execution was issued on Roberts' judgment, which was levied on the 19th of November, 1868, on one thousand two hundred acres of land in Navarro county. The land was sold on the first Tuesday in February, 1869, and Roberts became the purchaser for sixty dollars. The creditors, Roberts and Raquet, filed their petition, and insisted before the register:

First. That he should grant an order compelling the assignee to convey the said one thousand two hundred acres of land to Roberts, by virtue of the judgment, levy, and sale, as aforesaid. This the register refused to do, because the said one thousand two hundred acres had been conveyed by the bankrupt to his children before the levy was made, and as the bankrupt was not then the owner, the levy created no lien. Further, because the sale was made after the filing of the bankrupt's petition, and was therefore void, unless ratified by the assignee, and proceeds paid over to him; and lastly, because it was not competent for the register to make such an order, when the land sought to be conveyed neither belonged to the bankrupt nor was surrendered in bankruptcy by him.

Second. That an order of sale should be made for the one hundred acres of land in San Augustine county, in satisfaction of the lien claimed to exist in favor of Roberts by the judgment rendered in that county in October, 1866. The register declined making the order on the ground that said judgment created no lien under the law; that from the 14th of February, 1860, to the 9th of November, 1866, a judgment in a court of record in Texas created no lien on real estate, unless the same was recorded in the clerk's office of the county court in the county where the land was situated, and that no such record appeared in this case.

Third. That an order should be made by the register to sell the five hundred and fifty acres in Harrison county, and the three hundred and twenty acres in Limestone county, to satisfy the lien created in favor of Roberts by recording his judgment therein, before the bankrupt filed his petition in bankruptcy.

[1] [Reprinted by permission.]

This order the register declined granting in full, but directed the assignees to sell one undivided half of these two tracts of land, in satisfaction of said lien, one-half only of said land having been surrendered by the bankrupt, and the other half appearing to belong to other parties.

Fourth. That the register should order the assignee to sell the tract of about two thousand acres in Smith county in satisfaction of a lien claimed by virtue of the judgment rendered in that county in favor of Raquet, and should decree that the judgment was a lien on said land, notwithstanding the conveyance thereof by the bankrupt on the 10th of July, 1868. This the register declined doing, because the said land was not surrendered in bankruptcy, and because, at the date of said judgment the legal title was not in the bankrupt; and lastly, because the deed from the bankrupt to his children, although recorded after the rendition of judgment in favor of Raquet, at least passed the legal title of the land to them, and that therefore the judgment was no lien thereon.

Fifth. That the register should grant an order requiring bankrupt to appear and submit to an examination touching his acts and business, and to give complete statements about the lands rendered and sold, etc. This the register refused, because the bankrupt had been discharged and was then beyond his jurisdiction.

These were the main points or issues made before the register, and disposed of by him as stated above. No charge of fraud was made by the creditors against the conveyance by the bankrupt to his children of the 10th of July, 1868, nor any attempt to disturb the same, otherwise than by subjecting the lands to the liens supposed to exist by virtue of their judgments. I do not believe they existed as claimed; but if they did, it was not competent for the creditors, in such a proceeding as this, to enforce them after the bankrupt had been discharged, or to affect injuriously the rights or interests of the bankrupt's children, under the conveyance of lands made to them on the 10th July, 1868, without an original proceeding for that purpose, and making the children parties thereto. I think Mr. Register Whitmore is right in his conclusions, and hereby ratify and confirm, in all respects, his action in the premises. The clerk will so certify to the register.

Case No. 3,702.

DEAN et al. v. ANGUS.

[Bee, 369.][1]

Admiralty Court, Pennsylvania. 1785.

ADMIRALTY JURISDICTION — LIBEL BY OWNERS AGAINST CAPTAIN—LIABILITY FOR HIS TORTS.

1. Admiralty has jurisdiction of a libel by owners against their captain, for satisfaction of the damages which they have sustained in consequence of a wrongful capture made by him.

[Cited in American Ins. Co. v. Johnson, Case No. 303; Bains v. The James & Catherine, Id. 756.]

2. Owners are answerable for torts done by the captains they employ under a general principle of the maritime law, and not by virtue of any special contract.

[Cited in Ralston v. The State Rights, Case No. 11,540; The Martha Anne, Id. 9,146; New Jersey Steam Nav. Co. v. Merchant's Bank, 6 How. (47 U. S.) 430; McGuire v. The Golden Gate, Case No. 8,815; The Yankee v. Gallagher, Id. 18,124; The Florence, Id. 4,880.]

Judgment on a plea to the jurisdiction of the admiralty.

In a former suit in this court, Silas Talbot libelled and recovered against Dean, Purviance and Harbeson, as owners of the brigantine Hibernia, and also against certain other persons, respondents in that cause, for a wrongful capture on the high seas. From the decree in that cause, an appeal was entered, and the cause removed to the high court of errors and appeals for the commonwealth; where a judgment was finally obtained against the said respondents to a considerable amount. And now, Dean, Purviance and Harbeson libel against John Angus, their captain, for satisfaction of the damages they have sustained, in consequence of the wrongful capture he had made. To this libel, Angus hath filed for answer, a denial of the wrong done, and a plea to the jurisdiction of this court in the present cause. "For this, viz. that the contract between the said libellants and him, the said Angus, and also the damage alleged to be sustained by the said libellants, if any there be, arose upon the land, to wit, in Philadelphia, in the county of Philadelphia."

Three acknowledged principles of law naturally present themselves, for the solution of the present question, viz. 1st. Where the original cause of action is exclusively of admiralty or exclusively of common law jurisdiction, all incidental matters, and all matters necessarily flowing from, or dependent upon, that first cause of action, shall follow the original jurisdiction, whatever the complexion of those matters, separately considered, may be. 2dly. Where the original cause of action is partly of common law and partly of admiralty jurisdiction, the common law shall be preferred. 3dly. Where the jurisdictions are concurrent, the suit may be determined in either. To one or other of these principles must the present case apply, to ascertain the jurisdiction by which it is to be tried; and the propriety of the application depends upon this sole question, what is the original cause of action in this suit?

It is alleged in support of the plea, that this is a new action between the owners of a vessel and their captains, and hath no necessary connexion with the suit brought by Silas Tal-

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

bot. That it is enough if the respondents shew that the decree passed against the libellants, not as principals in the wrongful capture, but solely on account of the maritime law, which makes owners answerable for the misconduct of the captains they employ; and, therefore, their connexion with Angus, as captain of the brig Hibernia, must be considered as the true cause of the damages they say they have suffered, and the source from which the present suit originates. And so infer, that as this connexion is grounded on a contract, express or implied, made upon the land, the original cause of action must, from its nature and locality, be exclusively of common law jurisdiction.

The two criterions of exclusive jurisdiction are, the subject matter and the locality of the transaction. It is not doubted but that the question of prize or no prize, when it is the foundation of a suit, is exclusively of admiralty cognizance, from the subject matter. The authorities to this point are too numerous and conclusive to admit of contradiction. But these authorities go farther, and say, that the mere taking as prize, and all matters dependent thereupon, are also peculiarly of admiralty jurisdiction. Lord Chief Justice Lee's opinion, in the case of Rous v. Hassard, as cited by Lord Mansfield, and again cited by Justice Willes in the case of Le Caux v. Eden, 2 Doug. 594, is full to this purpose. "The great question was, whether an action of trespass would lie for taking a ship as prize? Lord Chief Justice Lee, having called in two civilians to his assistance, delivered the opinion of the court, that though, for taking a ship on the seas, trespass would lie at common law, yet, when it was taken as prize, though taken wrongfully, though it were acquitted, and though there were no colour for the taking, the judge of the admiralty was judge of the damages and costs, as well as of the principal matter; and he laid it down as law, that if such an action was brought in England, and the defendant pleaded not guilty, the plaintiff could not recover." By this quotation, it is clear, that, in order to fix the admiralty jurisdiction, it is not necessary that the question before the court should precisely be, is this property lawful prize to the captor, or is it not? but a suit for costs and damages may be had in the admiralty for a taking as prize, though wrongfully done, and even without any colour for such taking; and, as it should seem from the case, even though the property so taken, should not be in the possession of the court. So, also, in the case of Lindo v. Rodney, 2 Doug. 612, Lord Mansfield, in giving the opinion of the court, says—"A thing being done upon the high seas, does not exclude the jurisdiction of the common law. For seizing, stopping or taking a ship upon the high seas not as prize, an action will lie; but for taking as prize, no action will lie. The nature of the question excludes, not the locality." And a little farther on—"The end of a prize court is to suspend the property till condemnation, and to punish every sort of misbehaviour in the captors."

How it came to pass, that the Case of Silas Talbot was, by the court of errors and appeals, and still is, by concession of counsel in the present cause, considered to be not of admiralty jurisdiction, on account of the subject matter, I am at a loss to conceive; especially when I look at the two only points of defence taken in that cause, viz. 1st. That from the papers found on board the captured vessel, and from other concomitant circumstances, there was a reasonable colour for taking as original prize; and, 2dly, that if the vessel captured was indeed prize to Silas Talbot, the three brigs were in sight at the time of the capture, and, by the maritime law, acquired thereby an interest in the property—I say, these pleas, together with the current of the testimony then exhibited, and the time of the transaction, being time of war, all united in fixing that cause within the admiralty jurisdiction, from the subject matter and nature of the case. It is in obedience to strong conviction, that I thus venture to differ in opinion from the judgment of the honourable court of errors and appeals—a judgment which, I am inclined to believe, would not have taken place, but from the peculiar situation of Talbot's Cause. The court of appeals for the United States, in prize causes, had rejected the appeal, because the question was not strictly prize or no prize, but an action for damages between citizen and citizen. That court, as I have understood, looked at that cause in no other point of view, and therefore refused to take cognizance of it, and soon after adjourned. The appeal was then carried to the high court of errors and appeals for this commonwealth. The proctors had previously agreed not to contest the point of jurisdiction, and so the cause came before the judges on the merits only; and the court proceeded to sentence, without suspecting their jurisdiction. After sentence, however, some of the judges began to entertain scruples respecting the jurisdiction of the court, and, upon inquiry, found that the jurisdiction had only been submitted to by consent. The court well knew, that consent could not give jurisdiction, and therefore retracted or suspended the sentence, until an argument should be held on that point; and the question of the jurisdiction was again agitated. In the mean time, that is, between the rejection of the cause by the court of appeals for the United States, and its introduction into the court for the commonwealth, the case of Le Caux v. Eden, as reported by Douglas, with Lord Mansfield's dissertation on admiralty jurisdiction subjoined, made their first appearance amongst us, and furnished new ideas respecting the court of admiralty. Then, for the first time, did the distinction occur, between the prize court and the instance court of admiralty. Possessed of this idea, the judges of appeal for the state, looked at the

proceedings which the court of admiralty had adopted in the case before them, and found they had been in personam, by attachment, to answer for damages arising from a tort committed at sea. This, it was observed, was never the practice in the prize court, which always proceeded in rem, by proclamation and monition, whether the property be, in fact, in the possession of the court or not. And so it was in the case of The King v. Broom, Carth. 398, by proclamation at the royal exchange, although the prize taken had been previously sold at Barbadoes. And, for this error of form in the admiralty, Talbot's Case was considered as belonging to the instance court. The judges of appeal considered themselves as an instance court of appeals, and so proceeded to the definitive decree. Had the court of admiralty, when Talbot's Cause first made its appearance there, been possessed of the light which hath been since thrown upon this subject, it is more than probable that the process would have been conducted otherwise than it was. It should be observed, however, that an exclusive jurisdiction cannot be subverted by an erroneous process. How far the consideration, that if the court of appeals for the commonwealth should reject Talbot's Cause (as the court for the United States had done) the appellants would have had no other resource, and so been deprived of the benefit of an appeal, might have operated to induce the judges to take that cause within their cognizance as an instance court, I will not presume to say. But the peculiar circumstances of the case ought to be remembered; and I have mentioned them on this occasion, from a sense of the duty I owe to the jurisdiction entrusted to my care.

I come now to consider the origin of the cause before the court, and whether it is, or is not, necessarily dependent on, and consequential to, the Case of Silas Talbot. It has been said, that this suit is derived from three circumstances, viz. the contract by which Angus was made captain of the Hibernia—the wrongful taking at sea—and the damages the libellants have been obliged to pay, in consequence of this contract and wrongful taking. And it has been urged, that as two of these circumstances, viz. the contract and the payment of damages, happened on the land, the common law, by the second general rule, hath the exclusive jurisdiction. It appears to me, however, that owners are answerable for torts done by the captains they employ, under a general principle of the maritime law, and not by virtue of any special contract. No such responsibility can be deduced from any articles or sailing orders given to captains of vessels. The contract may be the ground of an action of damages for a breach of orders respecting the particular interests of the owners; but, in cases of tort, the owners are answerable by a general law. The libellants have been obliged to pay the damages in Talbot's Case, not because they employed Angus, but because they were owners of the brigs. Neither can I consider the payment of moneys, according to the decree in favour of Silas Talbot, as the origin of the present suit. We should not stop short in the train of causes. In such a train, every circumstance is the effect of the preceding and the cause of the subsequent link. No decree would have past, no damages have been paid, nor would the present suit have been instituted, but for the original wrong done at sea. To this wrong, therefore, we must have recourse, for the source of the present action.

Some pains have been taken to apply the case of ransom-bills, charter-parties, and policies of insurance, all suable at common law, to the present suit. A ransom-bill supposes a divestiture of property by the rights of war, and the bill is a promissory note for a certain sum, in consideration of the victor's relinquishing his right of conquest, and restoring the property. In a suit, therefore, on a ransom-bill, the question of prize or no prize can only come in incidentally, to shew whether there was a value received or not. For, if the taking was wrongful, the property never divested, and, of course, the promissory bill was given without consideration. Charter-parties and policies of insurance, are written contracts, executed on land, respecting certain specific contingencies. It is altogether immaterial where these contingencies shall happen. The suit is founded in the binding force of the contract, and the contingencies are only incidental circumstances, shewing that the force of the contract is to take place and operate. But these are not parallel to the case before the court, wherein the libellants complain of damages they have sustained, in consequence of a tort committed at sea, by the captain they had employed. When the Case of Silas Talbot came first before this court, the libel was filed in the name of Silas Talbot qui tam against the brigs Achilles, Patty and Hibernia, and against certain persons, in the said libel named, as owners and captains of the said brigs. All these persons (except two, if I rightly remember) appeared either in person or by proxy, and entered into stipulations, according to the practice of the court. In this form the suit proceeded through the admiralty and through the court of appeals. The question was general in both courts, viz. Whether there had been a wrong done? and if so, whether the parties who had appeared as respondents to the libel, were answerable for the damage, and to what amount? And, finally, the decree was also general, that the appellants should pay to the appellee certain moneys, in recompense of the injury sustained. But how far any particular captain, or the owners of any particular vessel, might have justified themselves by a separate defence, was never the subject of inqu ry—no such specific justification having been proffered in either court.

And whether it is or is not now too late to make discrimination, may be the subject of future discussion: but I mention this to shew, that the present libel manifestly rises out of Talbot's Case, and that its pursuit will unavoidably force us up to the wrongful taking as prize, for the origin of the present suit. Since, then, I cannot but consider the Case of Silas Talbot as properly belonging to the prize court of admiralty, and that the present suit originates from, and is a supplementary part of, that transaction; I cannot (according to the first principle stated) but overrule the present plea to the jurisdiction of this court.

I conclude with this observation, that in all pleas of this kind, where the law is doubtful, the leaning of the court will be in favour of its own jurisdiction. Not from a desire of extending the admiralty cognizance, but for this important consideration, that if the decision in favour of the jurisdiction should be erroneous, the doors of the common law are open for redress, and a prohibition may be obtained; but there is no remedy for the erroneous exclusion of parties who apply for the process of the admiralty, the benefit of the laws by which it is governed, and the summary justice it affords.

[NOTE. The cause having been afterwards heard on the merits, the libel was dismissed. Case No. 3,703. Libellants thereupon appealed to the high court of errors and appeals of Pennsylvania, which entered a decree in their favor. Purviance v. Angus, 1 Dall. (1 U. S.) 180.]

Case No. 3,703.

DEAN et al. v. ANGUS.

[Bee, 378.][1]

Admiralty Court of Pennsylvania. 1785.

SHIPPING—CAPTAIN'S MISCONDUCT—LIABILITY TO OWNERS.

1. Under what circumstances owners of vessels ought to recover against the captains they employ for damages suffered in consequence of their misconduct.

2. Captains are not answerable for losses arising from unavoidable accidents, mere errors of judgment, or failure of success, after having exercised all reasonable diligence and discretion.

Judgment on the merits. [A plea to the admiralty jurisdiction was previously overruled. See Case No. 3,702.]

The bill filed in this cause states, that John Angus, being commander of the brig Hibernia, belonging to Joseph Dean and others, did, on a certain day, without any licence, order, or authority from his owners, and without any probable cause of capture, with a view to his own private interest and emolument, combine and confederate with certain malefactors, and did pursue and take the brigantine Betsey, then in the possession of Silas Talbot, commander of the sloop Argo, as lawful prize and booty of war. And that the said John Angus, not being ignorant of the premises aforesaid, but well knowing the same, and intending to deprive the said Silas Talbot of his prize, and to defraud and injure, as much as in him lay, his owners, the libellants in this cause, did cause the brigantine Betsey to be sent to places unknown, &c. whereby she was lost, &c. The bill then goes on to state, that, for this cause, the said Silas Talbot did afterwards file his bill in this court against the said John Angus, and against his owners, the present libellants, and also against certain other persons, in the said bill named, for the wrong and injury done, and did, by the sentence and decree of this court, recover against them the sum of £12,700. 5s. damages, with costs of suit. Whereupon, an appeal was entered to the honourable the high court of errors and appeals of this commonwealth, in the prosecution and final issue whereof the said Silas Talbot did recover against the appellants the sum of £11,141. 5s. 4d. of which sum the libellants in this cause were compelled, and did actually pay the sum of £4,000; and, also, that they had expended the further sum of £450 in defending themselves against the bill of the said Silas Talbot, and in prosecuting their said appeal. Whereupon, they now pray judgment against the said John Angus, for reparation of the damage and loss they have so sustained.

I have found it necessary to the determination of the present question, to consider it under the three following points of view, viz.: 1st. How far the cause, now before the court, may be considered as connected with, or determined by, the decree in the Case of Silas Talbot. 2d. Under what circumstances, owners of vessels ought to recover against the captains they employ, for damages suffered in consequence of their misconduct. And, 3d. The specific circumstances of the present case, as they stand on the testimony; or, what is called the merits of the cause.

As to the first point, I can see no connexion between this cause and the Case of Silas Talbot, further than this, that as it originates from the same transaction, to wit, a taking a prize on the high seas, the jurisdiction is thereby determined. In all other respects, the two causes proceed on different principles. The points in view in Talbot's Case were, how far owners of vessels were answerable for torts committed by the captains they employ; and whether the taking in question was, in fact, such a tort, as they ought to be answerable for. The objects in the present case are, under what circumstances, owners may recover against their captains; and whether Angus was or was not particeps criminis, with the wrongdoers in Talbot's Case. The complexion of the two causes being thus manifestly different, it cannot, with any reason, be admitted, that the testimony or decree founded

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

thereupon, in the former, should be conclusive in the present case. The decree in Talbot's Case was against certain persons who, by stipulation, had made themselves responsible for the issue of that suit. It is not inconsistent with the record of that decree, for Captain Angus, who was not one of those stipulants, and who was no party to that suit, to come in now, and make his specific defence, when personally called upon to answer, and shew that he was not one of the wrong-doers against whom that decree was obtained.

On the second point, viz. under what circumstances owners of vessels ought to recover against the captains they employ, for damages suffered in consequence of their misconduct. It is consonant with reason and authority, that captains are not answerable for losses arising from unavoidable accidents, mere errors of judgment, or failure of success after having exercised all reasonable diligence and discretion. It would be very difficult, and is at present unnecessary, to delineate the particular circumstances, and kinds of misconduct, which should render a captain responsible to his owners. Every case that occurs, must be judged of by its own peculiar circumstances. The present libel states. "That John Angus did, without any authority from his owners, combine with certain malefactors, and, without probable cause of capture, take the brig Betsey, then in the possession of Silas Talbot, as prize and booty of war. And that he did this, not ignorantly, but well knowing the circumstances, and with a view to injure the said Silas Talbot, and also his owners, as much as in him lay." If these charges are supported by the testimony now before the court, there can be no doubt but that he ought to be answerable to his owners for whatever they have suffered in consequence of this transaction.

And this leads to the third point, viz. the consideration of the specific circumstances of the case, as exhibited by the testimony; or, the merits of the cause. The facts, so far as they respect Captain Angus, appear to be in substance as follows: Angus sailed on a trading voyage to Teneriffe, in the armed letter of marque brig Hibernia, in company with the brigs Patty and Achilles, also letters of marque, and bound to some ports in Europe, under the commands of Captains Prole and Thomson. Angus had received written instructions from his owners (the present libellants) to keep company with the two brigs so long as he should think it prudent, and had their approbation to cruize with them on the coast for two or three weeks, if they should so agree. At Reedy Island, in the Delaware, a consultation was had between the three captains, and Prole was appointed commodore. Two or three days after they had got out to sea, they discovered a brig and a sloop at a distance. Prole gave orders to chase, which was done. Prole and Thomson, under British colours, came up with and took the brig; but the Hibernia, being a dull sailer, was left four or five miles astern. When she came up, however, Captain Angus inquired what the captured vessel was, and was informed by Prole or Thomson, that she was a good prize, bound from Montserrat to New-York. To which Angus replied, that if the brig was prize, the sloop (then in sight) must be so too, and asked why one of their fast sailing brigs did not pursue her. To which it was answered, that they did not choose to leave the prize till they saw her well manned, and ordered him to chase the sloop; which he accordingly did for two or three leagues; but finding he could not come up with her, he hauled his wind, and beat up again for the other brigs; but did not reach them till just before dark. Prole then sent a boat to Angus, demanding two of his hands to help man the prize, forwarding, at the same time, a paper for Angus to sign; which appears to have been orders drawn up by Prole, and signed by him and Thomson, for the prizemaster they had put on board the captured brig. Angus hastily signed this paper on the binnacle, and sent the two men required. The wind blowing very fresh, the sea running high, and the night coming on, the four brigs separated, and saw each other no more. From this detail it is manifest, that Angus had no opportunity of acquiring information of those circumstances which were the ground of condemnation against the respondents in the suit of Silas Talbot. The assurance of Prole, the commodore, that the Betsey was good prize, was, in the then situation of affairs, sufficient to convince Angus that there must have been, at least, probable cause of capture; and if the enterprize had been a successful one, which he had no substantial reason to doubt, Angus would not have been justifiable in neglecting any thing, on his part, to secure to his owners a share of the booty taken, or to add thereto by endeavouring to take the sloop also. The only circumstance which hath a direct tendency to criminate Captain Angus, is his signing the orders to the prizemaster put on board the Betsey, directing him to "keep to the southward, for fear of falling in with the Argo." There are two ways in which this may, very naturally, be accounted for; neither of which are in the least contradicted by the testimony, viz. that in the hurry of the transaction, the boat waiting alongside, the sea rough, and night coming on, he signed these orders without reading them, having confidence in those who had drawn them up and signed before him; or, that, according to his first conclusion, if the brig was prize, the sloop must be so too, he still conceived the Argo to be an enemy, and therefore to be avoided by the prizemaster.

But, without having recourse to surmises, I am clearly of opinion, that the libel is not supported by the testimony; that is, there is not sufficient proof, that the respondent "did wilfully and knowingly, and without

probable cause of capture, join with others in taking from Silas Talbot his prize and booty of war." It is manifest, indeed, from the records of the court of appeals, that the libellants have suffered considerable damage, in consequence of this transaction at sea. But, as they had embarked themselves in a suit with real wrong-doers, and suffered judgment to go against them on general principles, without attempting a separate defence, this is no reason why Angus should not now bring forward that specific testimony, with regard to his own conduct, as may exculpate him from the charges laid in the present libel. Some stress has been laid on a passage in the deposition of W—— D——, exhibited in Talbot's Cause, tending to prove that Angus was not so ignorant of the circumstances respecting the Betsey and Argo, as he pretends. The passage is in these words—"Afterwards Captains Prole, Angus and Thomson, in the presence of this deponent, consulted what they should do with the brig Betsey, and being of opinion," &c. Whatever weight this deposition might have had in Talbot's suit, it is inadmissible in the present; but I would observe, that this circumstance is not supported by any other testimony on the records of this court; on the contrary, from the general history of the transaction, there seems to have been no period of time in which Angus could have left his vessel, or the other captains have been on board the Hibernia, to hold this consultation. D—— must, therefore, have been mistaken. Indeed, this is not the only circumstance in which he is singular. For, just before, he says—"The brigs Achilles and Hibernia endeavoured to speak her (meaning the Argo) but could not come up with her. And upon the said Church's saying, that Captain Talbot was not a man that would run away from one of them, if they would not both chase, the brig Achilles then chased alone," &c.

Now, the whole current of testimony agrees in this, that it was the Hibernia, and not the Achilles, that chased the Argo. And, as I remember, in some stages of Talbot's suit, it was urged as a circumstance of aggravation against the owners of the Hibernia, that their captain was employed in driving off the Argo, whilst his confederates were plundering her prize. These observations on D——'s deposition do not directly affect the present question; but I mention them because, if I could find any substantial ground to believe that Angus was indeed particeps criminis with Prole and Thomson, or that he knew, or had any opportunity of knowing, the circumstances which should have prohibited them from making that unfortunate capture, I should not be so clear, as I now am, in adjudging, that the bill in this cause be dismissed, and that the libellants pay the costs of suit.

Whereupon the libellants appealed; and, after long argument, the court adjudged, in June, 1785, that John Angus should pay to the libellants £948. 15s. 10d. with interest thereon from the twenty-second day of January, 1785. [1 Dall. (U. S.) 180.]

Case No. 3,704.

DEAN v. BATES et al.

[2 Woodb. & M. 87.][1]

Circuit Court, D. Massachusetts. Oct Term, 1846.

ADMIRALTY JURISDICTION — LIBEL TO ANNUL MORTGAGE ON VESSEL — LIBEL IN REM AND IN PERSONAM.

1. A libel does not lie in the district court to enforce the surrender or avoidance of a mortgage of a ship, on the ground that it has not been duly prosecuted, or the claims under it not seasonably made.

[Cited in The J. B. Lunt, Case No. 7,246; The Mayflower v. The Sabine, 101 U. S. 389.]

2. The remedy, if any, in such case, is in chancery, and will not usually be settled there till the disputed rights of the parties under the instrument are first adjudicated on at law.

[Cited in Weston v. Minot, Case No. 17,453; Hill v. The Golden Gate, Id. 6,491.]

3. A libel is informal if it proceed against both the vessel and the owners.

[Cited in Ward v. The Ogdenburgh, Case No. 17,158; The Alida, 12 Fed. 344.]

This was an appeal from a decree of the district court, dismissing a libel between these parties. [Case unreported. The libel was by William H. Dean against J. D. Bates and another and the brig Flora.] The libel was originally filed Janury 14, 1846, setting out that Dean was owner of the brig Flora, and having certain unsettled accounts with Bates & Co., the two respondents, he executed to them a conveyance on the 20th of August, 1845, to secure what might be due. It was alleged to have been the design of the conveyance to give security on said brig in a certain event, for any thing due on a voyage of the schooner Nile, where Bates & Co. had made some advances, and the accounts for which were in their possession and control. The libellant in that conveyance acknowledged himself indebted to Bates & Co. $1000, the instrument to be void if that sum was paid, or whatever was due from said Dean, in three months from the date thereof. That within the said three months, Dean called on the respondents for their accounts, but they neglected to furnish any; and that he was ready, and offered to pay any thing due. That said instrument has not been discharged, but still remains an incumbrance on the vessel, and lessens her value to the damage of Dean, and he, therefore, prays the court to pronounce it void, and no longer an incumbrance, and grant such other relief as

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

to law and justice appertain. On the 16th of January aforesaid, the two respondents appeared and filed the following exceptions: 1. That this court has not jurisdiction to enforce the claim set up. 2. That the possession of the brig Flora is not in the respondents, but this court, as appears by its records. 3. That this court has already declared the said instrument to be void, and no incumbrance on the brig. 4. That an appeal has been taken from the decree, declaring this, and is now pending, and the respondents are entitled by law to have its validity there settled. 5. That the libel is informal, and without sufficient cause. A copy of the instrument referred to being produced by the counsel for the libellant, it purported to be a bottomry bond, executed June 13, 1845, by the libellant to the respondents, for $1000, reciting that a loan had that day been made by them to him of this sum, advanced on said brig of 242 tons burthen, and if he paid them said sum, or the balance due, within three months from the date, then the obligation was to be void. And as security for the loan, the brig was mortgaged and pledged, and her registry set out, and concluded by a stipulation, that it was to be understood between them, that if any of the loan and interest shall remain due after the expiration of the three months, the respondents might sell the brig, and account for the balance.

The exceptions were argued at this term by F. C. Loring in their favor, and F. W. Sawyer against them.

WOODBURY, Circuit Justice. The first objection to this libel is, that the district court, where it was filed, had no jurisdiction over the matter prayed for. If that matter had been to enforce a clear maritime lien on the vessel, like a good bottomry bond, or to settle a contest between several part owners, as to the employment of a vessel, or for the recovery on some contract of admitted admiralty jurisdiction, such as to pay a ransom or an insurance, the district court, by having jurisdiction in all civil cases of an admiralty character under the act of 1789 [1 Stat. 73], could clearly sustain this libel. But the prayer in this case is resisted for an alleged want of jurisdiction, for reasons bringing it into much doubt. Because, firstly, it is not to enforce a contract; but is for the avoidance and surrender of an incumbrance on the vessel. It is doubted here, whether that incumbrance be any thing more than a mortgage, and not a valid bottomry bond, and if the former, whether there is clearly conferred over it any jurisdiction in admiralty for any purpose whatever. But it not being absolutely necessary here to settle these last questions, I shall at once proceed to the consideration of the first objection. This rests on the ground, that nothing is due upon the claims secured by the incumbrance, and that the continuance of a groundless incumbrance on the vessel injures its sale, and can and ought therefore to have been annulled by the district court. But such a prayer is, in form and substance, a case of equity cognizance, belonging to chancery, independent of admiralty. And though proceedings in admiralty are, as argued by the counsel for the libellant, founded on the civil law like those in chancery (2 Browne, Civ. & Adm. Law, 507), yet the former are only one branch of the civil law, relating to maritime matters (The Orleans v. The Phoebus, 11 Pet. [36 U. S.] 175); while chancery powers extend to other and numerous cases, not belonging to the admiralty. On this ground it is laid down in the books of practice, that admiralty courts have no general chancery powers, as, for instance, in common cases, over enforcing the specific performance of contracts,—over the correction of mistakes and the issuing of injunctions, or the rescinding of ordinary contracts on account of their being void for fraud. Conk. Pr. 60. But these general powers are vested in courts of equity as such, or in courts of common law, on their statutory equity side. The last is the situation of the circuit courts of the United States. Its district courts are by acts of congress not invested with any such chancery powers, and when they possess any, it is merely by virtue of the admiralty and maritime jurisdiction bestowed on them, and in order to enforce that. But a court of admiralty, as such, never requires nor exercises such general chancery power as is asked to be exercised here. Sir William Scott, in The Juliana, 2 Dod. 521, says: "This court certainly does not claim the character of a court of general equity; but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice." Whatever extensive control abroad as well as here may be exercised by admiralty courts over bottomry bonds, and the vessels pledged by them, it is not believed that they ever extended to an interference so as to avoid or annul an incumbrance.

It has been expressly ruled, that a prayer to the admiralty court to reform a contract, though clearly a maritime one, like a policy of insurance, is a matter proper for chancery powers, and not those belonging to the district court, as a court of admiralty. Andrews v. Essex Fire & Marine Ins. Co. [Case No. 374]. One of these chancery powers is to require the surrender of contracts, or to issue an injunction against the use of them under a bill quia timet, or a bill of peace to prevent further litigation; and generally it is exercised in those cases alone where the rights of the parties have been already settled, or the party is in possession who is applying. 2 Story, Eq. Jur. § 852. For even a court of chancery will not usually grant such a request as is here presented, if the rights of

the parties concerning the instrument are, as here, still in contest, and no jurisdiction is given to it by alleging fraud, mistake in a trust, or asking a disclosure, or introducing some such matter of clear chancery jurisdiction over such subjects. But here a contest exists still between these parties as to the debt which the incumbrance was given to secure; and none of the most usual grounds for chancery to interfere are alleged. It is true, that in a libel in the district court to enforce that mortgage on the vessel, the libel was dismissed, and an appeal taken here, which has never been prosecuted. But this does not show, nor is it averred, in the present proceeding, that nothing was in fact due either in praesenti or in futuro on the claims secured by that mortgage; and till that question is settled in some other proceeding, even a court of chancery would probably be obliged to decline such request as is made here, except where allegations like those before named are also introduced to give it jurisdiction to settle the title itself. The other libel does not judicially appear to have disposed of the rights or merits of these parties. It is on the record a naked dismissal of the libel, and might perhaps well have been from want of jurisdiction, as in this case. That was one exception taken to it. Allowing, then, that a court of chancery could in such an application settle a question of title, between the parties, when it had jurisdiction of the subject-matter, as if it was a contest as to a mistake, or fraud, or trust, or discovery, or an injunction, or account required, or something else clearly of chancery jurisdiction, this case might not be proceeded in even then. Though on this I give no opinion. It is true, that the rule on this subject is laid down more broadly in some books in chancery, describing chancery powers; but as it is not questionable, that a mere admiralty court possesses no such power, I forbear from now going further into the true boundaries of it in a court of chancery. I see only one other objection beside this, among those enumerated in the exceptions, which requires comment in the present state of things between these parties,—that is, the vessel being now in possession of the libellant, and the appeal referred to in one of the exceptions, having since been abandoned. That other objection is the misjoinder of the vessel and the owners in one and the same libel. This involves a proceeding both in personam and in rem, in the same case, and contravenes the settled rules in admiralty proceedings. See rules 14–17; [The Orleans v. The Phoebus] 11 Pet. [36 U. S.] 175. Being objected to seasonably here, it seems fatal to the libel as it now stands. For these reasons the decree in the district court, dismissing the libel, is affirmed.

DEAN (BORLAND v). See Case No. 1,660.
DEAN (DONOVAN v.). See Case No. 3 992.

Case No. 3,705.

DEAN v. EQUITABLE FIRE INS. CO.

[4 Cliff. 575; 8 Ins. Law J. 773.][1]

Circuit Court, D. Massachusetts. May Term, 1878.

REFORMATION OF INSURANCE POLICY—FRAUD AND MISTAKE—TRUSTEE IN BANKRUPTCY.

1. Courts of equity have power to correct mistakes in polic.es of insurance, even to the extent of changing the material clauses of the instrument which are the subjects of special agreement.

2. Such instruments may be reformed where it appears that, in consequence of fraud or mistake, they do not express or violate the intention of the parties.

3. The party alleging the mistake must show exactly in what the error consists.

4. A person was adjudged a bankrupt, May 8, 1876. In March previous he conveyed certain real estate to certain grantees. The complainant was appointed trustee of the bankrupt estate, June 3 of the same year. Soon after his appointment an agent of the respondents told him that he held certain policies on the property, payable to the vendees of the property. To this he replied that he would not accept the same if the policies were payable to the said vendees of the property, that the property belonged to the estate of the bankrupt of which he was trustee, and that the policies must be made payable to him as such trustee. The bill contained an averment that he thereby meant and intended that his interest as trustee in the premises should be insured, and that the respondent company had fair and ample notice of such intention. No averment was made that he requested any such pol'cies to be issued to him. Immediately the company wrote in the policies "payable in case of loss to Joseph F. Dean, trustee," and forwarded the same to the complainant. *Held*: no mistake was made by either party such as would warrant a court of equity in reforming the policy. The mistake was one subsequently made by the complainant in taking a conveyance from the parties in whose name the policy was issued, without first securing the assent of the insurance company.

This was a bill in equity brought to reform a policy of insurance on certain real estate. It was brought by Joseph F. Dean, a citizen of Massachusetts, trustee in bankruptcy of the estate of G. Campbell, against the Equitable Fire Insurance Company of Nashville, Tenn. The bill averred that Campbell was duly adjudged bankrupt, that the complainant was appointed trustee, that the bankrupt made a fraudulent transfer of the property, without consideration, in March, before he went into bankruptcy in May, later in the same year. The following allegations were then made: "That shortly after your orator's said appointment, John R. Dorrance, of Providence, R. I., acting for and in behalf of said respondent company and other companies hereinafter named, informed your orator that he held certain policies of insurance on said premises, payable to said Haskell & Jellerson, which he was ready to deliver to your orator upon payment of the premiums; that your orator thereupon replied that if said policies

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 8 Ins. Law J. 773, contains only a condensed report.]

were payable to Haskell & Jellerson he would not accept the same; that said property belonged to the estate of George Campbell, in bankruptcy, and that he was trustee in bankruptcy thereof; and that said policies must be payable to him; and your orator thereby meant and intended that his interest as such trustee in said premises should be insured; and your orator avers that said respondent company had fair and ample notice of such intention, and that your orator desired to have his interest in said property insured by good, effectual, and valid policies; that thereupon said respondent wrote or caused to be written its policy, insuring Haskell & Jellerson against loss by fire on said premises to the amount of $2,500, payable, in case of loss, to Joseph F. Dean, trustee, and forwarded the same to your orator; and your orator, believing, and having good reason to believe, that said policy insured your orator's interest in said premises, accepted the same. That your orator further shows your honors that it was the intention of your orator and said respondent, in and by said policy, to insure said property and your orator's interest therein, and the failure to correctly word the same, if it be incorrectly worded, arose without fault of your orator and from accident and mistake." The loss of the buildings by fire was also set out in the bill, and it was averred that the vendees of the bankrupt released all their interest in the property to the trustee complainant. The respondents demurred to the bill.

J R. Bullard, for complainant.

First. The jurisdiction of this court to reform policies of insurance, when such reform is necessary and proper, is well established, and has been frequently exercised. Harris v. Columbiana Mut. Ins. Co., 18 Ohio, 116; Fireman's Ins. Co. v. Powell, 13 B. Mon. 311; National Fire Ins. Co. v. Crane, 16 Md. 260.

Second. The bill shows a proper case for the interference of the court, a case complete in all essential details, viz.: The mistake, to wit, that the policy on its face insures Haskell & Jellerson, "payable in case of loss to Joseph F. Dean, Trustee," instead of insuring "Dean, Trustee." The correction sought, to wit, the substitution of the words "Joseph F. Dean, Trustee," for the words "Haskell & Jellerson," or generally by making the policy cover Dean's interest as trustee in the premises. The fact is that the mistake was mutual and common to both parties. It sufficiently and clearly appears from the tenor of the whole bill that both parties have done what neither intended, and that there was a distinct agreement to do something different. For example, see end of second page of bill: "That your orator further shows your honors that it was the intention of your orator and said respondent in and by said policy to insure said property, and your orator's interest therein, and the failure . . . arose from mistake." These elements are all the distinctive requisites of a bill to reform. Hearne v. Marine Ins. Co., 20 Wall. [61 U. S.] 491. The bill is not only to reform, but is also for general relief, and, besides, contains a distinct and separate prayer that the court will interfere to prevent the gross injustice sought to be worked by the unfair and exceedingly technical position of the respondent, and that a decree may be entered ordering payment of the policy in accordance with equity and good conscience. The cause appeals strongly to the favorable consideration of the court. The complainant has acted in perfect good faith, in a trust capacity, with only a nominal personal interest. The creditors have intrusted their rights to him, and they alone are to be affected by the results. The respondent company, with a full knowledge of all the facts, has received a premium, insured the property, and agreed to pay some one the loss; the property is destroyed, and the respondent, feeling sure of and threatening a defence, which, narrow and technical as it is, would avail at law, now endeavors, by demurrer, to prevent the court from reaching the merits in equity. The company knew that "said property belonged to the estate of George Campbell in bankruptcy, and that he (the complainant) was trustee in bankruptcy thereof," and it therefore knew that Haskell & Jellerson had no insurable interest in the property. The complainant did inform the company that the estate belonged to him as trustee. He therefore did inform it that he had the insurable interest in it, and wished to have that interest covered, and the policy should have been drawn to insure the complainant's interest. A new policy was written, and it appears in the bill. The allegation of the bill that the company knew that Haskell & Jellerson had no insurable interest, and the allegation, "your orator further shows your honors that it was the intention of your orator and said respondent, in and by said policy, to insure said property and your orator's interest therein, and the failure to correctly word the same . . . arose . . . from accident and mistake," are conclusive allegations of the fact that there was a mutual mistake, and that both parties did what neither intended.

F. D. Hyde and Henry D. Allen, for respondents.

The principles upon which a policy will be reformed are fully stated in Hearne v. Insurance Co., 20 Wall. [61 U. S.] 490. Now applying the rule of law, in what did the mistake of the insurance company consist? They were directed to make the policies payable to the complainant. They did so. That certainly was not a mistake. The complainant says he informed the agent of the defendant that the property insured belonged to the estate of which he was trustee, but he did not inform them that he had obtained either title or possession, which in fact he had not. What correction should be made? In other

words, how should the policy have been written, following the instruction of the complainant's letter? He does not claim to have had either title or possession. The policy was made payable to him as directed. There was no direction to insure his interest as trustee, or to leave Haskell & Jellerson out of the policy, but to make the policies payable to him. The minds of the parties never met as to any contract, except the one expressed in the policy. There can be no doubt how the company understood the order, which was a reasonable and fair understanding of it, and they had no motive to deliver a policy to the plaintiff other than as directed by him. The policy was accepted as drawn and no objection made, and it is not claimed that the plaintiff could not recover had the loss followed the delivery of the policy, and before Haskell & Jellerson conveyed the property to the plaintiff. The only mistake made by anybody in the premises was that of the plaintiff in taking a conveyance of the property from Haskell & Jellerson, and not notifying the defendant company and securing their assent. Had he done that, all would have been satisfactory. It was not a mistake of the company in writing the policy, but of the plaintiff in allowing the title of the property to change without notice to the company. The policy provides that "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process, or judicial decree, or voluntary transfer or conveyance, . . . then, and in every such case, this policy shall be void." The following cases, out of a great number that can be cited, state the law fully as to the relation of the parties under the policy, and when a court will and will not reform a contract: Fogg v. Middlesex Ins. Co., 10 Cush. 337; Carpenter v. Providence Wash. Ins. Co., 16 Pet. [41 U. S.] 495; Wilson v. Hill, 3 Metc. [Mass.] 66; Hidden v. Slater M. F. Ins. Co. [Case No. 6,463]; Carroll v. Boston Ins. Co., 8 Mass. 515; Young v. Eagle Fire Ins. Co., 14 Gray, 150; Adams v. Rockingham M. F. Ins. Co., 29 Me. 292; 1 Story, Eq. Jur. §§ 152–157; Adams, Eq. 171; Andrews v. Essex Ins. Co. [Case No. 374]; Sawyer v. Hovey, 3 Allen, 331; Lyman v. United Ins. Co., 17 Johns. 373; Wemple v. Stewart, 22 Barb. 154; Kent v. Manchester, 29 Barb. 595; Dickinson v. Glenney, 27 Conn. 104; Hibbert v. Rolliston, 3 Brown, Ch. 571; Bryce v. Lorrilard Fire Ins. Co., 55 N. Y. 245; Young v. McGown, 62 Me. 56; Diman v. Providence, W. & B. R. Co., 5 R. I. 130; Hoover v. Reilly [Case No. 6,677]; Vallette v. Valley Canal Co. [Id. 16,820].

CLIFFORD, Circuit Justice. Courts of equity undoubtedly possess the power to correct mistakes in policies of insurance, even to the extent of changing the material clauses of the instrument which are the subjects of special agreement. But the settled practice is that the power should be exercised with great caution, and only in cases where the proof is entirely satisfactory. Oliver v. Mutual Commercial Marine Ins. Co. [Case No. 10,498]. Instruments of this kind may be reformed in equity, where it appears that by fraud or mistake they do not fulfill, or that they violate the agreement between the parties; but the party alleging the mistake must show exactly in what the mistake consists, and the correction that should be made. Hearne v. New England, etc., Ins. Co., 20 Wall. [61 U. S.] 490; Hunt v. Rousmaniere, 1 Pet. [26 U. S.] 12.

The jurisdiction of chancery courts in that regard is everywhere admitted; but the question is, whether the bill of complaint shows a proper case for equitable interference. Matters well pleaded are admitted by the demurrer, but the corporation respondents deny that the complainant has stated such a case as entitles him to the relief prayed for in the bill of complaint. Sufficient appears to show that the title in the premises insured was in the bankrupt; that he, on the 18th of March, 1876, for some unexplained cause, conveyed the same to John H. Haskell and George S. Jellerson, of New York city, and the complainant alleges that the conveyance was without consideration, and in fraud of the bankrupt act [of 1867 (14 Stat. 534)].

Though executed in fraud of the bankrupt law, the clear inference from the allegations of the bill is that the deed was in due form; and it appears that the grantees, on the 3d of June, 1876, insured the premises in their own name in the company of the corporation respondents, in the sum of $2,500, against loss by fire for the term of one year from the date of the policy. Prior to that, to wit, on the 8th of May, in the same year, the grantor in the conveyance was adjudged bankrupt, and on the 31st of the same month the complainant was duly chosen and confirmed as trustee of the estate of the bankrupt, and on the 3d of June following became seized of the bankrupt's estate by due conveyance, as required by law.

Shortly after the appointment of the complainant, information was communicated to him by an agent of the respondents, that he, the agent, held certain policies of insurance on the said premises, payable to Haskell & Jellerson, which he was ready to deliver to the complainant upon payment of the premiums; to which he replied, that if the po[illegible]s were payable to those parties he would not accept the same, that the property belonged to the estate of the bankrupt, of which he was the trustee, and that the policies must be payable to him, as such trustee. Appended to that allegation is the averment of the complainant that he thereby meant and intended that his interest, as such trustee, in

the premises should be insured, and that the respondent company had fair and ample notice of such intention that he desired to have his interest in the property insured by good, effectual policies; but he does not allege that he requested that any such policies should be issued to him, or that any other alteration should be made in the policy issued to the grantees of the bankrupt, than what was subsequently made by the company before the policy was delivered to him as such trustee.

They immediately wrote in the policy, or caused to be written, as follows: "Payable in case of loss to Joseph F. Dean, trustee," and forwarded the policy to the complainant; and he alleges that "believing, and having good cause to believe, that said policy insured his interest in said premises, he accepted the same;" that what the complainant wanted was, that in case of loss the insurance should be payable to him, as the trustee of the bankrupt's estate, and that was fully accomplished by the amendment inserted in the policy. Neither party made any mistake in that transaction, and the only mistake subsequently made was that made by the complainant in taking a conveyance from the parties in whose names the policy was issued, without securing the assent of the insurance company. Had he done that, no controversy would ever have arisen.

Plainly it was not a mistake of the company in writing the policy, but of the complainant in allowing the title of the property to be changed without complying with the following condition of the policy: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession, except in case of succession by reason of the death of the assured, whether by legal process, judicial decree, or voluntary transfer or conveyance . . . then and in every such case the policy shall be void." Conditions of the kind are frequently inserted in policies, and though they often operate with great severity, still they are obligatory in case they are not waived by the company.

It is said that the conveyance was without consideration, but that cannot make any difference, as the formal title was changed before any loss occurred. Written agreements, whether executory or executed, may be reformed in equity courts where there is a material mistake of fact. In all such cases, says Story, if the mistake is clearly made out, by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as a full and correct expression of the intent of the contracting parties, until the contrary is established beyond reasonable controversy. 1 Story, Eq. Jur. § 152; Adams, Eq. (3d Am. Ed.) 171; Andrews v. Essex Fire & Marine Ins. Co. [Case No. 374]. Apply those rules to this case and it is clear that the complainant is not entitled to any relief.

Demurrer sustained and bill of complaint dismissed.

Case No. 3,706.

DEAN v. EQUITABLE FIRE INS. CO.

[See Case No. 3,705.]

Case No. 3,707.

DEAN v. FLANNERY.

[Cited in Wilson v. Turberville, Case No. 17,842. Nowhere reported; opinion not now accessible.]

Case No. 3,708.

DEAN v. HARVEY.

[Cited in Cuyler v. Ferrill, Case No. 3,523. Nowhere reported; opinion delivered orally, and not now accessible.]

DEAN (HINES v.). See Case No. 6,519.

Case No. 3,709.

DEAN v. LEGG et al.

[1 Cranch, C. C. 392.][1]

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

CHANCERY ATTACHMENT — SERVICE OF PROCESS — VIRGINIA STATUTE.

In a chancery attachment, if the subpoena be served on the principal, the bill cannot be taken for confessed for non-appearance, as in ordinary cases in equity; but there must be an affidavit and publication, &c., according to the act of Virginia, p. 115.

Mr. Taylor (as amicus curiae) suggested that the court could not take the bill for confessed, nor proceed to decree against Legg. The subpoena was served on Legg, and the bill, having been filed three months, was taken for confessed. The debt was due from Legg to the plaintiff on promissory notes under seal. The bill states, in the usual form, that the defendant Legg is a non-resident of the District of Columbia, and cannot be found so as to be served with process. At the expiration of three months after the filing of the bill and service of the subpoena, the bill was taken for confessed at the rules. There was no affidavit of non-residence and no order of publication. There was an agreement between the plaintiff's counsel and James Legg, by which the attached effects were released, and possession of the wagon

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

and horses given to him, upon his entering into an agreement to be answerable for the decree. If it is taken as confessed that defendant was a non-resident, then there must be publication, &c., according to the act of assembly.

Mr. Simms contended that the subpoena served is as good as an order of publication.

CRANCH, Chief Judge, delivered the judgment of the court.

This is a chancery attachment against Eli Legg as principal debtor, and the other defendants as garnishees. The case, as between the plaintiff and Eli Legg, is a case at law, the debt being due upon single bills under seal. The jurisdiction of this court as a court of equity is given merely by the act of assembly (page 115), giving a remedy in equity against absent debtors having effects in the hands of persons within its jurisdiction, and the act of congress of the 3d of May, 1802 (2 stat. 193). That act of assembly points out the mode of proceeding in order to obtain a decree in case the principal debtor should not appear and give security. That mode of proceeding has not been adopted, but inasmuch as the subpoena was served on Eli Legg, who has not appeared and given security, the plaintiff proceeded to take the bill for confessed, as in ordinary cases in chancery after the expiration of three months from the filing of the bill and the service of the subpoena. The court is of opinion that the bill has been erroneously taken for confessed; because the only ground of jurisdiction of the court, and the only title to relief which the plaintiff can claim, are under the act of assembly, which describes particularly the mode of proceeding in such cases. That mode of proceeding not having been pursued, the court is not authorized to make a decree. A publication, according to the provisions of the act, is necessary.

Case No. 3,710.

DEAN v. MARSTELLER.

[2 Cranch, C. C. 121.][1]

Circuit Court, District of Columbia. Nov. Term, 1816.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS—DILIGENCE OF HOLDER.

The holder of a promissory note, in Alexandria, D. C., has no equity against a remote indorser, unless he has used due diligence to recover the money from the parties who were liable to him at law upon the note.

Bill in equity. The complainant held a note made by James Wilson payable to John Tucker, chairman of a marine insurance association, and indorsed by him, by William Yeaton, and by the defendant, Marsteller, for $610.72, given by Wilson to the association to secure the repayment of that sum in case he should not, within a certain time, produce satisfactory proof of his loss on the ship Governor Strong, for which loss he claimed indemnity under a policy of insurance, and on account of which loss that sum of money had been advanced to him by the association with the assent of the defendant, but contrary to the will of the plaintiff, who, as well as the defendant, Marsteller, was a member of the association. In 1811, it had been decided, in a suit by Wilson against the association, that they were not liable for the loss. Before the note became due Wilson died insolvent; after which, and after the decision against Wilson in his action upon the policy, and after the complainant had failed in a suit against Tucker, the chairman of the association to recover the plaintiff's share of the money thus advanced to Wilson without his consent, the association, being indebted to the plaintiff and others, for the money thus advanced to Wilson, ordered this note of Wilson's, thus indorsed, and which had become payable November 1st, 1805, to be assigned to the complainant, which was done accordingly. The complainant, in his bill, after stating the foregoing facts, avers, that in consequence of the decision against Wilson in his action upon the policy, and his insolvency, the defendant, who is a remote indorser as to the complainant, (the intermediate indorsers being Tucker, the chairman of the association, and William Yeaton,) became liable to the complainant for the amount of the note, and as he cannot maintain an action at law against the complainant for the amount of the note against this defendant, his only remedy is in equity. The answer of Marsteller denies that the note had been assigned to the complainant by order of the association, and avers that it was delivered to him in violation of their rules; and that the complainant had only a claim to some distributive share of the funds of the association, but not to the amount of the note. That after the note became payable it remained some years in the possession of the association as their property. That Wilson was bound to pay it at maturity, unless he should, before that time, produce evidence of the loss, satisfactory to the association. That the association never took any compulsory measures to obtain payment from Wilson's estate, and that if they had, he (the defendant) believes that the note would have been paid; but that in consequence of their neglect the debt has been lost. The cause was set for hearing on the bill, answer, and exhibits.

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

CRANCH, Chief Judge. It is difficult to perceive wherein the equity of this case consists. The suit is against a remote indorser, but the reason for not resorting to the intermediate indorsers is not stated. I do not perceive that it follows, that because a person has not relief at law, he must necessarily

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

have a remedy in equity; yet that seems to be the only ground of equity relied upon in the bill. It does not appear, from the bill, that the defendant had notice of the non-payment of the note by Wilson or his administrator, so as to become liable at law; and if not liable at law, I see no ground to charge him in equity. But if he had notice, yet he was discharged in equity by the negligence of the complainant and those under whom he claims, in not proceeding to enforce payment from Wilson's estate.

THRUSTON, Circuit Judge, absent.

Case No. 3,711.

DEAN v. TUCKER.

[2 Cranch, C. C. 26.][1]

Circuit Court, District of Columbia. July Term, 1811.

INSURANCE ASSOCIATION—POWER OF MAJORITY.

The members of an insurance association are bound by the act of the majority, unless there be some restriction in the articles of association.

This was an action for money had and received.

Dean was entitled to a dividend on premiums received by the insurance association, of which Tucker was chairman, and the plaintiff a member. The association had voted to advance to James Wilson a sum of money, on account of a claim for a loss. The advance was made, and Wilson's note taken to refund in case the loss was not finally established. Dean objected to the advance. The broker of the association (Groverman) applied Dean's dividend to his proportion of the advance to Wilson.

E. J. Lee, for plaintiff.

C. Simms, for defendant.

THE COURT (nem. con.) instructed the jury, at the prayer of the defendant's counsel, that if they should be satisfied, by the evidence, that there was no restriction in the articles of association, (which were lost) then the members of the association were bound by the act of the majority, as to all matters within the purview of the association; and that the payment, or advance of money, on account of losses, was a matter within the purview of the association; and that the plaintiff, being a member, could not recover in this action.

Case No. 3,712.

Ex parte DEANE.

[2 Cranch, C. C. 125.][1]

MUNICIPAL CORPORATIONS—AUTHORITY OF MAYOR AND COUNCIL—TERRITORIAL LIMITS.

1. The common council of Alexandria has no authority to make by-laws operating beyond the limits of the town, as described in the acts of Virginia of December 13, 1796 [2 St. Va. (N. S.) 41], and January 8, 1798 [Id. 122], and the jurisdiction of the mayor is confined to the same limits.

2. The corporation of Alexandria cannot enforce its by-laws by corporal punishments.

This was a motion to the court for a habeas corpus to bring up the slaves of Joseph Deane, who had been committed by the mayor of the town for the supposed violation of a by-law prohibiting the nightly meeting of slaves, &c., and the question was, whether the jurisdiction of the mayor and common council extended to the northward of the range of lots on Montgomery street.

Mr. Taylor, for Mr. Deane.

By the charter of 1779, the judicial power of the corporation extended half a mile beyond the limits of the town, but their legislative power was confined to those limits. They had power "to make by-laws and ordinances for the regulation and good government of said town," "to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders." The act of 1785 [Hen. St. 205] did not enlarge the limits of the town, but provided, that when the proprietors of lands within a certain district "round the said town" shall incline to lay out the same in town lots for the purpose of building thereon, they shall be laid out so as to correspond with the streets of the town. The act of 1786 [Hen. St. c. 73, p. 362], provides "that the limits of the town of Alexandria shall extend to and include, as well the lots formerly composing the said town, as those adjoining thereto, which have been and are improved." The act of the 13th of December, 1796, provides, "Whereas several additions of lots contiguous to the town of Alexandria, have been laid off by the proprietors of the land, in lots of half an acre each, extending, to the north, to a range of lots on the north side of a street called Montgomery; upon the south, to the line of the District of Columbia; upon the west, to a range of lots on the west side of West street; and on the east, to the river Potomac; that many of the lots in the said addition have already been built upon, and many more will soon be improved; and whereas it has been represented to the general assembly, that the inhabitants residing on the said lots are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants, by the prevention and removal of nuisances, upon which their prosperity and well being does very much depend: Sec. 1. Be it therefore enacted, that each and every lot and part of a lot within the aforesaid limits, on which, at this time, is built a dwelling-house of at least sixteen feet square, or equal thereto in size, with a brick or stone chimney, and that each and

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

every lot within the said limits, which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof." The second section provides that the mayor and commonalty may compel the proprietors of lots within those limits, and not incorporated with the town, to remove nuisances in the same manner as if the lots were within the town. The act of the 8th of January, 1798, recites, that, "Whereas by an act of assembly passed in 1796, entitled," &c., "it is enacted that certain improved lots and all others, as they become so improved, within the bounds in the said act mentioned, be added to and made part of the said town of Alexandria, thereby leaving out of the jurisdiction of the said mayor and commonalty of the said town, the unimproved lots within the limits aforesaid, as long as they shall so remain unimproved; by which means the prosperity of the said town is in a great degree prevented." "Be it enacted that the unimproved lots within the limits aforesaid, shall be and are hereby incorporated with, and considered as a part of the said town of Alexandria, and subject to the same regulations as the other part thereof." By the act of congress of the 25th of February, 1804 (2 Stat. 257), "To amend the charter of Alexandria," it is enacted (section 4), "That the jurisdiction of the said common council shall extend to the limits heretofore prescribed by law and exercised by the mayor and commonalty," and by the fifth section "shall have power to make all laws which they shall conceive requisite for the preservation of the health of the inhabitants and for the regulation of the morals and police of the said town, and to enforce the observance of their laws by reasonable penalties and forfeitures, to be levied upon the goods and chattels of the offender;" "provided that such laws shall not be repugnant to, or inconsistent with the laws and constitution of the United States." By the act of the 27th February, 1801 (2 Stat. 103), all the judicial power of the corporation was abolished, and the new charter of 1804 does not extend the jurisdiction of the corporation beyond the limits of the town, except to the poor-house, and the ten acre lot on which it stands. The lot on which the meeting of negroes was held, was at some distance north of the range of lots on Montgomery street.

E. J. Lee (the mayor) contended that the lot was within the jurisdiction of the corporation, by virtue of the acts of 1785, 1786, 1796, and 1798, and that the by-law was an amelioration of the general law of Virginia, because it allowed an alternative of fine or corporal punishment; whereas the law of Virginia inflicted corporal punishment only.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the common council had no authority to make by-laws operating beyond the limits of the town, as described in the acts of 1796 and 1798, and that the jurisdiction of the mayor was confined to the same limits, and that the corporation could not enforce its by-laws by corporal punishments.

DEANE, In re. See Case No. 3,700.

DEANES (SCRIBA v.). See Case No. 12,-559.

Case No. 3,713.

The DEAN RICHMOND.

[1 Chi. Leg. News, 370.]

District Court, N. D. Illinois. July Term, 1869.

COLLISION—STEAM AND SAIL—FAULT OF STEAMER.

[A propeller which fails to keep out of the way of an approaching schooner, so that a collision occurs without change of course by the latter, is solely in fault. And she is not excused by the fact that there are other vessels on her right and left, when a sufficient change of course would cause no serious danger of contact with them.]

[This was a libel by E. B. Dean and others against the propeller Dean Richmond to recover damages for a collision with the schooner A. Baensch on Lake Michigan.]

Waite & Clark, for libellants.
Rae & Mitchell, for defendants.

DRUMMOND, District Judge. The libellants, on the 11th of September, 1866, were the owners of the schooner A. Baensch, and about ten o'clock in the evening of that day the schooner was proceeding down the lake, about five miles from the west shore, the wind from west to west-south-west, blowing quite fresh and in gusts, heading about north-half-west, when she came in collision with the propeller Dean Richmond, coming up the lake. The collision occurred about twenty miles from Chicago. When the propeller first made the schooner, the propeller was heading nearly south-half-east, as the course is given by one of the witnesses. The propeller struck the schooner on her port bow, and the schooner immediately sunk and became a total loss. The officers and crew of the schooner were saved on board of the propeller.

The question is, by whose fault this loss was sustained? And I think it was the fault of the propeller. The main controversy turns upon this: Whether the schooner, up to the time of the collision, changed her course. It is claimed by those on board the propeller that her course was changed, and that the result of this was the collision. It is insisted by all those on board the schooner that no change took place up to the time of the collision; that the schooner kept her course until on the instant, as it were, of the collision, and when it appeared imminent an order was given to change the course of the schooner, but before that order was executed the col-

lision took place. I think this seems to be the weight of the evidence: that no change in the course of the schooner occurred. It was undoubtedly the duty of the schooner to keep her course, and the duty of the propeller to avoid her,—to keep clear. It is quite possible that one of the reasons why those on board of the propeller state the schooner did change her course was in consequence of the change in the course of the propeller. Taking the story as told by those on board of the propeller, the schooner was seen about four miles off, in the first instance, from a point to half a point on the port bow of the propeller. Now, this is manifest, I think, that if the course of the schooner had been diligently watched, and the effect of the change of her relative position when the order was given to alter the course of the propeller, that a few minutes would have demonstrated what steps were necessary to be taken by those on board of the propeller in order to avoid the collision, and it would have been clear that they were approaching in almost precisely an opposite course, and therefore what change was indispensable on the part of the propeller in order to avoid the schooner. The failure to do this, I think, was the main cause of the collision. The night had been rainy, but it had cleared off. There is no controversy but that the lights on board of the schooner were proper lights; they were seen from the propeller. The lights of the propeller were seen from the schooner, and it was known, therefore, by those on board of the schooner, that there was a propeller, and it could be seen in a very brief space of time that the propeller was approaching. The only thing that there is in the case to throw doubt upon the question is the fact that there were some propellers, the lights of which were seen by those on board of the Dean Richmond, to the east, as the propeller was coming up the lake, and there was a little apprehension, it might be said, that there would be danger, owing to the proximity of these propellers, and also to the circumstances of there being a sail to the westward, but on the whole, if the propeller had been properly kept in command, I do not think that there was any serious danger of contact with the propellers, or of such a result as to prevent the propeller from attending to the duty which was the most pressing and most in hand for the moment, namely, avoiding contact with the schooner.

Then upon the main point, as to whether the schooner did change her course, the testimony on the part of the libellants, and by all those on board of the schooner, is uniform, and the facts in the case, I think, confirm the truth of that testimony. As already stated, the schooner knew that it was a propeller; knew that it was her duty to keep her course, and that of the propeller to avoid her, and nothing but the appearance of an immediate collision or of imminent peril from such a cause would naturally induce, in the ordinary course of things, the schooner to change her course.

The amount involved in this case is quite large. The value of the schooner, which, as I have already said, was a total loss, is stated by the different witnesses to be from nine to ten thousand dollars. There were also some valuables on board—some merchandize, amounting to four or five hundred dollars, the property of the libellants. Looking at the testimony on the question of damages, and considering it as fairly as I am able, and the lapse of time, it being now nearly three years since the collision, I have concluded to fix the value of the damages at eleven thousand dollars, and a decree will be entered accordingly for libellants for that amount.

DEARBORN (PARTRIDGE v.). See Case No. 10,785.

Case No. 3,714.

DEARBORN v. The UNION.

[1 Wkly. Notes Cas. 222; 21 Int. Rev. Rec. 79.]

District Court, S. D. Pennsylvania. Feb. 12 1875.

MARITIME LIENS—ADVANCES—VESSEL OF ANOTHER STATE.

[A vessel owned in Philadelphia is subject to a lien for advances made in New York, on her credit, for the payment of necessary port disbursements and for repairs.]

This was a libel filed on behalf of D. B. Dearborn, of New York, for funds advanced by the libellant for disbursements of the bark Union at the port of New York in the fall of 1874. The funds were advanced at the request of the master. The owner resided in Philadelphia. The libel alleged that the moneys advanced were for necessary port charges at New York, including wages, wharfage, repairs, etc., and were furnished on the creuit of the vessel. A sight draft was drawn by the master in New York on the owner's agents in Philadelphia for the balance due libellant, shortly before sailing from New York for Philadelphia, payment of which was refused; and after arriving at Philadelphia the vessel was attached. An answer was filed by the owner denying all knowledge of the claim, and excepting to the jurisdiction.

M. P. Henry and A. J. D. Dixon for libellant.

F. E. Brewster, for respondent.

THE COURT (CADWALADER, District Judge) entered a decree for libellant for $364.81, being the full amount of claim, with costs.

DEAS, The ANNIE. See Cases Nos. 402, 419, and 14,212.

DE BARE (UNITED STATES v.). See Case No. 14,935.

DE BASAVILBASO (THIBAULT v.). See Case No. 13,881.

DEBLOIS (KROUSE v.). See Cases Nos. 7,-937 and 7,938.

DEBLOIS (TAYLOR v.). See Case No. 13,-790.

Case No. 3,715.

DE BRIMONT v. PENNIMAN.

[10 Blatchf. 436.] [1]

Circuit Court, S. D. New York. Feb. 24, 1873.

FOREIGN JUDGMENTS—WHEN ENFORCEABLE HERE—DECREES BASED ON LOCAL STATUTES.

1. G., a French citizen, married, in France, the daughter of P., and of his wife, C., citizens of the United States. Such wife of G. died, leaving a child of such marriage. Under the statute law of France, providing, that a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living, G. afterwards obtained, in a court of France, a judgment or decree against P. and C., then residing in France, in an action in which they were served with process and appeared, requiring P. and C. to pay him a certain sum per year, in monthly payments, in advance, one-third of it to be for his use, and two-thirds of it for the use of the child. G. brought an action of debt, on the judgment or decree, in this court, against P. and C., to recover the amount of the decreed payment for two years and seven months: *Held*, that the suit could not be maintained.

[Cited in Hilton v. Guyott, 42 Fed. 255.]

2. The laws of France upon which such decree was made, and such decree founded thereon, are local in their nature and operation. They are designed to regulate the domestic relations of those who reside there, and to protect the public against pauperism. They have no extra-territorial significance, but must be executed upon persons and property within their jurisdiction.

[Cited in Hohner v. Gratz, 50 Fed. 370.]

3. Such orders of the French tribunals are in this respect like orders of filiation, and orders made, under local statutes, to guard against pauperism, and in the nature of local police regulations, and are not founded upon principles which, irrespective of local statutes, are of universal acceptation, like judgments for a sum certain, founded upon contracts or other recognized private rights.

[This was a suit at law by Gaston De Brimont against James F. Penniman, impleaded with Cornelia J. Penniman, his wife.]

George M. Van Hosen, for plaintiff.

Coudert Bros., for defendants.

WOODRUFF, Circuit Judge. This is an action of debt. The declaration contains two counts. The first is founded on an alleged judgment or decree pronounced in the then empire of France; the other count is debt on simple contract, for interest alleged to be due to the plaintiff, for the forbearance of moneys due and owing by the defendants to the plaintiff. The first count only is demurred to. That count alleges, that the plaintiff is an alien and a citizen of the French republic, and that the defendants are citizens of the United States and of the state of New York; that, on the 16th of March, 1868, at Paris, in the then empire of France, the plaintiff intermarried with the daughter of the defendants; that a child of the marriage was born, who is still living; and that, on the 7th of February, 1869, such daughter, (the wife of the plaintiff,) died. The declaration then sets out certain articles of the Code Civil of France, which provide, that children must make an allowance to their father and mother, and other ancestors, who are in need; that sons-in-law and daughters-in-law must, also, in like circumstances, make an allowance to their fathers-in-law and mothers-in-law, but this obligation ceases, first, when the mother-in-law contracts a new marriage, and, second, when that one of the married couple through whom the relation of affinity exists is dead and the children born of such couple are also dead; that the obligations springing from the foregonig provisions are reciprocal; and that an allowance is only to be granted in proportion to the necessities of him who claims, and to the means of him who is bound to pay. It is next averred, that at and prior to the said intermarriage, and at the time of the rendition of the judgment and decree next mentioned, and subsequently to such decree, the defendants were residents of the empire of France, had the benefit of its laws and owed to it a temporary allegiance; that, on the 14th of August, 1869, the civil tribunal, (particularly mentioned,) at Paris, rendered and pronounced judgment, in an action there pending, wherein the said plaintiff was plaintiff and the said defendants were defendants, brought by the plaintiff, to obtain an allowance from the defendants, under the said articles of the Code Civil, that the defendants, jointly and severally, pay to him 18,000 francs per year, in equal monthly payments, in advance, such payments to be made from the time that such allowance was first demanded, and should be 6,000 francs for the use of said plaintiff, and 12,000 francs for the use of the said child of the plaintiff and of said daughter of the defendants; that the defendants were both duly served with process in said action and appeared therein; that the said civil tribunal was a court of the empire of France, and had jurisdiction of the subject-matter of the action and of the parties; that the defendants appealed from the said judgment to the court imperial of Paris; that such appeal was there prosecuted by the plaintiff and the defendants, and, on the 5th of May, 1870, such appellate court adjudged and decreed, that the before-mentioned judgment be affirmed, in respect of the right of the plaintiff to an allowance, and in respect of the amount, to wit, 18,000 francs per year, and of the appropriation thereof by the plaintiff, to wit, 6,000 francs to the use of the plaintiff and 12,000 thereof to the use of the said child, and in respect of

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

the times and manner in which it should be paid to the plaintiff, to wit, in equal monthly payments, in advance, and did adjudge and decree, that the defendants, jointly and severally, pay to the plaintiff the said sum, and pay the same from the day of the decease of their said daughter, February 7th, 1869, as appears, &c., by the records and proceedings of said court, now remaining of record; that the said judgment and decree of the court imperial is final and conclusive, and is in full force, not reversed or annulled or satisfied, &c.; that such court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the parties; and that the plaintiff has not yet obtained satisfaction of the said judgment, whereby an action hath accrued to him to have and demand of the defendants, jointly and severally, the sum of $10,200, being the value, in currency of the United States, of the sum of 48,000 francs, in which said last-mentioned sum the defendants are, jointly and severally, indebted to the plaintiff, by reason of the said judgment, for the time beginning the 7th of February, 1869, and ending the 7th of November, 1871.

The defendant James F. Penniman demurs to this count, upon various grounds, which I do not think it necessary to enumerate. They were urged on the argument, and, by not noticing many of them further, I am not to be deemed to affirm the sufficiency of the declaration in respect thereto. It is sufficient that the principal question is decided. That question is, whether an action of debt will lie in this court, upon such a decree of a court in France, made against citizens of the United States, husband and wife, temporarily resident in that empire.

It may not be irrelevant to state, that, besides the articles of the French Code inserted in the declaration, the counsel for the plaintiff admitted, on the argument, and he has stated on his brief, that it is provided, by other articles of that Code, that the duty to make the allowance which the decree in question provides, ceases whenever the claimant obtains a fortune sufficient for his own support, or the party by whom the payment is to be made becomes unable to pay, or cannot pay without withdrawing means which are required for his own necessities.

The question is novel. No case has been cited by counsel, in which a foreign judgment of such a nature has been the subject of an action in this country, or in England; and no such case has fallen under my observation. Cases are numerous in which foreign judgments for the recovery of a definite sum of money have been sued upon; and the question has been largely discussed, whether such judgments are conclusive, or are merely prima facie, evidence of the debt which they award, and whether, and to what extent, the subject-matter is open to inquiry and proofs, on the original merits. Those cases are not controverted by the counsel for the defendants, but they are deemed not to apply to such a decree as is set out in this declaration. Cases are, also, numerous, in which the force and effect of judgments and decrees in the courts of one of the states of the United States are under consideration in the courts of other of the states, or in the federal courts. Those cases are not deemed to apply to the present, because, the constitution of the United States operates, as between the states, to give them an efficiency not due to a foreign judgment or decree.

In determining the precise question, whether, upon the facts stated in the declaration, the plaintiff shows a cause of action, it may not be material to decide, whether such a judgment is, in this court, to be regarded as conclusive, or only prima facie, evidence of the indebtedness claimed by the plaintiff; for, if it be either, then, in connection with the allegations showing the law and the relationship of the parties, a demurrer founded in denial of legal liability could not, probably, be sustained. The cases, therefore, which discuss that distinction need not be considered.

The broad question, whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French court, requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens, and the duties and obligations resulting therefrom; and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy to a decree of the nature in question, to which my attention is called, is a decree for alimony, where a divorce, total or partial, has been granted; but, the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the constitution of the United States, and, by force of that constitution, it was held that a suit would lie, in a court of chancery, to compel the performance of the decree. Barber v. Barber, 21 How. [62 U. S.] 582.

It is not irrelevant to a consideration of the nature of the decree in question, to say, that it does not proceed upon the rule of obligation recognized by all civilized nations, that the parent shall support his children during minority, which involves, also, the correlative right to the services of those children while thus supported. Such an obligation has no relation to the case under consideration. Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some re-

spects similar are found in England, and in most, if not all, of the states of this country. The duty of parents and grandparents, and, reciprocally, of children and grandchildren, when of sufficient ability, to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature, and in their application, and so are the orders for their enforcement. They are a part of a local system, to provide for paupers, and to relieve the public from their maintenance, when they have relatives within certain designated degrees, who are of ability to support them. Such orders are subject to modification and adjustment, as circumstances may require, in the states and tribunals wherein they are made. Apart from questions growing out of the federal constitution, they can only be enforced in the states where they are made. Orders of filiation are of a similar character. They are mainly for the protection of the public, founded on local statutes, and are in the nature of domestic police regulations. The provisions of the Code of France, set out in the declaration, and the decree of the courts founded thereon, are of the like nature. It would seem, that the policy of that country, as viewed by its courts, does not require that the son-in-law or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burthen of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our courts, is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The courts of this country will be slow to hold, that, whenever an American citizen shall visit France, and reside there temporarily, with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burthen of an annuity, for the support of the wife or husband. So long as such residence continues, no doubt, the parents must submit to the laws of France. The orders of her courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extraterritorial significance. They rest upon no principles of universal acceptation, like the obligation of contracts, or the protection of generally recognized, private, personal rights. No disposition to deal with foreign judgments, so as to promote the ends of justice, demands that such decrees should be arbitrarily enforced in our courts.

Beyond these considerations, I think it plain, upon the face of the declaration, and, especially where the other admitted provisions of the French Code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would, in France itself, be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their courts over the parties, in all the changes which may occur in their relative pecuniary conditions. The decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected, without a further application to the court, for some process or other award of means by which some definite amount shall be collected. Continuing necessity, on the one hand, and continuing ability, on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. Without assuming to say that the father-in-law and mother-in-law, if still in France, would not have the onus of showing that circumstances had changed, and of procuring a modification of the decree thereupon, these observations bear pertinently on the nature of the decree itself, and with great force on the question how such decree is to be treated in our own courts.

In harmony with what has been already suggested, I add, that we cannot hold that such decree is final, operative and binding unless and until the defendants go to France and there appeal to the discretion of their courts to modify the decree according to the new circumstances which may arise; and yet, the claim here made, in regard to the effect of the decree in our courts, would require us to give judgment in accordance therewith, even though the defendants offered to prove, and could prove, that the plaintiff had come to a princely inheritance.

Without, therefore, considering the other alleged imperfections in the declaration, or the peculiarity of a decree which charges the wife of the demurrant personally, or the want of any averment that she has any separate estate which can be charged by this court, I am of opinion, that the defendant James F. Penniman is entitled to judgment upon his demurrer.

Case No. 3,716.

DE BRUNS v. LAWRENCE.

LAWRENCE v. The LIEUTENANT ADMIRAL CALLOMBERG.

[18 How. Pr. 141;[1] 16 Leg. Int. 324.]

Circuit Court, S. D. New York. Sept. 22, 1859.[2]

SHIPPING—POWER AND DUTIES OF MASTER—PERISHING CARGO.

1. The master of a vessel is quasi agent for both parties (owner or consignee of the cargo and the owner of the vessel), in respect to the cargo found in a perishing condition on board the ship; and his acts, honestly put forth in an emergency, even if not the most suitable and well judged, with the intent to the best interests of all concerned, are to be indulgently considered.

2. This principle applied to this case, where a cargo of fruit, from Palermo, arrived in New York in a damaged and perishing condition, in consequence of inherent decay, by reason of a long voyage caused by storms and putting in for repairs, &c., which was alleged to have been unnecessarily protracted by the master, and in his unskilful management of the cargo.

[See note at end of case.]

[These were suits in admiralty by De Bruns against John J. Lawrence, and by John J. Lawrence against the brig Lieutenant Admiral Callomberg. The bill against the brig was dismissed in the district court (see Case No. 8,139), and a decree for freight was entered on the libel of De Bruns against Lawrence.]

Owen & Vose, for the Lieutenant Admiral Callomberg.

Beebe, Dean & Donohue, for John J. Lawrence.

NELSON, Circuit Justice. The first of these suits was brought to recover freight on a shipment of fruit, from Palermo to New York, in the brig Lieutenant Admiral Callomberg; the second, a cross-suit by the consignee, to recover for damages to the fruit in the course of the voyage.[3] The bill of lading contained the usual exceptions—damages of the sea, &c., and also from the liability to inherent decay. The brig sailed from Palermo on the 16th of December, 1855, and arrived at New York on the 20th of May, 1856, after a passage of over seventy days. She encountered a storm on the voyage, and was compelled to bear away to the port of Lisbon, in Portugal, for repairs, where she was delayed some forty-seven days in refitting, and where a survey of a portion of the fruit which was perishable (700 boxes of lemons and 2,150 boxes of oranges) was directed, and which were all discharged from the ship, and placed in a well ventilated warehouse on shore. The boxes were opened and examined, and the fruit found to be decaying. The unsound were separated from the sound, and then repacked with care. A quantity equal to 414 boxes of the lemons and oranges was found to be so far decayed as to be worthless—the greater proportion oranges. On the arrival of the ship at this port, almost all of them, however, were in a very damaged condition. It is not denied on the part of the counsel for the consignee, but that the damage was occasioned by the natural and internal decay of the articles, but it is insisted that the fault of the master in the course of the voyage contributed to this damage.

(1) It is insisted, that the length of time occupied in making the repairs at Lisbon was unnecessary and unreasonable, and that this delay was occasioned by the carelessness and want of energy and activity of the master, and that it contributed to the damage of the fruit; and (2) that the opening of the boxes of fruit at Lisbon, and the handling of it, in separating the sound from the unsound and repacking the same, had a tendency to increase the decay of the article, and manifested a want of proper skill in taking care of the fruit in the course of the shipment, and contributed to the damage. The court below overruled these positions, and held upon the proofs that the master had not been guilty of any culpable omission of duty in the voyage, which caused the loss or deterioration of the fruit, or that the delay of the vessel in Lisbon, where she put in for repairs, beyond the time reasonably required to obtain them,

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

[2] [Affirmed in Case No. 8,139.]

[3] [This statement of the facts in relation to the bringing of the libel and cross-libel differs from that made in the opinion of the supreme court, deciding the case on appeal. 1 Black (66 U. S.) 170. It is there said, per Mr. Justice Clifford: "Both of the suits were founded upon the same transaction, and depend substantially upon the same facts. One was a suit in rem against the brig L. A. Coltenberg, brought by the appellant, in which it was alleged that certain merchandise, consigned to the libelant, was shipped at the port of Palermo, on the 12th day of December, 1855, on board the brig, in good order and condition; and that the master signed bills of lading; agreeing to deliver the same, in like good order and condition, to the libelant at the port of New York; and the charge in the libel was, that he had failed to deliver seven hundred boxes of lemons, and two thousand one hundred and fifty boxes of oranges, constituting a large portion of the cargo. Service of the process was waived, and the claimant of the brig appeared, and, by consent, entered into stipulation, both for the costs of the suit and the value of the vessel. They also made answer to the suit, denying the allegations of the libel, and averring that the merchandise mentioned in the bill of lading, except four hundred and fourteen boxes of lemons and oranges, which perished from their own inherent tendency to decay, had been duly transported and delivered to the libelant in like good order and condition as when laden on board, saving only the damage occasioned by the perils of the seas, and such as resulted from the natural decay of the fruit. On the 2d day of July, 1856, they also filed a cross-libel against the appellant, as consignee of the cargo, to recover the freight for the transportation of the same, in which they alleged that they had fully performed the contract set forth in the bill of lading, and were entitled to have and receive of the respondent, for the freight and primage, including charges, the sum of $2,862.47."]

was the immediate or proximate cause of the injuries the fruit had sustained, and that it being proved that the efforts of the master in Lisbon to preserve the fruit were made in good faith, and under the advice of experienced and competent persons, and according to the best judgment of the master, the vessel was not responsible for the injuries the fruit received, even if the means used to save it were not the most suitable and well judged; the master was quasi agent for both parties in respect to the cargo found in a perishing condition on board of his ship; and his acts, honestly put forth in the emergency, with the intent to the best interests of all concerned, are to be indulgently considered.

We have looked into the evidence in this case, and although it is contradictory, and, in respect to the time consumed in the repairs at Lisbon, not very satisfactory, we think the weight of it sustained the view of the court below. We admit it is difficult to understand or believe that some three weeks should be consumed at Lisbon in refitting the vessel, when the work could have been done in this port in as many days. And the evidence returned to the commissioner executed in Lisbon explains it fully, not, however, in a manner very creditable to the character or enterprise of the government of Portugal. We are satisfied that the decrees of the court below are right, and should be affirmed.

[NOTE. Both decrees were affirmed by the supreme court on appeals taken by the consignee; it being there held, per Mr. Justice Clifford, that, under all the circumstances, the master exercised reasonable judgment and diligence both in regard to the repairs and the measures taken for the preservation of the fruit. The Collenberg, 1 Black (66 U. S.) 170.]

DEBTOR v. The COMET. See Case No. 3,030.

Case No. 3,717.

DE BUTTS v. BACON et al.

[1 Cranch, C. C. 569.][1]

Circuit Court, District of Columbia. July Term, 1809.

CHANCERY HEARINGS—VIVA VOCE TESTIMONY.

At the hearing of a cause in chancery, the court will not receive vivâ voce testimony unless to prove an exhibit.

Mr. Swann, for plaintiff, offered, at the hearing, to prove certain papers not made exhibits, and cited the 30th section of the judiciary act of 1789 (1 Stat. 88).

The cause was set for hearing upon the bill, answer, replication, exhibits, and depositions.

C. Lee stated it to be the practice in the federal courts to examine witnesses at the hearing, and to have the evidence taken down in writing by the clerk.

Mr. Youngs, contrà. Where the evidence has been taken in the usual mode by commission, and the cause set for hearing, no evidence taken afterwards can be received unless by consent or the special order of court. Law. Va. Nov. 29, 1792, p. 67, § 46; 1 Har. Ch. Pr. 595.

THE COURT refused to suffer vivâ voce testimony to prove a letter, produced by the plaintiff at the hearing, not being an exhibit referred to by the bill or answer.

THE COURT had some doubt upon the 30th section of the judiciary act of 1789, but as the practice both here and in Maryland has been not to receive the testimony at the hearing, and having so decided in the case of Harper v. Marine Ins. Co. [Case No. 6,088], at the last term, in a full court, they rejected the testimony. See the 12th rule of practice in this court.

[NOTE. On final hearing there was a decree for defendants, which decree was affirmed by the supreme court on appeal. De Butts v. Bacon, 6 Cranch (10 U. S.) 252.]

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

Case No. 3,718.

DE BUTTS v. McCULLOCH.

[1 Cranch, C. C. 286.][1]

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

DEPOSITIONS—NOTICE OF TAKING.

It is not necessary that the notice of taking a deposition under the act of congress should state the reason for taking it.

E. J. Lee objected to the deposition of Joseph Grant, taken under the act of congress, that the notice did not state the reason of taking it.

THE COURT overruled the objection to the deposition, and suffered it to be read.

DE BUTTS (McCULLOCH v.). See Case No. 8,736.

Case No. 3,719.

DE CAMP v. NEW JERSEY MUT. LIFE INS. CO.

[3 Ins. Law J. 89; 21 Pittsb. Leg. J. 162; 4 Bigelow, Ins. Cas. 287.][2]

Circuit Court, S. D. New York. Dec. 22, 1873.

LIFE INSURANCE—SPECIAL AGENT—DELIVERY OF POLICY—CREDIT FOR PREMIUMS—APPLICATION—TRUTH OF REPRESENTATIONS—DEATH FROM INTOXICATING LIQUORS—QUESTION FOR JURY—PROOFS OF LOSS—PHYSICIAN'S CERTIFICATE.

[1. A stranger who procures an application for insurance, and takes it to the insurance com-

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

[2] [21 Pittsb. Leg. J. 162, and 4 Bigelow, Ins. Cas. 287, contain only a partial report.]

pany, which approves the same, executes a policy, and delivers it to him, with instructions to deliver it to the insured only upon payment of the premium, thereby becomes its special agent to receive the premium and deliver the policy.]

[2. A delivery of the policy by the agent without exacting the premium, and upon the promise of the assured to pay in a few days, makes a binding contract from the date of delivery, subject only to the payment of the premium; and, if payment is in fact made within the time named, the insured is not bound to disclose to the insurer the fact of a change for the worse in the condition of health, which has taken place in the meantime. Nor is it material that the agent never accounts to the company for the premium so received.]

[3. Actual delivery of the policy into the possession of the assured is immaterial, if at the time it is tendered they examine it so as to become acquainted with its terms, and assent thereto, and subsequently pay the premium.]

[4. Whether the statements made in an application which becomes part of the policy be regarded as warranties or as material representations, they must be true at the time they are made; and if untrue, in a material respect, the policy is void.]

[5. Whether a death resulting from the use of liquors during a period of three weeks is caused by an "habitual" use of intoxicating liquors, within the meaning of a condition in the policy, is a question for the jury.]

[6. Where plaintiff, on the request of the insurer, but without being bound thereto by the terms of the policy, furnishes, as part of her proofs of loss, the certificate of a physician as to the cause of death, she is not concluded by the statements therein made, but may show the fact to be otherwise.]

Colton was agent for another insurance company. Becoming acquainted with De Camp, he solicited him to apply to the defendant for a policy on his life. The application was made June 1st, 1869, and the medical examiner of the defendant on the 3rd pronounced him a first-class risk. Colton endorsed the application as agent for the defendant. Defendant accepted the application and indorsed Colton's name as its agent on the policy June 5th, and delivered it to him, with instructions, however, to deliver it only on payment of premium. Colton, who was boarding in the family with De Camp, delivered the policy on the 5th. De Camp gave it to his wife and told Colton that he would pay the premium in a few days, to which Colton assented. On the 8th Colton wrote to the defendants that the policy had not been delivered, and that the premium had not been paid; but as De Camp promised to pay in a few days, he proposed to hold it and give him the opportunity. Defendant replied on the 10th, approving of the suggestion of Colton. On the 9th De Camp had taken hyoscyamus to quiet excitement arising from his domestic troubles and the use of liquor, and would have died but for medical aid. This condition of affairs was repeated on the 13th. On the 14th, Mrs. De Camp testified, he paid Colton the premium, and at some subsequent time, it does not exactly appear when, Colton took the policy at his own request from Mrs. De Camp for safe keeping, and after her husband's death she recovered it from him by a replevin suit. Defendant put in evidence letters from Colton written both before and after the death of De Camp, to the effect that the premium had not been paid or the policy delivered. Defendant also claimed that De Camp was not temperate when the application was made, and that it was untrue in this respect. One condition of this policy was, that if the insured should die from the "habitual use of intoxicating liquors" the policy should be void. The evidence showed that De Camp had made use of liquor after the application was signed, so as to be intoxicated. The inquisition made by the coroner the plaintiff had submitted as part of the proofs of loss, and it was introduced in evidence under the plaintiff's exception. The inquisition found De Camp had died from the habitual use of intoxicating liquors. It also appeared that Mrs. De Camp had been examined before the coroner, and had given evidence strongly tending to show that her husband had been a drinking man for years, and that he had taken opiates as remedies for the disorders induced by drink. That, however, was explained by the evidence of the attending physician, who said that she was so overcome with grief and mental agony at the time as not to be in a fit state to be examined. The evidence of De Camp's past life up to his death was that he was temperate, but the post mortem examination showed evidences consistent with the theory of death from liquor, and the attending physician said that on two or three occasions when he was called in, and after the application was made, he was wildly intoxicated, but that this might have resulted from a slight use of liquor, owing to the severe mental excitement under which De Camp was laboring. Defendant, among other things, claimed that as this agency was special, confined to this one policy, plaintiff dealt with him at her peril, and was bound to examine his authority; that the policy in no event could take effect until the actual payment of the premium; that until the payment, the policy was a mere proposition to insure, and that the payment was an implied reiteration by the plaintiff of the statements in the application, and that inasmuch as De Camp had partaken of liquor to excess, and had impaired his health by drugs, the policy was avoided.

Plaintiff requests to charge—as to the delivery of the policy and payment of premium:

(1) That there is no conflict of evidence but that Colton delivered this policy on the 5th or 6th of June, 1869, without exacting the prepayment of the premium, which act was sufficient in law to justify the belief that a loan of credit for the premium was extended, and the condition of the policy in this respect waived; and if Mrs. De Camp accepted the policy with that understanding, the contract became valid and operative immediately, and the company was bound. (2) That

if Mrs. De Camp innocently relied upon the apparent authority to be reasonably inferred from Colton's possession of the policy, and for that reason was induced to postpone immediate payment of the premium, the company became bound on delivery. (3) Same of De Camp as plaintiff's agent. (4) That if the company's direction to Colton, not to deliver the policy until premium was paid, was a mere secret or private instruction, and inasmuch as there is no proof that she ever knew it, it can have no effect whatever on her rights. (5) That the maxim of natural justice here applies with full force, that "he who without intentional fraud has enabled a person to do an act which must be injurious to himself or another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him." (6) That there is no question but that Colton's actual authority, with respect to this policy, continued down to and including the actual payment of the premium on the 14th of June, 1869, so that he was then an authorized agent of the company to receive it. (7) That even if there was no waiver of prepayment of premium, the payment on the 14th of June, 1869, was compliance with the condition of the policy in that respect, and it related back to the date of the acceptance by the company of the application for insurance. (8) That if the plaintiff and her husband made full, fair and honest disclosures of all the facts material to the subject of inquiry in the application, they were guilty of no fraud and concealment. (9) That in doing this (8) they were only obliged to disclose so much as was material to their own minds. (10) That although the application was the basis for the policy, its statements were not warranties, and an innocent mistake upon any question of disease or health, made by Mr. or Mrs. De Camp, would not affect the validity of the policy. (11) That even if there had been a waiver and the policy had not taken effect until the payment of the premium, neither the plaintiff nor her husband were obliged to disclose any voluntary statements. (12) That upon that hypothesis (11), if the company desired information of later facts than those shown by the application, it was its duty to have inquired about them, and that then the plaintiff or her husband would have been guilty of fraud or concealment in that respect. (13) That since there was no conflict of evidence about the delivery of the policy or payment of the premium, the only question for the jury is as to the cause of death.

That in respect to the cause of death:

(1) The insurance company is not entitled to a verdict unless De Camp's death was caused "by the habitual use of intoxicating liquor." (2) It is not enough to excuse the company that intoxicating liquors caused his death. (3) It is not enough to excuse the company that his death was caused by the excessive use of intoxicating liquor. (4) The term "intoxicating liquor" is to be construed in its ordinary and popular sense. (5) That inasmuch as there is no conflict against Dr. Johnson's statement, that the anodyne and opiates used by him are not included in the popular term "intoxicating liquors," the jury are bound to believe his statement in that respect. (6) That the burden of proof rests upon the company, and it is bound to show by a fair preponderance of evidence that death resulted from the habitual use of intoxicating liquor before they will be entitled to a verdict. (7) That it is not enough for defendant to show that death ought not to have resulted from the habitual use of intoxicating liquors; or, (8) that such liquor or its habitual use contributed to cause death. (9) They must be satisfied that his death actually resulted from such habitual use as the primary and controlling cause, and that death would have resulted at that time independently of the use of the narcotics, and of this, too, the jury must be satisfied by a fair preponderance of evidence. (10) That if De Camp only took intoxicating liquor in moderate quantities, medicinally, to quiet nervous excitement arising from other causes, and not from habit, and that death resulted from such use, the defendant cannot recover on this branch of the case. (11) That in determining the cause of death, the jury are bound to give just consideration to the evidence of De Camp's appearance shortly before his death, as they may deem it deducible from the testimony of Mr. Jencks, Mr. and Mrs. Johnson, Mrs. De Camp, Brockway and other witnesses, who speak upon that subject, as well as the medical witnesses, and to harmonize all the credible testimony on that subject if that can be done.

Defendant requests to charge:

(1) That prior to the transactions in question A. R. Colton never acted as the agent of the defendant in any way whatever, and since the transactions in question A. R. Colton has never acted as agent for the defendant in any way whatever. (2) That A. R. Colton was the agent of the plaintiff in making the application for the policy in suit. (3) That in this transaction no relation of agency existed between the defendant and A. R. Colton; except that Colton received the policy from the defendant, to be held by him in escrow, and to be delivered to the plaintiff upon the payment of the premium, but not otherwise. 25 Conn. 542; 1 Bigelow, Ins. Cas. 51. (4) That the delivery of the policy by A. R. Colton to the plaintiff or her husband, even if made, would not complete the contract of insurance or make it binding unless or until the premium was actually paid. (5) That if the jury believe that the premium on the policy was never actually paid, prior to the death of De Camp, then the contract of insurance never became complete, and there can be no recovery on the policy. (6) That even if the jury believe that the premium was paid to Colton on or about the

14th of June, 1869, as claimed by the plaintiff, nevertheless, if at that time John H. De Camp was so seriously ill that defendants would not have delivered the policy had they known that fact, and that fact was fraudulently concealed from the defendants by Mr. and Mrs. De Camp and Colton, acting in collusion with each other, there can be no recovery on the policy. (7) Even if the jury believe that the payment of premium claimed was actually made, yet if they believe that it was made at a time when De Camp was so seriously ill that the defendants, if they had been aware of the facts, would not have delivered the policy, and such a payment was a part of a collusive and fraudulent scheme which was carried out and perfected after the death of De Camp, by collusive proceedings arranged between the plaintiffs and Colton, under which she got possession of the policy, the plaintiff cannot recover. (8) That if any of the statements made by the plaintiff in the application for said policy were untrue, the plaintiff cannot recover. (9) That if the statement contained in such application, that at the date thereof, to wit, the 4th day of June, 1869, the said John H. De Camp was in good health was untrue, the plaintiff cannot recover. (10) That if the statement contained in such application, that at the date thereof, to wit, the 4th day of June, 1869, the said De Camp was sober and temperate, was untrue, the plaintiff cannot recover. (11) That in determining the question of the truth or untruth of this statement, the sworn statement of plaintiff made at the coroner's inquest, that John H. De Camp has drunk to excess for the last two months, is evidence that such was the fact, and that the statement in that regard in the application was untrue. (12) That if in making such application, facts were withheld in regard to the health and habits of life of the said De Camp, with which the defendant ought to have been made acquainted to make such insurance, the plaintiff cannot recover. (13) That if in making the application there was withheld from the defendant the fact that John H. De Camp was in the habit of making excessive use of either alcoholic or narcotic stimulants, the plaintiff cannot recover. (14) That if the jury believe that the habitual use of intoxicating liquors was a contributing cause to the death of John H. De Camp, the plaintiff cannot recover. (15) That if such use of intoxicating liquors did not become habitual until after the date of the application, nevertheless if it was a contributing cause to the death of De Camp, the plaintiff cannot recover. (16) That upon the question as to the cause of the death of De Camp, the plaintiff is concluded by the statement contained in her proofs of loss, including the verdict of the coroner's jury included in such proofs, and it appearing from such proofs that such use of intoxicating liquors was a contributing cause of the death of De Camp, the jury are directed to render a verdict in favor of the defendant. (17) That as it does not appear that at the time such proofs were served, the plaintiff was under any misapprehension as to the facts, she is concluded by the proofs and cannot recover. (18) That the facts stated in such proofs, inasmuch as they were not shown to have been made through mistake or to have been induced by fraud, are conclusive against the plaintiff, and that she cannot recover. Campbell v. Insurance Co., 10 Allen, 213. (19) That even if the plaintiff is not absolutely concluded by the statements contained in her proofs of loss, the said statements, especially when taken in connection with other statements of a similar nature made by the plaintiff before the coroner's jury, are evidence that the cause of the death of De Camp was as set forth in such proofs, and in the verdict of the coroner's jury, and are entitled to such weight and consideration as the jury should give them. (20) That in determining the cause of De Camp's death, the jury should give weight to the verdict of the coroner's jury as to the cause of such death, especially as such verdict constituted part of the proofs of loss served by the plaintiff on defendant.

Additional requests to charge were made in substance as follows:

That unless the statements and representations made in the application were fair and true, on the 14th day of June, 1869, or if any material fact which the defendant ought to have known at that time was suppressed in regard to the health of De Camp, the policy was null and void; that the application for all intents and purposes must be deemed to have been dated on the 14th day of June, 1869, when the premium, according to the plaintiff, was paid, and if any statements in the application were untrue at that time, the defendants are entitled to a verdict; that if any fraud was practiced on the company in the suppression of important information at the time when the premium was paid, the plaintiff cannot recover; that the representations in the application took effect on the 14th day of June, 1869, and are material representations.

John L. Hill and A. S. Diassy, for plaintiff.

Sandford, Robinson & Woodruff, for defendant.

SHIPMAN, District Judge. Gentlemen of the jury: This is an action to recover the sum of $10,000, and interest, being the amount named in a policy of insurance executed by the defendant upon the life of John H. De Camp, and payable to his wife, the plaintiff. It is evident from the testimony that the application for the policy dated June 4th, 1869, was made by the defendant and her husband at the suggestion of A. R. Colton, who, although he may have professed to be the agent of the company, was not then in any way in their employ; that he carried the application to the company, which was approved, and the policy produced upon this trial was exe-

cuted by them on the day of its date, June 5th, 1869; that the policy on said day was handed to Colton by the company, with instructions to deliver it to the parties named therein only in event of the payment of the premium to him; that he was authorized to receive the premium, and thereupon deliver the policy; that no instructions or information were communicated directly to the De Camps by the company; on the 24th day of June the insured died; on the 26th day of June, 1869, after the death of De Camp, the company by letter to Colton revoked the authority conferred at the time of the execution of the policy, Colton having informed them that the policy was not delivered; that the company never received from Colton any portion of the premium. These, gentlemen, are conceded facts, or else so proved that there is no serious or honest controversy in regard to them. It is testified by Mrs. De Camp that on the 5th or 6th of June, Colton delivered the policy to her husband, who accepted its terms and delivered it to her and promised to pay the premium in a few days, and that on June 14th he did pay the premium, amounting to $240, to Colton, who received it as in full payment. The company produce certain letters from Colton, which state that he has not delivered the policy. These letters, Colton being accessible as a witness, are not evidence to prove that the policy was not delivered or that the premium was not paid to him, but are explanatory simply of the letters of the company in revoking the agency.

There is no direct evidence on the subject of the payment of the premium and the receipt of the policy, except that given by Mrs. De Camp. The defendant offers testimony that after the death of Mr. De Camp, the policy being then in the possession of Colton, the policy was obtained from him by the plaintiff by an action of replevin, and offers testimony to prove that by collusion that policy was redelivered to Mrs. De Camp, who thus obtained it through a species of fraud. The plaintiff explains this evidence by her testimony that Colton received the policy from her before the death of her husband for the purpose of being deposited in a safe in New York, where she had other papers, for safe keeping, and that she sued him subsequent to the death of her husband to recover its repossession. The principles of law applicable to the facts in this part of the case are as follows: First, that Colton, prior to the execution of the policy, was not an agent of the defendants, although he may have professed so to act. Second, that upon the execution and delivery of the policy to him, he became the special agent of the company to receive the premium and to deliver the policy upon such receipt. Third, that assuming that the representations in the application are true, if you find that the De Camps were made acquainted on June 5th or 6th with the terms of the policy which had been executed by the defendants, and accepted those terms, and paid $240 on the 14th of June to Colton, who received the money as in full payment of the premium, that thereupon it became a perfected and binding policy, notwithstanding Colton never paid the money or any part thereof to the defendant. It is true, as a general rule, that if, after the representations were actually made, a material change in the health of the insured occurs before the contract is consummated, it is the duty of the parties to inform the company of such facts; but, fourth, if you find that the policy was executed by the defendant and handed to Colton to be delivered to the applicants upon the receipt by him of the premium, and that they became acquainted with its contents on the 5th or 6th, and assented thereto, and promised to pay the premium in a few days, that the contract then became consummated, subject only to the payment of the premium, and that no duty was incumbent upon them thereon, except to pay the preimum, and upon its payment within the time named, to Colton, the policy became a completed contract, whereby the defendant insured the life of De Camp from June 5th, 1869, and that it was not obligatory upon the plaintiff to inform the defendant of any change in the health of her husband, if such there was, which took place after the 5th of June and prior to the 14th. You will then perceive, gentlemen, that in my view of the case, the fact of the delivery of the policy to Mr. De Camp on the 5th of June is immaterial, except that I regard it as important for the plaintiff to show that she actually acquiesced in the terms of the contract prior to any supposed change in the health of her husband, and that there was an assent on the part of both plaintiff and defendant to the terms of the policy; that the applicants then agreed to pay the premium, and did not leave the question of an acceptance of the policy an open one so as to speculate upon the probabilities of health. If the terms of contract were definitely agreed to on the 5th or 6th, naught remains but the payment of the premium, which was paid as promised, and before the death of the insured. I regard it as of no particular moment who had the custody of the policy between the 5th and the 14th. If I did regard it as material, I should charge you upon that point. The delivery of a policy is often a material point when credit for the payment is given or pre-payment is waived, and when payment of the premium is deferred until after the loss occurs. But when the terms of the policy are assented to by both parties, that is, when the company executes the policy and tenders it to the insured as the contract of the company, and the insured examines the policy and assents to its terms, agrees to it, and says, I am satisfied with that contract, I assent to it, and subsequently, before the loss or before a revocation, pays the premium, then it is immaterial for the purposes of the case who has the custody of the policy for the time being before its payment, because

it being a contract completed, if the company has it, it can be obtained from it by due process of law, or if it is destroyed, secondary proofs of its contents can be exhibited upon the trial. So that thus far, it is necessary that the premium be paid at some time either before or after the loss. If this premium was paid on the 14th, and prior to that time, upon the 5th or 6th, the contract was assented to on the part of the applicants, it then became a policy from June 5th. If it was not paid on the 14th, why it is agreed that it never was paid, for it confessedly has never been paid at any other time since that date. But if the payment and receipt of the policy was part of a collusive and fraudulent scheme, carried out and perfected after the death of De Camp by collusive proceedings, arranged between the plaintiff and Colton, under which she got possession of the policy, then the plaintiff cannot recover.

Now, to return to the testimony. The testimony upon these points comes from Mrs. De Camp. Colton is not a witness. You have heard the testimony in regard to the obtaining possession of the policy from Colton after the death of De Camp, or the recovery of the policy, as the plaintiff would put it. One side put it that it was an obtaining possession for the first time. The other side says that it was obtaining a recovery of the policy. It therefore having been lawfully in the possession of Mrs. De Camp, I shall not spend much time—any time in recapitulating the testimony. It is sufficient for me to say that if Mrs. De Camp is to be believed, if you rely upon her testimony—and you saw and heard her—then she had a right to the possession of the policy from and after the 14th of June. If you find the question thus far submitted to you in favor of the plaintiff, you will proceed to consider the other questions in the case, upon which the plaintiff rightfully says that the defendants take the burden of proof. Mr. De Camp died on the 24th of June, and proofs of loss were thereafter furnished to the company. By the terms of the policy, the representations made in the application by the applicants in regard to the health, history and habits of life of Mr. De Camp, became a part of the policy, and upon the faith of these representations the policy was issued, and if untrue in any material fact, the policy was avoided. Such statements are sometimes considered in law as warranties, and are sometimes called material representations, which must be true. The only representation upon which evidence has been offered by the defendant is the statement in regard to the temperance, and perhaps the general health of the insured; but the statement in regard to the sobriety and temperance is the principal one upon which evidence was offered. Whether the statement in regard to which a question is here raised is a warranty or a material representation, the rule of law applicable to its truth is the same; and that is, that at the time of the application, Mr. De Camp must have been, and be found by you to be, a sober and temperate man in his habits in reference to intoxicating liquors, or the policy is voided, because the company had required and had a right to obtain correct information upon a point which they properly conceived to be material to the risk. The question did not inquire whether De Camp totally abstained from the use of liquor, but it did inquire whether he was a sober man; that is, whether he so far abstained, that is, whether he was such an abstinent that he was as a habit free from the excitement which the use of intoxicating liquor causes, and whether he was a temperate man—that is, was he habitually so far free from the use of liquor as to be a temperate man? If the defendant has satisfied you, on the evidence produced, that these questions in regard to the habits of De Camp, when he made the application, were not rightfully answered by him and his wife in the affirmative, the representations which De Camp made were untrue, and if untrue in this material respect, the company did not have a fair and honest statement of the risk which they were called upon to insure, and not having had such a statement the policy is avoided. Now, to come to the evidence upon this point of representation, that is, upon the habits of Mr. De Camp as to sobriety and temperance, prior to the 5th of June. The evidence on the part of the defendant—who, as I have said, takes the burden of proof—is Mrs. De Camp's statement before the coroner's jury, the evidence of the two Romers, and the fact, and the inferences which they would draw from this fact, to wit, that assuming that he died on the 24th of June from the effect of intoxicating liquor and stimulants, it is not credible that the use of liquor for so short a time as from the 5th to the 24th of June could have produced such serious results. Now, the evidence on the other side is that of various witnesses, and of the picture which has been produced before you and which was taken after the application, and which, as the plaintiff claims, shows that at that time, even after the application, and after he began, as the defendants say, to use liquor, shows that he was in apparent good health and free from outward and visible marks of intoxicating drink. The evidence on the other side consists of various witnesses who were produced by them. In the first place, Judge Roberts, Mills, Cochran, and the clerk of the board of supervisors, the various ladies who were produced upon the trial, and the other gentlemen living in and about Rye, whose names I cannot at this moment recall, but which you will recollect upon reflection, together perhaps with the last witness, the young man who had known him during boyhood and who had continued his acquaintance from that time down to the time of his death. These witnesses testify, as the plaintiff says,

that De Camp's habits during the time that he lived at Rye were uniformly those of a temperate and sober man. You will examine the evidence and ascertain whether the defendants have made out this point by a preponderance of proof.

The next condition of the policy is that if the insured shall die from the habitual use of intoxicating liquors, the policy is avoided. In this condition they stipulate that the cause of the death shall not be the habitual use of liquor voluntarily taken by the insured. I am asked to charge that these conditions are to be construed strictly against the company. In cases where the construction of language is the matter of any doubt, and where the meaning is ambiguous, that rule has been laid down by the courts, and is a correct one. In cases where the meaning is plain and the words are simple, the rule, while it exists, is not so important; but each word and adjective is material and is to be considered. The policy is substantially "that, if the insured shall die by the habitual use of intoxicating liquors;" the adjective "habitual" is material. It was inserted deliberately by the defendants in their contract, and has its meaning. I do not suppose that if a uniformly temperate man should be overcome with liquor, and die in consequence of a single debauch, he could be said to die in consequence of the habitual use of liquor. But it is not for me to say how long the use of liquor must be considered to make it habitual. You are to judge of this fact as of any other fact in the case. The law very frequently requires juries to find what is a reasonable time; there are numerous instances where juries are called upon to examine questions of that sort. And so you are to determine in case this man did die by use of intoxicating liquor, whether it had become habitual or whether it was a temporary thing, and you are also, permit me to say, permitted to find, if you choose, that the use of liquor between the 5th and 24th, or if you choose to find that the use of liquor for three weeks is an habitual use, you are permitted to do so. It is a thing entirely within your power. The testimony of the defendants is, that the death was caused by the excessive use of alcoholic liquors and opiates, and that statement is contained in the physician's certificate of death, and is exactly or substantially contained in the verdict of the coroner's jury. Now, in regard to the manner of his death, if De Camp used liquors habitually and excessively, and used opiates also, for the purpose of allaying the excitement of the liquor, and they combined to cause and did cause his death, and the liquor, directly, materially and effectually contributed to his death, then the policy was avoided. If you find that he used an undue quantity of liquor habitually, and in the wild and excited state which liquor created resorted to overdoses of opiates to produce quiet, and so, from the combined effect of these stimulants and narcotics, died—and observe this; if you find that the stimulants, that is liquors, directly, materially and effectively contributed to his death, then the policy is not binding upon the company.

Before considering the testimony I will refer to a point made by the defendant in regard to the proofs of loss. The defendant claims that the physician stated in his proofs of loss that the cause of his death was what I have stated, that is, that he died from the exhaustion produced by the overuse of alcoholic liquors and opiates; that is substantially it; that this was in violation of one of the conditions of the company, and the applicant is bound by the statement of the physician's certificate. I am aware that it has been held in a fire policy that where the applicant makes himself a sworn statement in his proofs of loss, required to be given by the terms of the policy, he is bound by that statement. All that the claimant is called upon in the policy to give, is to give due notice and proofs of the death or loss. The form is not stated. It is not incumbent upon her by the terms of the policy to give a physician's certificate, although it is proper for the company to ask it, and proper for her to comply with it; but if she does give it, is she concluded by the statement of the attending physician? I think not. It is not her statement. She furnishes it simply to comply with the request of the company. If she was concluded she might be injured, where there was no fraud, on the part of the physician, but where the physician was simply mistaken, and she might be therefore entirely remediless when she had a good case. It is evidence which you should consider and look at carefully. You are to give it weight. It was given at the time with knowledge of the circumstances; it was given under the solemnity of an oath; it was given when the physician was aware of the importance which would be attributed to it by the company, and in a pecuniary matter of no ordinary importance; and, on the other hand, it was not given under the criticism of a cross-examination. This point of the manner in which De Camp came to his death is the great and only leading fact in which a conflict of testimony arises in the case. On the one hand there is the statement of Dr. Johnson, Mrs. De Camp's evidence before the coroner's jury, the verdict of the jury, the testimony before you of three or four physicians—how many I don't recollect—and the fact that he did die in this sudden manner, and that as the defendant would claim he could not have died in this sudden and untimely manner unless there had been more liquor used by him than is disclosed by the other side. On the other hand, the plaintiff says that the physicians, including Dr. Johnson, do not verify the physician's certificate; that Mrs. De Camp's testimony is of no weight before the coroner on account of her excitement and the state of mind in which she was thrown by the sudden death of her

husband, and the fact that she was summoned before the coroner's jury under the circumstances of the case; that Mrs. De Camp now testifies with reliance and self-possession, and differs from her former testimony; that the experts are of the opinion that the symptoms of the post mortem do not point to alcoholism as the cause, or as one of the causes of death. They further show that his death was caused by a high state of mental excitement in consequence of domestic complication, aggravated by the use of liquor, in not large quantities, and mainly by exhaustion produced by very severe and over doses of narcotics taken to allay that excitement.

Now, gentlemen, I do not consider it my duty to analyze—to go through the testimony upon the one side and the other, and take up the witnesses and analyze them. I think that you are to look carefully at the physician's certificate and the verdict of the coroner's jury, and the testimony offered upon that subject; you are to look carefully and weigh the testimony offered on the other side; each item of it; all of it. You have heard all the testimony. It is not for me to decide upon this question of fact, and it is not for me to indicate on this question of fact. It is for you to decide, without any sort of prejudice in favor of or against either of these parties, but simply upon the evidence presented before you. If you find for the plaintiff, you will find the sum of $10,000 and interest from the expiration of ninety days after the rendition of the proofs of loss, and that date I have forgotten.

Mr. Hill: The 26th of October, 1869,—that is, the expiration of the ninety days.

THE COURT: If you find for the plaintiff you will find the sum of $10,000 and interest from the 26th of October, 1869.

Is there any point which I have omitted to charge, desired by either of you?

Mr. Hill: I will only call your honor's attention to a single fact, that the certificate of Dr. Johnson was given upon the same basis of facts upon which he gave his opinion at the coroner's inquest, which statement of facts has been materially changed by the evidence here produced.

THE COURT: Well, that is evidence, and they have got to weigh that evidence; I cannot do it; they must do it.

Mr. Hill: I will ask your honor to charge them, that if Mrs. De Camp innocently relied upon the apparent authority to be reasonably inferred from Colton's possession of the policy, and for that reason was induced to postpone the immediate payment of the premium, the company became bound upon the delivery of the policy to her in the first instance.

THE COURT: However that might be as an abstract question of law, I do not think it is material in this case, because, if her testimony is to be believed, she did pay the premium, and that ended that business.

Mr. Hill: I am in doubt whether I ought to have called your honor's attention to a single word, your charge has been so full, but in a little different manner from the propositions which I have made—that there is no conflict in the evidence, but that Colton delivered this policy on the 5th or 6th of June, 1869, without exacting the pre-payment of the premium, which act was sufficient of itself in law to justify the belief that the term of credit for the premium was extended, and the condition of the policy in this respect waived, and by Mrs. De Camp accepting the policy with that understanding, the contract became valid and operative immediately upon the company.

THE COURT: That is one of the same propositions. I think I have charged the jury fully upon that point.

Mr. Hill: There is only one thing more substantially (I suppose that any question of exception may arise after the jury have retired, so that I do not care to prolong the discussion now),—that the maxim of natural justice here applies with full force; that he who without intention of fraud has enabled a person to do an act which is injurious either to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him should suffer.

THE COURT: That is one of the same class of propositions which, as I have already said, however true they might be as abstract propositions, are not material in this case.

Mr. Hill: There is only one word more. I will ask your honor to charge that the statements of this application, if honestly made by Mr. De Camp, are not warranties.

THE COURT: I can only charge that they are representations, and they must be true. If a party makes representations which are material, they must be true; they cannot avoid it by saying that they did not know what they were talking about.

Mr. Robinson, after some preliminary remarks: I now ask you to call the attention of the jury to the fact that Mrs. De Camp served such a statement (the certificate of the physician and the verdict of the coroner's jury) sometime after the death of the party, in which statement it appeared that a contributing cause of the death of De Camp was the use of intoxicating liquors; and that they shall take the circumstances into consideration in determining the cause of his death. I merely wish that your honor would call attention to that as well as to the certificate of the physician.

THE COURT: I intended to say that the proofs of loss contain both the physician's certificate and the verdict of the coroner's jury, which was intended, I suppose, to be an accurate transcript of the verdict.

Verdict for the plaintiff for the whole amount claimed.

Case No. 3,720.

DE CASSE v. SPADER.

[3 Int. Rev. Rec. 163.]

Circuit Court, D. New Jersey. May 15, 1866.

INTERNAL REVENUE LAWS—FIRE-BRICK—"BRICK" DEFINED.

[The word "brick," as used in the internal revenue acts of 1862 (section 75) and 1864 (section 94) does not include fire-brick; and fire-brick were taxable, "as manufactures not otherwise provided for," at 3 per cent. under the former act, and at 5 per cent. under the latter.]

This was an action [by Henry De Casse against Krosen J. B. Spader] for the recovery of taxes paid under protest, assessed upon fire-brick manufactured by the plaintiff. It was tried before Judge FIELD, without jury, under the 4th section of the act of congress passed March 3, 1865 [13 Stat. 483].

Benjamin Williamson, for plaintiff.

A. Q. Keasbey, U. S. Dist. Atty., for defendant.

FIELD, District Judge. The question submitted to me in this case arises out of the internal revenue acts of July 1, 1862 [12 Stat. 462], and June 30, 1864 [13 Stat. 264]. By the 75th section of the act of 1862, brick is one of the articles not regarded as manufactures within the meaning of the act, and therefore exempt from taxation; and by the 94th section of the act of 1864, brick is subject to a duty of three per centum ad valorem. The plaintiff is a manufacturer of fire-brick and has been compelled to pay a duty of three per cent. under the original act, and of five per cent. under the act of 1864, upon the ground that fire-brick is not included under the term "brick," but is to be classed with "manufactures not otherwise provided for." This the plaintiff insists is an erroneous construction of these acts, and having paid under protest, now seeks to recover back the excess.

Does this term "brick," then, as used in these acts, include fire-brick? It has been repeatedly ruled by the commissioner of internal revenue, that it does not. I am aware that these "rulings" are not binding upon this court. Nevertheless they are entitled to respect. But in addition to this, we have the opinion of Mr. Boutwell, in his excellent "Manual of the Direct and Excise Tax System in the United States." "Fire-brick," he says, "are subject to a duty of three per cent. ad valorem, not being included under the term 'brick,' as used in the 75th section of the excise law." Boutwell's Manual, 334.

What is the origin of the word "brick?" According to Webster it is a contraction of the Latin word "imbrex," which was the name given to a hollowed tile for carrying off the rain. Nor is this one of Dr. Webster's ingenious and fanciful derivations. It has in its favor the authority of other distinguished etymologists. According to Richardson, Menage derives the corresponding French word "brique" from the Latin word "imbricare," that is, "imbrescibus tegere," to protect from showers. And "imbrices," the plural of "imbrex," are so called "ab imbre quod accipiant arceantque imbres," because they receive and keep off the rain. Thus, the etymology of the word "brick" involves the idea of its being designed for building purposes, and as a protection against the weather. In Chambers' Encyclopedia (volume 2, p. 337), "brick" is defined to be "an artificial substitute for stone, which has been extensively used for building in all ages." "Fire-bricks," on the other hand, are described as being made of a particular kind of clay, called "fire-clay," and designed for building up furnaces. "The clay has to be prepared with great care, in order to avoid unequal expansion and contraction, and they are baked to an intense heat. The clay differs from that of common bricks in containing but a small quantity of lime, magnesia, and the oxide of iron, all of which form compounds with silica, that are much more fusible than the silicate of alumina, of which the best fire-bricks are almost entirely composed." Ordinary brick, then, and fire-bricks, although made in very much the same way, are an essentially different article. They are composed of different materials, and they are used for different purposes. The one is made of brick-clay, or "brick-earth," as it is sometimes called, and is designed for building houses. The other is made of fire-clay, so as to sustain intense heat without fusion, and is designed for building furnaces. The various articles which, by the 75th section of the act of 1862, are not to be regarded as manufactures, may be readily classified in such a way as to indicate very clearly what those interests were which congress intended to exempt from taxation. First, we have "printed books, magazines, pamphlets, newspapers, reviews, and all other similar printed publications." A tax upon these would be a tax upon knowledge. Again, we have "all flour and meal made from grain, bread and breadstuffs, pearl barley and split peas; butter, cheese, concentrated milk." A tax upon these would be a tax upon the necessaries of life. And then we have "brick, lime, Roman cement, draining tiles, marble, slate, building stone." A tax upon these would be a tax upon building. That it was the purpose of congress in framing the internal revenue law to favor the interest of building, is further manifest from the 94th section of the act of 1864, where marble used for building purposes is subjected to a duty of three per cent. and marble used for monumental purposes to a duty of five per cent. We can easily understand, then, why congress, in exempting brick from taxation by the act of 1862, did not mean to include under that term fire-brick. No reason can be assigned why fire-brick should not, under the excise law of 1862, have been regarded as a manufacture within the meaning of that act.

Congress, no doubt, meant to use the word "brick" in its ordinary colloquial sense. By

the usage of trade fire-brick is not included in the term "brick;" when we use the term "brick" generally, we mean ordinary brick intended for building purposes. If one were to inquire what was the price of brick, would he be thought to mean fire-brick? Upon the whole, I am of the opinion that the word "brick," as used in the 75th section of the act of 1892, and in the 94th section of the act of 1864, does not include fire-brick. Judgment for the defendant.

DE CASTRO & DONNER SUGAR-REFINING CO. (COPP v.). See Case No. 3,215.

DE CASTRO, The GOMEZ. See Case No. 5,-525.

DECATUR (BROWN v.). See Case No. 2,-001.

Case No. 3,721.

DECATUR v. CHEW.

[1 Gall. 505.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

DISTRIBUTION OF PRIZE MONEY — RIGHTS OF SQUADRON COMMANDER — CAPTURE BY SINGLE VESSEL.

1. The commander of a squadron, to whose command a ship of war is attached, and under whose orders she sails, is entitled to the flag twentieth of all prizes made by such ship, although the other part of the squadron may never have sailed on the cruise, in consequence of a blockade by a superior force.

[Cited in Robinson v. Hook, Case No. 11,956; U. S. v. Steever, 113 U. S. 752, 5 Sup. Ct. 768.]

2. To deprive such a commander of his flag twentieth, on account of having left his station, within the act of the 23d of April, 1800, c. 33, § 6 [2 Stat. 52], it is indispensable, that some local station should have been assigned to him.

[This was a suit in admiralty by Stephen Decatur against Thomas I. Chew.]

Mr. Selfridge, for plaintiff.

G. Blake, for defendant.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. This is an action for money had and received, brought by Commodore Decatur against the defendant, who is the prize agent, to recover one twentieth part of a moiety of the proceeds of the British prize ship Volunteer, captured by the frigate Chesapeake, while attached to a squadron commanded by the commodore. From the statement of facts agreed by the parties, it appears, that in the autumn of 1812, the frigate Chesapeake, commanded by Captain Evans, and the brig Argus, commanded by Captain Sinclair, and the frigate United States, commanded by Commodore Decatur, were attached together, as a squadron, under the command of the latter, by orders issued on the 9th of September from the navy department. On the 2d of October, the secretary of the navy addressed a letter to Commodore Decatur, as follows. "You will consider yourself at liberty to proceed to sea, whenever you may judge it expedient, with the vessels attached to your command. You are to do your utmost to annoy the enemy, and to afford protection to our commerce, pursuing that course, which to your best judgment may, under all circumstances, appear the best calculated to enable you to accomplish these objects, as far as may be in your power, returning into port as speedily as circumstances will permit, consistently with the great objects in view." No other orders were received or given. On the 6th of October, 1812, Commodore Decatur gave sailing orders to Capt. Evans for a cruise; but as no particular circumstances, affecting this case, grow out of their language, I forbear to recite them. These orders direct the Chesapeake to cruise between certain given latitudes and longitudes, and vest a large discretion in Captain Evans, as to deviations. Commodore Decatur soon afterwards sailed from Boston, captured the frigate Macedonian in a memorable engagement, and returned with his prize to the United States, previous to the sailing of the Chesapeake, and has ever since been unable to put to sea, in consequence of the superior blockading squadrons of the enemy. On the 28th of November, 1812, the secretary of the navy addressed a letter to Captain Evans, directing, "as soon as you shall be prepared, you will weigh anchor and proceed as you have been directed by Commodore Decatur, to whose squadron you are attached." The Chesapeake sailed about the middle of the ensuing December, captured the Volunteer, and returned from her cruise about the 10th of April, 1813, and Captain Evans immediately reported his cruise to Commodore Decatur, as his commander. The Volunteer was brought into Portsmouth, N. H., and after due proceedings, was condemned, and a moiety of the proceeds adjudged to the captors, in the district court of that district. Such are the material facts of the case, upon which a question, highly interesting to the navy, has arisen between the very meritorious officers before the court, and has been discussed with characteristic urbanity and decorum.

The act of the 23d of April, 1800, c. 33, § 6, contains the regulations relative to the distribution of prize money in the navy of the United States. The articles, on which the present controversy turns, are the first and seventh. The first declares, that the prize money shall be distributed "to the commanding officers of fleets, squadrons, or single ships, three twentieths, of which the commanding officer of the fleet or squadron shall have one twentieth, if the prize be taken by a ship or vessel acting under his command, and the commander of single ships two twentieths; but where the prize is taken by a ship acting independently of such superior

[1] [Reported by John Gallison, Esq.]

officer, the three twentieths shall belong to her commander." The seventh declares, that "no commander of a fleet or squadron shall be entitled to receive any share of prizes taken by vessels not under his immediate command, nor of such prizes, as may have been taken by ships or vessels intended to be placed under his command, before they have acted under his immediate orders; nor shall a commander of a fleet or squadron, leaving the station where he had the command, have any share of the prizes taken by ships left on such station, after he has gone out of the limits of his said command."

It is contended on behalf of the defendant (1) that the Chesapeake, at the time of the capture, was acting independently of a superior officer, within the first clause, or (2) that Commodore Decatur had left the station, where he had the command, at the time of the capture, within the seventh clause.

Before I consider these points, I will advert to the distribution of prizes under the English statutes and proclamations, because I agree with the counsel for the defendant in thinking, that they reflect light on the subject in controversy, and were obviously in the view of congress in framing our own statutes. At least as early as the year 1708 (6 Anne), one eighth of all prizes, made by ships under the command of a flag, was given to "the flag officer or officers, being actually on board, or directing or assisting in the capture" (Rob. Coll. Marit. 200, note). Upon the construction of this clause, it was held, that actual direction or assistance was not necessary; and that the mere circumstance of holding a flag commission, and the authority, in virtue thereof, to direct and assist in the operations of a fleet, was such a constructive direction and assistance, as entitled the commander to share, although he had never joined the fleet, or given any order, or done any other official act in quality of commander. In point of fact, therefore, the commander claimed his share of all prizes made, from the date of his commission to the termination thereof. This extensive right was deemed injurious to the service, and at length, in 1744, was taken from the flag officer in a variety of cases: First, where prizes were made by ships on a station "before he arrived within the limits of his command;" secondly, where prizes were made by reinforcing ships "before their arrival within the limits of his command;" and thirdly, where prizes were made by ships on a station, the flag officer of which was returning home, "after he had got out of the limits of his command." In all other cases, the right stood upon the general clause, and extended to all prizes made by ships under his command. In 1756 these restrictions were somewhat varied, and the form then adopted continued in use until the year 1803. In the regulations of 1756, the flag officer is denied a right to share, first, in prizes made by ships on a station, where he is sent to command, "before he arrives at the place to which he is sent, and actually takes upon him the command;" secondly, in prizes made by a reinforcing squadron, before it "shall arrive within the limits of the command of the superior flag officer, and actually receive some order from him;" and thirdly, in prizes made by ships, "left behind to act under another command," when a flag officer is returning home from a station.[2]

Upon the construction of these regulations it has been held that a flag officer is not entitled, who has resigned, or accepted another distinct command, or has been superseded at the time of the capture; nor where the capturing ship has been detached by the admiralty, upon a separate service; nor where the capturing ship has made the capture without the limits of the station, without orders; nor where the flag officer has returned home for temporary purposes, leaving his squadron behind on the station; nor where there has been a temporary suspension of the command, as by the ship's going into another station for repairs, and acting, while there, under another command.[3] But in all cases, not within the exceptions of the articles of 1756, the general rule prevails, that the flag officer actually in command shall receive the flag eighth. And, therefore, if he be actually in command, he is entitled, although he has not given any orders, and the capture was made under orders from a former flag officer.[4] And it matters not, whether the actual command be by direct appointment or by devolution in the course of the service.[5] Such are the most important distinctions, which have been recognised, in the construction of the language of the prize proclamations of Great Britain. And it is impossible for the attention not to be forcibly struck with the exact resemblance, which the provisions of the act of March 2, 1799, c. 130, § 6 [1 Stat. 710], bear to these proclamations. I forbear however to comment on them, as the present question depends on another and more recent statute.

Keeping in view, however, the British decisions, let us now return to the two questions submitted to the court. And as to the first, I think it extremely clear, that in no sense could the Chesapeake be considered, at the time of the capture, as acting independently of a superior officer. She was not only attached to the squadron of Commodore Decatur, and therefore constructively under

[2] Johnstone v. Margetson, 1 H. Bl. 261; Nelson v. Tucker, 3 Bos. & P. 257, 4 East, 238.

[3] Taylor v. Pawlett (1759), and Pigot v. White (1785), cited in 1 H. Bl. 265, note; Johnstone v. Margetson, Id. 261; Nelson v. Tucker, 3 Bos & P. 257, 4 East, 238. Sed vide The St. Anne, 3 C. Rob. 60; Harvey v. Cooke, 6 East, 220; The Orion, 4 C. Rob. 362, 4 East, 232; Holmes v. Rainier, 8 East, 502.

[4] Taylor v. Pawlett and Pigot v. White, supra.

[5] Keith v. Pringle, 4 East, 262.

his command; but she had actually received his orders, and sailed in pursuance thereof on her cruise. Actual presence of the superior officer, at the time of the capture, is neither supposed nor required by the law. It is sufficient, if the ship be not detached on a separate service by the government, but remain under the command, and subject to the orders of the superior officer. In such a case, the superior officer is deemed to afford constructive assistance, and is responsible for his squadron, however far he may be removed from the scene of action. It seems to me therefore beyond all doubt, that the Chesapeake, at the time of the capture, was not acting independently, but was acting under the command of Commodore Decatur. I know not in what manner she could have assumed an independent character, unless she had been detached by the navy department from the squadron, or had thrown off the subjection to her superior by a voluntary deviation.

The second question is whether Commodore Decatur had left the station, where he had the command at the time of the capture. At the hearing, I expressed a strong opinion, that there was no foundation for the argument on this head; and more mature reflection has satisfied me of the correctness of that opinion. In order to lay a foundation for the argument, it was necessary to show, that Commodore Decatur had a station assigned to him; for otherwise it is impossible to conceive, how he could have left it. Now in the statute, a "station" necessarily includes the idea of local limits. It presupposes certain boundaries of place and command, beyond which the squadron could not lawfully proceed in their cruise. Such is the uniform meaning of the word in the British Naval Code, and it will be difficult to assign it another meaning in our own statute, without involving absurdities in construction. Now, in point of fact, no station was assigned to Commodore Decatur. His orders were of the most unlimited nature. He was at liberty to go where he pleased, consistent with the great object of annoying the enemy.

"The world was all before him, where to choose
His place of rest, and Providence his guide."

The exception then, supposed in the statute, the causa foederis, if I may use the expression, did not arise. The irresistible conclusion is, that as the exceptions of the statute do not apply, the case falls within the general rule, and Commodore Decatur is entitled to the flag twentieth of the proceeds of the captured ship. I am entirely satisfied, that judgment must pass for the plaintiff for the amount specified in the agreement of the parties. Judgment for plaintiff.

DECATUR (HUTCHINSON v.). See Case No. 6,956.

DECATUR (OLIVER v.). See Cases Nos. 10,494–10,496.

Case No. 3,722.

DECATUR v. YOUNG.

[5 Cranch, C. C. 502.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

AFFIDAVIT OF ATTACHMENT—RESIDENCE OF PLAINTIFF.

In an affidavit to obtain an attachment under the Maryland act of 1795, c. 56, it is not necessary to state the plaintiff to be a citizen of the county of Washington, D. C.

[This was an action by Susan Decatur against David Young.]

Mr. Morfit, as amicus curiae, moved the court to quash the attachment, which had been issued under the Maryland act of 1795, c. 56, because the affidavit, upon which the attachment was awarded, did not state that the plaintiff was a citizen of the county of Washington, although she was stated to be a citizen of the District of Columbia. The law is only in force in this county, and the plaintiff must be either a citizen of this county or of one of the states of the Union; but as the affidavit only states that she was a citizen of the District of Columbia, she may be a citizen of the county of Alexandria, in which case she would not be entitled to the remedy under the statute, the words of which are that "if any person whatsoever, not being a citizen of this state, and not residing therein, shall or may be indebted unto a citizen of this state, or of any other of the United States," "such creditor may" apply to a judge, &c., and obtain a warrant to the clerk of the court to issue an attachment, &c. A citizen of Alexandria, cannot be said to be a citizen "of this state, or of any other of the United States." The words, "this state," in order to make the law applicable to this part of the state which was ceded by Maryland, must be construed to mean this county. Mr. Morfit cited Mandeville v. Jarrett, 6 Har. & J. 497, and Yerby v. Lackland, Id. 416.

THE COURT stopped Mr. Marbury, in reply, and overruled the motion, nem. con.

Case No. 3,723.

In re DECKER.

[8 Ben. 81.] [2]

District Court, S. D. New York. April Term, 1875.

BANKRUPTCY — RE-EXAMINATION OF CLAIM—PRINCIPAL CREDITORS—COSTS.

D. being in financial difficulty, certain creditors signed an agreement that, if he would give those who signed it his notes for fifty per cent.

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

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

on his indebtedness to them, payable in three, six, nine, twelve, fifteen and eighteen months, they would release him from all further indebtedness, with the condition that the agreement should be binding only in case it was signed by "all his principal creditors." D. gave the notes and paid the two that first came due. Bankruptcy proceedings were then instituted against him, and a corporation, one of the creditors who had signed the agreement, filed a proof of debt, claiming as due the whole of the original indebtedness, less the amount of the notes paid, because, as was insisted, the agreement had not been signed by all the principal creditors: *Held*, that, as the creditor had taken the notes, which it was not bound to take unless the agreement was signed by all the principal creditors, it could not be allowed to say that the agreement was not so signed; and that the claim must be reduced to the amount of the notes unpaid, and the creditor must pay the cost of the proceedings to re-examine the claim.

This was an application by the assignee in bankruptcy of William H. Decker, for the re-examination of a debt proved against the estate by the South Brooklyn Saw-Mill Company. The evidence showed that the company, with other creditors of Decker, on March 12th, 1873, signed an agreement, whereby they agreed to accept Decker's notes for fifty per cent. of their respective claims against him, payable in three, six, nine, twelve, fifteen and eighteen months, and to release all further claim against him, on the condition that the agreement should be signed by all Decker's "principal creditors." The notes, specified in the agreement, were given, and the two that fell due first were paid. Thereafter, Decker being put into bankruptcy, the company filed a proof of debt for the amount of their original claim, less the amount of the two notes paid, and a bill of $66.41 for lumber sold to Decker after the execution of the agreement. The company claimed that the agreement had not been signed by all of Decker's principal creditors. The evidence also showed that Decker owed, at the time the agreement was signed, to seventy-eight creditors, about $123,462.46, and that it had not been signed by one to whom he owed $3,819.25, by another to whom he owed $2,623.83, by another to whom he owed $1,756.47, by another to whom he owed $1,511.38, and by others. On this evidence the register held that the agreement had not been signed by all the principal creditors, and that the proof of debt of the saw-mill company should therefore stand undiminished; and he certified the question to the court.

BLATCHFORD, District Judge. These creditors signed an agreement whereby they, with other creditors signing the same agreement, agreed, in consideration of Decker's giving to them his promissory notes to the amount of 50 per centum on the dollar of his then indebtedness to them, payable in three, six, nine, twelve, fifteen and eighteen months respectively, to release all further or other claim against him, with the condition that the agreement was "to be binding only in case that it be signed by all his principal creditors." The expression "all his principal creditors" is vague and difficult of interpretation. But certainly these creditors were capable of judging for themselves when all the principal creditors had signed. They were not bound to take the notes until the condition had been complied with. The fact that they took the notes must be accepted as evidence of their judgment that at the time they took them they were satisfied that the creditors who had already signed constituted all the principal creditors, within their understanding of the term and within that of the debtor. Otherwise, they were at liberty to decline taking the notes. Having taken them, they are concluded from saying, on the evidence presented, that all the principal creditors had not signed at the time.

The claim must be reduced to the amount of the four unpaid notes, at their provable amounts, and the $66.41, and the creditors must pay the costs of the proceeding.

Case No. 3,724.

DECKER v. GRIFFITH.

[10 Blatchf. 343, note.][1]

Circuit Court, S. D. New York. June, 1873

INFRINGEMENT OF PATENTS—BILLIARD CUSHIONS.

[1. The fact that defendant may have made patentable improvements in certain special features gives him no right to use the substance of plaintiff's invention.]

[2. The Decker reissue patent No. 3,323, for an improvement in cushions for billiard tables, *held* infringed.]

[This was a bill by Levi Decker against William H. Griffith for infringement of reissued patent No. 3,323, granted to complainant March 9, 1869, upon original patent No. 60,657, of December 18, 1866. The patent was for an improvement in cushions for billiard tables. The claim is as follows: "The catgut or other cord, E, partially or fully imbedded, or otherwise attached, at the angle, a, of the rubber cushion, C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth."

[For a full description of the invention, together with drawings, see Decker v. Grote, Case No. 3,726.]

WOODRUFF, Circuit Judge. The billiard cushion manufactured by the defendant may, very possibly, be an improvement upon that of the plaintiff, in respect to the use of a device for giving tension to the wire run through the edge of the elastic cushion, and, if so, may be patentable, so as to give the defendant the exclusive right to his special device. Possibly, also, he may have devised a new mode of introducing the wire, by a perforation near the edge of the rubber. Neither of these concessions will justify the

[1] [Reprinted by permission.]

defendant in using the substance of the plaintiff's invention for stiffening and regulating the elastic edge of the cushion, by a cord attached thereto, or inserted therein, or in employing an equivalent, either in respect of material used, or in respect of the manner of securing the cord, so that it may perform its office. The proof is without contradiction, that the infringing device operates in the same way, and by substantially the same means, to produce the same result. In regard to the validity of the reissue, I concur with Judge Blatchfield, in the case of Decker v. Grote [Case No. 3,726].

Case No. 3,725.

DECKER v. GRIFFITH et al.

SAME v. SILVERBRANDT.

[13 Blatchf. 187; 2 Ban. & A. 178; 8 O. G. 944; Merw. Pat. Inv. 136.][1]

Circuit Court, S. D. New York. Nov. 5, 1875.

PATENTS—NOVELTY—INFRINGEMENT—CUSHIONS FOR BILLIARD TABLES.

1. The claim of the reissued letters patent granted to Levi Decker, March 9th, 1869, for an "improvement in cushions for billiard tables," the original letters patent having been granted to him December 18th, 1866, namely, "The catgut or other cord E, partially or fully imbedded, or otherwise attached, at the angle a of the rubber cushion C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth," is not void for want of novelty, by reason of anything found in the letters patent granted to William K. Winant, August 10th, 1858, for "improvements in cushions for billiard tables."

2. In the Winant patent, a strip of steel merely lies in a crease or groove cut in the rubber, and is kept in place without being attached by screws, cement or otherwise. In the Decker patent, the cord is described as being moulded or imbedded entirely within the rubber. But, it appearing that, before Decker's invention, billiard tables were made in accordance with the Winant patent, but with the added feature of an arrangement for tying down the steel strip to the cushion, by means of holes in the lower edge of the strip and wires put through them and fastened to the under side of the rail, to keep the strip in place in the rubber, and it further appearing, that, prior to Decker's invention, billiard table cushions were made by one S., with a French clock spring placed in a slit cut in the upper face of the rubber, parallel to and near the under face of the rubber, and cemented into the slit, and cloth cemented over the slit: *Held*, that a suit founded on the Decker patent could not be maintained against billiard tables so constructed, or against an arrangement like that of S. but with a round wire substituted for the steel strip.

[This was a suit in equity by Levi Decker against William H. Griffith & Co. and against Charles Silverbrandt for the alleged infringement of a patent.]

William J. A. Fuller, for plaintiff.
Edward N. Dickerson, for defendants.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 136, contains only a partial report.]

BLATCHFORD, District Judge. The patent sued on in these cases, being a reissue [No. 3,323] granted to the plaintiff, Levi Decker, March 9th, 1869, on the surrender of the original patent [No. 60,657] granted to him December 18th, 1866, for an "improvement in cushions for billiard tables," has been heretofore the subject of consideration by this court in the case of Decker v. Grote [Case No. 3,726]. The invention set forth in the specification of the patent has reference to a cushion formed of India rubber.[2] The specification says: "My invention has for its object the preservation of cushions for billiard tables against the impact of the ball. The nature of my invention consists in the employment or use of a catgut or other strong cord, located in or at the upper corner or edge of the cushion, and immediately at the point against which the ball strikes when the game of billiards is played. * * * C is a body of rubber, which forms a cushion against which the ball strikes. This said rubber cushion has its inner or face side bevelled in such a manner that the ball strikes, at about its centre, against the upper corner or point of the cushion, as clearly shown at a, fig. 1. For the purpose of protecting the upper corner or edge of the cushion C, against the impact of the ball, I make a small concave or bed, immediately, or as near as may be, in the upper corner of the cushion, so that a suitable cord, E, or other support, may be fitted longitudinally, the whole length of the said cushion, around the table, so that the cushion is fully protected on all sides of the table against the impact of the ball. For this cord and support of the cushion I usually employ catgut, or cord may be used for the same purpose; but experience proves that catgut is most suitable for the purpose, as it is best adapted to prevent the cushion from giving way or yielding under the impact of the ball, it being understood that the ball only comes in contact with the cushion at a, the bevel or inclination being given the face of the cushion in order that all other parts of it will be kept clear of the ball. This cord E may be more thoroughly secured in its position by moulding it or imbedding it entirely within the rubber, near the corner, so as to perform the functions for which it is designed, or it may be secured by gluing a strip of cloth b over it, when not fully imbedded in the rubber, or it may be secured by any other well-known means. D is a strip of elastic cloth, which is cemented to the face side of the rubber strip or cushion C, and attached, at its lower edge, to the lower part of D," (elsewhere described as a strip or cleat, behind C,) "so as to support the upper edge a of C. It will be understood that the cord E is attached to D before the latter is secured to the cushion C and cleat B. To make the whole more secure, I usual-

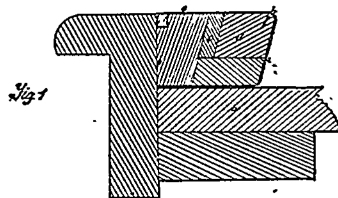
[2] [For drawings illustrating the invention, see the following case, Decker v. Grote, No. 3,726.]

ly cover the whole with the cloth F, and after cover the whole again with the usual green cloth G. This cord E performs two very important functions, viz., it gives stiffness to the angle or corner a of the cushion C, so that it cannot yield or give way under the impact of the ball, to allow the latter to pass over it; and it also gives prominence to the said angle, so as to present, under the yielding of the cushion, a stiff, narrow line to the ball, thus obviating much friction, so as not to impede the motion of the latter, and still not interfering in the least with the elastic effects of the cushion upon the ball." The claim is: "The catgut or other cord E, partially or fully imbedded, or otherwise attached, at the angle a of the rubber cushion C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth." In the case of Decker v. Grote [supra], it was said, in the decision of the court: "It is quite apparent, that the invention set forth is the placing and firmly securing along the upper edge or corner of the rubber cushion a strong, narrow cord, to receive the impact of the ball, and protect the cushion against such impact, by reason of its being placed at the point against which, and against which alone, the ball strikes. When the impact comes, the stiff cord receives it in substantially a horizontal direction, and prevents the cushion from giving way under such impact, and allowing the ball to ride over it and leave the table, while, at the same time, there is little friction from the impact, and the elastic force of the rubber acts fully through the cord interposed between it and the ball, to repel the ball in substantially a horizontal direction." The arrangement used by the defendant in that case was to imbed the cord in the rubber cushion, at the upper edge of it, by placing it there while the rubber was plastic, and before it was vulcanized, and by having a thin portion of the rubber interposed between the cord and the outside of the edge. It was held, that such arrangement embodied the invention claimed in the patent, and had the same mode of operation in use. The novelty of the invention was challenged in that case by the citation of an application for a patent filed by one Carpenter, in January, 1858; and rejected in April, 1858, of a patent to one Syrcher, granted in November, 1863, and of abandoned experiments made by one Delaney, in California, but the patent was sustained against those objections. Subsequently, in the case of Decker v. Griffith [Case No. 3,724], the use of a round metallic wire in the manner in which it is used by the defendants in the suit secondly above entitled, was held, by this court, to be an infringement of the Decker patent.

The alleged infringement complained of in the first above entitled suit consists in the use of a flat strip of metal, fitting in a slot moulded in the India rubber cushion, and running from end to end thereof, and strained by a straining key at its end. The strip is capable of moving in the direction of its length, when strained, though it is held firmly endwise at all times. The strip lies parallel with the inner inclined face of the cushion, and closely adjacent to it, and its upper edge is closely adjacent to the upper inner corner of the cushion. The alleged infringement complained of in the second above entitled suit consists in the use of a round metallic wire, arranged in like manner with the flat strip of metal, and situated in close proximity to the upper inner corner of the cushion.

It is contended, on the part of the defendants, that what they use, in so far as it is like what is described and claimed in Decker's reissue, existed prior to Decker's invention; in other words, that a narrow cord or wire of metal or other equivalent material, placed and firmly secured along and within, and closely adjacent to, the upper edge or corner of the rubber cushion, so as to receive the impact of the ball, existed before Decker's invention. Decker testifies that he "got the idea" of his invention in the fall of 1864, he thinks, in September; that he thinks he made cushions of tables complete, embodying the invention, in the fall of 1864; and that he is quite certain he did so before March, 1865.

The defendants introduce and refer to a patent granted to William K. Winant, August 10th, 1858, for "improvements in cushions for billiard tables." The specification of that patent sets forth that the invention of Winant "consists in the introduction of a strip of spring steel (or equivalent material), into a crease or groove cut in the upper face of the rubber, near the angle thereof, in such a manner that said steel is protected from injury by the rubber which thus intervenes between the steel and the ball, and the cushion is rendered sufficiently firm to prevent the ball imbedding and injuring the correctness of the angle of deflection; and besides this, the strip is so narrow as not to be injured by the concussion, and is retained in place without requiring any attachment by screws, cement, or otherwise. * * * In the upper part of the cushion d, and near its edge, I make a long incision parallel to its edge, and at a slightly greater inclination than the face of the cushion, and into said crease or groove, thus formed, I introduce a narrow, thin strip of steel i, or equivalent material, and the covering e, of cloth, or other material, as usual, completes



the cushion. It will be apparent that said strip i is retained in place by the rubber, and acts to prevent the ball imbedding, and at the same time is itself protected from injury by the rubber on both sides."

There is one feature in this patent of Winant's which is unlike the arrangement of Decker. Winant describes his strip of steel as merely lying in the crease or groove cut in the rubber, and as being kept in place without being attached by screws, cement, or otherwise; whereas Decker describes his cord as being moulded or imbedded entirely within the rubber. The patent of Winant's was considered, and very properly, by the patent office, when Decker's patent was reissued, as not having anticipated Decker's claim in his reissue.

It is shown by the evidence of Daniel D. Winant, the brother of William K. Winant, that, prior to 1864, he made many billiard tables, constructed in accordance with the Winant patent, but with the added feature of an arrangement for tying down the steel strip to the cushion by means of holes in the lower edge of the strip, and wires put through them and fastened to the under side of the rail, to keep the strip in place in the rubber. In that arrangement the steel strip was incorporated in the structure, so as to be incapable of dislodgment, quite as effectually as if moulded or imbedded entirely within the rubber, as suggested in Decker's specification. It stiffened the angle or corner of the cushion, and prevented its yielding under the impact of the ball, and allowed the ball to pass over it. It presented, substantially, the same features and mode of operation shown in the defendants' arrangement in the first above entitled suit, where the flat strip of metal is used, so far as there is anything in common between the plaintiff's arrangement and that of the defendants. The greater or less inclination of the strip to the face of the cushion, the greater or less proximity of the face of the strip to the inner face of the cushion, the greater or less width of the strip, and the greater or less proximity of its upper edge to the upper corner of the cushion, are questions of degree only, so long as the effective feature of the defendants' arrangement is found in the earlier structure, in connection with the use of the strip, which is shown to be the fact.

It is also shown, that one Stevens, in Boston, prior to 1864, made India rubber cushions for billiard tables, which had a French clock spring placed in a slit cut in the upper face of the rubber, parallel to and near the inner face of the rubber, bringing the upper edge of the spring near the upper corner of the rubber. The spring was cemented into the slit, and cloth was glued or cemented over the slit. The spring was thus imbedded entirely within the rubber. A portion of a cushion of such construction, made prior to 1864, by Stevens, is produced. It contains the features presented by the defendants' arrangement with the flat strip, so far as the latter is like the plaintiff's arrangement.

As to the defendants' arrangement with the round wire imbedded in the rubber, it required no invention to substitute, in the Stevens arrangement, a round wire for the steel strip. If the plaintiff's reissued patent can, in view of the Winant and Stevens arrangements, above described, be upheld at all, because it is made to cover a cord imbedded entirely within the rubber, and is not limited, as his original patent was, to a cord applied outside of the upper corner of the cushion, it certainly cannot be extended to cover arrangements which are substantially the same as the Winant and Stevens arrangements.

The bill must be dismissed, with costs.

[NOTE. For other cases involving this patent, see note to Decker v. Grote, Case No. 3,726.]

Case No. 3,726.

DECKER v. GROTE et al.

[10 Blatchf. 331; 3 O. G. 65; 6 Fish. Pat. Cas. 143; Merw. Pat. Inv. 134.] [1]

Circuit Court, S. D. New York. Jan. 2, 1873.

Patents — Construction of Claim — Infringement — Equivalents — Anticipation — Abandoned Experiments—Evidence—Billiard Table Cushions.

1. The claim of the reissued letters patent granted to Levi Decker, March 9th, 1869, for an "improvement in cushions for billiard tables," the original patent having been granted to him December 18th, 1866, namely, "the catgut or other cord, E, partially or fully embedded, or otherwise attached, at the angle, a, of the rubber cushion, C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth," covers the placing, and firmly securing, along the upper edge or corner of the rubber cushion, a strong, narrow cord, to receive the impact of the ball, and protect the cushion against such impact, by reason of its being placed at the point against which, and against which alone, the ball strikes, the stiff cord receiving such impact, in substantially a horizontal direction, and preventing the cushion from giving way under such impact, and from allowing the ball to ride over it and leave the table, while, at the same time, there is little friction from the impact, and the elastic force of the rubber acts fully, through the cord, interposed between it and the ball, to repel the ball, in substantially a horizontal direction. Such claim is infringed by embedding the cord in the rubber cushion at the upper edge of it, and securing it there by placing it therein while the rubber is plastic, and before it is vulcanized, and having a thin portion of the rubber interposed between the cord and the outside of the edge.

[Cited in Decker v. Griffith, Case No. 3,725.]

2. Adding a device to give tension to a wire run through the edge of the elastic cushion, or using a new mode of introducing such wire, by a perforation near the edge of the rubber, does not, even though such devices may be patent-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 134, contains only a partial report.]

able, justify the use of the substance of the plaintiff's invention, or the employment of an equivalent for the plaintiff's cord, either in respect of material used, or in respect of the manner of securing the cord, so that it may perform its office.

3. Such claim is not anticipated by an arrangement in which a stiff piece of elastic material was put along the upper face of the rubber, so as to be lifted by the force of the ball, when the ball embedded itself in the rubber beneath, and to act as a spring, to hug the ball down [to] the table, and prevent its hopping or jumping.

4. The testimony of a witness to prove prior knowledge of the plaintiff's invention, stricken out, at the hearing, on motion, on the ground that his place of residence at the time of putting in the answer was not given in the answer.

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

5. Abandoned experiments, commented on.

6. A reissued patent sustained, against objections as to its variance from the original patent, in what were mere matters of mechanical adaptation.

[Followed in Decker v. Griffith, Case No. 3,724.]

Final hearing upon pleadings and proofs.

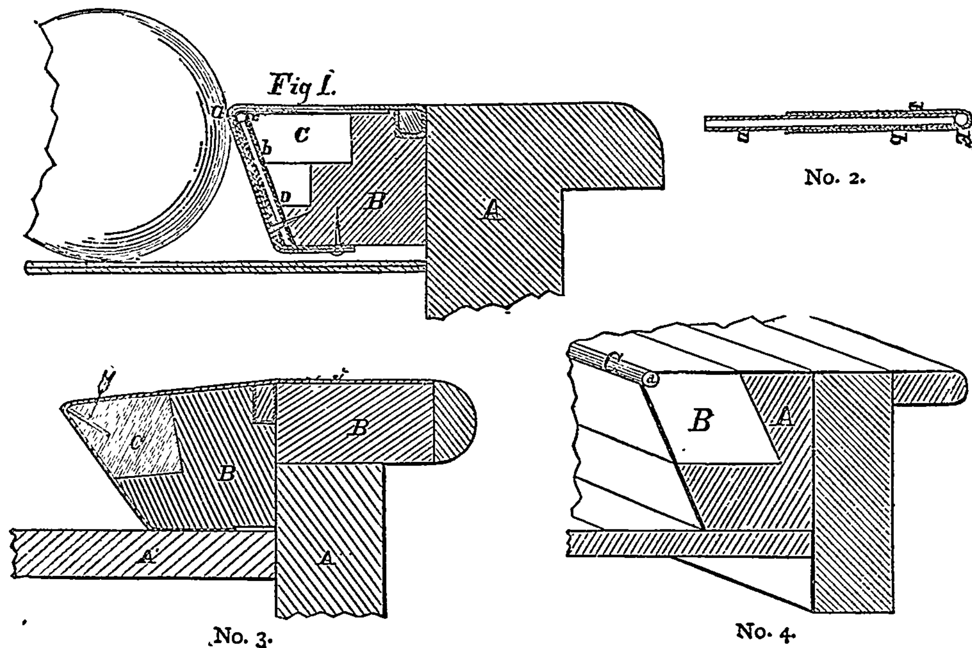
Suit brought [against Frederick Grote and others] on letters patent [No. 60,657] for "improvement in cushions for billiard tables," granted to the complainant [Levi Decker] December 18, 1866, and reissued March 9, 1869 [No. 3,323]. A description of the invention, quoted from the specification, together with the claim, will be found in the opinion of the court.

In the accompanying engravings, figure 1 shows the complainant's cushion in cross-section. Figure 2 shows more fully the arrangement of the elastic cloth. This cloth, inclosing a cord of catgut or other material, is cemented to the face of the cushion, and supports its upper edge; the whole being then covered with the ordinary cloth of the cushion. The various parts are described by letters of reference in the opinion below. Figure 3 shows the cushion patented by John Syrcher. The arrow indicates a strip of horn inserted in the cushion. Figure 4 shows the device described in the rejected application of W. B. Carpenter, having a piece of wire or whalebone along the edge of the cushion.

Mr. Abbott and William J. A. Fuller, for complainant.

Benjamin F. Lee and Anthony Pollak, for defendants.

BLATCHFORD, District Judge. This suit is brought on reissued letters patent granted to the plaintiff, March 9th, 1869, for an "improvement in cushions for billiard tables," the original patent having been granted to him December 18th, 1866. The specification of the reissued patent says: "My invention has for its object the preservation of cushions for billiard tables against the impact of the ball. The nature of my invention consists in the employment or use of a catgut or other strong cord, located in or at the upper corner or edge of the cushion, and immediately at the point against which the ball strikes when the game of billiards is played. * * * C is a body of rubber, which forms a cushion against which the ball strikes. This said rubber cushion has its inner or face side bevelled in such a manner that the ball strikes, at about its centre, against the upper corner or point of the cushion, as clearly shown at a, Fig. 1. For the purpose of protecting the upper corner or



edge of the cushion, C, against the impact of the ball, I make a small concave or bed, immediately, or as near as may be, in the upper corner of the cushion, so that a suitable cord, E, or other support, may be fitted longitudinally the whole length of the said cushion, around the table, so that the cushion is fully protected, on all sides of the table, against the impact of the ball. For this cord and support of the cushion I usually employ catgut, or cord may be used for the same purpose, but experience proves that catgut is most suitable for the purpose, as it is best adapted to prevent the cushion from giving way, or yielding, under the impact of the ball, it being understood that the ball only comes in contact with the cushion at a, the bevel or inclination being given the face of the cushion in order that all other parts of it will be kept clear of the ball. This cord, E, may be more thoroughly secured in its position by moulding it, or embedding it, entirely within the rubber, near the corner, so as to perform the functions for which it is designed, or it may be secured by gluing a strip of cloth, b, over it, when not fully embedded in the rubber, or it may be secured by any other well-known means. D is a strip of elastic cloth, which is cemented to the face side of the rubber strip or cushion, C, and attached, at its lower edge, to the lower part of B," (elsewhere described as a strip or cleat, behind C,) "so as to support the upper edge, a, of C. It will be understood, that the cord, E, is attached to D, before the latter is secured to the cushion, C, and cleat, B. To make the whole more secure, I usually cover the whole with the cloth, F, and after cover the whole again with the usual green cloth, G. This cord, E, performs two very important functions, viz.: it gives stiffness to the angle or corner, a, of the cushion C, so that it cannot yield or give way under the impact of the ball, to allow the latter to pass over it; and it also gives prominence to the said angle, so as to present, under the yielding of the cushion, a stiff, narrow line to the ball, thus obviating much friction, so as not to impede the motion of the latter, and still not interfering in the least with the elastic effects of the cushion upon the ball." The claim is in these words: "The catgut or other cord, E, partially or fully embedded, or otherwise attached, at the angle, a, of the rubber cushion, C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth."

It is quite apparent, that the invention set forth is the placing, and firmly securing, along the upper edge or corner of the rubber cushion, a strong, narrow cord, to receive the impact of the ball, and protect the cushion against such impact, by reason of its being placed at the point against which, and against which alone, the ball strikes. When the impact comes, the stiff cord receives it, in substantially a horizontal direction, and prevents the cushion from giving way under such impact, and allowing the ball to ride over it and leave the table, while, at the same time, there is little friction from the impact, and the elastic force of the rubber acts fully, through the cord, interposed between it and the ball, to repel the ball, in substantially a horizontal direction.

The great utility of the invention, in tending towards perfection in the billiard table, is shown by the evidence. The inventor was an experienced manufacturer of billiard tables. The cushion had, up to the time of his invention, in the latter part of 1864, been faced with a flat facing, made of various materials. But, the flat facing failed to add the necessary greater proportional strength to the upper corner or edge, and the plaintiff sought to do that, while, at the same time, the rubber below the edge, not being faced, would have its elastic action left unimpaired. The idea of a cord of catgut, to be secured to the upper edge, suggested itself to him. He arranged it, in the manner described in the specification of the reissue, and shown in the drawing, by laying the catgut along the edge of the elastic cloth which he had been using as a facing, and securing it there by wrapping a piece of cloth around it, and attaching that to the elastic cloth, and cementing the latter to the rubber. The moment the invention became known, it went extensively into use, and the cushion thus made superseded all other forms. A resulting feature of the arrangement is shown by the evidence to be, that a larger amount of the elasticity of the cushion is brought to bear at the point of contact of the ball with the cord, than when, in the absence of the cord, the ball strikes the rubber itself. The cushion is, also, protected from wear. Greater accuracy, also, results in respect to the direction the ball takes in rebounding.

In the defendants' arrangement the cord is embedded in the rubber cushion at the upper edge of it, and is secured there by being placed in it while the rubber is plastic, and before it is vulcanized, and by having a thin portion of the rubber interposed between the cord and the outside of the edge. There is no doubt that the defendants' arrangement embodies the invention claimed in the plaintiff's reissued patent, and has the same mode of operation, in use.

The novelty of the invention is attacked, by reference to an application filed in the patent office, January 18th, 1858, by William B. Carpenter, for a patent for an "improvement in billiard cushions," and which was rejected April 10th, 1858. The specification filed by Carpenter says: "The nature of my invention consists in providing a block of India rubber, cut or moulded in the desired shape, with a groove, which groove is to be made along the entire upper and outer edge, in which groove is to be placed a wire, composed of whalebone, steel, brass, or other elastic material, suitable for the purpose." Carpenter then proceeds to say, in the specification, that

he makes a groove at the outer, and along the entire upper, edge of the rubber, and inserts in the groove, along its length, a round piece, the size of the groove, of whalebone or steel or brass wire. The drawing shows the wire lying in the groove, and not otherwise secured, and with its upper face exposed to view. The specification says, that the cushion is to be "covered with cloth, in the usual manner of billiard cushions," and is then ready to be used. It then states, as the reasons for such arrangement of cushion, that, if a ball is played against a square-edged cushion of rubber, all parts of the same being equally elastic, the momentum of the ball, if the stroke be an energetic one, will be liable to so far overcome the resistance of the rubber, as to cause the ball to jump or hop either on or off of the table; that he wishes to preserve the delicate elasticity of the rubber, and, at the same time, to keep the ball, at all times, upon the table and free from hopping or jumping; that, to accomplish this, he makes the groove in the rubber, and inserts therein the whalebone or wire; and that this has the effect of stiffening the entire upper edge, and prevents the momentum of the ball from overcoming the weakest part of the rubber, because, "when the ball advances with considerable force, and is embedded into rubber, the whalebone or wire is lifted, the ball acting as a wedge, and, from the natural tendency of the wire to resume its former position, it hugs the ball firmly upon the table, which allows the rubber to repel the ball without hopping or jumping." The drawing accompanying Carpenter's specification corresponded therewith, in showing the rod of whalebone or wire as being laid in a groove cut in the top surface of the rubber, along the upper and outer edge. But, the model he sent therewith showed the groove as cut just below the top surface, and in that face of the cushion which would be towards the bed of the table. The patent office, in a letter to Carpenter, of January 20th, 1858, called his attention to this discrepancy, and stated, that the model showed the groove "along that face of the rubber cushion against which the ball strikes," and, suggested to him, that, if his specification and drawing were correctly understood, a different model would be necessary. In reply, he wrote to the office, saying, that the specification exactly described what was meant to be described, and that the drawing agreed therewith; that there was a discrepancy between the specification and drawing and the model; and that he would make another model, showing the invention truly, as he wished it to be shown, that is, with the groove and wire "at the upper and outer edge of the rubber, and not at the inner edge, immediately in contact with the ball." The new model, constructed to correspond with the specification and drawing, was sent, and filed January 26th, 1858, and the application was rejected, as before stated. The ground of rejection was a patent granted to the present plaintiff, December 15th, 1857, "for the combination of a steel spring with India rubber, for the same purpose." The claim asked for and rejected was, "the forming, in a block of rubber for billiard cushions, the groove, and inserting therein the round whalebone, steel, or other wire, substantially and for the purpose as herein described." On the 5th of June, 1858, Carpenter wrote to the office that he withdrew his application.

It is impossible to regard this application as anticipating the plaintiff's invention. The invention of Carpenter, as shown in his specification and drawing and correct model, was one of a wholly different character from that of the plaintiff. Carpenter shows that he intended that the ball should be played against the rubber, and should embed itself "into the rubber," and that the rubber should not receive the impact of the ball through the medium of the whalebone or wire. His device was one merely to put a stiff piece of elastic material along the upper face of the rubber, which should be lifted by the force of the ball, when the ball embedded itself in the rubber beneath, and should, by its action as a spring, hug the ball down to the table, and prevent its hopping or jumping. This is a different arrangement, and for a different purpose, from that of the plaintiff. In Carpenter's arrangement, the whalebone or wire does not receive the impact of the ball, and does not protect the cushion against such impact, and is not placed at the point against which, and against which alone, the ball strikes; the whalebone or wire has no effect to reduce the friction of the impact of the ball; the elasticity of the rubber is not, by the wire, concentrated at the point of impact of the ball; the cushion is not protected by the wire, from wear at the point where the ball strikes; and no greater accuracy of direction, in the ball, in rebounding, results from the use of the wire. These are all features of the plaintiff's arrangement. The only feature that is common to the two arrangements is, that the stiffening of the edge of the rubber has the effect to prevent the ball from jumping. But this, while it is an incident of the plaintiff's arrangement, does not cover other features which the claim of his patent, read in connection with the body of his specification, sets forth as inherent in his arrangement; and those features, so set forth, are not found in Carpenter's arrangement.

Another difficulty in Carpenter's arrangement is, that he neither shows nor describes any mode of fastening or securing the whalebone or wire in the groove, except, that, after it is "placed," or "inserted," in the groove, the cushion is to be "covered with cloth, in the usual manner of billiard cushions." It is evidently not intended to be secured or fastened, so as to become, as is necessary in the plaintiff's arrangement, an integral part of the structure of the rubber cushion, for Carpenter describes it as intended to be lift-

ed by the action of the ball, as a wedge, when embedded in the rubber beneath it. Hence, in Carpenter's arrangement, the wire does not receive a practically horizontal blow from the ball, and, in yielding, compress the rubber behind it, and bring the elastic force of such rubber into action to repel the ball in a horizontal direction. That is an essential feature of the plaintiff's arrangement, for he says, in the specification of his reissue, that the face of the rubber cushion is so bevelled, that the ball strikes, at about its centre, against the upper corner or edge of the cushion, along and in which the cord lies, and that the ball does not come in contact with the cushion at any other part of the cushion. A lifting of the cord, as in Carpenter's arrangement, would entirely destroy the plaintiff's arrangement. Hence, the plaintiff firmly secures his cord in place, so that it may receive the horizontal blow. No such arrangement is found in Carpenter's specification. But, such arrangement is found in the defendants' structure. The thin edge of rubber, interposed between the defendants' cord and the outer extremity of the cushion merely acts to hold the cord in place, so that it may be always in position to receive a practically horizontal blow, and is a mere equivalent for the cloth in which the plaintiff wraps his cord. There is an advantage, as respects utilizing the elastic force of the rubber to the greatest possible degree, in having the cord as near to the ball as possible, but, if it makes too prominent an edge, its covering is apt to wear too rapidly. But, that is a question only of durability. The invention of the plaintiff is employed, if the cord is found in the place indicated, so firmly secured, and so arranged, as to act always, in the manner indicated, in combination with the cushion behind it, in reference to a blow from the ball, delivered in the manner stated. The defendants make and sell a structure of that kind, and no such structure is found in Carpenter's arrangement.

As respects what appears in Carpenter's first or incorrect model, (both of the models being now in the patent office,) it is manifest, that he never pretended to have made an invention of anything shown in it, if it shows anything different from what is shown in his second model. He expressly says, in his letter to the office, that the first model does not show his invention "truly." Whatever there is in the first model, therefore, that is different from what is in the second model, was, at most, a mere abandoned experiment, not amounting to an invention. It is manifest, moreover, that a structure like that represented by such first model would be open to many of the objections, before specified, to which one like such second model is open.

Carpenter was examined as a witness on the part of the defendants. His name is not set forth in the answer as that of a person to or by whom the plaintiff's invention was previously known or used. His application of January 18th, 1858, is referred to in the answer, as containing the plaintiff's invention. But, his place of residence at the time of putting in the answer is not given in the answer. After he was sworn as a witness, and before any questions were put to him, an objection was entered on the record, on the part of the plaintiff, to his being examined, on the ground that he had not been named in the answer, and that the notice required by the statute had not been given of his examination. The bill in this suit was filed in August, 1871. He was cross-examined de bene esse, under the same objection so made to his direct examination. Such objection to the testimony of Carpenter, so far as it tends to prove prior knowledge or use of the plaintiff's invention, was insisted on at the hearing, and a motion was made by the plaintiff to strike out such testimony, in such respect. The motion must be granted.

But, even if the testimony of Carpenter were to be admitted in such respect, it adds nothing to what appears in his application. He says, that he made experiments with "the cushions" shown in the two models, before he applied for a patent; that those experiments were using "a cushion" two feet, or less, long, screwed to the bed of a table, and tested for about half a day by various parties; that such experiments were considered satisfactory enough, in hindering the ball from jumping, to apply for a patent; and that the cushion stood the blows of the ball, and the wire was not dislodged. It does not appear that any billiard table, provided with such cushions as Carpenter's, was ever made by him or any one else. The whole matter, so far as Carpenter testifies to having done anything, was an abandoned experiment.

What is found in letters patent granted to John Syrcher, November 10th, 1863, for a "billiard cushion," is adduced to destroy the novelty of the plaintiff's invention. Syrcher, uses thin strips of horn, cut spirally, in connection with hard or soft rubber, to form a cushion. The strip of horn is used as a facing to the rubber pad, or is inserted into a long slit cut in the pad, and made fast therein by rubber cement. The grain of the horn, in the spiral strip, runs crosswise of the strip, so that, when the ball strikes the cushion, the spring action of the horn, although crosswise of the strip, is with the grain, and not crosswise of the grain. When the strip is inserted in the pad, it is shown as extending downward from the upper exterior corner of the pad, in a slanting direction, away from the face of the pad. A facing to the pad presents nothing in common with the plaintiff's invention. In the case of the inserted strip of Syrcher, the action of the cushion, under the impact of the ball, is different from what it is in the plaintiff's arrangement. The cushion does not yield in sub-

stantially a horizontal direction, because of the interposition of the strip of horn. For the same reason, the resilience of the rubber is not returned to the ball in substantially a horizontal direction. By inserting the strip, Syrcher destroys the homogeneous character of the cushion. The plaintiff preserves the homogeneous character of the cushion. From this difference results the different action of the two cushions under the impact of the ball, and in response thereto. It follows, that nothing in Syrcher's arrangement anticipated the plaintiff's invention.

As to what Delaney did in California, he details a series of abortive and abandoned experiments. He himself calls them experiments. One of them he describes as the use of rubber, with "whalebone and drum snares cut into the upper edge, and there fastened into the groove with court plaster, to hold the whalebone or drum snares put into the rubber." He says, that he inserted the drum snare as close as possible to the upper edge of the cushion, along such edge, "and about one-fourth of an inch from the face where the ball strikes;" that he discontinued the use of drum snares and commenced using whalebone because he thought it was better, as having more elasticity; that he discontinued the use of whalebone because some one offered to furnish him strips at less money than he was paying, if he would use such strips; and that he did not apply for a patent for inserting drum snares or whalebones in rubber billiard cushions, because he did not think it was of any value at the time.

The answer sets up that the reissued patent granted to the plaintiff is void, for the reason that it describes and claims an invention different from any invention described or claimed, or intended to be, in the original patent, or shown in the model, drawings or application on which the original patent was granted. The drawings of the reissue are the same as those of the original patent.

It is objected, (1) that the original patent states that the invention consists in applying a cord "to" the upper angle of the cushion, while the reissue states that it consists in using a cord located "in or at" the upper corner or edge of the cushion; (2) that the reissue states that a small concave or bed is made immediately, or as near as may be, in the upper corner of the cushion, in which the cord may be fitted, while the original specification and the drawings disclose no such concave or bed; (3) that the reissue states that the cord may be more thoroughly secured in its position by moulding it, or embedding it, entirely within the rubber, near the corner, while the original specification and the drawing do not suggest any such thing; (4) that the reissue suggests the embedding the cord partially in the rubber, while nothing to that effect is found in the original specification or in the drawing; (5) that the partially or fully embedding the cord, found in the claim of the reissue, is not suggested in the original specification or by the drawing. The specification of the original patent describes the cord as applied to the edge or angle of the cushion, by enclosing it in a strip of cloth, cemented to a strip of elastic cloth, which itself is cemented to the face side of the rubber cushion. Whether this cord is wholly external to the rubber cushion, and so requires to be firmly attached to such cushion by applying means of adhesion, or is partly within such cushion, and so can be more easily attached with firmness thereto, or is wholly within the cushion, and so is kept firmly in its place by the rubber which is exterior to it, is a mere matter of mechanical adaptation, having no relation to the real invention. Each arrangement is an equivalent for the other, as respects such invention. One may involve more durability than the other, but that is a point aside from the invention. The plaintiff testifies, that, when he arranged the cord wholly external to the rubber cushion, as described in the specification of his original patent, it "wore the cloth a little faster than it would otherwise;" and that he then had a set of moulds made in such a way as to leave a groove in the upper edge of the cushion, to receive the cord, which obviated the objection of wearing out the cloth. This groove admitted of a partial embedding of the cord in the rubber. Embedding the cord wholly in the rubber was a mere question of degree. The plaintiff was entitled to use all these forms, within his invention, as modifications resulting from experience in its use, not involving any new or further invention. Within the rule laid down in Seymour v. Osborne, 11 Wall. [78 U. S.] 516, it cannot be said, in this case, that it is apparent, on the faces of the two patents, that the commissioner has exceeded his authority in granting the reissue, or that there is such a repugnancy between the two patents, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent.

It results, from these considerations, that there must be a decree for the plaintiff, for a perpetual injunction, and an account of profits, and an ascertainment of damages, with costs.

[NOTE. For other cases involving this patent, see Decker v. Griffith, Cases Nos. 3,724, 3,725; Decker v. New York Belting Co., Case No. 3,727.]

Case No. 3,727.

DECKER v. NEW YORK BELTING & PACKING CO.

[11 Blatchf. 76;[1] 6 Fish. Pat. Cas. 374; 3 O. G. 441.]

Circuit Court, S. D. New York. April 9, 1873.

SPECIAL APPEARANCE—WAIVER OF JURISDICTIONAL QUESTIONS—SERVICE ON FOREIGN CORPORATION.

1. A corporation does not waive an objection to the jurisdiction of the court over it, by ap-

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

pearing and pleading, by an attorney, to the jurisdiction of the court.

[Cited in Moynahan v. Wilson, Case No. 9,-897.]

2. Jurisdiction over a Connecticut corporation cannot be acquired by this court, by service of process on one of its officers, in this district.

[Motion for provisional injunction. Suit brought upon letters patent, reissue No. 3,323, for "improvement in cushions for billiard tables," issued to complainant, Levi Decker, March 9, 1869. The original patent (No. 60,657) was granted to complainant December 18, 1866. Defendant was a Connecticut corporation. Process having been served upon one of its officers in the city of New York, it appeared by solicitor, and filed a plea to the jurisdiction of the court.]

William J. A. Fuller, for plaintiff. Benjamin F. Lee, for defendants.

BLATCHFORD, District Judge. The case of Commercial & Railroad Bank of Vicksburg v. Slocomb, 14 Pet. [39 U. S.] 60, 64, 65, is a decisive authority that a corporation does not waive an objection to the jurisdiction of the court over it, by appearing and pleading, by an attorney, to the jurisdiction of the court. That jurisdiction over a Connecticut corporation cannot be acquired by this court, by service of process on one of its officers, in this district, is settled by the cases of Day v. Newark India-Rubber Manuf'g Co. [Case No. 3,685], and Pomeroy v. New York & N. H. R. Co. [Id. 11,261].

The motion for an injunction is denied, for want of jurisdiction of the court over the defendants.

[NOTE. For other cases involving this patent, see note to Decker v. Grote, Case No. 3,726.]

DECKER (RUE v.). See Case No. 12,112.

DECKER v. SILVERBRANDT. See Cases Nos. 3,724 and 3,725.

DECKER (WISE v.). See Cases Nos. 17,-906 and 17,907.

Case No. 3,728.

In re DECKERT.

[2 Hughes, 183; 10 N. B. R. 1; 3 Am. Law Rec. 96; 1 Cent. Law J. 316, 320; 6 Chi. Leg. News, 310; 1 Am. Law T. Rep. (N. S.) 336; 13 Am. Law Reg. (N. S.) 624; 8 Am. Law Rev. 786.] [1]

Circuit Court, E. D. Virginia. 1874.

BANKRUPTCY—STATE EXEMPTION LAWS — CONSTITUTIONAL LAW—AMENDMENTS—RECONSTRUCTION ACTS.

1. The provisions of the bankruptcy act [of 1867 (14 Stat. 517)], adopting the exemption laws of the several states has been sustained on the ground that it enacted a uniform rule that such property should be subject to its operation for the payment of debts as was liable to judicial process for the same purpose in the several states. The amendatory act of March 3, 1873 [17 Stat. 577], so far as it departs from this rule and attempts to exempt property specified in the state laws, in a different manner or with different effect from that of the laws themselves, is a violation of the constitutional requirement of uniformity and therefore void.

[Disapproved in Re Jordan, Case No. 7,515; Darling v. Berry, 13 Fed. 668. Cited in McFarland v. Goodman, Case No. 8,789. Followed in Re Duerson, Id. 4,117; Re Shipman, Id. 12,791. Distinguished in Re Martin, Id. 9,152. Criticised in Re Smith, Id. 12,996.]

2. Congress, under the reconstruction acts, approved the constitution of Virginia on April 10th, 1869 [16 Stat. 40], and ordered it to be submitted to the people. On July 6th, 1869, it was submitted and adopted by a large majority of the people, who on the same day elected a governor, legislature, and other state officers. The governor was inaugurated in September, 1869, and the legislature met in October, 1869, and passed acts ratifying the 14th and 15th amendments—all of these preliminaries being required by the reconstruction acts before the admission of the state to representation in congress. Congress, on January 26th, 1870 [16 Stat. 62], passed an act admitting the state to representation. The constitution contained a provision for homestead exemption, but this was not applicable to debts incurred prior to the time the constitution went into effect. *Held*, that as to this clause the constitution went into effect on the day of its ratification by the people, July 6th, 1869.

[In bankruptcy. Daniel] Deckert was adjudged a bankrupt on his own petition on the 31st of March, 1873. An assignee was appointed May 16th, 1873, to whom his real and personal property was assigned in due form. So much of the personal property as was exempt under the bankrupt law was duly set off by the assignee. Its value was estimated at $337.75. The bankrupt, however, claimed a homestead exemption in the real property under the provisions of the constitution and laws of Virginia and the act of March 3d, 1873, amendatory of the bankrupt law; and on his petition the district court of the western district of Virginia ordered such homestead to be set off to him.

Certain judgment and other creditors now filed this petition for a review of that order.

[1. Henry Smith. On the 24th of January, 1868, the bankrupt and J. L. Deckert executed to one Robert Wason, at Chambersburgh, Penn., a note for the payment of $2,500 in one year after date, with interest. This note was afterwards assigned to Smith, who obtained a judgment upon it in the Washington county circuit court of Maryland, at the August term, 1871, for $1,441.80, that being the balance then due. At the April term, A. D. 1872, of the circuit court of Halifax, Virginia, another judgment was obtained by Smith against the bankrupt upon the Maryland judgment. This last judgment was duly docketed in Halifax, and became a lien upon the real estate assigned under the proceedings in bankruptcy. Smith, having been cited to show cause why the prayer of the

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 1 Cent. Law J. 316, 320, and 8 Am. Law Rev. 786, contain only partial reports.]

petition of the bankrupt for the assignment of the homestead should not be granted, appeared and submitted an abstract of his Virginia judgment, but he did not furnish the complete record, and did not submit the record of the Maryland judgment, upon which that in Virginia was rendered. This judgment remains unpaid.

[2. D. K. Wanderlink. On the 1st day of April, 1868, the bankrupt, as surety, executed a note with one J. L. Deckert, as principal, for the payment to Wanderlink of $651.50 in six months after date. Proof of this note was made against the bankrupt's estate April 28, 1873.

[3. E. A. Roberts, John A. Roberts, and Robert R. Roberts, partners under the name of Roberts & Co. On the 15th of November, 1869, one Gaines entered into a contract in writing with the bankrupt to construct for him (the bankrupt) a dyke upon his lands. For this he was to be paid at the rate of ten cents per yard, a portion being payable as the work progressed, and the balance in ninety days after its completion. It does not appear at what time work under this contract was commenced, but it was completed on the 23rd of September, 1870, when there was a balance remaining unpaid of $500.25. This was assigned by Gaines to Roberts & Co., and they proved it against the estate on the 23rd of April, 1873. The cost of the whole work was $1,944.83. This has been reduced by payments so that only the above balance remained unpaid at the time of the bankruptcy.

[4. George Schindel. The bankrupt was, on the first day of April, 1870, indebted to him in the sum of $175 for rent of a house for one year from April 1st, 1869. He and the bankrupt, on the 30th of June, 1868, executed their joint note to Sarah Lee for $100, payable, with interest, in six months after date thereof. Schindel paid the whole of this note. In 1872 he commenced his action against the bankrupt in the circuit court of Washington county, Maryland, to recover the amount due him for the rent and one-half the amount paid on the note, and on the 25th of March, 1873, judgment was rendered in his favor for $270.52 and costs—$8.30. On the 22nd April, 1873, this judgment was also duly proved as debt against the estate.][2]

By article 11 of the constitution of Virginia, adopted in 1869, it was provided that every householder or head of a family should be entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, etc., issued on any demand for any debt theretofore or thereafter contracted, his real and personal property, etc., to the value of $2000, to be selected by him. An act of the general assembly of Virginia, approved June 27th, 1870 [Acts Va. 1869–70, p. 198], gave effect to this provision by prescribing in what manner and upon what conditions such householder could set apart and hold such exemption.

Before WAITE, Circuit Justice, and BOND, Circuit Judge.

WAITE, Circuit Justice (after stating the claims of the petitioning creditors). Under the bankrupt law, as originally enacted, there was exempted from the assignment of property required to be made by the bankrupt to his assignee, among other, such property as was exempt from levy and sale under execution by the laws of the state in which the bankrupt had his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864. By an amendatory act, passed on the 8th June, 1872 [17 Stat. 334], this provision was changed so as to give the bankrupt the benefit of exemptions under the laws in force in 1871. In 1872 the court of appeals of Virginia unanimously decided (22 Grat. 266) that the provision of the constitution above referred to, and the statute giving effect to the same, so far as they applied to contracts entered into, or debts contracted before their adoption, were in violation of the constitution of the United States, and therefore void. After this decision, on the 3d March, 1873, congress passed another act in the following words: "Be it enacted, etc., that it was the true intent and meaning of an act approved June 8th, 1872, entitled, etc., that the exemptions allowed the bankrupt by the said amendatory act should and it is hereby enacted that they shall be the amount allowed by the constitution and laws of each state respectively as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by the judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

The first question which presents itself for our consideration is whether the act of 1873, in so far as it seeks, in the administration of the bankrupt law, to give an effect to the exemption laws of a state different from that which is given by the state itself, is constitutional. Congress has power to "establish uniform laws on the subject of bankruptcies throughout the United States." Const. art. 1, § 8. A bankrupt law, therefore, to be constitutional, must be uniform. Whatever rules it prescribes for one it must for all. It must be uniform in its operations, not only within a state, but within and among all the states. If it provides that property exempt from execution shall be exempt from assignment in one state, it must in all. If it specially sets apart for the use of the bankrupt certain property, or certain amounts of property in

[2] [From 10 N. B. R. 1.]

one state, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect. The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law, to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the constitution. The act of 1873 goes further, and excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankrupt law, but that in each state the property specified in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares by its own enactment, without regard to the laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes, to be warranted by the constitution, must be uniform in their operation. This is not. The consequence is that the act of 1872 remains unchanged, notwithstanding its attempted amendment in 1873. The act of 1872 gives effect to the exemption laws of Virginia as they existed in 1871. The particular law under which the bankrupt in this case claims his exemption was passed in 1870; it does not apply to contracts made or debts incurred previous to the time the new constitution went into effect. That certainly was not before July 6th, 1869, and the debts due to Smith, Wanderlink, and Schindel were all incurred previous to that date. That of Smith dates from the time the note was given upon which his judgment was rendered, that of Schindel from the making of the contract out of which the indebtedness arose, and that of Wanderlink from the time of the execution of the note which he holds. As against these creditors the bankrupt is not entitled to the benefit of the exemption.

The claim of Roberts & Co. requires us to determine at what time the constitution, as far as it relates to the provision in question, took effect. It is claimed by the bankrupt that this was on the 6th July, 1869, when the constitution was ratified by the people, and by the creditors that it was postponed until the 26th of January, 1870, when the act was approved admitting the state to representation in congress. The contract upon which Roberts & Co. base their claim was made on the 15th of November, 1869. This constitution was adopted in accordance with the provisions of the reconstruction acts of congress. These acts provided in substance that when the people of the rebel states should have formed a constitution in conformity with the constitution of the United States, and should have done certain other things named, such state should be entitled to representation in congress. It was also further provided that until the people of any of such states should be by law admitted to representation in congress, any civil government which might exist therein should be deemed provisional only, and in all respects subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede the same. In pursuance of these acts, a convention duly elected assembled in Richmond, on the 3d of December, 1867, and proceeded forthwith to frame a constitution, which was certified to congress as required by law, and thereupon an act was passed by congress and approved on the 10th of April, 1869, authorizing its submission to a vote of the people, and an election of the state officers provided for and of members of congress. The same act provided that if the constitution should be ratified at such election, the legislature of the state then elected should assemble at the capital of the state on the fourth Tuesday after the promulgation of the ratification, and that before the state should be admitted to representation in congress, the legislature that might thereafter be lawfully organized should ratify the fifteenth amendment proposed by congress to the constitution of the United States, and all the proceedings under the act should be approved by congress. Under the provision of these several acts the president of the United States issued his proclamation, designating the 6th July, 1869, as the time for submitting the constitution to the vote of the people. On that day the vote was taken, and resulted in an almost unanimous ratification. The state officers, members of congress, and members of the general assembly were elected at the same time. The governor, thus elected, was inaugurated on the 21st September, 1869. The general assembly met on the

5th of October, and on the 8th passed acts ratifying the fourteenth and fifteenth amendments. It then adjourned to reassemble after congress should approve this action of the people. On the 26th January, 1870, congress passed an act admitting the state to representation, and reciting that the people of Virginia had framed and adopted a constitution of state government which was republican. From this it will appear that the constitution was adopted and the government partially at least, organized under it previous to the 15th November, 1869. It is true that the constitution was adopted and the organization made to obtain admission to representation in congress, but it is equally true that it was framed and ratified by the people as and for a constitution of state government. Admission might follow its adoption, but was not necessary to give it effect. On the contrary, congress required that it should become operative and have effect before the admission could be granted.

In the act of April 10th, 1869, it was provided that at the time the vote upon the ratification was taken there should be an election by the voters of members of the general assembly and all the officers of state provided for by the constitution; that if the constitution should be ratified the legislature should assemble at the capitol on a day named, and that, when lawfully organized, it should act upon the ratification of the proposed amendments. There certainly could be no lawful action by a legislature under the constitution unless the constitution was in force at the time the action was had. That congress understood that the constitution was in force and operative at the time of the admission is apparent from the terms of the act granting such admission. In that it was recited that the people of Virginia had framed and adopted a constitution of state government which was republican; that the legislature elected under the constitution had ratified the fourteenth and fifteenth amendments, the performance of which acts in good faith was a condition precedent to the representation of the state in congress, and because this had been done such representation was permitted. It is true that the government was not fully organized in all its departments under the constitution, and that the United States retained its supervisory powers under the reconstruction acts, until the final action of congress. Complete organization of the government, however, was not necessary to give effect to the constitution, and no modification of the particular provision now under consideration was ever attempted by the United States. [The government established by the people remained as established until actually changed by the United States in the exercise of its supervisory powers.][3] In our opinion the constitution of Virginia took effect, so far as it related to the provision for exemptions, on the 6th of July, 1869, the day of its ratification by the people. It follows that the exemption laws passed to give effect to that provision are to become operative for the benefit of its citizens from that date. As against Roberts & Co., therefore, the bankrupt is entitled to his homestead. The order of the district court [case unreported] allowing an assignment of the homestead as against the claims of Smith, Wanderlink, and Schindel, is reversed, but it is affirmed as against that of Roberts & Co.

[3] [From 6 Chi. Leg. News, 310.]

DE COMEAN (FIELD v.). See Case No. 4,765.

DE COOK (ADAMS v.). See Case No. 51.

Case No. 3,729.

DEDEKAM v. VOSE et al.

[3 Blatchf. 44.][1]

Circuit Court, S. D. New York. Sept. 24, 1853.[2]

SHIPPING—EXCEPTIONS IN BILL OF LADING—NEGLIGENT STOWAGE—TENDER.

1. The words "not accountable for rust," in a bill of lading of iron, do not exempt the owner of the vessel from responsibility for damage by rust to the iron, caused by its having been improperly stowed by such owner.

[Cited in The Delhi, Case No. 3,770; Vaughan v. Six Hundred and Thirty Casks of Sherry Wine, Id. 16,900; The Saratoga, 20 Fed. 871.]

2. When sued for the freight on such iron, its owner is entitled to an abatement of the freight, to the extent of the damage to the iron.

3. Where, before suit was brought for the freight, the owner of the iron offered to pay the balance of the freight, deducting such damage, to be ascertained by arbitration or by a sale of the damaged iron at auction, but this was refused and the whole amount of the freight was demanded, and, afterwards, the damage was ascertained by such a sale, on notice to the owner of the vessel, but no offer was made to pay the balance so ascertained, till it was made in the answer in the suit: *Held*, that, in a court of admiralty, the circumstances were equivalent to a tender after the sale and before suit brought.

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

This was a libel in personam, filed in the district court, by [Andres Dedekam] the owner of the brig Brodrene, to recover freight for the conveyance of certain bundles of nail-rod iron, in that vessel, from Newcastle-upon-Tyne to New York. The bill of lading of the iron was dated May 15th, 1850, and contained, at the foot of it, the exception, "not accountable for rust." On the discharge of the cargo, a portion of the iron was found to be injured by rust. The consignees claimed a deduction from the freight of the amount of the damage to the iron, which was

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

[2] [Affirming Case No. 3,732.]

refused. This libel was then filed, claiming the whole amount of the freight. The answer set up that the damage to the iron was occasioned by bad stowage; that it was sold at auction, after notice to the agents of the vessel; that the loss occasioned by the rust amounted to $164 14; and that a tender of the amount of the freight over and above that sum was made before the libel was filed. The respondents also brought into court, with their answer, the amount of the tender. Evidence was taken in the district court in respect to the stowage of the iron, by which it appeared that the portion damaged by rust was stowed at the bottom of the ship, under a large quantity of coal, and that the rust was occasioned by such stowage. The district court held the tender sufficient to cover the balance of the freight over and above the damage, and dismissed the libel. [Case No. 3,732.] From that decree the libellant appealed to this court. The other facts are sufficiently stated in the opinion of the court.

George F. Betts and Charles Donohue, for libellant.

Erastus C. Benedict, for respondents.

NELSON, Circuit Justice. It is urged, on this appeal, that the exception in the bill of lading exempts the owner from responsibility for the damage, although the rust be attributed to the defective stowage. But I cannot agree to this doctrine. Even in the case of the usual exception of "the dangers of the sea," if it can be shown that the goods might have been saved by the due and proper care and diligence of the master and crew, notwithstanding the peril, the vessel is answerable for the loss. These exceptions in bills of lading do not cover negligence or want of care on the part of the carrier. Whether carriers or other employees can stipulate for exemption from liability for negligence or unskillfulness in the fulfillment of their undertakings, within sound principles of public policy, is, perhaps, not exactly judicially settled; but, it may, at least, be safely said, that if any such exemption can be set up, it must be in pursuance of an express and positive agreement to that effect, or, what may be the same thing, necessary and unavoidable implication. Nothing of the kind appears in the bill of lading in this case. It is conceded that the rust was occasioned by negligence or unskillfulness in the stowage. The bundles of iron stowed upon the top of the coal were discharged in good order, while those under it, at the bottom of the vessel, were more or less damaged by the rust. The carrier, therefore, was clearly liable for this damage.

There is a little difficulty upon the question of the tender, on account of the confusion and want of precision in the evidence relied on to establish it. There is no doubt that the respondents are entitled to an abatement of the freight claimed, to the extent of the damage to the iron. But, in order to avoid being charged with costs, or, at least, to entitle themselves to costs, they must show that they made a tender, or what, in the admiralty, will be regarded as an equivalent, before the suit was brought. It is in proof, that an offer was repeatedly made, before suit, to pay the balance of the freight, deducting this loss, to be ascertained by arbitration, or by a sale of the damaged iron at auction, but that this was refused, and that the whole amount of the freight was demanded; also, that, after this, a sale of the damaged iron at auction took place, with notice to the agents of the vessel, and that the amount of the loss was in this way ascertained. But there seems to have been no offer actually made to pay the balance, after thus ascertaining it, till the offer that was made on the filing of the answer. It is quite clear, however, that a tender again would have been a mere matter of form, as the agents had refused repeatedly to accept the offer shortly before the auction sale took place; and, for aught that appears, they neglected to attend the sale, or to take any notice of it, thereby leaving the implication that they still refused to adjust the dispute in that way. If this conclusion can be properly maintained, the tender on the coming in of the answer was all that could be essential to support this branch of the defence. If a tender had been in fact made after the balance was ascertained by the sale, the case would be free from difficulty; and, if the conduct of the agents fairly authorizes the conclusion, that the repetition of the tender would have been but an idle ceremony, because of the offers and refusals that previously took place, then the case must be regarded as standing upon the same footing as if a tender had been made after the sale.

I admit that this tender could not be maintained, according to the strict principles of the common law. Indeed, as the sum in controversy sounds in damages, it could not have been the subject of a set-off at all in an action at law. It might have been given in evidence in abatement of the amount of freight claimed. The doctrine, however, of courts of admiralty on this subject, is less stringent. A tender may be made in salvage cases, where the amount in controversy is quite as uncertain and indefinite as it is here; and it will be upheld even where there has been less formality in making it than is required at law. The court looks to the substance and good faith of the transaction, rather than to technical forms of proceeding. The True Blue, 2 W. Rob. Adm. 176, 180; The Lady Flora Hastings, 3 W. Rob. Adm. 118; Crosby v. Grinnell [Case No. 3,422]; The Frederick, 1 Hagg. Adm. 211, 218; 2 Chit. Gen. Pr. 523.

Upon the whole, therefore, I think that the decree below is right and should be affirmed.

[NOTE. This case was afterwards twice heard in this court on questions relating to the taxation of costs. See Cases Nos. 3,730 and 3,732.]

Case No. 3,730.

DEDEKAM v. VOSE et al.

[3 Blatchf. 77.][1]

Circuit Court, S. D. New York. Oct. 12, 1853.

ADMIRALTY APPEALS—TAXABLE COSTS—DOCKET FEES—READING DEPOSITIONS.

1. On an appeal in admiralty to this court from the district court, where the cause is heard on proofs and decided, one docket fee of $20 to the proctor, and only one, is taxable under the act of February 26, 1853 (10 Stat. 161, § 1), although the cause may have been upon the calendar of this court at more than one term.

[Cited in Troy Iron & Nail Factory v. Corning, Case No. 14,197; Jerman v. Stewart, Gwynne & Co., 12 Fed. 278; Goodyear v. Sawyer, 17 Fed. 13; Mead v. Platt, Id. 836; Wooster v. Handy, 23 Fed. 54; Williams v. Morrison, 32 Fed. 683; Cleaver v. Traders' Ins. Co., 40 Fed. 864.]

2. Where, in such a case, a deposition was taken and used in the district court, and then read in this court from the apostles, a fee of $2.50, for reading the deposition in this court, is not taxable under the 1st section of that act. Such fee is taxable only on a new deposition taken in this court.

[Cited in Jerman v. Stewart, Gwynne & Co., 12 Fed. 278; Wooster v. Handy, 23 Fed. 57; Ferguson v. Dent, 46 Fed. 91.]

3. Where the appeal was taken, and the cause removed into this court, prior to the passage of that act, the item of $5 on the removal of the cause to this court is not taxable under the 1st section of that act.

After the affirmance by this court—Dedekam v. Vose [Case No. 3,729]—of the decree of the district court in this case [Case No. 3,732], dismissing the libel, the respondents [Francis Vose and others] had their costs on the appeal taxed by the clerk of this court. Among the items allowed and taxed by the clerk were these: (1) "Proctor's docket fee, April term, 1853, $20.00." "Proctor's docket fee, September term, 1853, $20.00." (2) "Seventeen depositions read, $42.50." (3) "Costs on removal to circuit court, $5." From the taxation of these items the libellant [Andres Dedekam] appealed to this court. As to item 1, it was contended that, under the act of February 26, 1853 (10 Stat. 161, § 1), only $5 was taxable, and that no docket fee at all could be taxed; but that, at all events, only one docket fee of $20 was allowable, instead of one for every term at which the cause was upon the calendar. As to item 2, it appeared, that the depositions had been taken and used in the district court, and that, on the hearing of the appeal, they were read from the apostles. As to item 3, it appeared, that the appeal was taken in May, 1852, and that the cause was removed into this court in September, 1852.

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

Charles Donohue, for libellant.

William M. Evarts and Erastus C. Benedict, for respondents.

THE COURT held: (1) That one docket fee of $20 to the proctor was allowable, and only one; (2) that the item of $42.50 for the depositions read on appeal was not allowable, because, in cases appealed to this court from the district court, the act of February 26, 1853 (10 Stat. 161, § 1), applied only to new depositions taken in this court; (3) that the item of $5 on the removal of the cause to this court was not allowable, as the removal took place prior to the passage of the act of 1853.

[NOTE. This case was again heard in the circuit court on a question as to taxation of costs. Case No. 3,731.]

Case No. 3,731.

DEDEKAM v. VOSE et al.

[3 Blatchf. 153.][1]

Circuit Court, S. D. New York. Dec. Term, 1853.

TAXATION OF COSTS—FEE BILL—DOCKET FEE ON ADMIRALTY APPEAL—PRACTICE.

1. Every item of costs taxable against a party to a suit in this court, is specified in the fee bill contained in the act of February 26, 1853 (10 Stat. 161).

[Cited in Ethridge v. Jackson, Case No. 4,541; Jerman v. Stewart, Gwynne & Co., 12 Fed. 275.]

2. The $20 docket fee allowed to a proctor or attorney by that act, can be taxed only on a final hearing, and can be taxed but once in a cause.

[Cited in Troy Iron & Nail Factory v. Corning, Case No. 14,197; Goodyear v. Sawyer, 17 Fed. 13; Williams v. Morrison, 32 Fed. 683; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., Id. 686; Cleaver v. Traders' Ins. Co., 40 Fed. 864.]

3. That fee is not taxable, after a decree on an appeal in admiralty, on a motion that the stipulators on the appeal pay into court the amount of their stipulations.

[Cited in Mead v. Platt, 17 Fed. 836; Wooster v. Handy, 23 Fed. 54.]

4. A general objection to the aggregate of charges for clerk's fees and affidavits, cannot be noticed, on an appeal from the taxation of costs. The objections, and the items composing the charges, must be specified.

After the decree in this cause (Dedekam v. Vose [Case No. 3,729]), the appellees [Francis Vose and others], on motion to the court, took an order, by default, against the stipulators in the cause, that they pay into court the amount of their stipulation, and had a bill of costs taxed on that motion by the clerk. From that taxation the appellant [Andres Dedekam] appealed to this court. The items allowed on taxation were these: Docket fee on hearing against stipulators, $20; cash paid for affidavits, 50 cents; clerk's fees, $5; total, $25.50.

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

BETTS, District Judge. This court has uniformly held that every item of costs taxable against a party to a suit is specified in the fee bill enacted February 26th, 1853 (10 Stat. 161), and that it cannot go out of the provisions and restrictions of that act, and make an allowance of costs on any considerations of equity or justice. The province of the taxing officer is accordingly now limited to the service of comparing a proposed charge with the particulars set forth by congress in that statute as taxable; and, when the charge is not found to fall within the enumerated and designated fees, it must be rejected.

A proctor is allowed, by the statute, a docket fee of $20 on a final hearing in admiralty. The same fee is given to an attorney on a trial before a jury in civil and criminal causes, or before referees. This language plainly imports an actual contestation of the case upon the merits, and does not embrace interlocutory or collateral proceedings by motion. This point was in effect determined in this cause at an early day of this term, before both judges, when we held that the docket fee of $20 could not be repeated on taxation. [Case No. 3,730.] The law allows but a single one, and that on final hearing. This charge must accordingly be stricken from the bill.

The objections to the $5 taxed to the clerk are not specified, and it is impossible for the court to determine what items of charges compose it. The orders, returns, or decrees entered and copied, and the $1 docket fee allowable to the clerk, may amount to that sum; and, as the party appealing from the taxation has not demanded a specification of the items from the clerk, this charge must now be considered as acquiesced in. The same remark applies to the charge of 50 cents "paid for affidavits." The docket fee of $20 must be deducted from the taxed bill.

Case No. 3,732.

DEDEKAM v. VOSE et al.

[25 Hunt, Mer. Mag. 719.]

District Court, S. D. New York. 1851.[1]

SHIPPING—NEGLIGENT STOWAGE — DEDUCTION OF DAMAGES FROM FREIGHT—TENDER.

[1. Where iron rods are damaged by reason of improper stowage, the same having been placed at the bottom of the vessel and covered by coal, and to which method of stowage the shipper at the time objected, he is entitled to a set-off against the freight charges to the extent of such damage.]

[2. An offer to pay the freight with such set-off, followed by payment into court, is a fulfillment in good faith of the contract of shipment.]

Before JUDSON, District Judge.

This suit is founded upon a bill of lading on a shipment of thirty tons of railroad iron on board the Brodrene, Charles C. Furst, master, lying in the river Tyne, and bound for the port of New York, dated May 15th, 1850. The contract is in the usual form, as "shipped in good order and well-conditioned," with a note at bottom in the following words: "Weight unknown, and not accountable for rust." The method of stowage adopted by the master was to place at the bottom of the vessel twenty-two tons of the iron, upon which a large quantity of Newcastle coal was stowed, and then the remaining eight tons of iron upon the top, without damage in either case. It was clearly shown that the rods were shipped in dry weather, and that the whole were new, bright, and free from rust. That at the arrival of the ship the eight tons were delivered in good order, but the iron stowed under the coal was damaged by an unusual degree of damp, while the coal and coal-dust intermingling with the rods had materially injured them, and at a sale at auction, with notice to the owners of the vessel, a loss was incurred to the amount of $164.14.

The respondent, in the sixth article of the answer, alleges that the damage incurred to the cargo amounted to the above sum of $164.14, and that they had offered and tendered to the libellant the full amount of the freight money, deducting therefrom said damages before suit, to wit, on the 18th of September, 1850, the respondent paid into court the sum of $257.84, being the balance of freight, deducting said damages. That sum is now in court to await its order. The libellant objects to this tender and payment, and claims still to recover $257.84, with cost, on several grounds: (1) That the iron was well and properly stowed; (2) that the rust and damage were produced by showers of rain while the iron was being put on board, and by the natural dampness of the vessel, without fault of the master; (3) that the shippers gave their consent to this mode of stowage, and therefore the vessel was not responsible for the damage; (4) there was no legal tender before suit; and (5) the damaged iron was stowed on the top of the coal, and, by the respondent's own proof, this was good stowage. These several positions were examined, and carefully compared with the evidence. These objections involve only questions of fact, and the weight of the evidence on these several points fails to sustain them. THE COURT on the contrary, finds that the damaged rods were all under the coal, and that the damage was sustained by the improper stowage of the rods at the bottom of the vessel and under the coal. The fact set up by the libellant, that the rods were wet while being put on board, is disproved by the testimony. There is no sufficient proof that the shipper gave consent to the stowage, but, on the contrary, that he protested at the time.

The only remaining point of importance is the question of tender. The offer to pay

[1] [Affirmed in Case No. 3,729.]

the freight with a set-off of actual damages, followed up by the payment of the money into court, is a fulfillment in good faith of the duty of the respondent under this contract. To adopt the positions suggested by the libellant would have a tendency to multiply suits, which is always prejudicial to the great commercial interests of the country. On the other hand, in admiralty proceedings, whenever it is found that an obligor has done all in his power to meet his contract, and render justice to the opposing party without suit, he should not be chargeable with costs. In a case like that the libellant must be deemed a suitor resting on the technicalities of the law, rather than the justice of his cause. From all the circumstances here disclosed, it is considered that the respondent has performed the contract in question, and that the libellant be dismissed with costs to the respondent—the said sum of $257.84 paid into court to remain at the disposal of the libellant.

[NOTE. This decree was affirmed by the circuit court on appeal. Case No. 3,729. The case was afterwards twice heard in that court on questions relating to the taxation of costs. Cases Nos. 3,730 and 3,731.]

Case No. 3,733.

DEDERER v. DELAWARE INS. CO.

[2 Wash. C. C. 61.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.

MARINE INSURANCE — CAPTURE AND CONDEMNATION —ABANDONMENT — NOTICE — BARRATRY—WHAT CONSTITUTES — ATTEMPTED RECAPTURE—EVIDENCE.

1. The vessel insured was captured by the British, on the alleged ground that a war had been declared, or soon would be, between England and the United States. The crew was taken out by the captors, and the captain, mate, and a boy, left on board, the vessel being ordered to Halifax. The captain, apprehending the loss of all he had on board, and that he would be imprisoned, made an attempt to rescue the vessel, with the assistance of the mate and boy, which failed; and the Romulus was libelled and condemned at Halifax as lawful prize. A regular abandonment was made, and the loss was stated to have been by capture and barratry. Where a regular abandonment is made, the property vests in the insurer by relation to the time of capture, but the captain continues the agent of the insured, until abandonment. His acts, subsequent to capture, may operate to the advantage as well as to the disadvantage of the insurer; and the insured is protected in the clause in the policy, which binds the master to act after capture, only when it appears that he acted for the best for all concerned. The unlawful acts of the master are never to be sanctioned. The attempt to rescue the Romulus was unlawful, and furnished good ground of condemnation.

2. The nature of barratry, and the principles of law relating to it. It is not essential to constitute barratry, that it should be to the interest of the master. If the act of the master were intended to benefit the owner, although mistaken, it cannot be barratry, because it was not fraudulent, or criminal. Acts of the master may be illegal and yet not being criminal or fraudulent, they will not be barratrous.

3. If a sufficient cause for abandonment is stated by the assured to the underwriters, when he offers to abandon, he need not communicate other or additional causes, although they were known to him; if the underwriters refuse to accept the abandonment.

4. Depositions stated in the record of the proceedings of the court at Halifax, were allowed to be read to show the ground of condemnation.

5. Quere. Whether the register of a vessel is prima facie evidence of citizenship, although it may be such evidence of property?

This action was brought on two policies of insurance, dated March and May, 1806, on the ship Romulus, and on her freight, both valued: the former at and from New-York to Havana, and back again to New-York. (The vessel warranted neutral, to be proved in this country. No warranty as to the freight.) On her return she was captured by a British privateer, the captain of which assigned, as the cause of the capture, that war was either declared, or would soon take place, between Great Britain and the United States. All the hands were taken out of the Romulus, but the captain, the mate, and a boy; who, under a prize-master and hands, were sent to Halifax. On the passage to Halifax, the captain of the Romulus, whose all was on board, as he stated, and apprehending its loss and his imprisonment, and the injury which a loss of the property would produce to his owners; concerted with the mate and the boy, a plan to retake the vessel. The attempt was made, and after a warm contest was given up. The vessel and cargo were carried in, libelled as enemy's property, and condemned as good and lawful prize. The plaintiff, as soon as he heard of the capture, made a regular abandonment, which was refused by the underwriters.

The defendants offered to read depositions from the record of the trial at Halifax, to prové that the attempt to rescue the vessel was the ground on which the vessel was condemned. This was objected to, but admitted by the court, to show what was the ground of condemnation.

In the opening of the cause, it was made a question, whether the register of the vessel was prima facie evidence of the citizenship of the plaintiff, to prove the warranty of American property, but not of citizenship. The cases cited were [Murgatroyd v. Crawford] 3 Dall. [3 U. S.] 491; [Murgatroyd v. M'Lure] 4 Dall. [4 U. S.] 342; contra, [Woods v. Courter] 1 Dall. [1 U. S.] 141.

Sergeant and Ingersoll argued, that the plaintiff was entitled to recover on one of two grounds—capture, or barratry. As to the first, the right of recovery is certain, unless the attempt to rescue was a forfeiture of neutrality.

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

The libel and condemnation show that the court proceeded on the ground of enemy's property only. The attempt to rescue was produced by the misrepresentation of the captors, and therefore could not be made the ground of condemnation. The attempt to rescue was a consequence of the capture, which constituted a loss; and if the defendant was answerable for the capture, he is answerable for all the consequences of it. After the capture, the captain is equally the agent of the insurer and the insured, and the abandonment makes him, by relation, the sole agent of the former. Capture is, by abandonment, made a total loss; as much so as if the loss had been really total: and after a total loss, the captain ceases to be the agent of the owner. 1 Term R. 613. But, secondly, if the captain, after the capture, continued the agent of the insured, his attempt to rescue was an act of barratry. It was a criminal act, contrary to his duty; contrary to the law of nations; done, in part at least, for his own advantage, and therefore comes fully within the definition of barratry. 6 Term R. 379; Park, 91; Cowp. 143; Park, 90; 3 Term R. 277; Park, 94, 364.

Condy and Rawle, for defendants.

First; the attempt to rescue must be considered as the ground of condemnation, because it was a sufficient one, and no other appears to have existed. That to resist a search, or to attempt to rescue, is ground of condemnation, is proved by Vattel, and a number of other books which might be cited. The captain, after the capture, continued the agent of the insured. Park, 152; [Crousillat v. Ball] 4 Dall. [4 U. S.] 294. It is no proof, that the attempt to rescue was not the ground of condemnation; that the libel states the vessel as enemy's property; and that she is condemned generally as good prize. These are the constant forms; because, if there be a breach of neutrality, the property is always considered as enemy's property.

Second; to constitute barratry it must appear that the captain acted fraudulently or criminally, with a view to his own benefit; and in all the cases, there were facts which proved that the motive was fraudulent or criminal. What was said in the case of Moss v. Bryrom, 6 Term R. 379, is very much qualified and explained by the declarations of the same judges, in 7 Term R. 505. Cases cited as to barratry, Park, 91; [Hood v. Nesbit] 2 Dall. [2 U. S.] 137. In this case it appears, also, that the captain acted under a misrepresentation. He supposed there was war between Great Britain and the United States, and that the act he attempted was lawful, and would redound to the advantage of his owners and himself. There could of course be neither fraud nor crime in the attempt.

Mr. Rawle made a new point for the defendant: that the insured, before he abandoned, had received a letter from his captain, mentioning the capture, and the unsuccessful attempt he had made to rescue the vessel, and stating that they were threatened to be libelled and condemned for that cause. This being known to the insured, it was his duty to have stated this to the underwriter as one of the grounds of abandonment. 1 Johns. 181.

As to this point, THE COURT observed, that if a legal ground of abandonment be assigned, it is sufficient, where the abandonment is refused. Had it been accepted, the underwriter would have been fully apprized of the attempt to rescue, as the letter of abandonment mentions that the insured is ready to furnish the proofs.

WASHINGTON, Circuit Justice (charging jury). The first question is, whether the plaintiff is entitled to recover upon the count which states the loss to have proceeded from capture. The defendant admits the fact, but answers that the plaintiff has forfeited his warranty of neutrality, by the misconduct of his captain; who, by an attempt to rescue the vessel, afforded a lawful ground for her condemnation. To this defence the plaintiff replies, that the alleged misconduct of the captain took place after he was captured, and at a time when he was as much a servant or agent of the insurers, as of the insured; consequently, his acts could not prejudice the latter as between these parties. It is even argued by the plaintiff's counsel, that the offer to abandon changed the condition of the parties, from the time of the capture, by relation; so that by that event, the captain became from that time the agent of the insurers. It is true, that where a regular abandonment is made, the property vests in the insurer, by relation to the time of capture; but the captain continues to be the agent of the insured, until the abandoment is made. His acts, subsequent to the capture, may operate as well to the advantage as to the disadvantage of the insured; it is his duty to do everything in his power for the preservation of the property committed to his care; and the clause in the policy, which permitted him to act for the best, to this end, without prejudice to the insurance, binds the underwriter to submit to the consequences of those acts, if performed for the benefit of all concerned. But the introduction of this clause proves, that after a misfortune has happened, the captain continues to be the agent of the insured, who might by his conduct prejudice the claim of his principal for indemnity, if his acts for the common benefit of all concerned, were not sanctioned by the underwriters. This clause, however, grants only a special authority, and protects the insured only, when from the facts it appears he acted for the best for all concerned. But, can it be said that he acts within this authority, when he does that which the law of nations, and his duty to his owners, forbid? Those who employed him are answerable to third persons for such conduct because they trusted him; not because such a power was im-

pliedly given to him. But the insurers did not employ him, though they granted him a special authority to act in a particular event, and in a particular way; and it never can be said, that from this authority a power to do an unlawful act is implied. If the act be not unlawful, the question always is, did he act for the best for all concerned? This is an inquiry proper for the consideration of the jury, upon the evidence submitted to them. But if the act be unlawful, then it is unauthorized by the underwriter. That the attempt to rescue the vessel was unlawful, and afforded a ground of condemnation, is proved by the opinions of the best informed jurists, and has received the sanction of the common law courts in a variety of instances. The doctrine was indeed admitted by the plaintiff's counsel, though said not to apply in this case; as the captain acted under misinformation given him by the captors. This excuse, however, will not do, as between the insurer and the insured; because the latter, before he can recover, must prove that he has strictly complied with the terms of his warranty. He cannot justify a breach of it, by alleging misconduct in third persons. Admitting the law to be so, the plaintiff then insists that the act which amounted to a breach of neutrality, proceeded from the barratry of the master; against which the defendants have undertaken to protect him.

It is certainly strange, after the repeated instances in which the courts have been required to define the term "barratry," a question should remain at this day as to the true import of it; and yet questions of difficulty frequently occur upon this clause in policies, when particular cases are to be decided by the former definitions of the term. The present case is one which admits of doubt, and has given rise to many ingenious arguments at the bar. Park defines barratry, "any act of the master, of a criminal or fraudulent nature, or which is grossly negligent, tending to his own benefit, to the prejudice of the owners, without their consent." The act must be fraudulent, and to the prejudice of the owners. If fraudulent, it is a criminal violation of the duty which the master owes to his employers. It is not essential to constitute the act of barratry, that it should be to the interest of the master, but if it be so, that fact is evidence of fraud: so is gross negligence. If the question turn merely on the fraud, it will always be necessary to look at the motives and intention which influenced the act. If the motive were to benefit the owner, it is an honest one, though it may be a mistaken one, and therefore the act cannot be called barratrous. The case of a wilful deviation for the benefit of the owner, is an example which attests the truth of the principle; but if made for the benefit of the master, it would be an act of barratry. The case of Moss v. Bryrom, as stated in Park, and the principle which he deduces from it, seem opposed to the above doctrine. But by referring to the case itself, in 6 Term R. 379, and to the explanations which the judges in Phyn v. Royal Exch. Ins. Co., 7 Term R. 505, have given of their meaning when deciding that case; it will be found not to oppose, but to support the opinion we have delivered. The judges declare, that what was said in Moss v. Bryrom was in reference to the circumstances of the cause, which consisted of many acts of the captain of a criminal nature; and Ashurst adds that there is no case of barratry, merely because the act was against the interest of the owners; unless done with a fraudulent or criminal intent. But no fraudulent intention may appear, and yet if the act be of a criminal nature it will be barratrous. Marshall, it is true, says that no fault amounts to barratry, unless it proceed from an intention to defraud the owner; but he is not warranted in his position, by the case referred to, in which fraud was negatived by the jury. All the cases, when well examined, will show that if the act be fraudulent or criminal, it is barratry. But it does not follow, that every illegal act is a criminal one. For example; suppose the captain ignorantly commit a breach of blockade, or violate some foreign ordinance with which he is unacquainted: these acts would be illegal, but not criminal. The illegality of the act, though no improper or fraudulent motive appear, may be prima facie evidence of fraud or of crime; but this presumption may be repelled by evidence. If, in reality, there was no fraudulent or criminal intention; no particular view to the personal benefit of the master, but an honest though mistaken motive to benefit his owners; the illegality of the act will not make it barratrous. Apply these principles to the present case. The captain had received information from the captor, that there was or would be war between Great Britain and the United States; and this was assigned as the cause for the seizure. He declares, that under the impression of this fact, and from a fear of loss of personal liberty, as well as of his own property and that of his owners, he attempted the rescue. But whether he was really induced to this act by the belief that he was captured by an enemy, you must determine, upon all the evidence in the cause. If he was, then the attempt to rescue was not a criminal act. Nevertheless, if you should think that he acted for his own benefit, it was fraudulent, and would equally amount to barratry.

Verdict for plaintiff.

Case No. 3,734.

Ex parte DEDERICKS.

[3 App. Com'r Pat. 421.]

Circuit Court, District of Columbia. Dec. 4, 1860.

PATENTS—ABANDONMENT OF INVENTION—WITHDRAWAL OF APPLICATION—LACHES.

[An inventor withdrew his application for a patent, and received back a portion of the fee

paid by him to the office, and 12 years thereafter filed a new application based on the same invention. *Held*, that the delay, in the absence of excuse on the ground of extreme poverty, or ignorance by the applicant of his rights, together with the fact of the continuous exhibition of his model in the patent office, constituted an abandonment to the public. Wickersham v. Singer, Case No. 17,610, and Ex parte O'Hara, Id. 10,464, followed.]

[Appeal from the commissioner of patents.

[Application by Levi Dedericks for a patent for an improved hoisting and extending ladder. The applicant appeals from the decision of the commissioner of patents rejecting the application.]

MERRICK, Circuit Judge. The applicant in the present case filed his claim in August, 1845, which he concedes was properly rejected on the 20th of November for being too broad. The specifications were now returned to him for amendment on the 12th of December, 1845, and again on the 5th of February, 1846, coupled, it is true, with an expression of opinion that the office did not then perceive anything patentable in his machine. This letter of February 5th was not a final and absolute rejection of the claim, as appears from its special objections to the specification as enumerated in that letter, and from the further fact that the specifications were returned for further modification, which would not have been done if the office had considered its action final in the premises. It is the practice of the office to retain the specifications and drawings of all rejected applications as a proper and necessary part of their records for the use and information of the public, as well as all models of rejected applications, whether the claims be withdrawn or not. On the 23rd of October, 1846, without any renewal or amendment of his specifications, the claimant asked leave to withdraw his application, which, after some contest on his part about his obligation to return his specifications and drawings to the office before being allowed to do so, was finally done, and $20 returned to him January 28th, 1848. From that time until January 23rd, 1860, he makes no claim or effort of any sort to vindicate his rights, leaving the public for twelve years in the possession of his model, openly exhibited to the world, and with full knowledge of all the details of his invention. Under such circumstances can a party come forward and claim a patent by filing a new and original application, or has the public by his recorded declaration of abandonment, uncontradicted by him and unrevoked for twelve years, acquired an absolute right to the free use of his discovery? The question, to my mind, is clear beyond controversy.

The public have a right to assume that every party has a knowledge of the law of the land, and of the modes which it appoints to be pursued by every one who desires to procure a patent for his invention. Those models are easy, cheap, and expeditious; and the law will assume that where an election is given to one to persist in his demand, and upon its absolute denial to appeal to another tribunal or to withdraw his claim, and have refunded to him the larger part of the price of his application, that he has calculated the value of the alternative, and deliberately made his election. This presumption, it is true, is not irrefragable. It may be explained and overcome by surrounding circumstances, such as clear proof of the extreme poverty of the applicant, that he was led into error and delusion as to the true state and condition of his rights, and was actually ignorant of the mode and means of vindicating them, and that so soon as the pressure of poverty was withdrawn, or he became aware that he had rights and means of establishing them, he with reasonable diligence set about their vindication. But in the present case no such excuses are offered; extreme indigence is not shown, and it is admitted in the argument, and appears upon the face of the papers, that the application was represented by counsel conversant with the law and practice of the office, and that he himself knew that the right of appeal was open to him, and that, notwithstanding the action of the office, he still had faith in the merit of his discovery. This being so, it was incumbent upon him, in the language of Judge Nelson in the instruction to the jury in Gaylor v. Wilder, 10 How. [51 U. S.] 477, to have "with reasonable diligence pursued his invention till he had perfected the same, and used due diligence in applying for and pursuing his application for a patent until he obtained the same."

In the case of Wickersham v. Singer [Case No. 17,610], I very carefully considered this subject, and I then said: "A withdrawal is not of itself an abandonment or dedication to the public, but is an equivocal act, to be interpreted by surrounding circumstances, and to be affected upon a second application by the subsequent conduct of the party, his diligence, or neglect and delay, in the same manner as his conduct is to be weighed in regard to an original application." In another part of the same opinion I said: "Should the office itself make a mistake in its judgment upon a case which does not create a delusion in the mind of the party as to his rights, can he repose upon that mistake, and make it operate as an indefinite excuse to him for delaying the further prosecution for those rights, either by endeavoring to convince the office, by claim for rehearing, of a palpable error, or by resorting to the easy and expeditious means for revising its decision upon appeal as the statute provides?" The question involved in that case has recently been considered by Judge Morsell in the case of Ex parte O'Hara [Case No. 10,464], and upon a state of facts almost identical with those presented by this appellant. He sustains in every particular the positions

which I often advanced and which, sustained by his approval, I now reiterate.

Now, for the reasons aforesaid, I hereby certify to the honorable Philip F. Thomas, commissioner of patents, that having assigned time and place for hearing said appeal, and having read and considered the arguments submitted to me by the appellant's counsel, and the reason of appeal with the office to those reasons and the facts in the cause, I am of opinion that there is no error in the judgment of the office in the premises; and the same is hereby accordingly affirmed, and a patent as prayed for finally refused to said applicant.

DEDRICK (ADAMSON v.). See Case No. 74.

Case No. 3,734a.

DEEGAN v. The CERES.

[Nowhere reported; opinion not now accessible.]

Case No. 3,735.

DEELY et al. v. The ERNEST & ALICE.

[2 Hughes, 70;[1] 1 Balt. Law Trans. 12.]

District Court, D. Maryland. Oct. Term, 1868.

ADMIRALTY JURISDICTION—MORTGAGES—FREIGHT.

Admiralty has no jurisdiction to enforce a mortgage upon a vessel where the mortgagee is out of possession, nor to enforce the payment of freight to the mortgagee.

[Cited in The Ella J. Slaymaker, 28 Fed. 768.]

This case was argued at its different stages, having been twice heard, first upon the plea of jurisdiction, and afterwards upon the merits, by Messrs. Wallis and Thomas for libellants, and by Messrs. Thomas W. Hall, Jr., Wm. Fell Giles, Jr., and John S. Hanan, for respondents. The libel alleges that libellants being owners of the said vessel, in the month of June, 1868, caused a cargo of guano, the property of the libellants, to be shipped on board thereof, at Alta Vela, in the island of St. Domingo, to be transported as their property and on their account, to this port; that said vessel had arrived in this port with said cargo on board, but that the captain of said vessel had issued bills of lading therefor in favor of some other person, who has no claim or title to said cargo, with whom the captain has fraudulently combined to deprive the libellants of the said property; and also that said captain refused to surrender said vessel to libellants, and it prayed for a decree that the possession of said vessel and cargo be immediately delivered to said libellants. This libel was filed on the 6th of July, 1868, and on the 5th of October, 1868, an amended and supplementary libel was filed, in which it is alleged that libellants furnished to Theodore Gomez the means necessary to defray the expense of shipping on their account and as their property this cargo, and that said cargo was paid for and put on board said brig with the means so furnished by libellants, and that Gomez promised and agreed to ship said cargo as their property; but since the original libel was filed the libellants have learned that said Gomez fraudulently combined with Francis Jouanin, the claimant of said cargo, to ship the same professedly as his, and that said Jouanin has no interest in said cargo, and it concludes with a prayer for a decree for possession. But if it shall appear to the court that said cargo ought not, in these proceedings, to be treated as the property of libellants, they pray that they may be allowed such freight for the transportation of the same as to the court may seem equitable and proper. Such is the case of the libellants as stated in the pleadings. On the 25th of July, 1868, a claim was filed by Francis Jouanin, of the city of Paris, France, in which it is alleged that Theodore Gomez, of the island of St. Domingo, is the true and lawful owner of the said vessel, and the said cargo of guano is the property of him, the said Francis Jouanin. This claim is sworn to by the said Jouanin, and on the 29th of August, 1868, the proctors for said claimant filed a plea to the jurisdiction of this court which, upon argument, was overruled by the court; the court holding that while it was not obligatory upon the courts of this country to enforce contracts or settle disputes between the subjects of foreign governments not residents of this country, but their action in each case rested in the discretion of the court, yet, that where it was a proceeding in rem, and the vessel was here, the court would entertain the jurisdiction if it appeared that otherwise there would be a failure of justice. After this decision, on the 26th of September, 1868, the claimant filed his answer, in which he denies the allegations of the libel in reference to the ownership of vessel and cargo, and states at large the facts and circumstances attending the transfer of the vessel by Gomez to libellants, which he, the claimant, asserts conveyed the vessel to libellants only as mortgagees to secure to them the amount due by Gomez upon a settlement of their mutual transactions; and, as to the cargo, the answer states that the same was purchased by Gomez, in the month of May last, and placed on board the said vessel, and was sold for a valuable consideration by Gomez to said claimant, on the 27th of May, 1868, at the city of St. Domingo, and that on that day he chartered the said vessel for the sum of two thousand dollars for the round trip from St. Domingo to this port and back, and the bills of lading for said cargo were made to him as the true and lawful owner of said cargo; and he denies all fraudulent combination, as charged in the amended libel.

GILES, District Judge. It will be perceived from these pleadings that there are

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

two issues to be decided by this court. First. Who is the owner of this vessel, or who is entitled to her present possession? Second. Who is the owner of this cargo? And in reference to both these issues a variety of evidence has been offered, both documentary and by parole. I have duly and carefully considered it all, and, to my mind, it establishes the following facts:

That in the spring of 1867, Theodore Gomez purchased at public sale, in the island of St. Thomas, the vessel now in controversy in this case. She was then in a damaged condition, and has been built in Spain, and known as the Spanish ship Immaculada. Gomez repaired her, and on the 24th of July, 1867, made a bill of sale of her to Benjamin Lobo, a British subject, residing in St. Thomas, in which the consideration is recited to be $10,000; but no consideration passed between said parties, said bill of sale being made to said Lobo for the purpose of obtaining from the British consul at St. Thomas a provisional certificate for said vessel, and placing her under the British flag. This course was no doubt pursued by Gomez to save her from capture and condemnation by some of the revolutionary parties in St. Domingo, of which island he was a citizen. Lobo was a clerk in the house of Jno. Newton & Co., of St. Thomas, the principal of which firm was a partner in the house of William Deely & Co., Liverpool, and is one of the libellants in this case. So that said Newton was fully aware of the change in the character of the vessel. I find this from the fact that Lobo was a clerk in his house at St. Thomas, and on the 3d of August, 1867, a letter is written in the name of Newton by Lobo, in which occurs this passage: "I have taken out a sea-pass in B. Lobo's name here, and on her arrival in England I shall get her a regular register." On the trial of this case this letter was shown to Mr. Newton when on the stand as a witness, and was identified by him. And further, that the vessel was about to load with a cargo for Liverpool, consigned to his house, and did so load and proceed to Liverpool. The vessel arrived at Liverpool about the 17th of December, 1867, with a cargo of log and other wood, consigned to libellants. On the 1st of October, 1867, Lobo had reconveyed the vessel to Gomez, and in the bill of sale executed by him the same consideration of $10,000 as stated in the one by Gomez to him, is recited. Gomez was then in Liverpool, and being without funds applied to libellants, who agreed to make advances for the supplies and expenses of said vessel upon a pledge of the same; and Gomez executed the bill of sale and agreement of the 30th December, 1867, and all the expenses of said vessel at Liverpool were paid by the libellants, and the sum so paid, with cargo furnished to said vessel on her return trip, amounted to the sum of £500 sterling, as stated in said agreement. That agreement contained a provision looking to the furnishing by libellants of further cargo for said vessel, but what additional amount beyond that included in the £500 was so furnished I cannot find from the evidence. Neither have I been furnished with any account of sales of the cargo carried to Liverpool by the Ernest and Alice or by the Isla, which was subsequently loaded and sent by Gomez to libellants. The true amount of indebtedness of Gomez to libellants can only be ascertained when these accounts are furnished. It is alleged in the answer that these sales will cover all sums advanced by libellants, but this is denied by Newton, and as it appeared by the letter of libellants of the 1st of July, 1868, that the bulk of the mahogany brought by the Ernest and Alice was still unsold, that indebtedness, if any, cannot be now ascertained. The Ernest and Alice, with Gomez on board, proceeded from Liverpool to St. Domingo, and in April went to the island of Alta Vela, where she took on board a cargo of guano, purchased and paid for by Gomez, and returned with it to St. Domingo. I find this from the agreement for its purchase by Gomez from the agent of the house of Don Joakin Comas, given in evidence, and the evidence of Captain Toulberg, that Gomez paid for it. That at that port the captain of the vessel executed and delivered to the claimant Jouanin the charter-party and bill of lading given in evidence in this case, to whom Gomez had sold the guano in the city of St. Domingo. I find the last-mentioned fact because the claimant has sworn to it and so represented it to the consignee when he arrived, and it is in accordance with the bills of lading; while to deny it, we have only the admissions understood to have been made by the claimant, a foreigner, not speaking our language, and when, from the fact that as regards the principal subject of dispute (the vessel) he was acting only as the agent of Gomez, under a power of attorney. The evidence further shows that after the vessel arrived in St. Domingo, one of the libellants, John Newton, who had arrived in St. Thomas, entered into a new arrangement with Gomez, by which the vessel, instead of being sold, was to proceed to Alta Vela for a cargo of guano, to be carried to this port for and on account of the libellants, as appears by Newton's letter to Gomez of 5th June, 1868, and that he, Newton, to furnish the means to pay for said cargo, gave to Gomez a draft on a house in the West Indies for $250, and authorized him to use the bricks (part of the cargo brought from Liverpool by the said vessel), but there was no evidence that said draft had been paid, and said bricks had already been charged to said Gomez by libellants in their account current of 14th February, 1868.

It is on these facts that I am called upon by the libellants to deliver to them the possession of this vessel and her cargo. Their right to invoke the aid of this court to give them the

possession of this vessel presents a question of some difficulty; and, to solve it, we must first ascertain the character of the papers executed by Gomez on the 30th December, 1867. Did they convey to libellants an absolute legal title or only a mortgage interest? The two papers of that date must be construed together, as if they had formed but one instrument; for, separated, the bill of sale could convey no interest in said vessel to libellants, being void for want of consideration and not under seal. Looking, then, at the two papers, the bill of sale and agreement, it is perfectly clear that Gomez conveyed the said vessel to libellants to secure to them, or to their agents, Messrs. John Newton & Co., the payment of the sum of £500 sterling on or before the 15th March, 1868; and, if said sum was not paid, Gomez agreed that after he had discharged her cargo in St. Domingo, he would proceed to St. Thomas and place the vessel in the hands of John Newton & Co. for sale, in order that out of the proceeds the libellants might be paid the amount mentioned in said agreement. Being then a mortgage, are there any circumstances surrounding these transactions which would take this case out of the general rule which denies to this court any jurisdiction to enforce the rights of mortgage? Now, the learned proctor for the libellants, in his closing argument, contended that the title of libellants under the bill of sale and agreement of the 30th December, 1867, had been consummated by possession. But this theory is inconsistent with the provisions of the agreement itself, and is contradicted by the correspondence of the parties and other evidence. It is true that John Newton, one of the libellants, when on the stand, spoke of the vessel as purchased by libellants from Gomez, and said they controlled her and gave written instructions to her captain, etc.; yet he says in his letter to Gomez of the 8th May, 1868: "I have written to Lobo for a declaration of ownership, and as soon as I am in receipt of it, and the Ernest and Alice has arrived, will send it on to you; and I hope you will soon be able to change the flag of the ship and do a good trade with her." So the letters of William Deely & Co., of the 1st and 15th February, 1868, evidently treat the vessel as the property of Gomez. I have said nothing of the bill of sale to libellants from Lobo of the 25th June, 1868, for I consider it as transferring no title whatever to the libellants. At the time of its execution, Lobo had no title of any kind to the vessel, as he had conveyed back to Gomez whatever title he had acquired from him by the bill of sale of the 24th of July, 1867, and the provisional certificate issued to him the 29th of July, 1867, had expired, and had been surrendered in Liverpool. Then regarding libellants as mortgagees out of possession, have I any authority to deliver to them the possession of this vessel? Now, a possessory suit is one which seeks to restore to the owner the possession of which he has been unjustly deprived, when that possession has followed a legal title.

The question here occurs, have libellants therein any legal title to the vessel? As their purchase, if any, was made at Liverpool, England, its validity will depend upon the requirement of the merchant shipping act of Great Britain (passed in 1854) in reference to the sale and transfer of vessels. These requirements will be found in the 55th, 56th, 57th, 58th, and 81st sections of said act. With some of these requirements the bill of sale from Gomez to libellants does not comply; and the same may be said of the bills of sale from Gomez to Lobo, and from Lobo back to Gomez. But it is unnecessary for me to pursue this inquiry as to the form of the bill of sale further, as I place my decision of the case upon other grounds. Then, as to the character of the transfer from Gomez to Lobo, and the obtaining of the provisional certificate for this vessel in the name of Lobo, a British subject. By the merchant shipping act of Great Britain (passed in 1854), no ship shall be deemed a British ship unless she belongs wholly either to natural born British subjects or to persons made denizens by law, or to bodies corporate, established under the laws of the kingdom. Now we have seen from an examination of the facts of the case that Lobo was not the owner of the vessel, but that she belonged to Gomez, and that Lobo's name was used for the purpose of placing her under the protection of the British flag. And that this was known to libellants, appears not only from the letter of Newton, per Lobo, his clerk, to which I have before alluded, but from the fact that under the provisional certificate thus obtained the vessel went to Liverpool consigned to libellants, and that while in that port libellants treated with Gomez as the true and real owner; and again, from the further fact that they cleared her from that port as a British vessel, although her provisional certificate had expired, and she had not been registered as required by the laws of Great Britain. Now, was not the whole transaction a fraud upon the navigation laws of Great Britain? and being clearly so, the court will not lend its aid to enforce a title thus tainted. This disposes again upon another ground of the title claimed through Lobo. But I place my decision in this case upon the fact that this conveyance to libellants by Gomez conveyed to them only a mortgage interest, as I have before shown. Indeed, if the bill of sale had been absolute, and it was proved to the satisfaction of the court that it had only been given as security for money advanced, the result would be the same, as has been lately decided in England in the case of The Innisfallen, Eng. Adm. 1866 [L. R. 1 Adm. & Ecc.] 72. This court has no jurisdiction to enforce the provisions of such a transaction. In the case of Bogart v. The John Jay, 17 How. [58 U. S.] 402, the supreme court say "that the mortgage of a ship has nothing

maritime in it, and a failure to perform such a contract cannot make it maritime." And that the courts of admiralty have therefore never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title or a right to the possession of the ship. This disposes of the first and most important part of the case. Now, as to the cargo, the testimony is conflicting, and the preponderance of evidence seems to be with the claimants, as I have before stated. The burden of proof was on the libellants, and if they have failed to satisfy the court that the cargo was theirs, they cannot receive its aid to gain the possession of it. I do not wish it, however, to be understood that if the proof of ownership had been clear, this court would have jurisdiction to decree the possession of a cargo situated as this was, on board a vessel moored to the wharf in this port, and both vessel and cargo regularly entered at the custom-house. This point was made by the learned proctor for the claimant who opened the argument on that side; but I have not fully examined it, and as I place my decision upon the failure of proof as to the cargo, I shall not give any opinion upon it in this case.

The only remaining question is, as to the freight. If I am right in the view I have taken of the character of the transactions between Gomez and the libellants, that they are mortgagees out of possession, they cannot recover freight. While they remain such, they are neither liable for any of the expenses incurred by or entitled to the freight earned by the vessel. The point is decided in Gardner v. Cazenove, 1 Hurl. & N. 423; Chinnery v. Blackburne, 1 H. Bl. 117, note; Brancker v. Molyneux, 3 Scott, N. R. 334. It is true that the evidence shows that Gomez has not kept his promise and engagement to ship a cargo of guano at Alta Vela, and transport the same in the Ernest and Alice to this port for and as the property of libellants, or as the property of John Newton. But the court has no jurisdiction to decree the specific performance of a contract. For this principle see the following cases: Andrews v. Essex Fire Ins. Co. [Case No. 374]; Kynoch v. The S. C. Ives [Id. 7,958]; Davis v. Child [Id. 3,628]; Alberti v. The Virginia [Id. 141]. I will therefore sign a decree dismissing the libel filed in this case with costs.

Case No. 3,736.

DEEMS et al. v. ALBANY & CANAL LINE.

[14 Blatchf. 474.][1]

Circuit Court, S. D. New York. June 11, 1878.

NEGLIGENT TOWAGE — CONTRACT EXEMPTIONS — SERVICE ON UNINCORPORATED ASSOCIATION — WAIVER—ADMIRALTY APPEALS—DECREE.

1. A steam tug was held liable for negligence, in towing a canal-boat in such manner that she collided with another vessel and was sunk, although the written contract of towage contained this clause: "All towing at the risk of the master and owners of the boat or vessel towed."

2. An unincorporated association of persons was sued as "The Albany and Canal Line." It waived process, and appeared by that name, and answered without objecting that it was improperly sued: *Held*, that it could not afterwards raise such objection.

3. The circumstances stated, under which, in this case, the value of the canal-boat was allowed as upon a total loss.

4. Where a libellant, in admiralty, in a cause of collision, has a decree in the district court, for a specified amount, with costs, and, on appeal, this court decrees for the libellant, the proper decree in this court is not a decree for the amount awarded below, including the costs there, with interest from the date of the decree below, nor is interest to be added to the amount reported by the commissioner below, from the date of his report, but the decree is to be for the amount of the loss at the time of the loss, with interest from the time of the loss, and for the costs in the district court, without interest on such costs.

[Cited in Vanderbilt v. Reynolds, Case No. 16,839. Distinguished in The Blenheim, 18 Fed. 48. Disapproved in The Umbria, 8 C. C. A. 181, 59 Fed. 475.]

This was an appeal from a decree of the district court [for the southern district of New York], in favor of the libellants [Charles Deems and others], in a suit in personam, in admiralty. The respondents, an unincorporated association of persons under the name of "The Albany & Canal Line," were the owners of a line of steam tow boats, of which the steam-boat Ohio was one, and engaged in the business of towing boats for hire, on the Hudson and East rivers, between Albany and New York. On Sunday, June 11th, 1871, the canal-boat C. M. Deems, with her cargo, consisting of iron, was taken in tow by the Ohio, at Albany, to be towed to New York, under a contract of which the following is a copy:

Austin's New Line. Steam Tow Boats, Syracuse, Ohio, Austin, McDonald, Leave New York & Albany daily. J. J. Austin, Agent, 108 Pier, Albany. A. D. Hoyt, Agent, 17 South St., New York.	Notice. Towing must in all cases be paid in advance. This company does not insure boats or cargoes. New York, June 11, 1871. Charles M. Deems. Master and Owners, To Steam Boat Ohio, Dr. For towing from Albany to New York— Special contract. All towing at the risk of the master and owners of the boat or vessel towed— $20 00. Received payment for owners, Ableman.

When the Ohio left Albany, her tow consisted of twenty-nine canal-boats, arranged in six tiers, and all towed by a hawser astern. The Deems was the outermost boat in the fifth tier, and upon the port side. The tow was a heavy one for the power of the boat, and, by reason of this fact, she was more than two days and two nights in making her trip, whereas it was usually made in about two nights and one day. Twenty-six of the boats were taken to New York. The remaining three were left at ports to which they were destined, on the way. The Ohio

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

reached Weehawken, on the New Jersey shore, opposite the upper part of New York, between eleven and twelve o'clock on the night of Tuesday, June 13th, and remained there, at a dock, until between three and four o'clock in the morning of the 14th. This was to save the necessity of passing around the Battery, and into the East river, in the night. The start was made in the morning so as to save the ebb-tide going down the Hudson river, and reach the Battery at slack water. The steam-boat A. Corning was attached to the starboard side of the Ohio, as a helper, when she left Weehawken. The Corning had gone up from New York that morning for this purpose. When the Ohio, with her tow, reached a point on the Hudson river about opposite Thirteenth street, New York, her pilot discovered the steam-ship City of Brooklyn, at anchor a little east of the middle of the river, about opposite pier 39, and fully a mile below him. There was plenty of room to pass on either side, and it was broad day light, and clear. The pilot at once shaped his course to pass on the east side, that being the course usually taken under the circumstances, as the set of the tide was in that direction, and this was known to him. After the pilot had proceeded on this course for a little time, the captain of the Ohio, thinking it better to go upon the other side, gave the pilot orders to that effect. This order was given because the captain discovered three barges lying to the eastward of the City of Brooklyn, and above her in the river, but which did not in fact interfere with the passage of the tow upon the course selected by the pilot. Upon receiving the order, the pilot changed his course, so as to pass to the west, and, having gone sufficiently far, as he supposed, to get by in safety, straightened the Ohio on her course down the river. After proceeding some distance further, the captain, discovering that the tide was setting the tow to the eastward, so as to endanger a collision with the City of Brooklyn, gave orders to head further to the west, and himself went into the wheel-house to assist the pilot in putting the wheel over, directing the pilot of the Corning to stop the engine of that boat, so as not to interfere with the movements of the Ohio. Having, as he supposed, taken the Ohio far enough to the westward, he again straightened her down the river upon her course, but the set of the tide was so strong, and the speed of the Ohio, with her heavy tow, so slow, that the boat on the port side of the tow next in front of the Deems swung against the City of Brooklyn, broke loose from her fastenings, and was thrown around, without further injury, upon the east side of that vessel. The bow of the Deems collided with the stern of the steam-ship and the Deems sank almost immediately. The boat next astern of the Deems was broken loose from her fastenings and somewhat injured, but did not sink until she had been towed by the Corning to the flats upon the New Jersey shore. The Ohio proceeded with the rest of her tow, in safety, to her destination in the East river. A contract was made with a wrecking company for raising the sunken boat and her cargo. In this way, about two-thirds of the cargo was saved, but the hull of the boat was so much injured as not to be worth repairing.

Robert D. Benedict, for libellants.

Cornelius Van Santvoord, for respondents.

WAITE, Circuit Justice. In my opinion this case is governed by that of The Syracuse, 12 Wall. [79 U. S.] 167, in which, under a special contract precisely like the one here presented, it was held, that the towing boat was liable, if, through the negligence of those in charge of her, the tow suffered a loss. It is there said, that, "although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and, if these are neglected, and disaster occurs, the towing boat must be visited with the consequences. * * * It frequently happens, in cases of collision, that the master of the vessel could not have prevented the accident at the moment it occurred, but this will not excuse him, if, by timely measures of precaution, the danger could have been avoided." Applying these principles to the facts as found, it seems to me that the loss must be charged to the Ohio. Beyond all doubt, the collision occurred by the want of preliminary caution and foresight, on the part of the captain and pilot, first, in changing her course, after they had started to go upon the east side of the City of Brooklyn; and, second, in not going far enough to the westward, after it had been determined to go on that side, before steadying her upon her course down the river. The set of the tide and the power of the boat were known at the time, and there was abundance of room to make a sufficient offing. The facts in this case are, certainly, as strong against the Ohio as they were against the Syracuse. The objection to the name of the respondents comes too late. They waived process, appeared by the name in which they were sued, and have answered without taking the exception.

The only difficulty I have had in the case has been in respect to the exception to the commissioner's report, for allowing the value of the boat as upon a total loss, but, on the whole, I am satisfied that the report is sustained by the evidence. The boat was loaded with iron, and, in raising her, the bow end, to the extent of about one-third her length, was broken off. She was towed in this condition to the Pavonia flats, and the saved portion of her cargo taken out. She lay there until September 1st, 1871, when she was sold at auction for $18, no formal survey having

been made. There can be no doubt her owners supposed she was not worth repairing, and the evidence, I think, is sufficient to justify them in not attempting to do so. Although the sale took place in New York, while the wreck remained upon the flats, at a distance from the place of sale, there is nothing to show that she did not bring all she was supposed to be worth. I am satisfied with the disposition of the case made below, and a decree may be prepared accordingly.

On the settlement of the decree, the libellants asked that the amount decreed to them might be ascertained by adding interest to the amount awarded by the decree of the district court, including the costs there, from the time of the rendition of such decree, or, in case that could not be done, that the amount reported by the commissioner might be taken as the basis, and interest added to that from the time his report was filed.

WAITE, Circuit Justice. Such I think is not the proper rule. The decree in this court is not one of affirmance or reversal, but is an original decree in the suit. The decree below was, in effect, vacated by the appeal. There should, therefore, be no rests in the calculation of the amount due. The damages should be ascertained at the time of the loss and interest added from that date, without rests, until the decree here.

No interest can be allowed upon the costs in the district court until the final decree here. Until the case is finally disposed of in this court, it is to be considered as all the time pending; and, interest on costs is not allowed during the pendency of the suit. The damages at the time of the loss, as shown by the commissioner's report, may be taken as the basis of the calculation in this case, and interest added from the date of the loss until the date of the decree.

Case No. 3,736a.

DEEN v. HEMPHILL.

[Hempst. 154.][1]

Superior Court, Territory of Arkansas. July, 1831.

APPEAL—DEFECTIVE BOND—CORRECTION.

1. Where an appeal bond is defective, the party may file a new one at any time before the case is finally acted on, and the appeal should not be dismissed.

2. Although the statute uses the term "recognizance," a "bond" is just as effectual, and a sufficient compliance with it.

Error to Lafayette circuit court.

Before ESKRIDGE and CROSS, Judges.

ESKRIDGE, Judge. This is an action of debt brought by Asa Deen against Andrew Hemphill, before a justice of the peace of the county of Lafayette. There was a judgment in favor of the plaintiff in the justice's court for the sum of $36 and costs, from which the defendant appealed to the circuit court of Lafayette county. There Deen moved to quash the appeal bond, and dismiss the appeal at the costs of the appellant. The circuit court sustained the motion so far as to quash the bond, but refused to dismiss the appeal, and thereupon, on motion of the appellant, permitted him to file a new bond in lieu of that which had been quashed, to which latter opinion the appellee excepted, and to reverse which he has brought the cause to this court by writ of error.

Two grounds were relied upon in argument for reversing the judgment of the circuit court: First, that the circuit court erred in permitting a new bond to be filed after having sustained a motion to quash the old one; and, second, admitting the circuit court to have decided correctly in receiving the new bond, that the bond thus received is not in conformity with the statute. It is admitted that the decision of the circuit court upon the first question is contrary to the practice which has heretofore generally prevailed in this territory. It is, however, sanctioned by the practice of several of the states, especially by that of the state of Virginia, and seems to be founded on reason. Brown v. Matthews, 1 Rand. 462; 1 Munf. 397. The object in requiring a bond from the party appealing is to secure the rights of the adverse party; and it seems to us, if the bond be given at any time before the suit is finally acted upon by the circuit court, the rights of the party are as effectually protected as if the bond taken by the justice had been valid and sufficient. The fact that the justice failed to take a good bond should not operate to the prejudice of the party. The party does all in his power to comply with the statute, and when the bond is ascertained by the circuit court to be defective, it would be highly unjust that the party should lose his appeal and be subjected to the payment of costs for an error in which he had no agency.

The second point is, that the bond permitted to be given in the circuit court is not in conformity with the statute. The statute, it is true, uses the term "recognizance," not "bond;" but it is not perceived why the one should not be as effectual as the other. Without tracing the legal distinction between a recognizance and a bond, it will be sufficient to observe, that the rights of the appellee are as certainly secured by the one as the other. They are equally binding, and the remedy upon each is equally obvious and direct. There is no error in the judgment, and the same is affirmed.

Judgment affirmed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 3,737.

The DEER.

[4 Ben. 352;[1] 4 Am. Law T. Rep. 142.]

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

TUG AND TOW—NEGLIGENCE—PLEADING—UNSEAWORTHINESS.

1. A tug is liable for damages, resulting from negligence in her navigation, to a vessel in tow, whether she is towing under a contract or not.

[Cited in The Merrimac, Case No. 9,478; Jennings v Muller, Id. 7,282. Quoted in The M. J. Cummings, 18 Fed. 182; The M. Vandercook, 24 Fed. 476.]

2. A tug was towing a barge to a bulkhead, near which was a sunken pier, whose presence was known to the master of the tug, and on which the barge struck: *Held*, that the running of the barge upon the pier was conclusive evidence of negligence on the part of the tug, in the absence of proof of any vis major.

[Cited in The Narragansett, 20 Fed. 398.]

3. A libel charged that the existence of the sunken pier was known to the tug, and that, in place of avoiding it, the tug towed the barge upon it, but did not aver that it was done negligently, and the answer averred that the accident was not the result of any negligence on the part of the tug, and the case was tried on those pleadings: *Held*, that the libellant might amend the libel, by averring negligence, and thus accepting the issue tendered by the claimant, and the issue which was in fact tried.

4. Where the defence was set up that a barge, injured by being towed against a sunken pier, was too heavily loaded and was too weak: *Held*, that as it was not shown that she was too heavily loaded for a barge which was to perform her voyage without being subjected to the blow which she received, nor that she was not sufficiently strong for the ordinary purposes of the voyage she was on, the defence was not available.

C. Van Santvoord, for libellant.

Brown, Hall & Vanderpoel, for claimant.

BLATCHFORD, District Judge. This is a libel to recover for the damages caused to a canal boat or barge and her cargo of brick, through her being run, while in tow of the steamboat Deer, on a sunken pier or dock at the foot of 25th street, East river, New York, on the 8th of May, 1869. The libellant was the owner of the boat, and had the cargo in charge as a common carrier. The libel alleges that the steamboat, for a consideration, undertook to tow the barge from the foot of Hubert street, North river, to a pier on the East river near the foot of 23d street; that, when she arrived off the foot of 23d street, she was directed to land the barge at the bulkhead between 25th and 26th streets, which she undertook to do; that, at the foot of 25th street, there was a sunken pier or dock, the existence of which was known to the persons navigating the steamboat; and that, in place of going sufficiently out into the channel, and avoiding the sunken pier, the steamboat towed the barge across or on the sunken pier, and caused her to strike amidships against one of the spiles or ties of the sunken pier, knocking two holes in her bottom near the bilge, and causing her to sink.

The answer avers, that the contract of towage, for the consideration, was to tow the barge to the 23d street pier, and not to a pier near the foot of 23d street; that the steamboat took the barge to the foot of 23d street; that, on arriving near there, the steamboat, as a matter of accommodation purely, and gratuitously, and without any compensation paid or to be paid therefor, undertook to push the barge along to the bulkhead between 25th and 26th streets; that the existence of the sunken pier at the foot of 25th street was known to the persons navigating the steamboat, but they did not know its extent, boundary or exact location, and it was not marked by buoys or otherwise; that the tide was flood in the river, and there was an ebb eddy or reverse current along the piers, from 23d street and below, to 26th street and above; that a vessel was anchored opposite the bulkhead between 25th and 26th streets, in the edge of the flood-tide current; that the steamboat had this barge on her port side, and another barge on her starboard side; that it was necessary to keep the steamboat and her tows within the ebb eddy, and to pass to the bulkhead below the anchored vessels, in order to land the barge properly at the bulkhead; that the master of the barge knew all this; that, as the steamboat approached the end of the sunken pier, she stopped her wheels, and her master went on board of the barge and examined as to the location of the sunken pier, which was at the time covered with water to the depth of three or four feet; that the barge was at the time about 45 feet out beyond the outermost visible portion of the sunken pier; that the master of the steamboat, believing that the barge was outside of any part of the sunken pier, advised the pilot of the steamboat that it was safe to go ahead, and he went ahead; that, soon afterwards, the barge struck lightly on her port bow; that the steamboat immediately stopped her wheels; that, by direction of the master of the barge, and contrary to the advice of the master of the steamboat, the steamboat backed, and very soon afterwards the barge commenced sinking aft, by reason of having been pierced by some sunken and unknown pile or stick aft of amidships, and above light water mark; that such injuries were received while backing; that there was no negligence on the part of the steamboat; that the barge was old and weak, and her bottom was decayed, and it was negligence to load her with the weight of cargo she had; and that, if she had been less heavily loaded, or had been staunch, the piles would not have been driven through her, and she would not have been sunk or damaged.

The principal question of law involved in this case was considered by this court in the

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

case of The Brooklyn [Case No. 1,938]. If the steamboat was negligent in her navigation in towing the barge, whether she was towing under a contract of towage or not, she was as much guilty of a tort towards the barge, if the barge was injured through such negligence, as she would have been towards a third and strange vessel, which should have been injured through such negligence. Her duty not to be guilty of such negligence was imposed by the law, and existed even though the service of towing was gratuitous. The barge being lawfully where she was, the steamboat owed a duty towards her independent of any contract of towage, and is liable for any damage to her, caused by negligent navigation amounting to a breach of such duty, to the same extent that the steamboat would be liable, for such negligent navigation, to a vessel which she was not towing; or to the barge if not towing her, and to the same extent that a third vessel would be liable, for negligent navigation, to the barge. Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 468, 485, 486. It is, therefore, unimportant to inquire whether the steamboat was under a contract for towage, express or implied, either a new one or an extension, for the same consideration, of the original one, at the time of the injury to the barge.

It is impossible not to say that the steamboat was guilty of negligence. The fact that the sunken pier was there was known to her, and yet she ran the barge upon it. There was no vis major that drove the steamboat with the barge upon it. The case is not one of inevitable accident, from stress of weather or some sudden outside controlling force. If the steamboat could, because of any vessel or vessels anchored outside, only reach the destination of the barge by going through a narrow space close to the sunken pier, she must be regarded as having taken all risks of the striking of the barge, it having been at her option to attempt or to decline to tow the barge through such space, which was clearly visible. The fact that the existence of the sunken pier was known to those navigating the steamboat makes the running of the barge upon it conclusive evidence of negligence, under the circumstances, in the absence of proof of any vis major.

It is objected, that the libel does not aver negligence in the steamboat, and puts the cause of action against her solely on the ground that she was a common carrier. It is true, that the libel does not use the word "negligence." It charges that the existence of the sunken pier was known to the steamboat, and that, in place of avoiding it, the steamboat towed the barge upon it. The answer tenders the issue of negligence, by averring that the accident was not the result of any negligence on the part of those managing the steamboat. On these averments, and the evidence, the libellant will be allowed to amend her libel, by averring negligence, and thus accepting the issue tendered by the claimant, and the issue which was in fact tried.

Whether the injury was caused while the steamboat was going ahead, or while she was backing, is immaterial, as the case stands. On the proofs, it was for the claimant to show that the stick or pile which was driven into the barge was no part of the sunken pier, and that, if it was backed upon, such backing upon it was not the direct consequence of the striking of the sunken pier, while going ahead. The steamboat was wholly under the management and control of her own officers.

The defence, that the barge would not have been damaged if she had been less heavily loaded, or had been stronger, is not available. It is not shown that she was too heavily loaded for a barge which was to perform her voyage without being subjected to the blow inflicted on this barge, nor is it shown that she was not sufficiently strong for the ordinary purposes of the voyage she was on. Amoskeag Manuf'g Co. v. The John Adams [Case No. 338]. There must be a decree for the libellant, for the damage done to both vessel and cargo, with costs, with a reference to a commissioner to ascertain and report the amount of such damages.

[NOTE. For statement of further proceedings in this case, see Case No. 3,738.]

Case No. 3,738.

The DEER.

[10 Ben. 628.][1]

District Court, S. D. New York. Nov. Term, 1879.

MOTION FOR EXECUTION—LACHES—SETTLEMENT.

A suit was brought by a married woman as owner of a canal-boat against a steamboat to recover the value of the boat and her cargo, lost by negligence of the steamboat. A decree was made in her favor on March 4, 1871, for $2,-737.69 damages and $331.61 costs. In May, 1871, an agreement to compromise was made between the proctors, and the stipulators paid $2,000 in settlement. The owners of the cargo were parties to the settlement and the husband of the libellant was present and consented to it and also her proctor, who has since died. In March, 1879, a motion for leave to issue execution against the stipulators was made on behalf of the libellant, on her affidavit that she did not authorize the settlement and received no part of the $2,000: *Held*, that the facts as to the settlement created so strong a presumption of acquiescence on the part of the libellant that it was not overcome by her affidavit, and that in any event she could only enforce the decree for the amount of her interest in it, and, as she had not shown what that was, her motion must be denied.

T. C. Campbell, for libellant.

J. Langtree, for stipulators.

CHOATE, District Judge. This is a motion for leave to issue execution to enforce a

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

decree against stipulators. The suit was brought by the libellant, Mary A. Corwine, to recover the value of a canal-boat and her cargo, lost through the fault of the Deer. [See Case No. 3,737.] A final decree was entered in favor of the libellant on the 4th day of March, 1871, for $2,737.69 damages and $331.61 costs. An appeal was taken but never proceeded further than the giving and filing of notice of the appeal. In the month of May, 1871, negotiations for a compromise of the suit were pending between the proctors representing the parties, and on the 18th day of said month the stipulators paid in setlement of the suit $2,000. It is proved that the owners of the cargo of the canal-boat, or those who had succeeded to their interest, were parties to this settlement: that it also was consented to by the proctors for the libellant, the law firm of Platt, Gerard & Buckley, and that the husband of the libellant, who had been the master of the canal-boat, was present at and consented to the settlement. The final decree does not show what part of said damages, if any, was awarded for the value of the canal-boat. The pleadings in the case cannot be found and there is no evidence produced to show what amount of damages this libellant claimed in her own right. Enough appears to show that she was suing on behalf of the owners of the cargo on board the canal-boat as well as on her own behalf. This motion was not made until the 28th day of March, 1879. The libellant has sworn that she did not authorize the settlement and received no part of the $2,000.

Under these circumstances the motion must be denied. It clearly would be improper and unjust towards the stipulators, even if the settlement was unauthorized by the libellant, to enforce the decree for any sum beyond the amount recovered by the libellant on her own account. Moreover, the extraordinary delay on her part, in connection with the facts that her husband was present at the settlement and that her proctors, especially through Mr. Buckley, now dead, took part in it, creates so strong a presumption of acquiescence on her part that I think it is not overcome by her testimony. In any event the burden is on her of showing what interest she had in the decree.

Case No. 3,739.

The DEER.

[1 Lowell, 95;[1] 2 Am. Law Rev. 101.]

District Court, D. Massachusetts. 1866.

PRIZE JURISDICTION—SERVICES BY STRANGERS—SALVAGE IN LIEU OF PRIZE-MONEY.

1. A court of prize has power to give salvage in lieu of prize-money to persons not of the navy, who have rendered valuable service in making a capture.

2. Four per cent. of the value of the prize and counsel fees granted to two persons who made known the rebel signals, and thus enabled the naval officers to make the prize.

Two men, who had escaped from Charleston and given themselves up to our fleet, made important disclosures concerning the signal lights used by the rebels, and thus enabled the navy to make the prize. This was done under a promise of payment if their services should prove to be of value. They now petition against the proceeds in the registry.

H. Flanders, for petitioners.

R. H. Dana, Jr., Dist. Atty., for naval captors and government, submitted the case without argument.

LOWELL, District Judge. The petitioners have rendered very useful services, and the only question is whether they can be paid out of the fund. The prize acts do not meet the case; but they are not exhaustive of the subject of prize. In The Dos Hermanos, 10 Wheat. [23 U. S.] 306, cited at the bar, non-commissioned captors were allowed one-half the value by way of salvage. The whole has sometimes been given: The Haase, 1 C. Rob. 286. So in case of recapture by the crew of the prize, or by the army, or by non-commissioned persons, salvage is awarded: The Hope, Hay & M. 216; The Helen, 3 C. Rob. 224; The Progress, Edw. 214.

That the petitioners ought to be rewarded cannot be denied, and that the government as well as the captors would be under a strong moral obligation to remunerate them is clear. In the case of the steamer Planter, which was run out of Charleston, with great skill and at great hazard, by the negro Robert Small and his associates, and delivered to our fleet, congress granted them one-half the value. 12 Stat. 904. As that vessel does not appear ever to have been taken before a prize court, the action of the legislature became necessary. But, in this case, the simple and practical mode of arriving at the compensation, and the mode by which the burden will be properly distributed in exact proportion to the benefit conferred, is to make it a charge on the fund. And it comes fairly within the analogy of the cases cited, which hold those to be salvors who are not technically captors, but who have made or contributed to the capture. The amount of salvage suggested was five per cent. of the net value of the prize. I have concluded to award two thousand dollars to each petitioner, which is about four per cent. in all, and a reasonable counsel fee.

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

DEFENDER, The (THORP v.). See Case No. 14,003.

Case No. 3,740.

The DEFIANCE.

[6 Ben. 162;[1] 5 Chi. Leg. News, 97.]

District Court, S. D. New York. July, 1872.

BILL OF LADING—FREIGHT ON PINE WOOD—"NORFOLK INSPECTION."

A vessel took on board at Norfolk, Va., a quantity of pine wood, and her master signed a bill of lading, which described the wood as being "112½ cords pine wood, Norfolk inspection," and agreed for its delivery at New York on payment of freight "at four dollars per cord." The vessel arrived in New York, where the consignee refused to pay $450 for the freight, but insisted that the cargo should be discharged and measured, and that freight should be paid only at the rate of $4 per cord on such measurement. The wood was then discharged by the vessel, and deposited in a proper wood-yard, of which the consignee had knowledge. He filed a libel against the vessel to recover the value of the wood, alleging that the master had sold it and converted it to his own use: *Held*, that, on the bill of lading, the vessel was entitled to receive the $450 as freight; that she delivered all the wood she took on board at Norfolk; that it was not made to appear by the libellant that the master had sold and converted the cargo, and that the libel must be dismissed.

[Distinguished in Gibson v. Brown, 44 Fed. 99.]

W. R. Beebe, for libellant.

J. H. Choate, for claimant.

BLATCHFORD, District Judge. On the 14th of August, 1868, the master of the schooner Defiance, at Norfolk, Virginia, took on board of that vessel a quantity of pine wood, under a bill of lading given by him, which described it as "112½ cords pine wood, Norfolk inspection," and stated that it was to be delivered to the libellant, Samuel Kimmelstiel, at New York, on payment of freight at "four dollars per cord." The libel avers that the libellant, after the vessel arrived at New York, demanded the delivery of the wood to him, and tendered and offered to pay to the master freight on all the wood on board, according to the bill of lading, but the master refused to deliver any part of it, and, on the contrary, sold it at private sale, without notice to the libellant, and converted it to the use of the vessel. The libel claims the value of the wood at $9 per cord, less the freight. The answer denies that the libellant tendered or offered to pay to the master freight upon the wood on board according to the bill of lading, or that the master refused to deliver it or any part of it, or sold it or converted it to the use of the vessel. It alleges that the master duly notified the libellant of the arrival of the vessel with the wood on board, and duly tendered and offered to deliver the wood to him on payment of the freight, as provided by the bill of lading, and demanded payment of said freight, but the libellant refused to pay the same or to receive the wood on and by payment of the freight provided in the bill of lading; that thereupon the master discharged the wood from the vessel at New York at a suitable place, with notice to the libellant; and that the libellant afterwards got the wood without paying freight.

The evidence shows that the vessel brought to New York, and discharged, all the wood which she took on board at Norfolk. The contest between the libellant and the master was as to the amount of freight to be paid. The master claimed that, if he delivered all the wood he took on board, he was entitled to be paid $450 as the freight. The libellant refused to pay that amount, even though all the wood should be delivered to him, and insisted on having the wood landed and then measured by the cord, and on paying freight at the rate of $4 per cord on what the wood should thus measure. Such was not the contract of the parties. The agreement of the bill of lading was, that the wood put on board of the vessel should be called 112½ cords, and should pay freight at $4 for each of such cords. The contract was the same in legal effect as if the gross sum of $450 had been named as the freight. The bill of lading is satisfied by delivering all the wood taken on board. It is shown that the wood parts with its bark, by being handled, in being loaded and discharged. The vessel is entitled to be paid for transporting the wood as put on board, and not as it may measure after being discharged at the port of delivery. The libellant, therefore, when he brought the suit, had no cause of action against the vessel, founded on refusal of the master to deliver any part of the wood unless he should be paid $450 freight on delivery of all he had taken on board.

The wood having been tendered to the libellant, and he having refused to pay the proper freight on it, it was discharged by the vessel and deposited in a suitable wood-yard. The libellant had immediate knowledge of such place of deposit. The circumstances of the case, as shown in evidence, prove acquiescence by the libellant in such deposit of the wood. Knowing where it was, and that the person who had it in custody had no title to it, he suffered it to remain with him and to be treated by him as his own property. The allegation that the master sold the wood and converted it to the use of the vessel, is one which must be satisfactorily established affirmatively by the libellant. It is not so established. It rests on the testimony of a single witness, and that is the testimony of the person with whom the wood was deposited, and who says that he bought the wood from the master. I cannot credit his story, and it is contradicted by the master. If I credit it, I must convict the master of felony, and the alleged purchaser of fraud, for the latter knew, from the circumstances of the case, that the wood did not and could not belong to the master.

The libel is dismissed, with costs.

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

Case No. 3,741.

DE FITCH et al. v. UNITED STATES.

[Hoff. Land Cas. 272.][1]

District Court, D. California. Dec. Term, 1857.

ABANDONED CLAIM.

This claim seems to have been abandoned.

Claim for a half league of land [the Rancho Parage del Arroyo] in San Francisco county, rejected by the board, and appealed by claimants [Josefa Carillo De Fitch and others]. The grant in this case purports to have been made July 26th, 1846. No evidence in support of the claim was offered to the board, except the deposition of Pablo de la Guerra to the effect that the signatures are genuine. The original grantees were Enrique Domingo Fitch and Francisco Guerrero. There is no evidence of the decease of either of these persons, or any connection or privity of estate between them and the present claimants. The claim was rejected by the board for this reason in November, 1854. No attempt has been made to supply the omission in this court. The claim in fact seems to have been abandoned. It is not necessary to consider the other objections which might be urged to its validity. The decree of the board must be affirmed.

E. O. Crosby, for appellants.
P. Della Torre, U. S. Atty., for appellees.

Case No. 3,742.

DE FLOREZ et al. v. RAYNOLDS et al.

[14 Blatchf. 505;[2] 3 Ban. & A. 292.]

Circuit Court, S. D. New York. June 18, 1878.

PATENTS — DECISION OF OFFICER AS TO PRELIMINARY OATH — NOVELTY — INFRINGEMENT —EVIDENCE—TIN CANS.

1. The invention described in the reissued letters patent granted to Moritz Pinner, November 1st, 1864, for an improvement in tin cans, (the original patent having been granted to Jean Bouvet, June 28th, 1864,) is not a different one from that described in the original patent, although, in the reissue, the device is described as applicable to different forms of construction of cans, and by different modes, from those in the original.

2. The decision of the patent office, in granting a patent, that the inventor had made the necessary preliminary statutory oath, is final.

[Cited in Holmes Burglar Alarm Tel. Co. v. Domestic, etc., Tel. Co., 42 Fed. 222.]

3. Soldering a flat strip of metal over a slot, by soldering the edges of the strip to those of the slot, is not different from soldering a round wire into a slot, by connecting the edges of the slot with solder over the wire.

4. The necessary utility, to uphold a patent, considered.

5. The requirement, in the patent, that the solder is to be torn, indicates that it must not be of a kind so hard that it cannot be torn.

6. A person who infringes a patent is liable for the infringement, although what he does may be an improvement upon the patented device.

[Cited in Phillips v. Carroll, 23 Fed. 250.]

7. The proof of infringement was the sale of a can by the defendant, purchased for and by the direction of the plaintiff. The can was sold in the usual course of the defendant's business. On all the evidence, it was held that the defendant was dealing in the infringing cans in such a manner that, except as to the one can referred to, he was liable to account, and ought to be restrained by injunction.

[This was a bill in equity by Rafael De Florez and another against Charles T. Raynolds and others.]

William K. Hall and Joseph J. Marrin, for plaintiffs.
James A. Whitney, for defendants.

WHEELER, District Judge. This cause has been heard on pleadings, proofs, and arguments. The orators are owners of a patent for an alleged improvement in tin preserve cans, originally issued to Jean Bouvet, in letters No. 43,378, June 28th, 1864, assigned to Moritz Pinner, and reissued to him in letters No. 1,804, November 1st, 1864, and have brought this bill to restrain an alleged infringement, and for an account. The defendants deny the validity of the patent, for the reasons that, as they claim, the invention described in the reissue is different from that covered by the original; that it cannot be adjudged, on the proofs, that Bouvet was an original and first inventor, as in ordinary cases, because it does not appear by the record that he made oath that he was such inventor, nor that Pinner made oath that he was, nor that he believed that he was, and that it is not proved, otherwise than by the production of the letters, that he was; that the invention lacks utility; that it cannot be put into use by the method described; that the method described is not the best one for putting it into use; that what is claimed to be an infringement is not so; and that, if it is, no foundation for an account is shown.

The principal grounds of difference between the invention described in the reissue and that in the original, specified, are, that, in the reissue, the device is described as applicable to different forms of construction of cans and metallic vessels, and by different modes, from those in the original. These grounds, to some extent, seem to exist. But, to the extent shown to exist, they do not make it appear that the invention described in each is not the same. That may be used in many different ways, and be applied to many different subjects, and still be precisely the same thing. While this strict identity remains, it is not understood that any departure, however wide, in the reissue, concerning the mode or the subjects of application, will invalidate it. No variance touching the invention itself has been point-

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

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

ed out or noticed. So, that ground of objection must fail.

Bouvet signed a petition for letters patent for the invention, in which he stated that he had invented it, but not that he believed himself to be the original and first inventor of it. The vice consul of the United States at Paris, in France, certified that he personally appeared before him and made oath that he verily believed himself to be such inventor, but Bouvet did not sign that statement. So, he did not sign and make oath, both, to any statement of such belief. It is claimed, that both are necessary to show the necessary oath. This may or may not be correct. It is also claimed, that, as it is because patents are granted only upon oath, that they are prima facie valid, in this country, if it is shown that proof of an oath was lacking in the granting, the prima facie effect is done away with, and the patent must fail, unless supported by proof to the court that the patentee was the original and first inventor. But, the law requires the oath to be made before the granting, as a condition precedent to it. Rev. St. § 4892. With the oath, and other requisites, it was within the province of the patent office to grant the patent; without it, not to grant it, nor any qualified one, to be valid only on proof of priority of invention. The certificate of the vice consul had some moral tendency, at least, to show the necessary oath. It was the duty of the officers of that department to decide whether it was sufficiently shown or not. It must be presumed to have been passed upon according to the requirements of the law; and the law does not leave the validity of the patent open to be inquired into by the courts, upon that ground, as it does for want of novelty and some other grounds expressly provided for. Rev. St. § 4920. The decision of that tribunal upon that question must be final, like that of others made competent by law to decide. The patent must be considered to be prima facie valid, like others.

The question of infringement, or not, is the most important one in the case, and the other remaining ones are so connected with that, that the disposition of that will dispose of most of them. The plaintiffs' device consists in providing for opening cans without cutting the material of which they are made, or melting the solder with which it is fastened, by making a slot around, or nearly around, the part to be removed to open them, placing a wire, round, flattened, or of other shape, with one end projecting outward, into the slot, and connecting the sides of it with solder over the wire, so that, by lifting the wire outward by the projecting end, it will divide the solder and leave the part to be removed free to be taken out or turned outward. The defendants' device consists in placing a narrow strip of metal, with a projecting end, over a similar slot, and soldering the edges of the strip to those of the slot, so that, by lifting the strip outward, by the projecting end, it will divide the solder at the edges, uncover the slot, and leave the part to be removed likewise free to be taken out or turned outward. A comparison of these two contrivances with each other shows, quite clearly, that they accomplish the opening of the cans, each by tearing the pieces of metal, by the projecting ends, through the solder. The differences most relied upon by the defendants are, that, by the orators' method, they are put into the slot, while, by theirs, they are put over it, and that the orators use wire, while they use strips, and that the orators solder over them, while they solder the edges of them, and not over them. But, the thing to be accomplished is to connect the two edges of the slot by solder, with something between that can be removed without melting the solder, and it can be of no consequence, whether the thing between is in the slot or above it. The mode of unison is the same. Nor can it be of any importance, whether the solder extends all the way over across the intermediate piece, or only over the edges of it. There appears to be no doubt, but that it would be an infringement to use the plaintiffs' device by soldering the sides of the wire to the edges of the slot, without joining the solder over it. And, if the defendants' strip of metal is the equivalent of the wire, it is equally an infringement to join the edges of that to the slot with solder, without soldering over it. It is urged, that the strip is not a mechanical equivalent of the wire, and that, if it is, it was not known to be such at the date of Bouvet's invention. In the original specification, the wire was to be of any desirable shape to fit into the vacant space. This would include a flattened wire, if that shape would be desirable, and then it would be a flat strip of metal. But, if round wire only had been referred to, a strip of metal would be its ready equivalent, for the purpose of occupying a vacant space, to be soldered to. The leading conception and the idea are the same in each case, and those embodied in Bouvet's invention lead readily and directly to the defendants' device.

The defendants have undertaken to show lack of utility, by having cans made, as they claim, according to the letter of the specification in Bouvet's patent, which cannot readily be opened as desired. But, these cans are not made according to the specification. The solder extends around under the wire, when, by the specification, it would only extend over it. It is said that they can be made without the solder extending around the wire on the under side, only with difficulty. That may be so; but, if they can be made at all without, the invention may be of some, though not of great, utility, enough to uphold the patent for it. And, then, the solder in those specimens is quite hard. It is true, that the patent

does not specify the kind of solder to be used. But, it proceeds, all the way, upon the requirement that the solder is to be torn, which would indicate, to a competent workman, that it must not be of a kind so hard that it cannot be torn. The invention covered by the orators' patent seems to be sufficiently useful to be patentable, and they have a patent for it. If the defendants infringe, they are liable for the infringement, although what they do may be an improvement upon the orators' method.

The infringement shown is by proof of the sale of a can by the defendants, purchased for and by the direction of the orators. It is claimed that the orators so participated in this transaction, that the defendants cannot be liable on account of it. This is, probably, true, and, if this was all the defendants have done, the orators would not be entitled to a decree. But, this can was purchased of the defendants in the usual course of their business, which is some evidence that they are dealing in those articles. This evidence they have not met and denied, but have rather supported. From it, it is found that they are dealing in these infringing cans in such a manner that, except as to this one purchased for the orators, they are liable to account, and to prevent which they should be restrained.

Let a decree be entered for an injunction and an account, accordingly.

[NOTE. An application for leave to review the decree entered pursuant to this opinion was denied. Case No. 3,743. Subsequently, on defendant's application, the decree was amended. See 8 Fed. 434.]

Case No. 3,743.

DE FLOREZ et al. v. RAYNOLDS et al.

[16 Blatchf. 397;[1] 4 Ban. & A. 331.]

Circuit Court, S. D. New York. June 9, 1879.

DECREES IN PATENT CASES — APPLICATION FOR REVIEW—NEW ANTICIPATION — SUFFICIENCY OF EXCUSES.

In a suit on a patent, after an interlocutory decree in favor of the plaintiff, the defendant applied to the court for leave to file a bill to review the proceedings and the decree, and to amend the answer by setting up two French patents against the novelty of the plaintiff's patent, on the ground that, if the French patents had been in evidence, the decision would have been different. The application set forth, (1.) that the defendant was ignorant of the existence of the French patents until after the proofs were closed; (2.) that he did not know of their relevancy and materiality until after the decree was made and after he had employed new counsel; (3.) that the defendant's ignorance, and the insufficiency of a prior application, made after the proofs were taken and before the hearing, to admit said patents in evidence, was solely due to the inexperience and lack of legal knowledge of his former counsel; (4.) that, in selecting such counsel, the defendant was mistaken: *Held*, that the excuses offered were not sufficient to warrant the granting of the application, and that it was not clear that the result would have been different if the French patents had been in evidence.

[Cited in Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333; Witters v. Sowles, 31 Fed. 10; Austin v. Riley, 55 Fed. 838. Followed in Adair v. Thayer, 7 Fed. 920.]

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

In equity.

W. K. Hall and J. J. Marrin, for plaintiffs.

Edmund Wetmore, for defendants.

BLATCHFORD, Circuit Judge. The bill in this case was filed in May, 1875. It named as defendants Charles T. Raynolds, Thomas B. Hidden, Leonard Richardson and Edward L. Molineux, as members of and composing the firm of C. T. Raynolds & Co. In August, 1875, Aquila Rich was added as a defendant, as a member of said firm. In June, 1875, the four defendants originally made such put in an answer to the bill, which set forth that Rich was a member of the firm. The answer was sworn to by the defendant Richardson, and the name of George F. Martens was appended to it as attorney for the defendants, above the signature and oath of Richardson. The answer set up that Bouvet was not the original and first inventor of the patented invention, and other defences. A replication was filed to the answer. The taking of proofs for the plaintiffs began January 10th, 1876. The defendants took proofs on several days in March and April, 1876, Mr. Martens conducting the examination a part of the time, and Mr. Whitney a part of the time. The plaintiffs put in rebutting evidence on three days in April, 1876. The case was then ready for hearing. In October, 1876, a motion was made on the part of the defendants for leave to put in evidence on their part a French patent granted to Martin de Lignac, dated May 19th, 1847, No. 5,630, and the certificates of addition forming part thereof, and a French patent granted to one Dupas, dated December 2d, 1847. This motion was founded on two affidavits, one made by Mr. Whitney, the defendants' counsel, and the other by the defendant Richardson, both of them sworn to the 2d of October, 1876. The affidavit of Mr. Whitney set forth, "that he is an attorney and counsellor at law residing and doing business in the city of New York; that he has been attorney in fact for the defendants in the above entitled action, from the inception of said action, and that, since about the month of May last, he has been counsel for said defendants; that he has been fully familiar with the progress of the said action, and with the nature of the testimony produced therein by, or available to, the said defendants, in said action; that neither he, nor, to the best of his knowledge and belief, any other person connected with said action in behalf of defendants, was aware that the French patent granted to Martin de Lignac, May 19th, 1847, No. 5,630, and the certificates of addition forming part thereof, contained

matter relevant or bearing upon the issues or subject matter of the above entitled action, but that, on the contrary, said defendant had no reason to suppose that said patent contained matter proper in evidence in said action, until after the testimony had all been taken, both for the complainants and the defendants in said action, but that, after the closing of such testimony, he became aware, that said French patent and the certificates of addition forming part thereof, did probably contain matter which should be produced in behalf of defendants in the above entitled action, from his connection with another and different matter, and with due diligence did proceed to obtain copies duly certified, of said French patent and the certificates of addition forming part thereof, in accordance with the usage of the French government in such cases; and that he hath also with due diligence obtained a translation of said copy, which now, in connection with the certified copy hereinbefore named. he lays before this court, praying that the above entitled action may be reopened for the admission of the aforesaid French patent and certificates of addition forming part thereof, as hereinbefore set forth, as evidence in behalf of the defendants in the above entitled action; and defendant also prays that said action may also be reopened for the admission in evidence of a certain French patent, granted to one Dupas, dated December 2d, 1847, which deponent is informed and believes describes 'boxes with a band or a wire bound around top; ring at the overlapping end for opening the box; tearing off band by pulling,' said patent last mentioned, as also the French patent to De Lignac, as deponent believes, being a direct anticipation of the United States patent granted to Jean Bouvet, on or about the 28th day of June, 1864, upon which the complaint in the above entitled action is based, but which said patent to Dupas deponent has not been able as yet to examine, or to obtain copies or translations of the same." The affidavit of Richardson set forth, "that he resides in the city of Brooklyn, and is a member of the firm of Charles T. Raynolds & Co., the defendants in the above entitled action, and that the said firm has confided to his charge all business affairs relating to said action; that he had no knowledge of the French patent granted to Martin de Lignac, dated May 19th, 1847, No. 5,630, or the certificates of addition forming part thereof, contained matter relevant to the subject matter or issues of the above entitled action; and that he, the said deponent, was first made aware of the existence of such French patent, its certificates of addition, &c., and the contents thereof, by James A. Whitney, counsel for defendants in the above entitled action, on the second day of October, 1876, and that, to the best of his knowledge and belief, no other member of said firm of C. T. Raynolds & Co. is aware of such patent or of the nature of the matter contained therein." This motion was argued by Mr. Jacques for the defendants, and was denied by this court. This cause was heard on the pleadings and the proofs, by Judge Wheeler, who decided it in favor of the plaintiffs (De Florez v. Raynolds [Case No. 3,742]), and, on the 29th of June, 1878, an interlocutory decree was entered in favor of the plaintiffs, awarding a perpetual injunction and an account of profits.

On the 16th of October, 1878, the defendants gave notice of an application to this court for leave to file a bill for the purpose of having the proceedings in this suit, and especially the decree therein, reviewed, reversed and set aside, and that all proceedings had therein and thereunder be vacated and set aside, and that no further proceedings be had therein or thereunder, and that the answer in this suit be amended by setting up the new matter set forth in a petition on which such application was founded. and that this suit be reheard. The said petition is sworn to by all the defendants except Rich. The petition sets forth that the said decree has been enrolled; that the injunction under it was served July 2d, 1878; that the accounting is being proceeded with; "that, since the time of pronouncing said decree, your petitioners have discovered new matter of consequence in the said cause," particularly the French patent of Dupas, dated December 2d, 1847, and the addition thereto dated March 14th, 1848, and the French patent to De Lignac, dated May 19th, 1847, and the addition thereto dated December 6th, 1847, and the second addition thereto dated February 19th, 1848; and that, if the said two French patents had been read in evidence and considered by the court, said decree would almost certainly not have been made, but it would have been decided either that the plaintiffs' patent was void for want of novelty, or that the defendants did not infringe it. The petition sets forth the reason for so stating, founded on a comparison of the contents of the Dupas and De Lignac patents with the plaintiffs' patent. It also states, that, when this suit was brought, the defendants referred the matter of defending the suit and doing all things requisite therefor, to the defendant Richardson, as the one among them the best qualified to take charge of such matter, he having the supervision of the cans made, used and sold by the defendants. It then proceeds: "And Leonard Richardson, one of your petitioners, says, and the other of your petitioners say, upon information and belief, that the said Richardson immediately consulted James A. Whitney, Esq., of New York City, formerly their attorney and counsel in the said suit, whom your petitioners were recommended to employ, to advise them and defend the suit, by one G. H. Churnock, the inventor and patentee of the can used by your petitioners, Mr. Whitney having solicited his said patent and others relating

to cans, and thereby acquired an extensive knowledge of the state of the art, and as a competent person to advise your petitioners and to defend the suit. And your petitioners, being informed by Mr. Richardson that he had been acquainted for a little time previous with Mr. Whitney, and that he was a counsellor in patent causes, and made a specialty of such matters, and supposing that he was a counsellor of this court, of extensive experience, your petitioners employed and directed Mr. Whitney to investigate the plaintiffs' claims, to advise them as to the validity thereof and the course to be pursued by your petitioners in the action, and to do whatever was requisite and proper for maintaining such defences as might be available to them. Your petitioners were not acquainted with the patent laws of the United States, and were not aware that a patent is not authorized to be issued for an invention which has been previously described in a foreign publication, or patented abroad, and relied, therefore, upon the professional knowledge of Mr. Whitney, the advice which he should give them and his acts in their behalf. After Mr. Whitney had, as they were informed and believed, investigated and considered the matters intrusted to him as aforesaid, they were advised by him that the plaintiffs' patent was void for an irregularity in the application for it, and also that the cans made by your petitioners were not an infringement of the plaintiffs' patent, both of which points the court, by its said decree, decided against your petitioners. Your petitioners have been, since the decree, informed that no search was made among the records of foreign patents, for anticipations of the plaintiffs' said reissued patent. They did not themselves make such a search, because they were not, any of them, aware that such search would have been usual or proper, or that if, in the course of such search, an anticipating foreign patent had been found, it would have availed them as a defence, nor were they aware how or where such a search could have been prosecuted, nor were they advised on the subject, and they had given Mr. Whitney authority to do whatever might be requisite and proper in their behalf. And your petitioners are informed by W. A. Jenner, Esq., one of their present counsel, whose affidavit is hereto annexed, that Mr. Whitney did not make, or cause to be made, a search for such foreign anticipating patents, because it did not occur to him to make such a search, and that he was not aware that such search was usual or proper. Your petitioners further show, that, on or about the 1st day of October, 1876, or shortly prior thereto, as they have been informed by Mr. Whitney, he, while engaged in other business, became aware of the existence of the said Dupas and De Lignac patents, and communicated such knowledge to Leonard Richardson, one of your petitioners, without, however, explaining to him their importance and relevancy to the issues. Thereupon Mr. Whitney made a motion in the said suit, upon the affidavits of himself and the said Richardson, to the end that the said Dupas and De Lignac patents might be admitted in evidence in the said suit, but did not explain in the said motion papers the reasons why the said French patents had not been set up in the answer, or excuse the negligence in not before ascertaining the facts as to said patents. Thereupon, and on or about the seventh day of October, 1876, the said motion was argued before the Honorable Samuel Blatchford, by David R. Jacques, Esq., who was employed by Mr. Whitney, and the said motion was denied without any opinion having been rendered by the court. Your petitioners further show, upon information and belief, that, upon the argument of the said cause before the Honorable Hoyt H. Wheeler, Mr. Whitney attempted, in the course of his argument, to refer to the said Dupas and De Lignac patents, as illustrations of the prior state of the art, but such reference was objected to by the counsel for the complainants, as irregular, on the ground that the same were not a part of the case, whereupon Mr. Whitney desisted from further reference thereto, and your petitioners, therefore, say, that the same were not considered by the court, and no reference to them is made in the opinion. And your petitioners further show, upon information and belief, that, at the time they employed Mr. Whitney as counsel, and that he accepted their employment, Mr. Whitney was not a counsellor of this court or admitted to practice in any court of this state, or qualified to appear therein, or to advise them as to their defence, or to take any steps on their behalf, and that he did not become a counsellor of this court, or of the New York supreme court, until on or about the 26th day of May, 1876; and that George F. Martens, Esq., who appeared as their solicitor, and, as such, signed their answer, was not employed by your petitioners, nor were they acquainted with him, nor did they counsel with him; and, therefore, your petitioners say, that, at the time they were advised as to their defence in the said suit, and the steps proper or necessary to be taken for the protection and maintenance of their interests and rights, and at the time their answer in the said suit was prepared and filed, they did not have the benefit of the advice of a counsellor of this court. Your petitioners further say, that the plaintiffs' attorney and counsel have asserted and still assert, that, in the accounting herein they expect to recover from your petitioners at least $50,000 as profits, and, if your petitioners should be compelled to pay such sum, they believe that they would be unable to recover back the same." The petition is accompanied by an affidavit made by the defendant Richardson, which says: "At the time the suit in the annexed petition mentioned was commenced, I was directed by

my co-defendants to employ counsel and take especial charge of our defence therein, as I was more familiar than the other defendants with our can manufacture, and the subject matter of the litigation. I had been acquainted for about —— years with Mr. Whitney, our former counsel in said suit, and, upon the suit being commenced, was recommended by Mr. G. H. Churnock, the patentee of the can used by us, to employ Mr. Whitney, because he was acquainted with the subject of tin cans as affected by patents, and would be a very competent person to take charge of our interests. Mr. Whitney had also obtained the patent for the can used by us, and, as I was informed, others relating to the same subject, and had thereby acquired an extensive knowledge of the art. I supposed, at that time, Mr. Whitney to be a counsellor at law, my impression being derived from the signs upon his office door, on which he advertised as a solicitor of patents, his possession of a library, and I supposed that he was a lawyer who made a specialty of matters relating to patents, and had acquired an extensive experience therein. I directed Mr. Whitney to investigate the claims of the plaintiffs and advise us upon the subject, and authorized him to do whatever was requisite and proper for maintaining any defences which we might have. After Mr. Whitney had examined the subject of the litigation, he advised me that the plaintiffs' patent was void for an irregularity in the application, and also that the cans made by the defendants did not infringe. When, about the 1st of October, 1876, Mr. Whitney informed me of his being referred by the patent office to the Dupas patent, and that he had a copy of the latter, he did not explain to me the importance of these patents or their scope, nor did I understand that they were anticipations of the plaintiffs' invention, or that it was important that the answer should be amended so as to set them up; and I did not become acquainted with the contents of said Dupas patent, nor understandingly of the De Lignac patent, until the same were brought out by search made by Messrs. Wetmore and Jenner, our present counsel, subsequent to the decree. I intrusted these matters entirely to Mr. Whitney. I supposed that whatever was proper to be done would be regularly done by him. My attention was not called to the fact that George F. Martens, Esq., was attorney of record for us, as I have not had any acquaintance with him, and did not employ him nor counsel with him." The affidavit of Mr. Jenner, referred to above, says: "That on the 7th day of September, 1878, he saw James A. Whitney, Esq., formerly attorney and counsel for the above named petitioners in the suit of Rafael de Florez et al. against them, for the purpose of ascertaining from Mr. Whitney why the Dupas and De Lignac patents, referred to in the annexed petition, were not mentioned in the answer in the said suit. Mr. Whitney informed me that he discovered the said patents on or about the 1st day of October, 1876, by accident, being referred to them by the commissioner of patents, in an application for a patent which he was then making to the patent office; that he, Mr. Whitney, did not make any search for French patents or other anticipations of the Pinner patent set forth in the complainants' bill in said suits or of the device used by the defendants, for the reason that he had no acquaintance with the French language, or so slight an acquaintance that he could read the said language only by the aid of a dictionary; that the said suit of De Florez against Raynolds was his first case, and he was not acquainted with the practice of examining at the Astor Library for foreign anticipations, and it did not occur to him to make any search or procure one to be made. Deponent further says, that he requested Mr. Whitney to make an affidavit of the facts so stated by him, having told him that he was preparing a petition for a review of the decree in said suit, and desired to use it in that connection, but Mr. Whitney refused to make any affidavit." There is also an affidavit of Mr. Richardson, stating that the petitioners did not employ Mr. Jacques as their counsel, and had no communication with him respecting their defence in the action; and that Mr. Jacques was employed by Mr. Whitney to argue said motion, because of Mr. Whitney's intention to leave the city, and did not at any time advise the petitioners regarding the suit.

This application is made on the ground that the French patents to Dupas and De Lignac are an answer to the charge of infringement, and that the decision of the court, on final hearing, would have been different, if the proofs had embraced those patents. In regard to the omission to introduce those patents into the proofs, it is contended, (1.) that the defendants were ignorant of the existence of those patents until after the proofs were closed; (2.) that they did not know of their relevancy and materiality until after the decree was made, and after they had employed their present counsel; (3.) that the ignorance of the defendants and the insufficiency of the application made in October, 1876, to admit said patents in evidence, were solely due to the inexperience and lack of legal knowledge of Mr. Whitney, so that the defendants were not advised as to the necessity of searching for those patents, nor as to their legal effect when found, and the rules of practice of the court were not followed in the application made for their admission in evidence; (4.) that, in the selection of Mr. Whitney, the defendants were misled and mistaken, and were ignorant of the fact that he was not authorized and qualified to perform the duty which he undertook.

This is not a case of newly discovered evidence. The gravamen of the application is the alleged laches and inexperience and incompetency of Mr. Whitney. If such

grounds were to be admitted as reasons for opening cases, there would never be an end of a suit, so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent, or experienced or learned. Questions of the kind have often been presented. In Ruggles v. Eddy [Case No. 12,118], application was made to amend an answer and contest the question of the infringement of a patent, which had been admitted, on the ground that, if the defendants' counsel had sufficiently studied the patent and examined the defendants' stoves, the admission of infringement would not have been made. The ground urged was, that the defendants' counsel had not been diligent enough. The court (Judge Woodruff) said: "I am constrained to hold the defendants concluded. Their case, as made by themselves, rests either upon their own want of due diligence, or the want of due intelligence on the part of their counsel. By this the complainant ought not to be so far prejudiced as, after decree, reference and report of the master, to be compelled to go again through the litigation, on a point distinctly presented, and proper to be met at the outset. Their case, as presented by the counsel whom they have employed for the purposes of this motion, and who regards it as clear that, as to most of the stoves which they had made, they had avoided the operation of the patent, seems, at first view, one of hardship; but, if that is so, the defendants have brought it upon themselves, by their own negligence, or by relying on a degree of vigilance, study and accuracy on the part of their several counsel, which they now think was inadequate to their protection. No case has been referred to which, in any degree, tends to sanction the latitude of indulgence which the defendants here seek. Cases are numerous tending in the other direction, of which India R. Co. v. Phelps [Id. 7,025], Hitchcock v. Tremaine [Id. 6,540], Prevost v. Gratz [Id. 11,406], and Livingston v. Hubbs, 3 Johns. Ch. 124, are examples." The same principle is found in Webster Loom Co. v. Higgins [Case No. 17,341], in this court. The case of Cutler v. Rice, 14 Pick. 494, was one of a different kind, and the decision was put on the ground of surprise.

The foregoing remarks are based on the assumption that the matter now sought to be introduced would, if it had been in the case, have led to a decision in favor of the defendants. It is well settled, that, in the case of an application, on the ground of newly discovered evidence, to vacate the decree in an equity suit on a patent, and allow the answer to be amended and the case to be retried, the application can be granted only "for the gravest reasons and the plainest proof of the sufficiency of the newly offered evidence to lead the court to a different result." Buerk v. Imhaeuser [Case No. 2,107]. An examination of the text of the Dupas and De Lignac patents, in connection with the affidavit of Mr. Copeland, leaves it in great doubt whether the plaintiffs' invention is anticipated or whether the defendants' structure is described by Dupas or De Lignac. This is my conclusion, after considering Mr. Renwick's affidavit. The original patent to Dupas refers to a way of opening a box by means of an iron wire, with a looped end, soldered on the cover of the box, but no sufficient or detailed description is given. The addition to the Dupas patent refers to a mode of closing the entire end of a box by applying a thin plate soldered on such end, with a wire ring attached to one end of such plate; and, as Mr. Copeland says, there is also indefinitely described, what appears to be a narrow band of thin metal, with a wire terminating in a ring, the band of metal and the wire being both of them soldered their entire length to the exterior of the box. Mr. Copeland says: "In my opinion, neither the patent nor the addition describes any device with language sufficiently explicit to enable that particular thing to be constructed by a mechanic, with the exception, perhaps, of the plate furnished with a ring and closing the entire end of the box. It does not, in my opinion, describe the invention of the complainants herein." There is no evidence in the case which outweighs this opinion of Mr. Copeland's, and my judgment concurs with his.

As to the original patent to De Lignac, it describes the insertion of a band of lead or pewter, easily cut, between the box and its cover. The first addition is of no importance to this case. The second addition is stated, in the title, to consist "of a tin band added to the lead hoop." The text says: "As it has occurred that boxes having lead or pewter hoops have been damaged by shocks with the tin portions of the boxes, I have been obliged to protect the pewter or lead by a more résistant metal. I have accomplished this in slightly modifying my style of hooped boxes, sufficiently, however, to render this addition to the patent already taken deemed necessary. I have replaced the lead and pewter hoops by a tin band of nearly the same width as the latter. Then I have plentifully soldered this band with lead on the under side to the outside of the cover and of the body of the box. Here the lead solder replaces the original hoop of the first patent, in borrowing from the tin which covers it its resistance to shock. I have been careful to keep the tin band about two centimetres larger than the outer circumference of the box, so that the end of the band, which I terminate by a ring or loop, covers about two centimetres of the part first soldered. When the box is closed, on grasping the ring and pulling, the lead will be easily torn, as, in the former instances, it was easily cut." Mr. Copeland's view of this language is, that it says that the band of lead to be protected may be replaced by a thick coating of lead solder applied to the under side of the tin band; which is then soldered to the cover and the box, so that, on

removing the tin band, the cover is still united to the box, as before, by the lead or other soft metal, which may be easily cut. Mr. Copeland says: "In my opinion, it neither describes nor suggests the invention of the complainants; and, in fact, in placing the lead or solder under the band, it does purposely what the complainants intended to avoid." To say the least, the description is ambiguous. It clearly describes a band of tin lined with lead to close a can. This is not the plaintiffs' structure, nor the defendants', as was held by Judge Wheeler.

The application is refused.

[NOTE. The decree here sought to be reviewed was subsequently amended, on defendants' application. 8 Fed. 434.]

Case No. 3,744.

In re DE FORD.

[18 N. B. R. (1879) 454.][1]

District Court, W. D. Tennessee.

INVOLUNTARY BANKRUPTCY—REGISTER'S POWERS.

The register has power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default.

By T. J. Latham, Register: To the Hon. E. S. Hammond, Judge of said Court: Julius Bamberger and others filed their compulsory petition in bankruptcy in this case July 1, 1878, on which day your honor directed that the order to show cause issue; which petition and order are herewith referred. The order was made returnable July 10, 1878, but subsequently, viz., July 3rd, another order was made, changing the return day to July 16, 1878. The order to show cause is on file, returned duly executed. On the 27th day of July, 1878, S. W. Hatchett, a register of this court, by order signed by him, adjudicated said C. H. De Ford a bankrupt, which order of adjudication is herewith referred. I am asked to certify to your honor the question as to whether the register had the power to make a valid adjudication, this being a case of compulsory bankruptcy. By section 4 of the bankrupt act [of 1867 (14 Stat. 519)], it is enacted that registers shall have power to make adjudication of bankruptcy, "provided, however, that nothing in this section contained shall empower a register to commit for contempt or to hear a disputed adjudication." Sup. Ct. Rule No. 4 provides that "upon the filing of a petition in case of voluntary bankruptcy, or as soon as any adjudication of bankruptcy is made upon a petition filed in case of involuntary bankruptcy, the petition shall be referred to one of the registers in such manner as the district court shall direct." While section 4 of the act seems to clearly imply that the register may make all uncontested adjudications, rule 4 seems to imply with equal clearness that he can have no power in case of involuntary bankruptcy until after adjudication. But it must be observed that rule 4 contemplates that a compulsory petition will necessarily be contested, which is far from being the case, and the supreme court clearly recognizes this fact, and provides accordingly in framing the forms and orders for enforcing the provisions of the act. At the foot of form 60, they say: "If default be made by the debtor to appear pursuant to the order upon a creditor's petition, the subsequent order may be made by a register in bankruptcy." Considering that this note is not only last in order of all the provisions on this point, but made with the attention of the supreme court directed particularly to the question now under discussion, it seems to me they could have had but one object, and that to free the question from doubt. The order of adjudication was directly before them, and they plainly provide that, in case of default by the debtor, that "order may be made by a register in bankruptcy." In this case the order of your honor was a clear recognition of the sufficiency of the charges in the petition. If proved, they would establish a case of bankruptcy. A denial would raise a contest which only the district judge could hear. Default was an admission that there was no defense, and that consequently he was a confessed bankrupt, and there could be no contest. Clearly the district judge could have made the adjudication at chambers, because of the default; and, for the same reason, if the supreme court form 60 means anything, it is that there being default the "order may be made by a register in bankruptcy." Such, too, has been the uniform practice of this court under the construction given by his honor, Judge Trigg.

L. and E. Lehman, for petitioning creditors.

HAMMOND, J. I concur with the register in the foregoing opinion. Section 4998, Rev. St., is a clear grant of power to the register to make adjudications of bankruptcy in cases unopposed. There is no more of an anomaly in the exercise of such a power by that officer than in its exercise in any other matter in an involuntary case where there is no contest. General order No. 4, and form No. 60, with its note 1, taken together, mean only that there shall be no reference in a contested case of involuntary bankruptcy until after adjudication. When the alleged bankrupt suffers a default, the court may refer the case to the register to enter the order of adjudication, because it appears that there is no opposition. As soon as a contest arises in any matter before the register, the act makes ample provision for its decision by the court. Rev. St. § 5009. My learned predecessor made a general order referring all involuntary cases, where default was made upon the order to show cause, to the register, and authorized him to make adjudication, it being then an

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uncontested matter. It was a convenient and necessary practice, as he was necessarily often absent at long intervals from each of the three judicial districts of which he had charge. I have no doubt of his power to make that order, and I shall not disturb it. The application to vacate the former order of adjudication is therefore denied. The clerk will certify this opinion to the register.

Case No. 3,745.

In re DE FOREST.

[9 N. B. R. 278.][1]

District Court, N. D. Ohio. 1874.

INVOLUNTARY BANKRUPTCY — CHARACTER OF PROCEEDING—JURY TRIAL—NEW TRIAL.

1. A proceeding to have a debtor adjudged bankrupt is a civil and not a criminal proceeding.

2. Where a debtor denied the alleged acts of bankruptcy and demanded a jury trial, and upon such trial the jury found the facts alleged in the petition were untrue, *held*, the district court has the same power over verdicts rendered in such cases as courts of common law, and may, on proper cause shown, set them aside and order a new trial.

[Cited in Re California Pac. R. Co., Case No. 2,315.]

In bankruptcy.

WELKER, District Judge. R. A. De Forest having filed his answer denying the acts of bankruptcy charged against him in the petition, demanded a trial thereof by a jury. At the last term of this court a trial was had before a jury and a verdict returned that the facts set forth in the said petition were not true; thereupon, on motion of petitioners, the verdict of the jury was set aside by the court and a new trial ordered for reasons alleged in the motion. De Forest then filed a motion asking the court to set aside its order setting aside the verdict as above stated, and asking that the proceedings in bankruptcy be dismissed, because the jury had decided in his favor on the issue submitted to them.

The question now submitted to me on the last motion is, whether the district court was authorized to set aside the verdict of the jury and grant a new trial when the verdict was so in favor of the alleged bankrupt. The forty-first section of the bankrupt law [of 1867 (14 Stat. 537)], among other things, provides: "That if upon such hearing or trial the debtor proves to the satisfaction of the court or jury, as the case may be, that the facts set forth in the petition are not true, * * * the proceedings shall be dismissed and the respondent shall recover costs." Under this section it is claimed the court has no discretion in setting the verdict aside, but if such finding be for the debtor a dismissal must follow the verdict as a matter of course. It will be found that the forty-second section also provides: "That if the facts set forth in the petition are found to be true, * * * the court shall adjudge the debtor to be a bankrupt, &c." The construction of these two sections, then, raises the question, whether the court has the authority to set aside the verdict of a jury in the trial of charges of bankruptcy, whether the finding be for the debtor or against him. The debtor, however, insists that the proceedings against him are quasi criminal, and a verdict of acquittal entitles him to a discharge. This claim is not tenable. It does not involve any charge of crime and is, like every other question of fact, to be decided by weight of evidence, and tried like any civil case. Questions of fraud do not necessarily involve crime, and none of the acts of bankruptcy set forth in the law constitute a charge of crime against a debtor.

The district court has criminal and civil jurisdiction triable by jury. Provisions are made in the statute for attendance of juries at the terms of the court, and it possesses full power in the trial of criminal and civil cases to try cases by juries, and if it were not for constitutional restrictions the same power could be exercised in criminal cases. In case of acquittal, the constitution protects a defendant from a second trial for the same offence. It is exercised in cases of conviction. Incidental to the trial of jury causes, all courts of record, unless specially restricted from its exercise, possess the power of revising verdicts of juries, and setting them aside, in all civil cases in its discretion. This court is not one created by the bankrupt law, with only such special powers as are conferred therein. It existed before its passage. The bankrupt law, therefore, in the first section, provides: "That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy; and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act." The forty-first section provides, also, that if the debtor, in writing, demands a jury trial, the court shall order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy. This implies a jury trial, like any other case, to ascertain the facts charged against the debtor, and subject to the control of the court in its discretion in the way adopted in the usual practice of courts. It is made the duty of the court to enter judgment on the return of verdicts of juries in all cases, but this has never been held to mean that the court has no authority to set aside verdicts in its discretion. There is no positive restriction in the bankrupt law, to the court exercising the authority and power, to set aside verdicts and grant new trials. Again, the district court exercises not only statutory, but common law powers within its jurisdiction; and where issues of fact are made entitling parties to a trial by jury, such trials are con-

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ducted according to the course of the common law. I am of the opinion, therefore, that the order made in district court by my predecessor, Sherman, District Judge, setting aside the verdict in this case, was within the authority and power of the court, and overrule the motion to set it aside.

[NOTE. For an opinion rendered in this case on a motion to attach witnesses for disobedience of subpoenas, see Case No. 4,173.]

Case No. 3,746.

DE FOREST et al. v. REDFIELD.

[4 Blatchf. 478.] [1]

Circuit Court, S. D. New York. Dec. 29, 1860.

CUSTOMS DUTIES — DEPRECIATED FOREIGN CURRENCY—REGULATIONS BY PRESIDENT—CONSULAR CERTIFICATE AS EVIDENCE.

1. Under the proviso to the 61st section of the act of March 2, 1799 (1 Stat. 673), which authorizes the president to make fit and proper regulations for estimating the duties on imported goods, in respect to which the cost shall be exhibited in a depreciated foreign currency, the president cannot fix an arbitrary value to such foreign currency, without regard to its intrinsic value, as compared with the money of the United States.

2. A consular certificate, attached to an invoice, as to the value of the foreign currency in which the invoice is made out, is only prima facie evidence of such value, and may be contradicted by the importer.

3. An importer being required, under the 36th section of the act of March 2, 1799 (1 Stat. 655), to specify, in his entry, the species of money in which the invoice is made out, and it being required, by the 2d section of the act of March 3, 1801 (2 Stat. 121), that the invoices of goods subject to ad valorem duties, shall be made out in the currency of the country from which the importation is made, and shall contain a statement of the actual cost in such currency, without respect to the value of the coins of the United States in such country, and it being provided by the 61st section of the act of March 2, 1799 (1 Stat. 673), that all denominations of foreign money not therein enumerated shall be estimated in value, as nearly as may be, according to the intrinsic value thereof compared with money of the United States, an importer, whose invoice and entry are correctly made out in a denomination of foreign money not enumerated in said 61st section, is entitled to have the value of his goods estimated, for the purposes of duties, according to the intrinsic value of such foreign money compared with the money of the United States.

This was an action against [Heman J. Redfield] the collector of the port of New York, to recover back an excess of duties, paid under protest, upon numerous importations of merchandise, during the years 1853, 1854, 1855, and 1856, from the island of Porto Rico, a part of the Spanish dominions. The plaintiffs [George B. De Forest and others] claimed that the merchandise was invoiced at the legalized nominal currency of Porto Rico, called Macuquino currency, and that $1.12½ of said currency was intrinsically worth only one of the dollars of the United States, of the weight of 412½ grains, and of the fineness of 90 grains of standard silver. It appeared, that the silver coins of Spanish America were formerly of various shapes, being melted and then flattened and clipped until they were of the requisite weights. They were then stamped with given devices, to show their values and the republics in which they were coined. These coins were neither round nor flat, and were easily lessened in weight by clipping, by which their intrinsic value was greatly reduced. In this clipped condition, they were many years ago, introduced into the Island of Porto Rico, and were known and circulated as Macuquino coins. In 1843, the royal authorities of that island, having assayed said coins, decreed that they should be a legal tender at the rate of 112½ Macuquino dollars to 100 United States or Spanish silver dollars then in existence, although the decree was not generally promulgated until 1853. From that time, all business transactions on the island were governed and controlled by that decree, until the close of the year 1857, when the authorities of Porto Rico called in from circulation all the genuine Macuquino coins, and paid for them at the aforesaid rates. After the United States, under the acts of February 21, 1853, and March 3, 1853 (10 Stat. 160, 188, 189), coined and issued half dollars and other smaller fractional parts of a dollar, of the standard fineness but less than the standard weight (206¼ grains) fixed for the half dollar by the act of January 18, 1837 (5 Stat. 137), reducing the weight to 192 grains for the half dollar, and in the same proportion for the lesser fractional parts of a dollar, these new coins were introduced into Porto Rico. Thereupon, the royal authorities of the island caused them to be assayed, and, under date of March 20th, 1854, issued a decree, that these new fractional coins of the United States should circulate and be received by the inhabitants and royal treasury of the island at the rate of 54-100 Macuquino currency to 48-100 of the United States or Spanish standard silver dollar. As soon as information of this decree was received at the United States treasury department, the secretary of the treasury issued the following circular: "General Instructions to Collectors and Other Officers of the Customs. Macuquino Currency. No. 22. Treasury Department, May 1st, 1854. Sir: Since the date of the general instructions No. 21, transmitted to you on the 10th ultimo, this department has been advised, by the consul of the United States at St. Johns, in the island of Porto Rico, that the authorities of that island had determined, on the 20th of March last, that, after that date, the value of the silver dollar of the United States, of the coinage of 1853 and after, should be at the rate of one hundred and eight cents Macuquino, or eight per cent. premium over the Macuquino currency of the said island of Porto Rico. You will be regulated ac-

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

cordingly, in your estimate of duties on invoices of goods from said island arriving at your port. James Guthrie, Secretary of the Treasury." Before the issuing of this circular, the defendant had exacted from the plaintiffs duties on merchandise invoiced in Macuquino currency, at the rate of 106¼ dollars of that currency to 100 United States dollars. These duties were paid under protest. After the issuing of the circular, the defendant exacted from the plaintiffs duties on goods thus invoiced, at the rate of 108 Macuquino to 100 United States dollars. These duties, also, were paid under protest.

John S. McCulloh, for plaintiffs.

James I. Roosevelt, Dist. Atty., for defendant.

SMALLEY, District Judge. Were the exactions which were made by the defendant before the issuing of the treasury circular of May 1st, 1854, and those made by him under the circular, in accordance with the law or in violation thereof?. The 36th section of the act of March 2, 1799 (1 Stat. 655), provides, that the owner, consignee or factor, &c., shall make entry in writing, &c., "particularly specifying the species of money in which the invoices thereof are made out." The 2d section of the act of March 3, 1801 (2 Stat. 121), provides, that "from and after the thirtieth day of June next, the invoices of all goods imported into the United States and subject to a duty ad valorem shall be made out in the currency of the place or country from whence the importation shall be made, and shall contain a true statement of the actual cost of such goods in such foreign currency or currencies, without any respect to the value of the coins of the United States * * * in such foreign place or country." The 61st section of the act of March 2, 1799 (1 Stat. 673), fixing the value of certain foreign coins and currencies, among which the Macuquino currency is not enumerated, provides, that "all other denominations of money shall be estimated in value, as nearly as may be, according to the intrinsic value thereof compared with money of the United States." It is conceded, that the plaintiffs' invoices were correctly made out according to the 36th section of the act of March 2, 1799, and the 2d section of the act of March 3, 1801; and the evidence shows conclusively and without contradiction, that the difference between the intrinsic value of the Macuquino currency and the money of the United States, was 12½ per cent., as claimed by the plaintiffs, instead of 6¼ or 8 per cent., as insisted upon by the defendant.

It is quite evident, that the treasury circular of May 1, 1854, originated in a misconception of the royal decree of Porto Rico, of March 20, 1854, and was issued, as appears from the circular itself, on the supposition that said decree extended to the standard silver dollar of the United States, when, in point of fact. it was expressly limited to the half dollar and the lesser fractional parts thereof. But is argued, that, under the proviso to the 61st section of the act of 1799, the circular of the secretary of the treasury, of May 1, 1854, with the regulation therein promulgated, is conclusive upon the rights of the plaintiffs, although it may have originated in error, and although the statements in it are unfounded. That proviso reads, "that it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government." The plaintiffs' counsel insist, that the phrase "depreciated currency" is not applicable to the Macuquino coins, but that such coins were what is known as "scaled" or "lightened" coins, as defined in the 3d section of the act of April 21, 1806 (2 Stat. 405). But, in the view I take of the case, it is unnecessary to consider how that term should be construed.

We have already seen, that the law makes it imperative upon the importer to make, in his invoice, a true statement of the actual cost of the goods in the currency of the country from which they are imported, without respect to the coin of the United States. Was it intended, by conferring the power to establish "fit and proper regulations," to enable the president, through the secretary of the treasury, or otherwise, to fix an arbitrary value to such foreign coin, without regard to its intrinsic value, as compared with the money of the United States? If so, he might, at his pleasure, increase or diminish the rate of duties, accordingly as he might happen to favor a high or low tariff, or as he might think the exigencies of the occasion required, without regard to the legislative branch of the government. If he could thereby change the intrinsic value of foreign coin, 6¼ or 4 per cent., he might 15 per cent. It would, in effect, enable him to make or remake the revenue laws, not only without consulting, but in defiance of, the senate and the house of representatives. No such construction ever has been, or can be, given to the words in question, by any judicial tribunal. They were intended to authorize the president to make "fit and proper regulations," to sustain and carry out the revenue laws relating to foreign coins, and not to violate them. It can only be regarded as matter of surprise, that, under our federal constitution, any high officer of the government should have claimed for the president any such extraordinary power, and it is not understood that the then secretary of the treasury did.

It is also argued, that some of the consular certificates attached to the plaintiffs' in-

voices, state the value of the Macuquino currency to be 6¼ and others 8 per cent. less than the United States dollar, and that such certificates are conclusive as to such value and cannot be contradicted. Many of the certificates, however, state the difference to be 12½ per cent., as the fact really was. It appears, from the proofs, that such certificates as stated it at less than 12½ per cent. were framed and issued under orders from the treasury department. This position of the defendant is not tenable. The law makes it necessary, that the importer should procure the certificate of the United States consul or commercial agent at the foreign port from which the goods are shipped, not only as to the value of the foreign currency in which the invoice is made out, but as to the value of the goods in such port, and without it they cannot be entered at the custom-house at all; but it has never been considered that such certificate was more than prima facie evidence, either as to the value of the currency or of the merchandise. It would be singular, indeed, if the certificate of such inferior officers of the government in relation to questions of fact could be held to conclude the party against whom they were presented from showing the truth.

Again, it is contended, that the protests, or at least some of them, are too vague and indefinite, and do not set out distinctly that the intrinsic relation between the Macuquino currency and the United States standard dollar is as 112½ to 100. This objection is not sustained by the papers. In all that have been submitted to the court, the difference between the two currencies is clearly and specifically stated. The plaintiffs must have judgment for the excess of duties exacted and paid under protest, being the difference between the Macuquino currency as estimated and insisted upon by the defendant, and the intrinsic value thereof as before stated.

DE GARCIA v. UNITED STATES. See Case No. 15,186.

[illegible]NER (BABCOCK v.). See Case No. 698.

Case No. 3,747.

In re DE GIACOMO.

[12 Blatchf. 391;[1] 21 Int. Rev. Rec. 205.]

Circuit Court, S. D. New York. Dec. 24, 1874.

EXTRADITION TREATIES — EX POST FACTO OPERATION—RIGHT OF ASYLUM—CONSTITUTIONAL LAW.

1. Under the convention for the extradition of fugitives from justice, between the United States and Italy, concluded March 23, 1868 (15 Stat. 629), a person may be surrendered for the crime of murder committed in Italy before the making of the convention.

2. The various extradition treaties between the United States and foreign countries examined, with a view of showing that some, on their face, exclude surrender for prior crimes, while others do not, and that prior crimes are included, where the language is capable of a construction including them, unless they are expressly excluded.

3. A person who has committed a crime abroad, and come to the United States before the making of an extradition treaty covering a surrender for such crime, has not thereby acquired a right of asylum of which he cannot be deprived

4. The restrictions in article 4 and article 5 of the amendments to the constitution of the United States, have no relation to the subject of extradition, as regulated by the convention with Italy and by statute.

5. Such convention, construed as covering the case of a crime committed before the treaty was made, is not open to the objection that it is a bill of attainder, or an ex post facto law, within the meaning of article 1, section 9, of the constitution of the United States.

Francis C. Bowen, for the prisoner.

Frederic R. Coudert, for the Italian government.

BLATCHFORD, District Judge. This is a writ of habeas corpus to inquire into the legality of the arrest and detention of Angelo de Giacomo, surnamed Ciccariello. He is in the custody of the marshal of the United States for this district, under a warrant issued by a United States commissioner, on the 25th of September, 1874, in proceedings for extradition instituted under the provisions of a convention for the surrender of criminals, concluded between the United States and the King of Italy on the 23d of March, 1868 (15 Stat. 629). This convention is one of those which requires that a requisition, accompanied by certain specified papers, must first be made by the proper diplomatic agent of the foreign power, for the surrender of the fugitive from justice, and that then the president of the United States may "issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination." The proceedings before the commissioner are before this court, on a writ of certiorari. On the application of the minister from Italy, the department of state of the United States, on the 9th of September, 1874, issued the usual mandate or warrant, authorizing proceedings to be had for the apprehension of the prisoner for the crime of murder, and for his examination as a fugitive from justice from Italy, with a view to his surrender pursuant to said convention. On the complaint of the consul general of Italy at New York, sworn to on the 24th of September, 1874, the commissioner issued the warrant on which the prisoner is held by the marshal. The complaint sets forth, that the prisoner, on the 29th of August, 1867, wilfully and maliciously killed one Airgliano, at or near San Simeone, in the kingdom of Italy, and refers for particulars to a warrant for the arrest of the prisoner, issued at Naples on the 17th of March, 1869, which accompanies the complaint. The prisoner

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was arrested, and was brought before the commissioner on the 24th of October, 1874. The proceedings were adjourned from time to time until the 17th of November. On that day, the counsel for the prisoner objected before the commissioner, to any further proceeding in the case, on the ground that there was no treaty for extradition between the United States and Italy at the time the alleged offence was committed. The objection was overruled by the commissioner. Thereupon the proceedings were adjourned to a future day, and this writ of habeas corpus was granted. The only question raised upon it is the one so raised before the commissioner.

The warrant of arrest issued at Naples shows that the prisoner was indicted for the offence in question, at Naples, on the 19th of March, 1869, and that the warrant of arrest was issued on the same day. It does not appear that he has been convicted. The mandate from the department of state sets forth that the prisoner is "charged with the crime of murder." The convention provides (article 5) that, "if the person whose extradition may be asked for shall have been convicted of a crime," an authenticated copy of the sentence of the court in which he may have been convicted shall accompany the requisition; that, when he "shall have been merely charged with crime," an authenticated "copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition;" and that then the president may "issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination."

The preamble of the convention sets forth, that it is expedient "that persons convicted of, or charged with, the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up." The 1st article sets forth that the two governments "agree to deliver up persons who, having been convicted of, or charged with, the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other." The 2d article provides, that "persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes," including murder. The 3d article provides, that "the provisions of this treaty shall not apply to any crime or offence of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime committed previously to that for which his or their surrender is asked."

The expression, "persons convicted of, or charged with, the crimes hereinafter specified, and being fugitives from justice," and the expression, "persons who, having been convicted of, or charged with, the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other," and the expression, "persons * * * who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes," are expressions which are as properly used to include crimes already committed as crimes to be afterwards committed. That the convention applies to future crimes, even if it does not apply to past crimes, and that the expressions just quoted apply to future crimes, even if they do not apply to past crimes, are propositions not disputed and not to be disputed. In other words, it is not, and could not, be contended, that the convention applies only to crimes committed before the making of the convention. The preamble to the convention says, that it is made "with a view to the better administration of justice, and to the prevention of crimes" within the "respective territories and jurisdiction" of the two governments. Justice may be better administered, and crime may be prevented, as consequent upon extraditing a person for a crime committed before the making of the treaty, quite as much as consequent upon extraditing a person for a crime committed after the making of the treaty. The expression, "a person charged with murder and being a fugitive from justice," does not require that the person shall commit the murder in the future. If he has committed the murder and fled from justice before the making of the treaty, and is, after the making of the treaty, charged with the crime, he answers the description of "a person charged with murder and being a fugitive from justice." The expression, "a person who, having been charged with murder, committed in Italy, shall seek an asylum, or be found, within the United States," does not require that the person shall commit the murder in the future. If he has committed the murder in Italy before the making of the treaty, and is, after the making of the treaty, charged with the crime, and found within the United States, he answers the description of "a person who, having been charged with murder, committed in Italy, shall be found within the United States." And, even though he fled from justice before the making of the treaty, and, before the making of the treaty, came into the United States with a view of obtaining an asylum there, and remained there permanently, after coming there, until found there after the making of the treaty, he was at all times a fugitive from justice, after he first fled, and continued to be such down to the time of his being found within the United States, and is such when so

found, and he was at all times the seeker of an asylum within the United States, after his first arrival there, down to the time of his being found there, and is such when so found. He does not seek such asylum only at the moment when he first reaches our shores. The word "asylum" includes not only place, but, also, shelter, security, protection; and a fugitive seeks such asylum at all times when he claims the use of the territories of the United States as an asylum. The expression, "a person shall be delivered up, who shall be charged with murder," and the expression, "a person shall be delivered up, who shall have been charged with murder," do not require that the person shall commit the murder in the future. If he has committed the murder in Italy before the making of the treaty, and is, after the making of the treaty, charged with the crime, he answers the description of "a person who shall be charged with murder," and the description of "a person who shall have been charged with murder."

Another mode of stating the question leads to the same result. If the contracting parties had been advised, when making the treaty, that this particular murder had been committed by the prisoner, and that he had fled to the United States, but had neither been convicted of the crime nor formally charged with it, and had designed to use language, in the treaty, which would provide for the extradition of the prisoner, when he should be formally charged with the crime, and his surrender be asked for, they could not have used language more aptly chosen to carry out such design, than that which is used in the treaty, the same language being intended to cover also future crimes. Hence, in the preamble, they say they design to deliver up persons convicted of or charged with murder, which includes persons thereafter to be convicted and persons thereafter to be formally charged, but covers crimes committed before the making of the treaty. Then, in the 1st article, they agree to deliver up persons who, having been convicted of or charged with murder, committed within the jurisdiction of one government, shall be found within the territories of the other, which includes persons thereafter to be convicted and thereafter to be formally charged, but covers crimes committed before the making of the treaty. Then, in the 2d article, they contract that persons shall be delivered up, who shall have been convicted of or be charged with murder, which includes persons thereafter to be convicted and thereafter to be formally charged, but covers crimes committed before the making of the treaty.

The foregoing considerations lead to the conclusion, that there is nothing in this convention which excludes extradition for crimes previously committed, and nothing inconsistent with a construction of the convention, that such crimes are included within the convention, and were intended to be so included. But, the correctness of this conclusion becomes more apparent, when, on a comparison of this convention with other extradition treaties made by the United States, it is seen that there are some of such treaties made before and some since the convention in question, which take pains, in their language, to exclude prior crimes, while this convention contains no such exclusion. As has been already seen, there is, in this convention, a limitation article, the 3d, which declares what the provisions of the treaty shall not apply to. It enumerates political offences, and then provides that a person surrendered shall not be tried for any ordinary crime committed prior to that for which his surrender is asked. A limitation article as to offences first makes its appearance in the treaty with France, of November 9, 1843 (8 Stat. 582). Article 5 of that treaty provides, that its provisions shall not be applied to any crimes committed anterior to its date, nor to any political offence. In the treaty with the Swiss Confederation, of November 25, 1850 (11 Stat. 594), article 17 provides, that the treaty shall not apply to offences committed before its date, nor to those of a political character. In the treaty with the Two Sicilies, of October 1, 1855 (Id. 653), article 24 contains like provisions. In the treaty with Austria, of July 3, 1856 (Id. 692), article 1 contains like provisions. In the treaty with Baden, of January 30, 1857 (Id. 715), the limitation as to offences (article 1) only excludes those of a political character, and does not exclude offences committed before the date of the treaty. In the treaty with Sweden and Norway, of March 21, 1860 (12 Stat. 1126), the exclusion (article 5) is only of political offences. In the treaty with Venezuela, of August 27, 1860 (12 Stat. 1160), the limitation article (article 30) returns to the practice of excluding offences committed before the date of the treaty, as well as political offences. In the treaty with Mexico, of December 11, 1861 (Id. 1202), the limitation article (article 6) excludes political offences, and the return of fugitive slaves, and crimes committed by slaves, and crimes committed anterior to the date of the exchange of the ratifications of the treaty, which date was more than five months after the date of the treaty. In the treaty with Hayti, of November 3d, 1864 (13 Stat. 728), the exclusion (article 41) is of offences committed before the date of the treaty, and of those of a political character. In the treaty with the Dominican republic, of February 8th, 1867 (15 Stat. 489), the exclusion (article 30) is in like terms. Next in order of time follows the treaty now in question, with Italy. After excluding, in three treaties made in 1850, 1855 and 1856, offences committed before the date of the treaty, two treaties were made, in 1857 and 1860, which did not exclude such offences, and then four treaties were made, in 1860, 1861, 1864 and 1867, excluding such offences,

and then this treaty with Italy was made, in 1868, not excluding such offences. Here is evidence of intention and design in excluding past crimes from some treaties and not excluding them from others, showing that the understanding was that past crimes would be included, where the language was capable of a construction including them, unless they were expressly excluded. In all the treaties which do not expressly exclude them, the language is as apt and proper to include them as in this treaty with Italy. Passing now to treaties subsequent to that with Italy, the limitation article (article 3) of the treaty with Nicaragua, of June 25, 1870 (17 Stat. 817), is precisely like that of the treaty with Italy. So, also, is the limitation article (article 3) of the treaty with Salvador, of May 23d, 1870 (18 Stat. "Treaties," 11). But, the like article (article 3) in the treaty with Peru, of September 12, 1870 (18 Stat. "Treaties," 37), excludes offences of a political character, and crimes committed anterior to the date of the exchange of the ratifications of the treaty. So, also, the like article (article 12) in the treaty with the Orange Free State of December 22, 1871 (18 Stat. "Treaties," 67), excludes offences committed before the date of the treaty and political offences. But the like article (article 3) in the treaty with Ecuador, of June 28, 1872 (18 Stat. "Treaties," 74), excludes only political offences. We then come to the latest published extradition treaty made by the United States, that with Belgium, made March 19, 1874 (18 Stat. "Treaties," 120). It is substantially identical with the treaty with Italy, and drafted on the same model, except in the following particular. The 3d article of it is in these words: "The provisions of this treaty shall not apply to any crime or offence of a political character, nor to any crime or offence committed prior to the date of this treaty, except the crimes of murder and arson; and the person or person delivered up for the crimes enumerated in the preceding article, shall in no case be tried for any crime committed previously to that for which his or their surrender is asked." There is, in this article, a clear indication that the contracting parties understood that crimes committed prior to the making of the treaty would be within its terms, unless they should be expressly excluded by it from its operation; that, having in view and in mind crimes which might have been committed before the date of the treaty, they proceeded to declare that they should be excepted from the operation of the treaty; and that then, having in view and in mind the crimes or murder and arson which might have been committed before the date of the treaty, they proceeded to declare that those two crimes, committed before the date of the treaty, should not be excepted from its operation, by virtue of the general clause excepting crimes committed prior to the date of the treaty. The language of this 3d article of the treaty with Belgium, in connection with the language of the prior treaties, is evidence of the fact, that, in all of the treaties, the language being such as to admit of the including of prior crimes, the general rule is understood by the contracting parties to be, that prior crimes are included, and that where they are not included it is because they are expressly excepted in the treaty.

It is not shown by the papers before the court, whether the prisoner came into the United States before or after the treaty with Italy became the law of the land. But, on the view which must be taken of the case, that point is immaterial. The counsel for the prisoner, on the assumption that the prisoner came into the United States before the treaty became effective, contends that, before the treaty became effective, the prisoner had acquired a right of asylum in the United States, based on the fact of his having sought and acquired an asylum there; that such right was and is a substantial personal right; and that such right cannot be taken away from the prisoner, by the government of the United States, under a treaty which comes into operation after such right has been acquired. It is further contended, that the United States have no right to make a treaty for extradition which shall apply to crimes committed before the ratification of the treaty; and that such a treaty is open to all the objections which apply to the enactment of an ex post facto law.

While the question of the duty or obligation of one government, independently of treaty stipulations, to surrender to another government a fugitive from justice, so as to make a refusal to surrender a valid ground of complaint or cause of war, has been much discussed, and while it may not be regarded as settled, that the executive of the United States has the right to surrender a fugitive from justice, independently of statute or treaty, as against a claim of the fugitive that no such right of surrender exists, yet it is not to be questioned, that a treaty stipulation, on the part of the government of the United States, to surrender fugitives from justice, is a lawful stipulation, and within the authority of the treaty making power. The principle on which treaties for extradition are made is, that no nation ought to permit its territory to be made a place of refuge for criminals. This principle is violated by the mere fact of finding the fugitive in such territory, as a place of refuge, without reference to the particular time when the crime was committed. Therefore, if there be no affirmative restriction existing, which limits the power of the government to make a treaty which covers the surrender of fugitives for crimes committed before the making of the treaty, and if the treaty, in the present case, covers the case of the prisoner, no ground exists for his discharge.

It am not prepared to admit that a person who has committed a crime abroad and fled to this country has acquired a right of asy-

lum here, as a personal right, so that, under a subsequent law, whether treaty or statute, he cannot be delivered up as a fugitive from justice. If there be any want of power to deliver him up, it must be found in a constitutional restriction upon the power to make a treaty, or to pass a statute, covering extradition for a crime previously committed. The general right to make treaties for extradition, and to deliver up fugitives thereunder, cannot be denied to the government of the United States. The restriction, in article 4 of the amendments to the constitution, against violating the right of the people to be secure in their persons against unreasonable seizures, and the restriction, in article 5 of such amendments, against depriving a person of liberty without due process of law, are restrictions which, if applicable at all to the subject of extradition, would extend to cases of extradition for crimes committed after the making of a treaty as fully as to crimes committed before. But they have no relation to the subject of extradition for crime, as regulated by the treaty in question and the statutes of the United States passed on the subject.

But, the constitution contains (article 1, § 9) a provision, that "no bill of attainder or ex post facto law shall be passed," and a provision (article 1, § 10) that no state shall pass any bill of attainder or ex post facto law. Assuming that a treaty must be regarded as a law, within the inhibition, is this treaty, in the particular in question, an ex post facto law or a bill of attainder? A bill of attainder is defined to be "a legislative act which inflicts punishment without a judicial trial," where the legislative body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the forms or safeguards of a trial, and fixes the punishment. Cummings v. Missouri, 4 Wall. [71 U. S.] 323. This treaty does none of these things, nor do any of the statutes for carrying the treaty into effect contain provisions which fall within such definition.

By an ex post facto law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required. Cummings v. Missouri, 4 Wall. [71 U. S.] 326. It is said, in Calder v. Bull, 3 Dall. [3 U. S.] 390, that the meaning of the prohibition against passing ex post facto laws is, that laws shall not be passed "after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it." It is also there said: "Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law." It is contended, in the present case, that the effect of extradition for a crime committed before the making of the treaty is to punish the party, by depriving him of his liberty, and sending him out of the United States, and delivering him up to a foreign authority, and to punish him for remaining and being found in the United States, when he could not have been thus punished at the time the treaty was made. But, the fact of extradition cannot properly be regarded as "punishment," within the sense of that word, as used when considering the subject of ex post facto laws. There is no offence against the United States, and no trial for any such offence, and no punishment for any such offence. It is true, that extradition relates only to criminal offences, but it relates only to criminal offences committed abroad; and no treaty for extradition, nor any statute passed in relation to extradition, purports to punish the fugitive for the offence. Both treaties and statutes assume that he is to be tried upon the charge, if not already convicted. With the question of punishment, or its kind or degree, they have no concern. They merely declare that the protection of this government shall not be interposed between the fugitive and the laws which he has violated, and that, if he flees hither for such protection, the injured government may take him hence, and shall be aided therein. This government neither assumes nor exercises any power to punish for the crime. The fact that the fugitive is deprived of his liberty does not make such deprivation a punishment. Loss or suffering to the party supposed to be punished is not punishment, in a legal sense, unless the punishment is inflicted as a penalty for the commission of crime. If extradition for an anterior crime is punishment, extradition for a subsequent crime is equally punishment. But, it is an incorrect idea of punishment, to say that the United States, in every case of extradition, is punishing the party for the offence committed abroad, by extraditing him. It being assumed that the prisoner committed a murder abroad, and then fled to the United States, and that the treaty was afterwards made, it is not a punishment of the prisoner to deprive him of his liberty, under the treaty, and surrender him to the foreign authority, so as to make the treaty obnoxious to the objection that it is an ex post facto law. As this question is a novel and important one, and has arisen in the circuit court, I have thought it proper to submit these views to the circuit judge, and am authorized to say that he concurs in them. The writs must be discharged, and the prisoner be remanded to the custody of the marshal under the warrant issued by the commissioner.

Case No. 3,748.

DE GRAFF v. The MOFFAT.

[Cited in Moore v. Newbury, Case No. 9,772. Nowhere reported; opinion not now accessible.]

DEGRAND (MITCHELL v.). See Case No. 9,661.

DE GRIEFF (UNITED STATES v.). See Case No. 14,936.

DE GROOT (LANGDON v.). See Case No. 8,059.

DE HARO (UNITED STATES v.). See Cases Nos. 14,937-14,941.

DE HAVEN (TOWN v.). See Case No. 14,113.

DE HERRERA v. The ACME. See Case No. 27.

DEKLYNE (WRIGHT v.). See Case No. 18,076.

DELAFIELD (SANDS v.). See Case No. 12,304.

Case No. 3,749.

DELANCEY v. M'KEEN.

[1 Wash. C. C. 354.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

LANDS FORFEITED BY ATTAINDER — RIGHTS OF MARRIED WOMEN — ATTAINDER OF HUSBAND — POSSESSION AS EVIDENCE OF OWNERSHIP — LIMITATIONS — RECORDING OF DEEDS.

1. If an equitable estate has been forfeited under the attainder laws, the legal estate will not be allowed to be set up, to bar a fair purchaser of the equitable interest.

2. Mere possession of land, or offering to sell it, or even partial sales actually made, are not, alone, sufficient to authorize a presumption of ownership; for these may be the acts of a tortious possessor, or of an agent.

3. The payment of part of the purchase money of land, the property of a feme covert, in her presence, cannot prejudice her right to claim the land, after the termination of the coverture.

4. The title of a feme covert to land, cannot be affected by acts of commission, short of those required by law to bind her; much less, by acts of omission. Even, if by any acts during coverture, other than those which by the provisions of law may clearly bind her, a feme covert may have bound herself, they are proper for the decision of a court of equity, and not of law.

5. In order to protect the rights of a feme covert, in property forfeited as belonging to her husband, on his attainder, it is not necessary that the husband should put in a claim to the same, for her; as, by the supplement to the attainder laws of Pennsylvania, passed 29th March, 1779, the rights of persons claiming paramount to the attainder, are saved.

6. Where a party has been absent from the country during a war, the period of the war should not be construed against him, in computing the length of time in which an ejectment can be brought.

7. A deed, acknowledged before a judge of the supreme court, and recorded in one county, may not require to be recorded in every county in which the lands conveyed by it, were supposed to be situated.

Ejectment, to recover 100 acres of land, in Northampton county. The plaintiff deduced a regular title from the proprietary to William Allen, for 1853 acres of land; and read the copy of a deed from William Allen, in 1771, to James Delancey, and the plaintiff his wife, in fee, for 1000 acres, part of the above 1853 acres; of which 1000 acres, the land in question, are parcel. The deed from William Allen, was acknowledged in 1773, before a justice of the supreme court of Pennsylvania, and was recorded in the county of Philadelphia. The deed produced, was an exemplification from the register's office of that county. The plaintiff survived her husband. The above deed contained a grant of lands lying in the county of Philadelphia, and of lots in the city of Philadelphia, as well as of the above 1000 acres. The defendant set up a title, under a deed from the commissioners of forfeited estates, who sold the same as part of the estate of Andrew Allen, a son of William Allen, and brother of the plaintiff, who was regularly attainted; his estates were sold in September, 1778, and the deed executed in 1779. It was contended, that, from certain acts of ownership, exercised over the land of Delancey and wife, by Andrew Allen, there was ground to presume, that he had purchased the 1000 acres from them; but no evidence of such a deed, or of any contract for the sale of it, was offered. Evidence was given, that in 1775, Andrew Allen, entered into contracts for the sale of parcels of this land; that he offered the whole 1853 acres for sale, and that he received the consideration money for such parcels, as he had sold. That these payments were made, sometimes to himself, sometimes to William Allen for his use; and that at one time, Mrs. Delancey, the plaintiff, was in the room, when a sum for a part of the land was paid by the purchaser. It appeared in evidence, that James Delancey left the United States in the fall or winter of 1775; that he passed first into Canada, from whence he went to England, where he always afterwards lived, until the year 1799 or 1800, when he died. That Mrs. Delancey went to England early in 1799. That in 1788, Mr. Delancey brought an ejectment for the land in question, and a verdict and judgment was given against him. The defendant offered in evidence, a claim put in by Wilson, (who purchased from Andrew Allen part of the 1853 acres,) in the supreme court, to so much of the land of Andrew Allen, which had been confiscated, as he had purchased, which was allowed.

BY THE COURT. This is nothing more than an attempt, in this suit, to give evidence of a judgment rendered in a case between different parties, for a different piece of land, and different title. The evidence was refused.

Mr. M'Kean and Mr. Dallas relied, that the acts of ownership, exercised by Andrew Allen, were sufficiently proved; and that upon such a case as this, the jury might presume a conveyance from Delancey and wife, to Andrew Allen, or at any rate, an agreement to sell,

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

which would be sufficient to pass an equitable estate to Andrew Allen; upon which, as well as upon legal estates, the act of confiscation operated. Upon this point, they read 1 Eq. Cas. Abr. 305, 306; Skin. 77; Cowp. 108; 9 Mod. 37. The objection to the plaintiff's title: 1st. That the exemplification of the deed, from William Allen to Delancey and wife, was not evidence, since it was not acknowledged or proved before a justice of peace, in the county where the lands lie, or recorded in that county. That this point was to be determined under the act of 1715, which establishes in each county an office of record, for recording deeds, and declares "that all deeds, for lands in this province, may be recorded in said office, the same being proved by two of the witnesses present at the execution, or acknowledged before one of the justices of the peace of the proper county, or city, where the lands lie." Though the words of the second section are general, yet it will appear, by the whole law taken together, that the deed must be recorded in the county where the lands lie. The fourth section provides for the proving deeds, made out of the province, and says; that they, being certified in the manner mentioned in this section, and recorded in the county where the lands lie, shall be as valid, as if the same had been made, acknowledged, or proved, in the proper county where the lands lie. The fifth section declares that all deeds made, and proved or acknowledged, and recorded as aforesaid, shall have the same force, for giving possession and seisin, and making title, as deeds of feoffment with livery, or deeds enrolled in England, are there; and that copies or exemplifications of deeds, so enrolled and certified, under the seal of the proper officer, shall be allowed, in all courts, as good evidence, and as valid as the originals. The 8th section declares, "that no deed or mortgage, or defeasible deed in the nature of mortgage, shall be good to pass any freehold, or interest, for life, or years; unless the same be acknowledged, or proved and recorded, within six months after the date thereof, where such lands lie, as herein before directed for other deeds." Secondly. It was contended, that under the 14th section of the confiscation act (2 Carey & B. Ed. c. 773, p. 173), the plaintiff and her husband were bound by the attainder, confiscation, and sale of Andrew Allen's land; as they did not interpose their claim before the justices of the supreme court, within the time mentioned in that law.

The plaintiff's counsel insisted, that to open the door for a presumption of a deed to Andrew Allen, some proof should first be given, that there was a deed (1 P. Wms. 652); and that, at any rate, there was not the slightest ground of presumption in this case. That, if the jury presumed any thing, they must presume a deed from Delancey and wife, and her privy examination regularly taken under the act of 1770. That it was not enough to presume a contract for a sale, which could only pass an equitable estate, which would not be a title to be noticed in this court. As to the copy of the deed from William Allen to Delancey, it was the universal understanding in this state, that all deeds made before the year 1775,[2] (when another law was passed on the subject,) might be proved before a justice of the supreme court, who is considered as a justice of peace in every county, and might be recorded in any county in the state. That as to the 8th section, it had lately been determined in the supreme court, that it was to be construed to extend only to mortgages, or deeds in nature thereof. As to the necessity of a claim, the supplement passed 29th March, 1779, to the act which has been read, saves the rights of all persons claiming, paramount to the person attainted, as was determined in this court, in the case of Hylton v. Brown [Case No. 6,980], and in Gordon's Cases [Cases Nos. 5,610, 5,611].

Lewis and Tilghman, for plaintiff.
M'Kean and Dallas, for defendant.

WASHINGTON, Circuit Justice. The single question is, whether a conveyance of the land, to which Delancey and wife were entitled, under the deed from William Allen to them, was made by Delancey and wife, to him, any time, prior to the attainder of Andrew Allen? If such conveyance was made, then the title of the defendant is unquestionable; since no person will doubt the power of this state to attaint Andrew Allen, and to confiscate his property, and none have been suggested, as to the regularity of the proceedings against him, and of the sales which took place under them. If, on the other hand, no such conveyance was made, then the confiscation is out of the question, and the plaintiff must recover, if his evidence is regular; because, having shown an undisputed title to the land sued for, no objection is pretended, except that the land was sold to those, under whom defendant claims, as part of the confiscated lands of Andrew Allen. But, if Andrew Al-

[2] This law directs, that all deeds executed in this state, of lands here, shall be acknowledged or proved by one or more of the subscribing witnesses, before one of the judges of the supreme court, or one of the justices of the common pleas of the county where the lands lie, and recorded in the office for recording deeds in the county where the lands lie, within six months after they are executed; and, if not proved and recorded as aforesaid, they are void against any subsequent purchaser or mortgagee, for a valuable consideration—unless they be recorded as aforesaid, before the proving and recording the deed under which such subsequent purchaser or mortgagee shall claim. If made out of this state, and acknowledged; or proved, as directed by former laws; or proved by one or more of the subscribing witnesses, before any supreme judge of this state, they shall be recorded in the office in the county where the land lies, within twelve months from the execution.—Note, this law, as well as that of 1715, in this last case, does not mention the acknowledgment of the grantor.

len had no title to the land, previous to his attainder, the confiscation of his property, because of his offences, could not affect an innocent person, and thus deprive Mr. and Mrs. Delancey of their land; who, claiming paramount to the attainder, were not bound to interpose a claim, in order to save their rights.

In support of the defendant's pretensions, that the land in question was conveyed, by Delancey and wife, to Andrew Allen, no deed, no contract of any kind, no receipt for any part of the consideration money, have been produced; and no witness examined, to prove that he ever saw, or heard, that any such existed. In this situation, without having any ground to stand upon, you are called upon to presume such a conveyance; that is, a deed executed by Delancey and wife, made valid by the privy examination and consent of the plaintiff. Cases sometimes occur, where certain things necessary to the perfection of a deed, or even a deed itself, may be presumed. Where a feoffment has been made, or a copyhold disposed of; livery of seisin, and a surrender, after long and quiet possession, may be presumed. So, too, if a man continues for a great length of time to enjoy land, and to treat it as his own, to the knowledge, and with the apparent approbation of the true owner, he knowing of his rights; I am inclined to think, that a deed or contract for a sale, might be presumed, if a proper foundation is first laid, on which to build the presumption. But, in all such cases, the acts of ownership, thus exercised, should not be of an equivocal nature, and should be with the full knowledge of the supposed grantor. The mere possession and receiving of the profits, or offers to sell, or partial sales actually made, may as well be the acts of a tortious possessor, or of an agent, as of one claiming title under the real owner. Consider what would be the consequences of a doctrine more relaxed than that just laid down. A man living here, and owning lands at a distance, might, after some years, find them in possession of another; and the demand of restitution would be met by this novel, extravagant, and pernicious doctrine, that the claimant had sold and conveyed his right to him in possession. No deed, contract, receipt for money, or testimony, that any, or either of those evidences of title ever existed, would be produced; but, he would rely upon a tortious possession, short of the limitation, which by law may give a right, as evidence of a conveyance. Of what consequence is it, that men should, in the transfer of real estates, require regular conveyances, executed with all due solemnities, or that they should so cautiously endeavour to preserve these muniments of title; if all may be prostrated by the destroying and pernicious doctrine, which we have heard maintained in this cause.

What, then, is the present case? Delancey and wife, being the acknowledged owners of the land in question, (provided the copy of the deed to them should be determined to be proper to be given in evidence,) lived in the province of New-York. In 1775, the equivocal acts of ownership, exercised over this land by Andrew Allen, took place. It does not appear, that they were ever communicated to, or known by Delancey, or even by his wife. In the autumn or winter of the same year, he left the United States, passed into Canada, from whence he went to England, and never again returned to this country. The war commenced before his departure, and continued until 1783; and, in 1788, as soon as it is probable he could obtain information of his affairs in this country, he brought an ejectment for the land in dispute, which failed. The acts of ownership by Andrew Allen, set up as a title for the defendant, prove nothing against the plaintiff; and, as to a long and quiet possession, what was it? I should reject the whole period of the war in the computation of time, as applying to a case of presumption, where one of the parties was beyond sea; and, of course, there was not a quiet possession for more than five or six years. But, what has all this to do with the lessor of the plaintiff, who laboured under two disabilities, coverture, and absence beyond seas, until the year 1780, or 1781, when the joint estate vested in her by survivorship? It is said, that Mrs. Delancey was present, when part of the purchase money was paid for a parcel of the land; and, on this ground, it is contended, that her silence ought to postpone her to a fair, bona fide, purchaser. To this, there are three answers: First, that, being a feme covert, she could not bind herself by acts of commission, short of those directed by law to bind her, much less by acts of omission; second, that it does not appear, she knew on what account the money was paid; and, third, that, if all these points were against her, the principle contended for is inapplicable to matters of title, in a court of common law.

As to the point made, that Delancey and wife should have put in their claim, it is sufficient to answer; that, the rights of persons claiming paramount to the attainder, are saved by the supplement to the act. Whether the copy of William Penn's deed, ought to have been read in evidence, is a question of considerable difficulty. I am satisfied, that, under the true construction of the act of 1715, the recording of a deed in the county in which the land lies, is not necessary to its validity; and, I am also clear, that the eighth section only extends to mortgages, or deeds in nature thereof. The latter words prove this; for all the first mentioned deeds are directed to be recorded where the lands lie, as herein before directed for other deeds; which would be nonsense, if the word deeds, in the first part of the

section, meant all deeds. But, whether a copy of a deed, from an office where it was recorded, different from that in which the lands lie, can be offered in evidence, is another question. There is no adjudged case. The counsel concerned, are equally positive, on both sides, as to the practice and general understanding. Three gentlemen of the bar, not concerned, say, they have always understood, that the deed must be proved, in the county in which the lands lie. Under these circumstances, I must recommend to the jury to find, subject to the opinion of the court, upon this question.

The jury found for the plaintiff, subject to the opinion of the court, whether the exemplification of the above deed could be read in evidence.

[NOTE. At the October term, 1806, it was decided that the deed was properly admitted in evidence—Case No. 3,750; and this decision was subsequently affirmed by the supreme court of the United States.—McKeen v. Delancey, 5 Cranch (9 U. S.) 22.]

Case No. 3,750.

DELANCEY v. McKEEN.

[1 Wash. C. C. 525.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.[2]

DEEDS OF LANDS IN SEVERAL COUNTIES — PLACE OF RECORDING—COPY AS EVIDENCE.

1. According to the true construction of the law of Pennsylvania of 1715 [1 Laws Pa. 94], relative to the recording of deeds, the deed should be recorded in the county where the land lies. But if a deed conveys lands lying in different counties, the law does not require that it shall be recorded in each county. It is sufficient if it be recorded in one of the counties, and then the exemplification of it will be evidence as to any of the lands conveyed. And this construction of the law is supported by the practice and tacit approbation of the bench and bar, as clearly proved to the court.

[Cited in Beals v. Hale, 4 How. (45 U. S.) 54.]

2. Until the act of [March 18] 1775 [1 Laws Pa. 424] there was no absolute necessity to record deeds at all, except mortgages; and this law was passed for the protection of creditors and subsequent purchasers.

3. The provisions of the act of 1715, were merely intended for the preservation and safe keeping of deeds.

4. Quere, whether if, against subsequent purchasers, without notice, the exemplification of a deed for lands in more than one county, and which had not been recorded in the county where the lands were situated, would be evidence.

This case came on, upon a point reserved at the last court, whether the exemplification of the deed, from Allen to Delancey, executed in 1771, proved before a justice of the supreme court in 1772, and recorded in the county of Philadelphia in 1773, could be offered in evidence. [See Case No. 3,749.]

Myers Fisher, Esq., was examined; who proved, that he had been, for many years before the revolutionary war, a practitioner at the bar; had since acted as a scrivener and counsel; and that it was always common, where deeds contained lands in Philadelphia county, and in other parts of the state, to record them in Philadelphia county; and that the exemplification of them, was always considered and read as evidence, on trials for lands in other counties. That it was always considered as good evidence, and admitted without objection. That he never knew or heard a doubt suggested upon the subject. Mr. Lewis, an old practitioner, produced many deeds of this sort, recorded in the same way; and mentioned from his briefs a great variety of cases, where exemplifications, similar to the present, were read in evidence, without objection. Judge Peters fully confirmed this practice; and they all concurred in stating, that, to their knowledge, the propriety of admitting such evidence had never been questioned. They all concurred likewise in stating, that these deeds were sometimes proved before a justice of the supreme court, and sometimes before a justice of the common pleas; and either was considered equally valid. In a suit brought by the husband of the plaintiff, for this very land, shortly after the peace, in the state court, before Chief Justice M'Kean, this very exemplification was read in evidence, without objection. Governor M'Kean gave a certificate, that he had always considered that it was necessary to record the deed in the county where the land lay, and that this was the general opinion; but he never knew the point made, nor does he state how the case would be, if part of the lands lay in the county where the deed was recorded.

M'Kean and Dallas, for defendant, argued, that the clear exposition of the act of 1715, was, that the deed should be recorded where the land lies; and that if any doubts on this point could exist, the 8th section is conclusive. That if not proved before a justice of peace, in the county where the land lies, (whereas this was proved before a judge of the supreme court, who is not a justice in the county,) it could not be recorded any where; and if not recorded in the county where the land lies, the officer is not authorized to record it, and of course his exemplification is not evidence; but the original deed should have been proved in the common form; or a copy, proved to have been examined, might have answered. Gilb. Ev. 24–26; Peake, Ev. 24; 1 Burrows, 445; 6 Bac. Abr. 382.

Tilghman and Lewis, for the plaintiff, relied upon the general practice, as to proving and recording deeds; and the unvarying opinion respecting the exemplification of them.

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

[2] [Affirmed in M'Keen v. Delancy, 5 Cranch (9 U. S.) 22.]

They read [Davey v. Turner] 1 Dall. [1 U. S.] 11, and [Lloyd v. Taylor] Id. 17, to show, where a common error, as to the conveyance, by a feme covert, of her real estate, had been sanctioned. They contended, that the deed being proved in one of the counties where some of the lands lay, the exemplification is evidence, by the fourth section of the law; whatever might be the construction of the law, if none of the lands conveyed by the deed, had been situated in the county of Philadelphia.

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

WASHINGTON, Circuit Justice. I have no doubt, but that, according to the true construction of the act of 1715, the deed should be recorded in the county where the land lies; but, if the deed conveyed lands lying in different counties, the law does not require the deed to be recorded in each county, either by the words or the intention of it, so far as this intention can be discovered. Until the act of 1775, there was no absolute necessity to record any deeds, mortgages excepted; and the provision made by the law of 1715, for recording them, was merely made with a view to their preservation. This is manifest from the act of 1775; which was passed, with a view to protect the rights of subsequent purchasers against secret deeds, which the grantees might have kept in their pockets for years; without the possibility of subsequent purchasers, and creditors, knowing of their existence. If this were the case, then there was no absolute necessity, at that time, to require that a deed, if recorded, should be recorded in every county in which there were lands conveyed by the deed; because, the recording the deed in any one county, was bettering the situation of subsequent purchasers; and the law had no view to them at all, that I can perceive.

It is, however, perfectly clear, that the deed might legally be recorded in the office of the county where part of the lands lay; and that quoad that law, the exemplification was evidence. The public officer was instructed and commanded to record and to exemplify it. If, from being the exemplification of a sworn public officer, it was evidence as to the lands lying in his county, upon what principle should it not be evidence as to lands conveyed by the same deed, lying in other counties, proved in the same way, and recorded by the same officer? I can see no reason why his exemplification should give credit and authenticity to his copy in one case, and not in the other. But, as soon as the attention of the legislature was drawn to the frauds, practised by secret conveyances upon subsequent purchasers and creditors, and the necessity was perceived of giving notoriety to all conveyances; it naturally followed, that such deeds should be recorded, as a matter of compulsion, or that the grantee should be postponed to fair, bona fide, and subsequent purchasers. But, what influences my opinion more than any thing else, is, that courts, lawyers, conveyancers, and all others, seemed to have concurred in the opinion, that the exemplifications of deeds, like the present, recorded as this was, were evidence. If one solitary decision, affirming this practice, had taken place, all would have agreed, that it would bind us; and yet the uniformity of practice and of conduct, respecting such deeds, operates more powerfully with me; because they amount to a contemporaneous exposition of the act of 1715, fortified by a subsequent, unvarying usage. The practice is incorporated with the land titles of this state; and, if it be an error, it is common and uniform; and a decision now against the practice, would be mischievous in the extreme. I am therefore of opinion, that the exemplification of this deed was properly admitted, and that judgment should be for plaintiff.

Mr. Dallas asked if the court meant to say, that if a deed for lands lying in different counties, made and recorded since 1775, in one county, would be good as to lands lying in other counties; and, that an exemplification would be evidence, as to such lands; because the act of 1775 does not in terms require such deed to be recorded in each county.

BY THE COURT. We give no opinion on this point; it is not before us. There might, in the case supposed, be a distinction between the validity of such a deed against subsequent purchasers of lands lying in a county, where the deed was not recorded, and the exemplification of the deed. But we give no opinion on the point.

Judgment for plaintiff.

NOTE. This case was carried by writ of error to the supreme court, and the following points were decided by that court:

1st. Under the act of Pennsylvania, of 1775, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it having been the long established practice, before the year 1775, to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania, and, although the act of 1715 does not authorize such a practice, yet, as it has prevailed, it is to be considered as a correct construction of the statute.

2d. In construing the statutes of a state, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and, in this case, the court could not doubt, that the courts of Pennsylvania consider a justice of the supreme court, within the description of the act.

3d. Under the same act, when a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county in which the land lies; but if several tracts be conveyed, neither the letter nor the spirit of the act, requires that the deed shall be recorded in each county. If the deed was recorded in the county where a part of the lands lies, an exemplification is good evidence, as to the lands in the other counties. Under the act of 1715, the validity of the deed is not affected by omitting to record it. Though not recorded, it is still binding, to every intent and purpose whatsoever. The only legal

effect, produced by recording it, is its preservation, by making a copy equal to the original. [M'Keen v. Delancy], 5 Cranch [9 U. S.] 22-31; Whart. Dig. 246.

DELANO (BURT v.). See Case No. 2,211.

Case No. 3,751.

DELANO v. The GALLATIN.

[1 Woods, 642.][1]

Circuit Court, S. D. Alabama. Dec. Term, 1871.

GENERAL AVERAGE.

1. To make a case for general average, the property saved and the property sacrificed must be exposed to a common danger; the sacrifice of a part must contribute to the saving of the residue, and the sacrifice must be voluntary.

2. There can be no contribution for damage caused by the common danger to which both ship and cargo are exposed.

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

Edward S. Dargan, for libellants.

Peter Hamilton and T. A. Hamilton, for claimants.

WOODS, Circuit Judge. The facts were these: On the 17th of April, 1868, the ship Albert Gallatin was lying at anchor in the bay of Mobile, about twenty-five miles below the city of Mobile. She was loading with a cargo for Liverpool, and had on board 3,511 bales of cotton, most of which had been stowed, but 209 bales were still on deck, and 160 other bales were on the way to the ship on a lighter, but had not yet reached her. Delano, the master, was not on board, but the ship was in charge of Russell, the first mate. On the morning of April 17, between 2 and 3 o'clock, the ship was struck by lightning, and, immediately after, her cargo was discovered to be on fire in the after hold, under the cabin floor. The crew immediately commenced pumping water on the fire through the cabin floor, but without effect, to put it out. The mate then ordered holes to be cut in the ship's side to sink her. This effort had not succeeded when salving vessels came alongside, and the ship and cargo were surrendered by the mate to the salvors. They at once cut large holes in the ship's side, and, by means of steam pumps, forced large quantities of water into the hold, by which, after some hours, the ship was sunk. A large part of her hull still remained out of water. The salvors continued to pump water upon the ship, and succeeded in extinguishing the fire. The salvors then removed the cotton, pumped out the ship, towed her to an anchorage, when she was raised by the salvors without expense to her owners. The ship and cargo were libelled for salvage. [See Case No. 140.] The ship was delivered to the master on stipulation. He sold her, and the owners received the proceeds of the sale, and contributed nothing to pay the decrees for salvage. All costs and expenses of the litigation, the handling of the property, and the salvage decrees were paid exclusively from the proceeds of the sale of the cargo, the ship contributing nothing. The cargo was insured by underwriters, who have paid the losses, and waived abandonment of the cargo, and they have received the proceeds of the sale of the cargo, after paying the salvage decrees, costs, etc. There remains, however, in the hands of A. J. Ingersoll & Co., defendants, the sum of $19,257.47, being the proceeds of a portion of the cargo which was sold after the proceeds of a former sale had been seized by order of the admiralty court. After the sale of the ship, she was taken to New Orleans and repaired. It appears from the evidence of the witnesses, Vallette and Marcy, that the repairs put on her, made necessary by reason of the fire, exceeded $33,000, while the damage produced by the scuttling and sinking was a mere trifle. Marcy testified that "the scuttling produced no injury to the ship. Twenty-five dollars would have covered all the repairs caused by the scuttling." This witness is corroborated in this evidence by Joseph Loach. Vallette testifies: "I saw no damage from the scuttling of the ship. The damage was caused by the fire. It took a little over two months to repair the vessel. These repairs were made for the damage done by the fire, and not by the submersion." These are the facts as admitted by the parties, or clearly established by the proof.

The libel alleges that the ship was sunk and greatly damaged, voluntarily, for the sole purpose of saving the cargo, and that thereby the cargo was saved; that the sinking of the ship was the loss of the freight and ship, in all amounting to the value of $70,000, and that the libellants are entitled to participate in the average to that extent, subject to a deduction of the net proceeds of the sale of the ship after the fire. This case is governed by the well known rules of admiralty law, and it appears to me admits of easy solution. According to the decision of the supreme court in Columbian Assur. Co. v. Ashby, 13 Pet. [38 U. S.] 331, pronounced by Mr. Justice Story, the leading limitations and conditions to justify a general contribution are: "First, that the ship and cargo should be placed in a common imminent peril; second, that there should be a voluntary sacrifice of property to avert that peril; and thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained." See, also, Barnard v. Adams, 10 How. [51 U. S.] 303; 1 Pars. Mar. Law, 288, where the rule is sufficiently stated, thus: "There must be a common danger, a voluntary loss, and a saving of the imperilled property by that loss."

In the case now on trial, the proof shows a

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

common danger to ship and cargo and a saving of the imperilled property by the scuttling of the ship, and that the scuttling was voluntary. I think it is clear that this is a case for general contribution for any loss occasioned by the voluntary sacrifice of ship to save the cargo, and that the fact that the loss of both ship and cargo was inevitable unless saved by the sacrifice, does not change the rule. Columbian Assur. Co. v. Ashby and Barnard v. Adams, supra. But I am just as clear that the damage for which general average is claimed must be the result of the voluntary sacrifice of a part to save a part. If the damage to the Albert Gallatin had resulted from the scuttling and sinking of the ship, the cargo should bear its proportion of the loss. But libellant claims general average for the loss resulting from the fire as well as from the sinking of the ship. There are, it appears to me, insuperable obstacles to the allowance of this claim. The loss by fire was the result of the common peril to which both ship and cargo were subjected. The damage from fire was not a contribution of a part to save a part. It was not a voluntary sacrifice any more than the loss of 204 bales of the cotton, part of the cargo by fire, was a voluntary sacrifice. The loss to the ship by fire did not contribute to the saving of the cargo. In a word, this loss has none of the elements which would entitle the owners of the ship to contribution. If libellants could show that they voluntarily sacrificed their ship by fire to save the cargo, and that the cargo was thereby saved, they would bring the case within the rule. Can we say that by the burning of the ship the safety of the cargo "was presently and successfully attained?" The only salvation for either ship or cargo was in submerging both. Whatever loss was occasioned by this ought to be borne by all the imperilled property pro rata.

The loss of the freight was complete before the ship was scuttled. At 7 o'clock, a. m., of April 19, not only was the cargo on fire, but the ship was on fire, the flames breaking through the cabin floor. (Evidence of Captain Lee.) The shop was in no worse condition for proceeding on her voyage after than before the scuttling, so far as damage from the sinking of the ship is concerned. Notwithstanding the submersion of the ship, she continued to burn and sustained such damage from the fire that she only brought $6,000, and it required $33,000 to repair the ravages of the fire. Can we then reasonably attribute the loss of the freight to the scuttling of the ship, when notwithstanding the scuttling the fire left nothing but the hulk of the ship; left her totally disabled, even if she had been afloat, from pursuing her voyage and earning her freight.

The evidence already cited, and there is nothing in the record to contradict it, shows that the ship sustained no damage, or but a very trifling one, from being scuttled. The cost of raising her and towing her to a safe anchorage, was paid by the cargo. The expense of repairing the damage caused by the scuttling, is placed at $25. This is so inconsiderable a trifle, as to be unworthy the consideration of the court. "De minimis non curat lex."

I think there is no case here for general contribution. The libel will therefore be dismissed, with costs.

Case No. 3,752.

DELANO v. The J. WALLS, JR.

[N. Y. Times, May 4, 1862.]

MARITIME LIENS—SUPPLIES—EQUITABLE CONSIGNMENT OF SHIP.

[1. A vessel was allowed to leave New York on the promise of a part owner to pay petitioner for supplies. Thereafter, to prevent an attachment in Baltimore, the part owner agreed to consign the vessel to petitioner, at New York; but, though brought to that port, the agreed consignment of the vessel was not made, but she was libeled and sold under proceedings by other parties. *Held* that, though the vessel itself could not have been libeled for the debt, the court, under the circumstances, would decree the payment of petitioner's debt out of the surplus of the proceeds of the sale. The Santa Anna, Case No. 12,325; The Stephen Allen, Id. 13,361; Zane v. The President, Id. 18,201,—followed.]

[2. In view of the circumstances under which the vessel left New York, and the fact that she was not attached at Baltimore, by reason of the promise of consignment, the court, for the purpose of giving petitioner a lien on the proceeds, will consider that in equity the vessel was consigned.]

This case came up on a petition of [Joseph W.] Delano to be paid out of the proceeds of the vessel [the bark J. Walls, Jr.] the amount of a bill of supplies furnished her by him. The supplies were furnished her in this port on the application of her master. About the time the delivery of them was to be completed, Johnson, the present claimant, purchased a third of the vessel. On such purchase the vendor and Johnson expressly agreed with Delano that, as part of the consideration of that purchase, Johnson should pay Delano's bill, amounting to over $1,000; and thereupon, Delano furnished the supplies, and allowed the vessel to depart from the state without filing any lien. Johnson did not pay the bill, and the bark afterward being in Baltimore, Delano took measures to have her attached there, to collect his debt. Johnson, learning this, wrote to him, telling him that he had bought another third of the vessel, and would be responsible for the debt; that he had gone to Baltimore to take the vessel and bring her to New York, and as soon as he could get her he would consign her to him (Delano) in New York, and requesting him not to attach the vessel. Delano, accordingly, did not have her attached, and she was brought to New York by Johnson, but he did not consign her to Delano, and on her arrival here, she was immediately libeled by Peter Rice, et al., and

was thereafter sold under the process issued in that suit for $4,400. A decree was made in favor of the libelants in that suit for $1,700 and costs, which was paid out of the proceeds. The balance remaining was, on a consent signed by the proctor for one claimant, Douglass, by some means not sufficiently explained, immediately obtained by the present claimant, Johnson, and his proctor. Delano's petition was filed on the same day, and a stipulation was afterwards given to secure to him whatever sum the court should award him.

Benedict, Burr & Benedict, for petitioner.
Beebe, Dean & Donohue, for claimants.

HELD BY THE COURT: It is conceded that the petitioner could not have maintained his libel directly against the vessel for the recovery of his debt, but it is insisted, upon the authority of the case of The Santa Anna [Case No. 12,325], decided in this district in 1829, and the case of The Stephen Allen [Id. 13,361], decided here in 1830, as well as of the case of Zane v. The President [Id. 18,201], decided by Judge Washington in 1824, that this court should direct the payment of the petitioner's debt out of the surplus in court. If these cases are to be followed, the petitioner must have a decree. I am aware that the tendency of the later decisions is to restrict the remedy of petitioners against the surplus to cases in which they had a maritime lien or privilege upon the vessel, or else a lien thereon which could have been enforced in a court of common law or equity. And yet I am not prepared, while sitting temporarily in this district, to disregard the cases arising here, which, though decided in 1829 and 1830, were published with the sanction of the learned judge of this district in 1855, and may be considered as authoritative expositions of the rule then acted upon in this district. This case is, I think, a stronger case than that of The Santa Anna [supra], and a decree for the petitioner will be fully sustained by the case of The Stephen Allen [supra].

There is also another ground upon which a decree for the petitioner may be based. The letter of Johnson from Baltimore may be properly regarded as a promise to consign the vessel to the petitioner; in other words, to put her in his possession or under his control for the security of his debt. Such is the fair construction of the promise, for so Johnson evidently intended it should be understood. Considering the circumstances under which she was permitted to leave the state, upon the faith of Johnson's agreement to pay, and the fact that she might have been attached for the debt in Baltimore, and was not, in consequence of this letter, I shall hold that this agreement was founded upon sufficient consideration, and was in equity an appropriation of the specific property to the payment or security of the petitioner's debt. The bark, on her arrival in New York, should have been placed in his possession under the agreement; and, as between the parties to the agreement, the court is authorized to consider what, under the contract and in equity, should have been done, as having been actually done, for the purpose of giving the petitioner a lien on the surplus funds in court. If Johnson had carried out his contract, instead of fraudulently violating it, the petitioner could have held the vessel in his possession as a security for his debt, and, in a court of equity, he is not to be permitted to take advantage of his own misconduct. The petitioner must have a decree for his debt and interest, with costs.

Case No. 3,753.

DELANO v. SCOTT.

[Gilp. 489;[1] 1 Robb, Pat. Cas. 700; 20 Jour. Fr. Inst. 47.]

District Court, E. D. Pennsylvania. May 27, 1835.

SCIRE FACIAS TO REPEAL PATENT—WHEN ISSUED—FRAUD—RULE TO SHOW CAUSE—EFFECT OF DECREE—ANTICIPATION—INVENTION—INFRINGERS.

1. The provisions of the sixth section of the act of 21st February, 1793 [1 Stat. 322], are intended to declare the defence that shall be available to a party charged by a patentee with a violation of his right.

2. The provisions of the tenth section of the act of 21st February, 1793, apply only to cases in which a patent has been obtained by fraud, surreptitiously, or by false suggestions, and are intended to protect the public from imposition.

3. Though a patentee believes himself, bonâ fide, to be the original inventor of the improvement patented, yet the fact of his not being so, if it does not constitute a false suggestion in obtaining it, appears to be a sufficient ground for repealing it.

4. The mere existence of a previous patent or specification of an improvement is not sufficient to establish the fact of fraud in a subsequent patentee of a similar improvement; actual knowledge of it must be proved.

5. If there be a false suggestion in any of several material facts set forth in a specification, the patent is invalid.

6. An order, on a rule to show cause why a scire facias should not issue to repeal a patent, is merely a preliminary proceeding, and does not determine the question of the validity of the patent.

7. An exemplification of a patent afterwards surrendered and cancelled, may be given in evidence to show that an improvement, subsequently patented, is not original.

8. A mere workman, employed by a person who is not the patentee, to make parts of a patented machine, is not liable to a penalty under the provisions of the act of 21st February, 1793.

[Explained in Morse v. Davis, Case No. 9,855 Applied in United Nickel Co. v. Worthington, 13 Fed. 393. Cited in Estes v. Worthington, 30 Fed. 465; Young v. Foerster, 37 Fed. 204.]

9. A mere difference in the manner and form of applying an invention, which is the same in

[1] [Reported by Henry D. Gilpin, Esq.]

principle with one previously used, will not justify a new patent.

10. A judgment against a patentee, on a scire facias issued to obtain a repeal of a patent, vacates the same; but a judgment in his favour will not prevent his right being contested in a suit he may subsequently institute for its violation.

This was a suit brought by scire facias, for the purpose of repealing a patent obtained by the defendant [John Scott] from the United States, under which he claimed the sole and exclusive right of using and vending to others, certain improvements in making iron chests or safes. This patent the plaintiff [Jesse Delano, Jr.] alleged he had obtained surreptitiously and on false suggestions. The original proceedings in the case were as follows: On the 29th October, 1833, the plaintiff appeared before the district judge of the United States for the eastern district of Pennsylvania, and on his oath declared and complained: That the defendant, who was a resident of the district, had, on the 12th November, 1830, and within three years from this application, as well as within three years from the issuing of the patent in question, obtained the same from the United States; that it purported to secure to him the right above stated for fourteen years from the date thereof; that it was obtained by the defendant surreptitiously and on false suggestions; that he was not the true inventor of the improvements described in it; and therefore praying that a rule might be granted, calling on the defendant to show cause why process should not be issued, for the purpose of repealing the patent, according to the provisions of the act of congress, in such case made and provided.

Mr. Perkins, for plaintiff.

Mr. Earle, for defendant.

HOPKINSON, District Judge. The affidavit of the complainant in this case was made on the 29th day of October, 1833, and set forth, that the defendant, John Scott, within three years antecedent to the date of the said affidavit, to wit, on the 12th day of November, 1830, had obtained, from the United States, a patent, to secure to him for fourteen years the sole and exclusive right to vend to others certain improvements in making iron chests or safes; that this patent was obtained by the said Scott surreptitiously and upon false suggestions; and that the said Scott is not the true inventor or discoverer of the said improvements. Upon this affidavit a rule was granted, calling upon the said Scott to show cause why process should not issue to repeal the said letters patent. The rule was duly served on the defendant, and he has appeared, by his counsel, to show cause against the issuing of the process demanded.

The affidavit contains two allegations, distinctly made: 1. That the patent in question was obtained surreptitiously and by false suggestions. 2. That the patentee is not the true inventor or discoverer of the improvement patented. To maintain these allegations, the complainant has given in evidence a patent granted to himself for the same improvements, as he avers, dated on the 7th March, 1826; and also the depositions of several witnesses to prove the identity, at least, substantially, of the improvements patented in the two patents, and also to show the fraud of the defendant in obtaining his patent. These witnesses swear, in general, that the improvements are substantially the same, and particularly describe both. They also testify, that the defendant, Scott, was employed by the complainant as a workman in doing the iron work of these chests, for about two years, having, during that time, had free access to all parts of the work carried on in the shop, and there become acquainted with the business of making iron chests and safes, and with the peculiar method of saturating the wood with certain materials, so as to render it incombustible. Other circumstances are detailed, which need not be repeated now, to show that the patentee got his whole knowledge of the improvements in question by working in the shop of the complainant, and there seeing the manner in which his iron chests were prepared and made. No evidence was produced, on the part of the defendant, to rebut or explain the inference that would be drawn from these facts, to wit, that when he took out his patent he knew that he was not the inventor or discoverer of the improvements he claimed and patented. Nor has he given any testimony of persons skilled in the manufacture of the article in question, to show that his manner of preparing and making these chests is not substantially and truly the same, with that before used and patented by the complainant. If the alleged improvements in both patents are the same, and if the defendant acquired his knowledge of them by working in the shop of the complainant, where they were made, then the whole case of the complainant is made out, to wit, that the defendant is not the true inventor or discoverer of the thing he has patented, and that he did obtain his patent surreptitiously and by false suggestions, by swearing to that which he knew to be untrue. This is not the stage of this proceeding when I am called upon definitively to affirm or deny either of these allegations: they are questions of fact on which the defendant has a right to the opinion and verdict of a jury of his country, on such evidence and arguments as it may hereafter be in his power to offer to them. Having already acted on the opinion, that the matter alleged in the complainant's affidavit was sufficient to grant the rule upon the patentee to show cause why process should not issue against him, to repeal his patent, I have only now to decide whether he has shown such cause, and removed the effect of the complainant's affidavit. I think

he has not done so; on the contrary, he has offered no evidence to repel, or weaken, or discredit the allegations of the complainant, who has strengthened himself by the depositions of several witnesses. I repeat that the whole case is nevertheless open to the defendant; he may reserve his defence for the future inquiry before a jury, and will not then be prejudiced by any omissions on his part, at this incipient hearing, or by any opinion I may express of his case as it now stands.

Some questions of law, on the construction of the tenth section of the patent law of 21st February, 1793, have been mooted in the argument of the case, which I will briefly notice. If I were called to give a construction, for the first time, to this section, I confess I should have some embarrassment to reconcile and satisfy all its parts. But happily this section has been carefully and critically examined, not only by a learned judge of the supreme court of the United States in his circuit (Stearns v. Barrett [Case No. 13,337]), but afterwards by that court itself (Ex parte Wood, 9 Wheat. [22 U. S.] 603). The decisions of that court on the doubtful points in this law, not only bind me by their authority, but entirely satisfy and accord with my own judgment. They give the fullest justice to the parties interested, while they do no violence to any part of the act, but make all its provisions consistent with each other, and with the general principles of justice and law. The following points seem to me to be the settled construction of the section in question: 1. That the proceeding given by it, to procure the repeal of a patent, applies only to cases in which the patent has been obtained by fraud, surreptitiously, by false suggestions, by some wilful misrepresentation and deception. The mere fact that the patentee was not the original inventor of the thing patented, is not such a false suggestion as is contemplated by the act, although there are some words in it which seem to favour that construction, provided that the patentee bonâ fide believed himself to be the true inventor, when he applied for and received his patent, and did not know of any antecedent use and invention of the thing claimed by him. There must be an intended deception and fraud upon the government and the public; a wilful wrong to the true inventor. 2. That the hearing, on the return of the rule to show cause, is merely an initial proceeding, for a more full and deliberate examination and trial of the cause of complaint, if, in the opinion of the judge, there shall be a good and sufficient ground laid for such further examination; that the order of the judge, on this hearing, cannot be that the patent is invalid, but only that process shall issue for a trial of its validity; and it is upon such trial that the question of validity is to be determined, or an issue to be made between the parties, and the letters patent to be repealed by the judgment of the court, if the issue shall be decided against the patentee. 3. That on the return of the process issued on the rule, the parties will make up their issue according to the case in controversy; and the trial will be by a jury or the court, according as the issue shall present a question of fact or of law. The decision against the patentee will repeal and vacate his letters patent, but a decision of this issue in his favour will give no strength or confirmation to them, to prevent his right from being contested and tried in any suit he may afterwards bring for a violation of it. The summary proceeding under the tenth section was probably given to protect the public from manifest frauds, in taking out patents, (the fees of office being no check,) for known and common things. The imposing appearance of the patent would deceive the timid and ignorant, who might believe it was conclusive evidence of right, or who might be unable or unwilling to take upon themselves the hazard, and the certain loss of time and money, in which they would be involved by litigation. They would, therefore, wisely prefer to pay something for the peaceable use of the pretended invention. Such frauds have been, more than once, successfully practised.

It is ordered, that the rule in this case be made absolute; and that process issue, in nature of a scire facias, to the patentee, to show cause why the patent should not be repealed, with costs of suit.

On the 2d May, 1834, the writ of scire facias issued, to which the defendant subsequently pleaded not guilty, with leave to give the special matter in evidence.

On the 27th May, 1835, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by Perkins, for plaintiff, and Earle and Dallas, for defendant.

Mr. Perkins, for plaintiff.

This suit is a proceeding under the tenth section of the act of congress of 21st February, 1793 (1 Story's Laws, 303 [1 Stat. 322]), directing the manner in which a patent may be repealed, if it has been obtained surreptitiously or upon false suggestions. The plaintiff invented a mode of making iron chests so as to render them incombustible. On the 7th March, 1826, he took out a patent for his improvements, which are detailed in his specification. In October, 1827, Scott, the defendant, came to work in the plaintiff's shop, who was then making iron chests according to his patent. He remained working in this shop until September, 1829, when he went to Ohio. He returned to New York in about a year. The plaintiff had heard in the meantime that he had been making iron chests; he charged him with it, but he denied it. He was then allowed to go over the factory. He went away, declining employment by Delano, and came to Philadelphia where he set up a manufactory of iron chests

the same as those made by Delano. In October, 1830, he took out his patent for them, making the usual affidavit. It is to repeal this patent, as having been obtained surreptitiously and by false suggestions, that this proceeding has been instituted.

The affidavit of Scott, made before Alderman Badger on the 29th October, 1830, was then read. In this he swears that he believes himself to be the true and original inventor of the improvements within specified and described; and that the same, to the best of his knowledge and belief, had not been known or used either in this or any foreign country.

The counsel for the plaintiff then stated in detail the improvements claimed by Scott, amounting to ten. He then offered a certified official copy of a patent taken out by the plaintiff, which was afterwards surrendered and cancelled on account of a defective specification; and a new patent obtained on 13th August, 1834. This cancelled patent was offered to show that Scott's first specification had been previously patented; it was to be followed by evidence of its use in the plaintiff's shop when Scott worked there.

Earle and Dallas, for defendant.

We object to this evidence. The paper is imperfect. We should know when it was cancelled; how and for what defect or reason. If the plaintiff can show that he had used potash in New York, and that Scott knew it, that is sufficient without this paper. He should first show that Scott knew the existence of this paper.

Mr. Perkins, for plaintiff, in reply.

By the third section of the act of 21st February, 1793 (1 Story's Laws, 302 [supra]), "certified copies are competent evidence in all courts when any matter or thing, touching a patent right, shall come in question."

Judge HOPKINSON delivered the following opinion:

I admit the evidence. The plaintiff is to prove two things: 1. That Scott is not the inventor of the improvement in question. 2. That he obtained his patent surreptitiously. To prove the second point, he must show knowledge of the defendant, that he was not the inventor; though he need not do so to prove the first. This evidence is good for the former purpose, that is, to show he was not the original inventor. The copy offered proves the existence of the original in the department of state.

Mr. Perkins, for plaintiff, in continuation.

All the specifications of Scott's patent show that none of them were his inventions. A great number of witnesses examined all show that these improvements were in Delano's patent; that they were used by him before Scott's application for a patent; and that Scott had full knowledge that they were so used. They further prove that Scott's first knowledge of the business was obtained in Delano's shop; he was entirely ignorant of every part of it when he came there.

Thomas Archbold, being offered by the plaintiff as a witness, was sworn on his voir dire. He said he had made springs to the bolt, such as are described in Scott's patent.

Earle and Dallas, for defendant, object.

The witness is not competent; he has an interest in the event of the suit. If, by this verdict and judgment, Scott's patent should be affirmed, it might be given in evidence against the witness in a suit for infringing the patent; he has, therefore, an interest to destroy it in order to secure himself. Scott might sue on his patent, even if the verdict and judgment here should declare it invalid. Agents who vend a patented article are liable to damages. The witness has admitted that he has violated the patent; and is, therefore, liable for damages. He cannot be permitted to take away from Scott the capacity to sue him. Hayes v. Grier, 4 Bin. 83; Conrad v. Keyser, 5 Serg. & R. 371.

The witness, being called back by the judge, says, that he has made these bolts in the shop of Mr. Delano, as one of his workmen.

Judge HOPKINSON stopped the counsel for the plaintiff, who was about to reply.

On general principles I should think the evidence admissible. To exclude it, the interest of the witness should be more certain and immediate; not so contingent, remote, and dubious. The possibility that an action might be brought against him, in case his testimony should not prevail, or the tendency of his testimony to render his liability less probable, would not exclude him; it may affect his credit, but not his competency. 1 Starkie, Ev. 86, 88. But it is clear to me that the witness would not be liable to any damages for the violation of Scott's patent, should it be found to be a good and valid one. He is not within the terms of the fifth section of the act. It is there enacted, "that if any person shall make, devise, and use, or sell the thing so invented, he shall forfeit and pay to the patentee." In my opinion, this description does not, and was never intended to, embrace every workman who may be employed in making parts of a patented machine; nor one who may sell them as the shopman or clerk of another. The maker and seller intended by the act, is the principal who employs these subordinate agents; the person for whom, by whose direction, and on whose account, the machines are made and sold; the person who receives the profit of the sale; he is the seller and the maker. It is he who claims title and property in the thing, and who undertakes to transfer it to the purchaser. The workmen employed by him for stipulated wages, have nothing to do with his right, or with his invasion of the rights of another. They work under his direction, and sell on his account. There may be a dozen or more mechanics employed in making one machine; and several attending in the shop where it is sold. Is each of these liable for damages, that is, to forfeit and pay to the patentee a sum

at least three times the price for which the patentee has usually sold his invention? If this be the law, the patentee would recover for every invasion of his right, for every machine made and sold, not three times but fifty or an hundred times the price of it; although no one of the defendants made the machine, but it was the joint work of all. The witness now offered, and objected to, made nothing but the spring bolts of the chests. So as to the persons who may sell it, as the shopmen or clerks of the owner. In common parlance, as well as in the understanding of the law, the seller of an article is the owner for whom it is sold; not the man or boy in the shop who delivers it to the buyer and receives his money. If sold on credit, the buyer becomes the debtor of the owner, of the master of the shop, as the seller.

Mr. Perkins, for plaintiff.

The evidence being closed on both sides, the case was argued by the counsel for the plaintiff, who cited Odiorne v. Winkley [Case No. 10,432]; Stearns v. Barrett [Id. 13,337]; Evans v. Eaton [Id. 4,559]; Id., 3 Wheat. [16 U. S.] 454; Ex parte Wood, 9 Wheat. [22 U. S.] 603.

Earle and Dallas, for defendant.

The evidence of the case shows, that some of the improvements introduced by Scott, were new and useful; but the main question is not, whether he was or was not the inventor of them or any of them; but whether he has falsely and surreptitiously taken a patent for that of which he then knew he was not the inventor. Evans v. Eaton [supra].

Judge HOPKINSON delivered the following charge to the jury:

The issue you are now trying, is made under the provisions of the tenth section of the act of 21st February, 1793. The question is on the repeal of the patent granted to the defendant; you will observe that a patent may also be annulled under the sixth section of this act. By the terms of that section, if the specification of the patentee does not contain the whole truth relative to his discovery; or contains more than is necessary, for the purpose of deceiving the public; or if it was not originally discovered by the patentee; or he had surreptitiously obtained a patent for the discovery of another person, judgment shall be rendered for the defendant, and the patent shall be declared void. Under the tenth section, the patent will also be repealed, if the patentee was not the true inventor of the thing; or had obtained the patent surreptitiously. These sections, however, are essentially different in their objects and provisions. The sixth section declares the defences that shall be available for a party against whom a patentee has brought suit for the invasion of his right; but no process or means are given for the examination of a patent right, however false and fraudulent it may be, if the patentee will be content to forbear to bring a suit against those who use it. He may thus avoid all examination of his right, and he may go on imposing upon the ignorant or timid, and lay his unjust contributions upon them. A case is recorded of a patent for using the common stone coal in a common blacksmith's forge. The patentee went through the country exhibiting his parchment patent with the great seal of the department of state, and the signatures of the high officers of government appended to it. This would naturally alarm an ignorant smith, and as the patentee would sell him a right for two or three dollars, or for whatever he could get for it, a prudent man would prefer paying so small a sum, rather than go to law with an adversary apparently so well armed. To protect the public from such impositions, this tenth section was enacted, and gives the power to any person, interested or not in the discovery or the patent, to call upon the patentee for an examination of his right, and have it repealed, if it shall be found that he is not entitled to it. This proceeding, however, must be instituted within three years; for if the public acquiesces for that period in the claim of the patentee, it shall only be questioned by one against whom a suit is brought for a violation of it, when the defendant will always have the benefit of the defence provided for him by the sixth section of the act.

With this explanation of these sections of the patent act, you will inquire whether the specifications contained in Scott's patent, or any of them, are substantially the same with those used in Delano's chests, or in any other chest, French, English or German, antecedent to Scott's patent, and to his claim of invention. I say "substantially," for a difference in the manner or form of applying the invention, if it be the same principle, will not justify Scott's patent. I have also said, "or any of them," for the petition and oath claim all and each of them; and if there be a false suggestion in a material fact, the patent is invalid. So, on another settled principle of law, he must not patent more than his invention, or all is invalid. If you shall think that all or any of Scott's specifications were used before by Delano, or any other person, his patent can give him no title to them.

But you have to inquire into another question here. Did the defendant obtain his patent "surreptitiously or upon a false suggestion?" If he knew that Delano, or any other person, had previously used his pretended inventions, he certainly obtained his patent by falsely suggesting that he was the inventor. An important question on the construction of this section of the act here presents itself: whether the mere fact that the allegation or suggestion of the patentee was false; that is, that in truth he was not the inventor, when he alleged that he was; will be sufficient to warrant a verdict and judgment against him,

repealing his patent in this proceeding: or, whether the complainant must not go further, and show that the defendant knew that he was not the inventor, and of course knew that his allegation was false, and therefore wilfully deceived the government and the public in obtaining the patent. When the application in this case was made to me, in March, 1834, for a rule upon the defendant to show cause why process should not issue to repeal his patent, the question now proposed was not much attended to. The argument was more on the mode of proceeding than the merits of the case. In the opinion I then said, that I considered it to be the settled construction of this section "that the proceeding given by it to procure the repeal of the patent, applies only to cases in which the patent has been obtained by fraud, surreptitiously, by false suggestions, by some wilful misrepresentation and deception. The mere fact that the patentee was not the original inventor of the thing patented, is not such a false suggestion as is contemplated by the act, (although there are some words in it which seem to favour that construction.) provided that the patentee, bonâ fide, believed himself to be the true inventor, when he applied for and received his patent, and did not know of any antecedent use and invention of the thing claimed by him. There must be an intended deception and fraud upon the government and the public; a wilful wrong to the true inventor." On a further consideration of the subject, I am led to doubt the correctness of this opinion; indeed, it is but one of several difficulties which occur, in reconciling the different parts and provisions of this law. The first part of the section unequivocally requires that the oath or affirmation, which is the commencement of the proceeding, the very foundation of the complaint, shall affirm that the patent "was obtained surreptitiously or upon false suggestions." If I were left to give a meaning to these words alone, with nothing more in the act to show the intention of the legislature, I should adhere to the opinion that the falsehood alluded to was a known and wilful untruth, the fraud a surreptitious application, a designed and wilful deception. But when the process has been issued on this affidavit, and the parties appear here, the one to maintain his complaint as set forth in the affidavit, and the other to defend himself against that complaint, which is, that he obtained his patent surreptitiously or by false suggestion, we find the ground of inquiry much widened, and this court is directed to render a judgment for the repeal of the patent, "in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer." The manner of obtaining the patent, whether by fraud and falsehood, whether bonâ fide or surreptitiously, is left out of the case, and it is your duty and mine to repeal the patent on the grounds I have mentioned. While this obscurity in the law has brought me to doubt the construction I formerly gave to it, I shall nevertheless instruct you, in your consideration of this case, to take the law to be as I held it on the application for this process. I must presume that the defendant has prepared his defence on the law as I then laid it down, and it would be unjust to place him on a worse footing now. He shall have the benefit of my mistake, if it was one, and the other party will have the opportunity, should it be necessary, to have the question more deliberately argued and decided, by this or another court. For the purposes of this trial you will hold it to be necessary, to justify a verdict against the defendant, that when he applied for and took his patent, he knew that the things, or some of them, that he claimed as his inventions, had been used before, and were not his discoveries.

Knowledge, then, being necessary to bring the defendant under the penalty of this section of the act, we must inquire what the knowledge is that will be sufficient for his condemnation. The complainant, in the first place, insists upon the legal or presumptive knowledge arising from the record of Delano's patent, long before that obtained by the defendant. The record of Delano's patent and its specification could be no notice of his discoveries to Scott, unless there is a substantial identity between the specifications of the two patents. This you will decide. You have them both, and have heard the elaborate arguments of the counsel of the respective parties, affirming and denying this identity. If you shall be satisfied that such identity does exist between the two specifications of Delano and Scott, the question then occurs, whether the record of Delano's patent in the office of the department of state, was such a notice to Scott of that patent and its specifications, as will bring him within the provisions of the tenth section of the patent law? Is it such a knowledge or notice as will render his suggestion or allegation that he was the inventor, surreptitious and false, according to the construction I have given to that section? Must actual knowledge be brought home to him of a previous use or patent of the same inventions; or will a legal construction or presumptive knowledge be sufficient? With the interpretation I have adopted of this section of the act, a constructive notice of a preceding patent will not be sufficient for the condemnation of the defendant; to fix the charge of actual falsehood and fraud upon him, actual knowledge must be proved. It is not like the case of a disputed right to property between two purchasers, where, if the first buyer has put his deed on record, he has given all the notice of his title the law requires, and a subsequent purchaser who neglects to make the inquiry at the proper place, will buy at his peril. The case of Odiorne v. Winkley [Case No. 10,432] was a suit brought under the sixth section of the act for the invasion of a patent

right. It is probable, however, that you will make up your opinion respecting the knowledge that Scott had of Delano's inventions from the direct evidence in the cause. It is certain that Scott knew Delano had a patent for improvements in making iron chests, and being about to get a patent himself for the same object, you will judge whether it is not to be presumed that he did inquire, at the patent office, what the improvements of Delano were. In addition to this reasonable presumption, much stronger than the ordinary constructive notice afforded by a recorded instrument, you have evidence that Scott came to Delano's shop as a common smith, having never before been engaged in making iron chests, nor, as far as we know, having ever seen one made; and that, if you are satisfied of the identity of the improvements claimed, the chests of Scott are the same with those he saw made, and assisted in making, in Delano's shop. If this evidence is relied upon, it brings home to Scott the full knowledge of Delano's improvements, and, of course, when he obtained a patent for them for himself, he did it surreptitiously and by false suggestion. (The judge then recapitulated to the jury the prominent parts of the testimony, to show the actual knowledge of the defendant, that the improvements he has patented, were those previously patented by Delano, and that he obtained his knowledge of them in Delano's shop.)

The jury found a verdict for the plaintiff.

Case No. 3,754.

DELANO v. WINSOR et al.

[1 Cliff. 501.][1]

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

EQUITY—PLEADINGS AS EVIDENCE—SHIP-BROKERS—FRAUD AGAINST PRINCIPAL.

1. If the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive, unless disproved by something more than the testimony of one witness.

2. Where the complainant sought to recover damages of the respondents, because they improperly and unfaithfully executed the trust he confided to them, and the facts charged in the bill were clearly and positively denied in the answer, *held*, that inasmuch as the complainant failed to prove the facts charged by more than one witness, he had not overcome the denials of the answer.

[Cited in Gilman v. Libbey, Case No. 5,445; Scammon v. Cole, Id. 12,432; Voorhees v. Bonesteel, 16 Wall. (83 U. S.) 30.]

3. The respondents were employed by complainant to obtain a cargo for his vessel, and complainant alleged that respondents were employed to ship the entire cargo at specified rates, payable in money, which was denied in the answer: and after the vessel was loaded, and had departed on her voyage, the respondents sent to complainant a statement or freight list prepared as if the whole cargo had been shipped at specified rates of freight, upon which complainant thereupon paid the agreed commissions. *Held*, that as a portion of the cargo was in reality shipped at half profits, the making of the freight list amounted to a misrepresentation.

This was a bill in equity wherein the complainant [Warren Delano], owner of the ship Mastiff, sought to recover damages of the respondents [Nathan Winsor, Jr., and others], as his agents, because they improperly and unfaithfully executed the trust he confided to them, as ship-brokers, to procure a cargo of freight for the vessel, and also on account of certain misrepresentations made by them in respect to the same, whereby he was induced to pay them in commissions a greater sum than they were entitled to receive. The complainant made application to the respondents to procure a cargo for his vessel while she was lying in the harbor of Boston bound for San Francisco, and agreed to pay them five per cent. on the amount of freight and primage of the goods laden on board. After the merchandise was shipped, the respondents sent to the complainant a freight list of the same, and a statement of the money to be earned in their carriage and delivery, showing freight including primage to the amount of $2,001.20, upon which the complainant paid them $1,005, besides other charges. The complainant alleged that the respondents were employed to procure the cargo at specified rates of freight, payable in money, and not on terms of half profits, and relying upon the freight list he believed the goods were to be carried for the specified rates of freight; but such was not the case, as appeared by the bill of lading signed by the respondents. According to the bill of lading a large portion of the cargo, to wit, fifty-seven tons of pig-iron, three hundred and thirty-three "nests" of tubs, so called, and seventy-five dozen pails, were shipped at "one half net profits over costs and charges," and these could not be sold at any profit, and he consequently received no compensation for them. He therefore insisted that the respondents were bound to pay him the loss he had suffered by their acts. The answer denied that the respondents were employed to procure a cargo of any particular kind or at specified rates of freight in money, and alleged that the kind of cargo and rates and terms were by the agreement left to their judgment and discretion. They also denied that they intended to represent in the statement that all of the cargo was procured and shipped at specified rates, to be paid in money, or that the statement contained any such representation.

F. C. Loring, for plaintiff.

Equity has jurisdiction, because plaintiff seeks to correct an account rendered by defendants. 1 Story, Eq. Jur. 429. Transactions between principal and agent being coupled with a trust, relief may be had in equity as well as at law. Hov. Frauds, 161,

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

162. Plaintiff has no remedy at law, neither in debt, covenant, assumpsit, trover, nor case. His claim is, that defendants shall make their representation good. Equity only can give this relief. In Harding v. Carter, 1 Marsh. Ins. 210, it was held that trover would lie for a policy of insurance never made. It has been doubted whether the relief should not have been sought in equity. Tickel v. Short, 2 Ves. Sr. 239, is in point. Gray v. Murray, 3 Johns. Ch. 167, same principle. Ground of action is false representation of the defendants, by reason of which they charged and received a larger commission than they otherwise would, and so are bound to make it good. Id. 185.

Ranney and Morse, for defendants.

If the plaintiff has any cause of action, he has a plain, adequate, and complete remedy at law, and a court of chancery has no jurisdiction of it. 1 Stat. 82; Baker v. Biddle [Case No. 764]; Sadler v. Robinson, 2 Stew. [Ala.] 520. It is not a case of fraud alleged or proved, nor one of trust or the violation of any trust. Russ v. Wilson, 22 Me. 207; Porter v. Spencer, 2 Johns. Ch. 170. If it is merely a case of violated contract in the shape of a warranty that the goods in question were shipped on a specific fixed rate of freight, an action at law is the clear and proper remedy. The omission to state the amount of freight on the iron, tubs, and pails as "estimated," so as to get a reasonable compensation in the shape of commissions as was customary and reasonable, was by mistake and accidental. At the worst, it was but a misrepresentation, which harmed nobody, and never would have been noticed if the goods had netted a rate of freight satisfactory in half profits. To recover the actual damages resulting from such misrepresentation would be the extent of the liability, if any. Cunningham v. Bell, [Case No. 3,479]; Bell v. Cunningham, 3 Pet. [28 U. S.] 69, 85; Greene v. Goddard, 9 Metc. [Mass.] 223; Brown v. McGrau, 14 Pet. [39 U. S.] 480, 496; Blot v. Boiceau, 3 Comst. [N. Y.] 78; Gould v. Rich, 7 Metc. [Mass.] 539, 546; Frothingham v. Everton, 12 N. H. 239.

CLIFFORD, Circuit Justice. Two grounds of claim are set up by the complainant which must be separately and carefully considered. Claims so entirely distinct in their nature, although presented in the same bill of complaint, cannot be so blended together as to excuse the court from their separate examination.

Careful attention to the first claim, as stated in the bill of complaint, will show that it is for damages arising from the breach of a contract to procure a cargo of goods as freight for a certain vessel, on a given voyage, at specified rates of freight, payable in money on the transportation and delivery of the goods; and the breach alleged is, that the respondents did not perform the contract; that a portion of the cargo procured and shipped was not subject to specified rates of freight payable in money, but that the articles were procured and shipped upon terms of one half net profits over costs and charges. Allegation is not made in the bill of complaint that cargo in lieu of that shipped, subject to freight at specified rates, payable in money, and such as it is alleged the respondents undertook and agreed to procure, might have been obtained in the market, or that the failure to procure such was occasioned through the negligence or unskilfulness of the respondents; but the allegation is,—and that is the foundation of the claim,—that the respondents undertook and agreed to do what they did not and have not performed, and that the non-performance of the undertaking and agreement has occasioned loss to the complainant which the respondents are bound to make good in the manner therein described. Taking the case as stated in that part of the bill of complaint under consideration, it plainly has all the material elements of an action on the case, founded upon a special undertaking and agreement in the nature of a warranty, and the non-performance of the same, where special damages are claimed for the breach of the undertaking and agreement. Special damages are evidently claimed in this case, because the complainant alleges that the respondents are bound to make good the loss he has suffered by their doings, and pay to him the sums of money he would have received if they had performed their undertaking and agreement. Irrespective of the question of jurisdiction raised in the case, the first question to be considered is, whether the complainant has proved the special undertaking and agreement on which the suit in this behalf is founded. Unless the respondents undertook and agreed to procure and ship the cargo on the terms assumed by the complainant, there could be no such breach of contract as is alleged, and of course there can be no cause of action. Such, undoubtedly, were the views of both parties at the inception of the litigation, as is obvious from the manner in which the pleadings are drawn. Distinct allegations upon the subject are to be found both in the bill of complaint and in the answer of the respondents. Complainant alleges that the commission, agency, and trust for which he retained the respondents were to procure a cargo for the vessel, to be carried and delivered on payment of freight in money at specified rates, and not upon half profits, which leaves it clearly to be implied that the whole cargo was to be procured and shipped at specified rates. On the other hand, the respondents deny that they were retained for that purpose, or that the undertaking and agreement contemplated that all of the cargo should be procured and shipped to be carried and delivered for payment of freight in money at specified rates, and none

of it upon terms of half profits; and to make the denial more explicit, they also allege that the kind of cargo to be procured, together with the rates and terms on which the goods were to be transported, were to be left to their judgment and discretion; so that the denial is as full and explicit as it well can be made. Where the facts charged in the bill as the grounds for obtaining the decree are clearly and positively denied in the answer, and are only supported by one witness, the rule is well settled that the court will not decree against the defendant. Union Bank of Georgetown v. Geary, 5 Pet. [30 U. S.] 111; Atkinson v. Manks, 1 Cow. 703; Walton v. Hobbs, 2 Atk. 19; Pember v. Mathers, 1 Brown, Ch. 52. Where the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive unless disproved by more than one witness. 1 Paige, 241; Daniel v. Mitchell [Case No. 3,-562]. Two witnesses, or one witness with probable circumstances, says Marshall, C. J., in Clark's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 160, will be required to outweigh an answer asserting a fact responsively to a bill. He also states very clearly the reason for the rule, which is, that when the complainant calls upon the respondent to answer an allegation, he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness; and as the complainant cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance. Hughes v. Blake, 6 Wheat. [19 U. S.] 453. Satisfactory proof, even by one witness, that the respondents undertook and agreed to procure and ship the whole cargo at specific rates, payable in money, is not to be found in the record. Great reliance is placed by the complainant on the testimony of the master, but it is sufficient to say on that subject for the present, that it is not very full to the point, or very definite as to the terms of the agreement. Another witness is called by the complainant, who had the charge of the work in furnishing the ship, and was present all the time she was loading for the voyage in question, but he states expressly that he does not know anything about the terms on which the iron was taken on board, and that he had nothing to do with the rates of freight. All he can state is, that he gave no authority to ship goods at half profits, and had no knowledge that any were shipped on such terms. Opposed to this is the testimony of the clerk of the respondents, who states in very positive terms that the respondents were to take the ship, load her to the best of their ability, and do the best they could; that they had no specific instructions; that the loading of the ship was left to their judgment and discretion to load her as "all others are loaded." Testimony was introduced in respect to the circumstances under which the iron was procured and shipped, and the details of the evidence were much relied on by the respondents to support the statements of their witness; and they also introduced certain letters of the complainant, and offered those written by themselves of the same series; but it is unnecessary to enter into those details, as I am of the opinion that the complainant in this branch of the case has failed to overcome the denials of the answer filed by the respondents, especially as the allegations of the answer are supported by the positive statements of a credible witness. Reference to the freight-list was made at the argument, as tending to show the alleged undertaking and agreement, but it is evident that it cannot have much weight in that direction, because the goods had been shipped and the vessel had departed on her voyage before it was forwarded or even prepared. Evidence is entirely wanting to show, from the state of the market, that the additional freight at paying prices could have been obtained for the port of destination at specified rates, or that the respondents were guilty of any negligence, unfaithfulness, or unskillfulness in executing their trust. Adventures to that distant market were attended with great uncertainty, and mercantile information upon the subject was so imperfect that the failure of an enterprise furnished but slight evidence to impeach the judgment and discretion of those who entered upon them. Estoppel cannot be set up, as the evidence fails to show that the respondents ever undertook or were employed to procure and ship the entire cargo or the goods in question at specific rates; and the act of preparing and sending the freight-list was after the vessel had departed, and after the fact of her departure was well known to the complainant. Attention to these considerations will show that the cases Tickel v. Short, 2 Ves. Sr. 239, and Gray v. Murray, 3 Johns. Ch. 167, do not apply, even if the principle there laid down could under any circumstances be regarded as applicable to a case of this description.

Sufficient has already been remarked to explain the grounds on which the second claim rests. Part of the cargo had been procured and shipped upon the terms of one half the net profits over costs and charges. Having completed the shipment, and the vessel having departed on her voyage, the respondents forwarded the bills of lading which had been signed by themselves, and prepared the freight-list and sent it to the complainant. They prepared it as if the whole cargo had been procured and shipped at specified rates of freight, making the total amount of freight, including the primage of the goods, twenty thousand and one dollars and twenty cents. When they sent the freight-list, they also sent their account for commissions, claiming five per cent. on the whole amount set down in the statement, and the complainant, trusting to the accuracy of the represen-

tation, paid the amount claimed. Misrepresentation and mistake are both charged in the bill of complaint as the foundation of this claim. Blended as the two charges are in the bill of complaint, it is somewhat difficult to separate them, and it is that difficulty which has occasioned the only doubt in the mind of the court on this branch of the case. After full consideration, I have come to the conclusion that the allegations of the bill of complaint are sufficient to support the claim, which is substantially based in the pleadings upon mistake induced by misrepresentation. Authorities are not necessary to show that errors in the settlement of accounts between principal and agent, especially if induced by misrepresentation, are cognizable in equity. 1 Story, Eq. Jur. §§ 462–464, 524–526; Daniel v. Mitchell [supra]. All of the allegations of the bill of complaint in this branch are admitted, except the allegation of misrepresentation. Respondents in their answer admit that the freight-list was prepared as alleged, and sent to the complainant. They admit that the commissions were demanded and paid; and I am of the opinion that the statement in the freight-list, under all the circumstances of the case, amounted to misrepresentation. Undoubtedly the complainant was deceived, and was thereby induced to make payment where he would have declined to do so, if he had known the true state of the case. Small as the error is, it is, nevertheless, the right of the complainant to have the amount corrected; and inasmuch as the mistake was induced by misrepresentation, this court, sitting as a court of equity, cannot refuse to take jurisdiction of the case. Unless the amount is agreed, the cause must be referred to a master to ascertain it, and, when that is ascertained, the complainant will be entitled to a decree.

DELANY (LADD v.). See Case No. 7,971.

Case No. 3,755.

DELANY v. WASHINGTON.

[2 Cranch, C. C. 459.][1]

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

APPEAL FROM JUSTICE DECISION — VIOLATIONS OF MUNICIPAL ORDINANCES—SUFFICIENCY OF WARRANT—UNLAWFUL SALE OF LIQUORS.

1. Upon appeal from the judgment of a justice of the peace, for the penalty of a by-law, the judgment will be reversed with costs, if the warrant does not set forth the offence with sufficient certainty.

2. A warrant, charging that the defendant "did during the last or present month, sell spirituous or other liquor without a license, contrary to the act, or acts of the mayor, &c., on that subject made and provided," is too vague and uncertain to support a conviction.

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

This was an appeal from the judgment of a justice of the peace for a penalty of $20. The warrant commanded the constable to take Pat. Delany, &c., to answer to the mayor, board of aldermen, and board of common council, &c., in a plea that he render to the said mayor, &c., the full sum of $20, which to the said mayor, &c., "he owes and unjustly detains, for that he the said Delany did, during the last or present month, sell spirituous, or other liquor, without a license, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

Mr. Jones, for appellant, contended that the offence is not set forth with sufficient certainty, and cited the case of Barney v. Washington City [Case No. 1,033], in this court, at July term, 1805.

THE COURT (THRUSTON, Circuit Judge, contra) decided that the warrant was too uncertain, and reversed the judgment with costs.

See, also, White v. Washington [Case No. 17,-560], at October term, 1822, and Boothe v. Georgetown [Id. 1,651], at the same term.

Case No. 3,756.

DELAPLAINE v. CROWNINSHIELD.

[3 Mason, 329.][1]

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

LIMITATION OF ACTIONS—SUIT COMMENCED IN ANOTHER STATE.

1. To a plea of the statute of limitations, it is not a good replication, that a suit for the same demand was commenced in a court in another state, and discontinued within six years.

2. The commencement of a suit, to defeat the statute of limitations, must be the same suit, to which the plea is pleaded.

Assumpsit on several counts: (1) Money had and received. (2) On a promissory note dated at New York, on the 23d of March 1811, payable to plaintiff [John F. Delaplaine] or order on the 15th of July then next. (3, 4, and 5) On like notes for like sums, payable on the 1st and on the 15th of August then next, and on the 1st of September then next. Pleas: (1) Non assumpsit. (2) Statute of limitations of Massachusetts specially set forth. (3) Same plea, setting forth generally actio non accrevit. (4) Same plea generally, and no promise within six years. (5) Statute of limitations of New York, and actio non accrevit. Replication as to second, third, and fifth pleas, that an action was brought on the same demands in the supreme court of New York at January term, 1812, and continued from term to term until May term, 1821, and then discontinued; and that the cause of action accrued within six years before the commencement of the same action. The defendant [Richard Crowninshield] demurred to this replication, and the plaintiff joined in the

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

demurrer. On a demurrer to the fourth plea, it was waived by the defendant.

Prescott, for defendant, in support of his demurrer to the replication to the second, third, and fifth pleas, cited 2 Salk. 420, 421; 2 Saund. 63, note 6; 6 Term R. 617; 3 Term R. 662.

G. Sullivan, for the plaintiff, argued e contra.

STORY, Circuit Justice. Whatever may be the case as to the other pleas, the plea of the statute of limitations of Massachusetts is a complete bar to the present suit, unless the matter set up in the replication is sufficient to avoid it. In my judgment, it is wholly insufficient. There is no case where the statute is stopped by the commencement of an action, unless that action is kept alive after the first process is returned, by continuances, and is the same suit to which the statute is pleaded as a bar. A suit commenced, and afterwards discontinued, will not aid the plaintiff in another suit, even in the same court for the same cause of action. The case of Smith v. Bower, 3 Term R. 662, is directly in point, and decisive against the plaintiff. Even if the law were otherwise on this point, it would be impossible to contend successfully for the proposition, that a suit commenced in another state would take a case out of the statute of limitations of Massachusetts, in an action pending here. No such exception is expressed or can be implied from that statute. The judgment must therefore be for the defendant on the demurrer, the replication being fundamentally bad; and this makes an end of the action. Judgment accordingly.

Case No. 3,757.

DELAUNEY v. HERMANN.

[1 Baldw. 132.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

EQUITY PRACTICE—DISMISSAL OF BILL—DELAY IN PROSECUTION.

The court will not dismiss a bill for want of proceeding in the cause for three terms, without giving one term's notice of the application for dismission.

In this case a bill was filed to October 1825; an answer put in March 1826; exceptions taken and a new answer filed June 1826. On the 11th of October 1826, the plaintiff took out a commission to Bordeaux, which has never been executed or returned. The plaintiff has filed no replication, or taken any measures to procure testimony, or to bring the cause to a hearing.

On the first day of this term, Mr. Rawle moved to dismiss the bill with costs.

BALDWIN, Circuit Justice. There has undoubtedly been very great delay on the part of the complainant, which is not satisfactorily accounted for; but the respondent has had it in his power, under the thirteenth and seventeenth rules of the supreme court, to compel a reply and a hearing of the cause, which has not been done. He now asks for a dismission, according to a rule of the English court of chancery, authorizing it, where the complainant has omitted for three terms to proceed in the cause. 2 Madd. Ch. 385. As this rule has never been acted on in this court, we should deem it a rigorous proceeding to enforce it now for the first time, and therefore enlarge it till the next term, of which notice must be served on the complainant.

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

Case No. 3,758.

In re DELAVAN.

[5 Law Rep. 370.]

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

BANKRUPTCY—DEBTOR'S DISCHARGE — OBJECTIONS —ADMISSION OF FICTITIOUS DEBTS — CONCEALMENT OF ASSETS—EVIDENCE.

[1. The admission of a fictitious debt against his estate will not bar the bankrupt's discharge, under the act of 1841, unless the same is admitted in proceedings under the act. Therefore, proof of an assignment of his whole estate before the passage of the act, with preference of fictitious debts, will not operate as a bar.]

[2. Putting a fictitious debt upon the schedules of the bankrupt is admitting the same, within the meaning of the act.]

[3. Declarations of a debtor, at the time of his failure, that he has means to pay all his debts, are not sufficient, by themselves, to show a fraudulent concealment of assets.]

On objections to a final discharge because the bankrupt had admitted a false and fictitious debt against his estate, THE COURT decided, that an assignment of all his estate by the bankrupt in 1839, and giving in it a preference to fictitious debts to his brother, would not bar his discharge under the bankrupt act [of 1841 (5 Stat. 440)]. The debt must be falsely admitted in proceedings under this act, to affect the bankrupt's petition for a certificate. THE COURT further decided, that putting a fictitious debt upon the schedules by the bankrupt, as just and owing by him, was admitting such debt against his estate within the mischief and meaning of the statute. That a collusive arrangement between the bankrupt and his brother in 1839, to convey to him his (the bankrupt's) estate in fraud of his creditors, not being done in contemplation of the passage of the bankrupt law, would not prevent his obtaining his discharge under the law. That in the judgment of the court the creditors had failed to prove a debt on the schedule for $3,000 to the bankrupt's brother, to be false and fictitious. THE COURT further decided, that declarations of the bankrupt at the time of his failure in 1838, and immediately thereafter to various creditors, that he had means to pay them fully, or to pay all his

debts, would not be sufficient without specific evidence of the extent of these means, or the subsequent possession of property, to prove a fraudulent concealment of his estate by the bankrupt. Decree of discharge granted.

Mr. Mitchell, for bankrupt.
Mr. Edmonds, for creditors.

Case No. 3,759.

DE LAVEAGA v. WILLIAMS, et al.

[5 Sawy. 573; 8 Reporter, 548; 4 Pac. Coast Law J. 51; 20 Alb. Law J. 336.][1]

Circuit Court, D. California. Aug. 14, 1879.

FEDERAL COURTS—TRANSFER OF TITLE TO GIVE JURISDICTION.

Where a citizen of the state transfers real property to an alien, the circuit court of the United States will take jurisdiction of a suit affecting such property brought by the alien against another citizen, although the conveyance was upon a nominal consideration, and made for the purpose of giving the court jurisdiction, provided it be not accompanied with an agreement to retransfer the property to the grantor after the termination of the litigation. The court in the absence of such agreement will not inquire into the motives which induced the transfer.

[Followed in Marion v. Ellis, 10 Fed. 412. Cited in Coffin v. Haggin, 11 Fed. 224; Collinson v. Jackson, 14 Fed. 310; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 761.]

[Suit in equity by Miguel A. De Laveaga against Thomas H. Williams and others.] This case came before the court on a plea of abatement to the jurisdiction of the court.

George W. Gordon, in support of the plea.
Wm. Irvine, contra.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

FIELD, Circuit Justice. This is a suit in equity, to restrain the defendants from carrying into effect certain proceedings taken by them for the reclamation of swamp and overflowed lands in San Joaquin county.

The complainant is a subject of the king of Spain, and claims to be the owner of an undivided fourth interest in a portion of these lands under a deed executed in August, 1877, by Henry M. Naglee, who then held the entire estate. The deed recites a consideration of one dollar, but the evidence of the complainant shows that no consideration was ever paid, and that the deed was executed to enable him to bring this case in the circuit court of the United States; and also, that the expenses of the litigation have been hitherto borne by his grantor.

The defendants have interposed a plea in abatement to the suit, that the complainant was not at the time of its institution the actual owner of any interest in the premises to be affected by the reclamation intended; and that the deed of Naglee, under which he claims, is merely colorable, made and delivered simply to give the court jurisdiction, and upon the understanding that the grantor was to retain all the interest in the premises.

Upon the evidence stated the defendants rely to sustain the plea, and oust the court of jurisdiction, Naglee, the grantor, being a citizen of California, the state of which they are citizens.

There is no doubt, that the sole object of the deed to the complainant was to give this court jurisdiction, and that the grantor has borne, and still bears the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses so to do. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of congress to proceed in the federal courts for the protection of his rights. It is only when the conveyance is executed, to give the court jurisdiction, and is accompanied with an agreement to re-transfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. Such was the case of Barney v. Baltimore City, upon which the defendants rely. 6 Wall. [73 U. S.] 280. Here there was no such agreement; and it will be optional with the complainant to re-transfer or to retain the property. He is by the deed absolute owner of the interest conveyed, and can only be deprived of it at his own will, and upon such considerations as he may choose to exact. Being such owner, and a subject of a country on terms of amity with the United States, his right to seek the federal court is indisputable. See Briggs v. French [Case No. 1,871].

The complainant must have judgment on the plea of abatement; and the defendants must file their answer on or before the next rule day; and it is so ordered.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 20 Alb. Law J. 336, contains only a partial report.]

DE LA VILLEBEUVE (NORTON v.). See Case No. 10,350.

Case No. 3,760.

The DELAWARE.

[1 Biss. 110.][1]

Circuit Court, N. D. Ohio. July Term, 1856.

COLLISION — CONFLICTING EVIDENCE — DUTY OF VESSELS MEETING—DUTY OF STEAMER—TRINITY RULES DEFECTIVE.

1. In cases of collision, the hypotheses and evidence of the respective parties are generally in-

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

consistent. When there is a change in the course of a vessel, a person without a compass, standing on the deck of either cannot, generally, say whether the change has been made by the vessel on which he stands, or the one on which his eye is fixed.

2. A vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel close-hauled or sailing by or against it; and the vessel on her starboard tack has a right to keep on her course.

3. So a steam vessel must get out of the way of a sail vessel, on the same principle, that the steam power gives the control of the vessel, as a vessel with the wind free. The exact variations of a vessel, from her general course, can only be known by the compass.

4. Where the light of a sail vessel appears to a steam vessel, at a distance of three or four miles, such light should be observed closely, in order that the steamer may avoid the vessel which carries it. The steamer is bound to port its helm, and make way for a sail vessel where there is the least possibility of danger.

5. It is negligence in the steamer not to guard against the contingencies of a shifting wind, and the accidents to which a sailing vessel is liable; the point of danger is not passed until the vessels have passed each other. And although such vessel may change its course from apprehension of danger, the steamer is in fault for not keeping out of the way, although the sail vessel may not be faultless. In such a case there is a mixed fault, and the damage done from a collision should be divided between the parties.

6. The trinity rules, sanctioned by the supreme court, were designed chiefly for the government of vessels on the Thames, and in their application in this country are defective. The defects consist in the conditional application of the rules. Some instances stated.

7. A rule of navigation should be simple, plain, and absolute.

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

Spalding & Parsons, for libellant.
Carter & Morton, for respondent.

McLEAN, Circuit Justice. The libellant states, that on the 11th of June, 1855, at half past eight o'clock in the afternoon, the schooner E. M. Lyon sailed from Cleveland, loaded with one hundred and forty tons of coal on a voyage to Toledo; that about fifteen miles westerly from Cleveland, at about half past two o'clock at night, she was run into and sunk by the propeller Delaware, which caused the loss of the schooner and her cargo. The propeller was on her course from the Middle Ross island to Cleveland.

The hypotheses of the respective parties are inconsistent with each other, in each charging the other with being the cause of the collision; and as usual in such cases, the officers and crew of each vessel, in their evidence, sustain the assumptions of each. This conflict of testimony in collision cases is not supposed to arise, altogether from a disposition to misrepresent the facts in justification or excuse of their own conduct; but from the uncertainty of the course and position of the vessels, before and at the time of the collision. No one standing upon the deck of a vessel, without a compass, can observe a small deviation from its general course. An experienced seaman having a fixed object ahead, by ranging with certain parts of the vessel, or from the stars, may see where deviations are made; but the changes cannot be noted with mathematical precision. Much less certainty can be attained, when the object ahead is a moving vessel. Whether a perceptible change in the course is caused by the vessel on which the observer stands, or the one on which his eye is fixed may be a matter of doubt. This difficulty is greatly increased at night when the wind is fresh, as the waves have some effect on a vessel propelled by steam, and a much greater effect upon a sail vessel. The lights of vessels at night may show their relative positions, but without reference to the compass they do not indicate the precise course of either.

It may be proper here to state the rules recommended by the trinity masters in England, and approved by the supreme court in the case of St. John v. Paine, 10 How. [51 U. S.] 581: "A vessel that has the wind free or sailing before or with the wind, must get out of the way of the vessel that is close-hauled or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. So when two vessels are approaching each other, both having the wind free and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side abaft the beam or near the stern, in that case the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other. Again when the vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should perserve in her course, while that on her larboard tack should bear up or keep away before the wind." A great many authorities are cited in the above case, as sanctioning these rules.

In a conflict of testimony, the number of witnesses on the respective sides may not be wholly disregarded; but there are often circumstances which should have a more controlling influence than the fact of numbers. Respectability of character, as is sometimes perceived from the manner of relating facts, a favorable position for observation, the danger apprehended at the moment, and the admissions of the parties must all be duly considered.

The crew of the schooner consisted of some

six persons, the master, mate, cook and three person before the mast. These witnesses agree in saying the night of the collision was bright and starlight, that about midnight Thomas R. Willis, the mate, took charge of the larboard watch, relieving the captain, who directed the course of the vessel should be west by north as long as the wind held on at the southward. A man by the name of Allen was at the helm, Nicholas Burke, the captain's brother was also on deck.

At about two o'clock a light breeze blew from the northward, the schooner was steered west-north-west, and run at the rate of two or two and a half miles an hour. At about a quarter after two, a bright light was made, a point over the starboard bow of the schooner, and in about five minutes after, a green light was seen, from which the approaching vessel was known to be a steamer going to the eastward. While these lights bore about a point forward of the beam of the schooner, that is, north by east, it is supposed to have ported its helm as its red light was seen. It then run heading for the midships of the schooner, on the starboard side. The propeller was hailed twice, but no answer was given. The schooner's helm was put hard a-port, so that the collision might take place as far forward as possible. A voice was then heard from the propeller, saying, "Hard a-port." The propeller, in attempting to cross the bow of the schooner, stem on, at full speed, struck the schooner abreast of the starboard catheads, forcing the forecastle in, glancing forward, separating the stern from the timbers, taking the bowsprit and knightheads away, and turning the bow of the schooner toward the shore. The captain of the schooner saw the propeller approach the schooner nearly at right angles on her starboard bow, and strike her near the catheads. She sunk in sixty feet of water. These facts are substantially corroborated by the other witnesses on board the schooner.

The course of the schooner, as stated by Allen, the helmsman, was west by north, the wind then headed her off to the north-northwest, and then died away so that the boom swung midships. She then lost her steerage way, and swung round about north. In a few minutes the wind rose from the north-north-east, then changed the course to west by north, and shortly afterwards to west-north-west.

The respondent's witnesses are in conflict with those of the libellant. The propeller was on a voyage from Toledo to Buffalo, by the way of Cleveland. Her helmsman says his course was east by south. He took the helm of the propeller about midnight, and remained at it until after the collision; and he says he did not deviate from the course stated more than the sixteenth part of a point, by the compass, until he was ordered to port, to avoid the collision. This statement is corroborated by Captain Dixon, and other witnesses on board of the propeller. In regard to both vessels, witnesses who did not examine the compass must have spoken of the course from the report of the helmsman, or their own general observations.

When the schooner was first descried on board of the propeller, it was one point or a half point on its starboard bow, which shows that the schooner was south of the course of the propeller. This relative position of the schooner is corroborated by the mate of that vessel. He says they made the bright light of the propeller one point over the starboard bow of the schooner, when she was four or five miles from the propeller. When the helmsman of the schooner first saw the light of the propeller, it was at the distance, as he supposed, of about a half or three-quarters of a mile. All the witnesses agree that when the light of the schooner was first discovered, she was south of the propeller. But it is contended that the schooner materially changed her course, which was the cause of the collision.

The witnesses do not differ as to the position of the vessels, when the conflict occurred. The schooner was struck on her starboard bow, so that the vessels, if not at a right angle to each other, must in some degree have approached that attitude. But which vessel was out of its path, or whether both are chargeable with a deviation, is the point in controversy. If the propeller were to the northward of the path of the schooner, and attempted to cross it, the collision might occur; and so if the schooner were north of the path of the propeller, and attempted to cross it, a similar result might follow. And the colliding vessels would appear to the witnesses on their decks respectively as they have sworn.

Captain Dixon of the propeller says, when he first saw the light of the schooner, it bore a half point on his starboard bow. From an observation, he saw the light was carried by a vessel on her samson post, which, as the wind was, would frequently be obscured by her jib. The light very soon changed to the port bow of the propeller; it was unsteady. But the light steadily opened to port, until it made three or four points off the port bow of the propeller. He then considered there was no danger of a collision. He did not order the helm a-port half a point, as was his custom in meeting a vessel, as the schooner was steering clear of the course of the propeller. Feeling chilly, he stepped into his room for his overcoat. He soon heard Austen, the mate, who was on the pilot house, order the helm to be ported; and looking out, he saw the light of the schooner was again closing on the propeller. On passing rapidly to the upper deck, the light on the approaching vessel shone steadily, so that the light must have been to the windward of the jib, and the vessel must have been crossing the path of the propeller. He saw the sails of the schooner, which convinced him that he was not mistaken as to her course; and that

there was danger of a collision. He then rung the bell to slow, and another to stop, and a third to reverse the engine, all of which orders were promptly obeyed. At this time, he heard an order on board the schooner, "Hard up," which as the wind then blew, was hard a-starboard. When witness first discovered the light of the schooner, she was at a distance of some four or five miles. The other witnesses on board the propeller corroborate this statement. Some of them suppose the course of the schooner was west-south-west, or south-west by west, and others, south-west or south-west by south, which would be a deviation of six points from west by north, the course of the schooner as sworn to by her helmsman.

When a collision is apprehended, it is natural to suppose that the eye of the helmsman is fixed on the approaching vessel, and not on the compass. Under such an exigency, I cannot receive without allowance a statement as to the precise course of the vessel, given by the pilot. He must generally, if not uniformly, speak from the recollection of the general course of his vessel, and from the orders given to port the helm. There is still greater uncertainty, when a witness on one vessel describes the course of another.

The pilots on the respective vessels had the best means of knowing their courses, and it appears from their statements that, at the time of contact, the propeller was running nearly south-east by east, and that the course of the schooner was west-north-west. Had the officers of both vessels desired a collision, I doubt whether they could have brought it about with more certainty than by the means used. The vessels approaching each other very near, the propeller changed her course two points to the right, and the schooner two points to the left, which changes from the position of the vessels could only extend the angle of contact. From the difference in the speed of the vessels, it would require a nice calculation, and no inconsiderable seamanship to bring them into a collision, under the circumstances. Whilst there is no ground to suspect a design to bring about a collision by the officers of either vessel, yet by the evidence, negligence, or a want of skill is shown.

It was the duty of the propeller, as a steam vessel, to keep out of the way of the schooner. Her light was seen by the officers of the propeller, at least, when the vessels were from three to four miles apart. Had her helm been ported, as her captain says was usually done in meeting a vessel, and her course continued, there would have been no collision. The excuse that the light of the schooner on the larboard bow of the propeller showed that there was no danger, is not sufficient. That light should have been closely and continuously observed. There was a breeze of at least five knots an hour from the north-north-east, and the wind was flawy. It was negligence not to guard against the contingencies of the shifting wind, and the accidents to which a sail vessel is liable. In such a case, the point of danger is not passed until the vessels have passed each other.

After it was observed that the light of the schooner opened upon the propeller, there was sufficient time to avoid the schooner, by putting the helm of the propeller hard a-port. And it is highly probable, had the propeller continued her course, instead of slowing and reversing her engine, she would not have struck the schooner. The damage done to the bow of the schooner, and turning it to the shore, shows that the propeller, when she struck her, must have had a strong headway.

But was the schooner free from fault? I think she was not. Her duty required her to keep on her way, and if she had done so, in all probability the propeller would have passed without touching her. But instead of doing this, on the approach of the propeller, her pilot turned her two points to the left. This increased the danger, and required a greater effort by the propeller to avoid her. And although I think under the rules of navigation above stated, the propeller being a steam vessel, having timely notice of the approach of the schooner, was bound to keep out of her way, which she might have done with ordinary care; yet the schooner cannot be held faultless, as she deviated from her course, and, in some degree, contributed to the collision. The decree of the district court, which held both vessels to have been in fault, is, therefore, affirmed with costs.

I take occasion here to state my view of the rules of navigation, as given by the trinity masters, and sanctioned by the supreme court. The trinity rules were designed chiefly, to govern vessels in the river Thames; and that their observance has been salutary in the navigation of that river, is undoubted. And the same rules are applied, especially in this country, to sea and lake navigation. But, from the experience I have had in collision cases, I am convinced they are defective. The defects consist in the conditional application of the rules. As, for instance, "The vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way or be answerable for the consequences." Now the duty here enjoined depends upon the relative position of the vessels; and the masters of the vessels must decide. If the position of either vessel do not come within the rule, it is not obligatory on such vessel. The safety of the vessel, the property on board, and the lives of the passengers, depend upon the decisions of the masters of the approaching vessels. There is but a moment for deliberation, and the danger is imminent. No persons who cannot look upon such a scene calmly, can act wisely.

The rules declare, "When two vessels are approaching each other, both having the wind

free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right." But what is to be done where the masters on the respective vessels differ as to which vessel is on the larboard tack, and where both vessels have not the wind free? Again it is said, "The same rule governs vessels sailing on the wind and approaching each other, where it is doubtful which is to windward." The masters must solve this doubt.

But it is said, "If the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side, the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other." May there not be doubt whether the vessel on the larboard tack is so far to the windward, that if they persist in their course the other will strike her, and if so, is the vessel on the starboard tack to give way? And again, "When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on her larboard tack should bear up or keep away before the wind." Here is a doubt to be solved, as to which there may be a difference of opinion.

It should be recollected that these rules must be often acted upon at night, in a rough sea, when nothing can be seen of the approaching vessels but their lights; and unless there be a concurrence of judgment in the masters of both vessels, an attempt by one of them to follow the direction, without the concurrent action of the other, is more likely to produce a collision than to avoid it. In almost every case of collision that I have investigated, the master of each vessel has mistaken the position and course of the other, and when a collision occurs, the one vessel is charged with having changed its course, and run into the other. Such is the case now before me.

In my judgment a rule of navigation to be effective, must be simple and absolute. It must be so plain as not to be mistaken by a man who knows his right hand from his left; a rule which may be carried out in storm and darkness, if the lights of the vessels be perceptible: a rule with exceptions, practically, is no rule. If an exception be made, I have investigated no case of collision where it was not relied on as an excuse or justification. I speak of cases where thousands of lives have been jeoparded, and hundreds have been lost.

It appears to me the following rule, if observed, would be effectual to prevent collisions. "Vessels approaching each other from opposite directions, shall turn to the right." And that this rule shall apply to all vessels, whether propelled by steam or wind. If it be objected that a vessel close-hauled or sailing against the wind, may not obey her helm, I answer that the master of the approaching vessel can be in no doubt as to the intention of the vessel so situated. Almost all collisions which occur, are attributable to doubts as to the course of the approaching vessel. Make this course certain; without condition, and the evil will be remedied. If a steamer, from any cause, should be unable to turn to the right, her engine should be stopped, until the approaching vessel shall have passed. If two steamers are moving in a direction so as to cross each other's path, and they should come so near as to apprehend danger, the engines of both should be stopped. No man who stands upon the deck of a sail vessel or steamer, can be so ignorant as not to understand and carry into effect the above rules, and if this were done, I am persuaded that the collisions which so often occur would be avoided.

NOTE. As to duty of steamer in approaching a sailing vessel, see The Pilot [Case No. 11,-168], and cases there referred to; Baker v. The City of New York [Id. 765]; Wakefield v. The Governor [Id. 17,049]; Pope v. The R. B. Forbes [Id. 11,275]; The Wings of the Morning [Id. 17,872]. That a vessel having the wind free must give way to one close-hauled (The Emily [Id. 4,453]), and without regard to their respective tacks. The Blossom [Id. 1,564]). Where a steamer discovers the light of an approaching sail vessel, and then loses sight of it, it is her duty to check her speed, and even to stop if need be, until she again discovers the light. The Illinois [Id. 7,002]. A sailing vessel discovering the lights of a steamer nearly ahead, on a dark and cloudy night, has no right afterwards to change her course, on the idea that she has not been seen by the steamer. The Scotia [Id. 12,512]. In the case of The Osprey [Id. 10,606] is a full discussion of the law of collision and the duties of approaching vessels; also in The New Jersey [Id. 10,161]. For an elaborate discussion of the law of collision, the rules of navigation, lights, and signals, duty of steamers and sailing vessels, see 1 Pars. Shipp. & Adm. 525–595, and voluminous authorities there cited.

Case No. 3,761.

The DELAWARE.

[6 Blatchf. 527.][1]

Circuit Court, S. D. New York. Aug. 5, 1869.

ADMIRALTY APPEALS—REVIEW OF SALVAGE AWARD—UNSEAWORTHINESS—LIABILITY OF CARGO.

1. An allowance for salvage services, made in this case by the district court, depending upon the exercise of sound discretion, was not interfered with by this court.

2. It was not error in the district court, not to charge the cargo of a vessel libelled for salvage, with a portion of the amount allowed for salvage, where no such point was taken in the answer, the owners of the vessel being responsible for her seaworthiness, and the disaster which made the salvage necessary having occurred through her unseaworthiness.

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

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

This was a libel in rem, filed in the district court, to recover damage for rescuing the steamship Delaware from impending peril, while lying off South Edisto island, South Carolina. The steamship Perit, belonging to the libellants, was on a voyage from New York to Savannah, and, discovering the Delaware blowing off steam, and with a flag of distress set, ran down to her, and ascertained that her boiler had given way, and, at the request of her master, attached a hawser to her and towed her to Savannah. The district court allowed to the master and crew of the Perit $2,500 for salvage services. [Case not reported.] The claimant appealed to this court.

Charles Donohue, for libellants.

Warren Hardenbergh, for claimant.

NELSON, Circuit Justice. As the allowance made in this case depends, as to the amount, upon the exercise of sound discretion, I am not inclined to interfere with it. A point is made, that the court erred in not charging the cargo with its portion of the amount allowed. No such point is made in the answer; and, besides, the owners of the Delaware were responsible for her seaworthiness, for the want of which the disaster occurred. Decree below affirmed.

Case No. 3,762.

The DELAWARE.

[Olc. 240.] [1]

District Court, S. D. New York. Jan. Term, 1846.

ADMIRALTY PRACTICE — ATTACHMENT FOR COSTS, ETC.—SUPREME COURT RULES—STATE STATUTES —STIPULATION FOR COSTS.

1. On a motion to show cause why an attachment should not issue against the parties for the payment of costs, or for other proper relief, the remedy is to be governed by the rules of the supreme court of the United States, or of this court, if any apply to it; and if not, then, "according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law."

[Cited in The Antelope, Case No. 481.]

2. The provisions of the state statutes, or the decisions of the courts, in explanation or enforcement of these laws, will not supply a rule of decision in this court, unless such regulations are adopted by rules of the United States courts.

3. Under the rules of this court, a stipulation for costs includes a consent that execution shall issue against all the estate of the parties, in case the stipulators do not perform their engagements. An order or decree of the court must be first obtained on default of the stipulators. That right to such process is now made positive and certain by a rule of the supreme court, so far as concerns goods and chattels, and the arrest of the person, in case the decree is not satisfied.

4. The party is entitled to either alternative of the 21st rule. Taking out a fi. fa. in the first instance without success, does not prevent his resorting to process of capias ad satisfaciendum, or to an attachment. He may have relief at his option, as to the order of process.

5. Quere. Whether the arrest of stipulators, under a ca. sa. or attachment, satisfies the decree? Also, whether, after a ca. sa. executed, the claimant may sue out an attachment?

[1] [Reported by Edward R. Olcott, Esq.]

On the attachment of the vessel at the suit of the libellant, a stipulation was entered into by him and Edward R. L'Amoreux, according to the course of this court, in the sum of two hundred and fifty dollars, to secure the costs of suit, if decreed against the libellant. On a hearing of the cause, upon the merits, on the 15th day of April last, the libel was dismissed, and costs to be taxed were adjudged in favor of the claimant of the vessel. On the 24th day of October, an order or decree was entered requiring the above stipulators to fulfill their undertaking, or show cause on a day assigned, why execution should not issue against the estate, real and personal, of the stipulators. On the 4th of November, a final decree for execution was made and entered, and execution of fieri facias or venditioni exponas was issued the 18th of November, and duly returned, nulla bona, as to both stipulators, on the 2d day of December.

Mr. Morton, for the claimants, thereupon, moved the court, upon these proceedings, and an affidavit that the taxed costs had been demanded of the stipulators, and were not paid, for an attachment against them, to compel payment of the taxed costs, or such other relief as he may rightfully have.

W. Q. Morton, for claimants.

S. B. Noble, for libellant.

BETTS, District Judge. It is to be remarked that L'Amoreux, one of the stipulators, was merely surety in the stipulation, and that the original costs are not taxed or decreed eo nomine against him, otherwise than as they are the subject of the condition of the stipulation, which the decree directs to be fulfilled. The remedy, whatever it may be, under the decree upon the stipulation, is not to be in consonance with the statute law or practice of the state courts, but is to be governed by the rules of the supreme court of the United States, or of this court, if any apply to it, and if not, then "according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law." Act May 8, 1792, § 2 [1 Story's Laws, 257; 1 Stat. 276]; Mauro v. Almeida, 10 Wheat. [23 U. S.] 473. The provision of the state statute giving a party an attachment to obtain the payment of costs, ordered and adjudged in his favor (2 Rev. St. p. 441, § 4; Sess. Laws 1840, p. 333), or the decisions of the courts in explanation or enforcement of these laws, will not supply a rule of decision here, without those regulations are also adopted by rule of the federal courts. The rules of the supreme court were in force when the first proceedings were taken by the claimants to

enforce the payment of these costs, and accordingly those rules are to be looked to as the paramount authority, controlling the whole subject matter. The 21st rule provides, that when a decree is for the payment of money, the libellant may have, at his election, an attachment to compel the defendant to perform the decree, or an execution against the property, or for want thereof, against his body. In all other cases the decree may be enforced by an attachment to compel the defendant to perform it. 3 How. [44 U. S.] Append. 7.

In this case an execution against the property of the stipulators only was prayed for and accorded, and it is urged in their behalf that the election of that process by the claimant concludes him from using any further or other form of remedy. This proposition cannot, I think, be maintained. As a general principle. when a party is entitled by law to an execution against the property and person of a debtor, the suing out, in the first instance, one against the property, does not preclude his afterwards resorting to a ca. sa. against the body (Olcott v. Lilly, 4 Johns. 407); and that principle is distinctly recognized in the act of congress of May 8, 1792, § 2, which provides that in judgments (in any proceedings of the United States courts) where different kinds of execution are issuable in succession, a ca. sa. being one, the plaintiff shall have his election to take that out, in the first instance (1 Story's Laws, p. 300, § 2). According to the practice of this court, a decree against stipulators for breach of their undertaking is equivalent to a judgment for the amount of the stipulation. Betts' Pr. 27. This is substantially the course of the English admiralty, other than that lands cannot, in that manner, be made subject to admiralty process. 2 Browne, Civ. & Adm. Law, 98. The decree in this case was, in effect, for the payment of money; the amount to be ascertained or liquidated by a taxing officer of the court. The stipulators thus became charged with the debt they had assumed by the stipulation. The amount of that assumption was determined by the taxation of costs. The recovery is not enforced by execution against stipulators upon taxation alone. That, like the report of a master in chancery, settles the sum to be paid, and then a specific order or decree may be had thereupon against the stipulators. Dist. Ct. Rule 145. Under the rules of the district court, the stipulation includes a consent that execution may issue against all the estate of the stipulators; and the order or decree, upon default in observing the engagement, is correspondent with it. Dunl. Pr. 147.

The remedy is now made positive and certain, without the consent of the stipulators, in respect to libellants, on all decrees for the payment of money, by the rule of the supreme court, so far as respects goods and chattels, and is also extended to the arrest of the person, in case goods or chattels are not found to satisfy the decree (rule 21); and by the same rule a direct proceeding, by attachment of the person, is authorized in all other cases. Either, then, the claimant might proceed upon the consent, and take out execution against chattels and lands of the stipulators, or he is entitled, by the rules of the supreme court, absolutely to an attachment. A parity of reason would give him equally the process of execution against the body, in case there are not sufficient goods and chattels found to satisfy his decree, as a peremptory attachment is a higher order of process than a capias ad satisfaciendum. He takes, with his decree, the right to all the remedies supplied by the law; the rules of the district court cannot restrict the remedy furnished by the rules of the supreme court; nor because he has unsuccessfully sought satisfaction of his decree, conformably to the course of practice of the district court, can that court withhold from him any further or more efficient process provided for the case by the supreme court. I hold, then, that the claimant is entitled to execution against the bodies of the parties charged by the decree; and his having previously taken out an ineffectual one against the property, does not prevent his resort to this also. But as the ca. sa. could have been embodied with the fi. fa., and properly should have been so issued, the stipulators are not to be charged with the additional costs of taking it out as a distinct writ, if it is now elected, nor of this application to the court, which was not necessary to authorize it. I do not now touch the question, whether the rule of the supreme court, authorizing a capias ad satisfaciendum upon a judgment or decree for the payment of money, may stand in conflict with the act of congress of February 28, 1839 [5 Stat. 321], abolishing imprisonment for debt. That question may arise and require a careful consideration and decision in case the claimant sues out a ca. sa., and the stipulators are imprisoned under it. The party is entitled to either alternative of the 21st rule; and as taking out a fi. fa. in the first instance, without effect, does not prevent his having afterwards the more stringent process of a capias ad satisfaciendum, so, also, he may avail himself of the still more coercive provision of the rule, and take out an attachment. The true construction of the rule is not, in my judgment, that the privilege of election given by it confines the party to the remedy he first adopts; but when he has bona fide tried without effect one, he still may resort to other alternatives, especially when his election was not against the body of the party but against his property. It is not necessary to decide here, nor do I mean to touch on that point, whether an arrest of a party on a ca. sa. or attachment shall be deemed a satisfaction of the decree, so as to preclude the after use of a fi. fa.; nor whether, after having arrested the stip-

ulators on a capias ad satisfaciendum, the claimant may resort to an attachment. He will elect his remedy at his own hazard. No costs are ordered on this application to either party.

Case No. 3,763.

The DELAWARE v. The OSPREY.

[2 Wall. Jr. 268;[1] 1 Am. Law Reg. 15; 1 Phila. 358, 401; 27 Hunt, Mer. Mag. 589; 9 Leg. Int. 82, 136; 4 Am. Law J. (N. S.) 533.]

Circuit Court, E. D. Pennsylvania. Sept. Term, 1852.

COLLISION AT NIGHT—STEAMER AND SAILING VESSEL—SIGNAL LIGHTS.

1. Although the court cannot establish a rule to bind vessels navigating the high seas to carry signal lights, yet where one vessel does so and another does not, the court, in case of a collision, will go some way to treat the dark boat as the wrong doer.

[Cited in Baker v. The City of New York, Case No. 765; The Frank Moffatt, Id. 5,060. Explained in Pope v. The B. B. Forbes, Id. 11,275. Distinguished in The Hypodame, 6 Wall. (73 U. S.) 225.]

2. The court going in advance of hitherto adjudicated cases, would seem to enforce the obligation upon all boats navigating bays and rivers, not only to show lights on an approach, but to carry them constantly.

[Cited in The City of Savannah, 41 Fed. 893.]

The steamer Osprey was on her way to sea, out of Delaware bay, with three signal lanterns in place, heading for the lights of Cape Henlopen, on the west. The barque Delaware, without any lights, came into the capes with the wind free to pass up the bay, and the tide against her. When at some distance from the steamer, the sails of the barque shut out the Cape Henlopen lights from the pilot of the steamer, and from this fact the pilot inferred a sailing vessel was between him and them, and of course, that the sailing vessel was heading to starboard of the steamer. But the barque having no lights, and the night being very dark, neither her courses nor position were, after this, discoverable. Both vessels went on at their previous speed—that of the steamer about ten or eleven miles an hour; that of the barque four or five; and they were approaching each other at the rate of a mile in about four minutes. The steamer, having the tide, was approaching much faster than the captain of the barque was aware of. The captain of the barque, who was on deck, first saw the steamer's lights five miles off, but was not certain, for some time, that the vessel was a steamer. Being satisfied at last on this point, he ordered a signal light to be shown. The rapidity with which the vessels had approached and were still approaching, made the interval between this and the moment of collision, too short. The light did not appear to have been seen by the steamer's pilot, and the evidence, which was conflicting, made it doubtful whether it had been exhibited before the collision became inevitable. Approaching in the rapid way above stated, and supposing the barque still to be, as her shutting out the Henlopen lights showed she had been, on the other side, the steamer put her helm to starboard; while the captain of the barque, not knowing that he had shut out these lights from the steamer, nor of the inference the steamer had drawn, that the barque was to the starboard, put his vessel to the starboard too, in order that the vessels might pass larboard to larboard. The steamer ran against the bow of the barque. Whether, if the barque had not gone to starboard, and had kept on her course, she would have cleared the steamer entirely, or whether, on the other hand, she would have been struck right amidships, and so gone to the bottom at once, was a matter about which the testimony conflicted. The two vessels came in collision near the bow of the barque, the wheels of the steamer rolling over the barque, and doing her, as the barque also did to the steamer, considerable damage. Cross libels were now filed.

By the usage of Delaware bay, vessels at anchor always hang out a light. Those not at anchor, usually, or often sail without them, steamers excepted; which, by statutes of the United States, as well as of Pennsylvania and New Jersey, are obliged to carry lights.

W. B. Reed and St. G. T. Campbell, for the barque.

The barque was not bound to carry lights. No maritime usage requires merchant vessels constantly to carry lights (The Rose, 2 W. Rob. Adm. 4); nor do the rules of the trinity masters, which we adopt (The Iron Duke, Id. 377). The statute of Pennsylvania does not apply to Delaware bay: and the statutes of the United States and of New Jersey, by confining the obligation of lights to steamers, directly exempt sailing vessels from the same obligation. By the usage and obligation of Delaware bay, vessels at anchor alone exhibit the signal lights. Had the barque exhibited such lights, she would probably have been assumed to be at anchor. They would have been false lights. She showed a light as soon as she saw a vessel approaching. She was not bound to do more. In other respects she conformed to the rules of good navigation. She had a watch on deck. She did not alter her course until it was rendered imminently necessary by the act of the steamer. Considering the darkness of the night, and the fact that she knew a vessel was somewhere ahead, the steamer was not navigated with the requisite caution. She was in a bay. She should have eased off for a few minutes. Admit that the barque ought to have carried lights, so that the steamer could have gone on without easing off, this is not important here, for in point of fact the barque was seen by the steamer, by her shutting out the Cape Henlopen lights. There was enough to put

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

the steamer on her guard. Admitting the barque's fault, the steamer had no right to run her down for it; the usual consequences of the fault having to a great degree been accidentally obviated in another way, by the shutting off the Henlopen lights. The case of The James Watt, 2 W. Rob. Adm. 270, syllabus, is much in point: "Where a steamer coming down the river, upon a dark night, meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken her speed, until he ascertains the course of the sailing vessel." "A defence—that the master of the steamer, under the circumstances, immediately put her helm to port, in compliance with the trinity house regulations—not sustained." It is true that case differs from this in the fact that there the sailing vessel was beating up the river, while here she had the wind free. But the case rests much more on the distinction between steamers and sailing vessels, the former of which, says Sir J. Nicholl, in another case (The Perth, 3 Hagg. Adm. 414), while they "are of vast power, liable to inflict great injury, may at the same time, with due vigilance easily avoid doing damage, for they are much under command, both by altering the helm and by stopping the engines." Even at her speed she would have gone clear had she kept her course, or ported her helm. The change from it, made suddenly and unwisely, in the circumstances, caused the collision. The counsel then cited many cases to show that the conduct of the barque when she came into close proximity of the steamer, was conformed to the directions of the trinity masters, and our own laws in the cases of vessels in positions like these and in danger of collision.

G. M. Wharton and Mr. Balch, on the other side, made the following points:

[That the steamer displayed proper lights, had a good and sufficient lookout, and was in every respect properly found, officered, and managed.][2] 1. The steamer pursued her course, the usual one, without change until the pilot saw the barque; from and after which point of time every thing possible was done on board the steamer to avoid and prevent the collision. 2. Backing the steamer with her helm to starboard was equivalent to going ahead with her helm to port. 3. Conceding that the steamer was going ahead with her helm a-starboard, this was the only manoeuvre left to her, and was the proper one under the circumstances of the case. 4. The barque, having the wind free, but with head tide, was more manageable than under any other circumstances. 5. The barque should have kept her helm to port, instead of putting it to starboard; in which case she would have gone clear of the steamer. 6. It was the duty of the barque, which had descried the steamer five miles off, to do every thing in her power to avoid the collision by showing a light, making a noise, &c. 7. The barque, in putting her helm to starboard, in not backing or easing her sails, and especially in disregarding the order to port her helm, violated all maritime law and usage. 8. The night being dark, the barque should have carried a light. "The want of a lantern in narrow waters," says Jacobsen,[3] "has always been looked upon as such a neglect that against any vessel without a light, the verdict was for re-imbursement of damages sustained. Thus it was decided on motion of Bynkershoeck, in a case pending in the supreme court of Holland. Questiones Jur. lib. 4, c. 22. The same was the verdict of the Rota Fiorentena, May 8th, 1766, in the case of Captain Ramkins, reported by Baldazzeroni." Tom. 2, par. 4, tit. 4, § 38. If the rules of the trinity masters prescribe in this respect any other rule, it is time for our courts to depart from obedience to them in that particular. We have a river commerce, and a commerce in bays and other narrow waters, much greater than that of England: and it is becoming matter of necessity that the court make it obligatory on all vessels to carry lights every where.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. Taking all the other circumstances of this case together, and omitting the fact of almost total darkness, and that the barque could see the steamboat while the steamboat could not see the barque, the steamboat would have clearly been held liable for the damages of the collision. It is true there is no law requiring vessels navigating the high seas after night to carry signal lights, and it is much to be regretted that it is not so. But the barque had the wind free, and the tide against her, and she had power, therefore, to give the steamer a wide berth, and to obviate collision. The steamer had three lights; the barque had none. Now, if the steamer had the same opportunity of observing the course of the barque, the latter knowing this fact would have a right to expect a consequent caution on the part of the steamer. But I think it is plain from the testimony, that the light shown by the barque was too late to be of any benefit, or to warn the steamer of its approach, till the very moment of the collision. The warning

[2] [From 4 Am. Law J. [N. S.] 533.]

[3] Jacobsen Seerecht, Altona, 1815, p. 477. "Der Mangel einer Leuchte im engen Fahrwasser ist immer als ein solches Versehen angesehen geworden, dass einem Schiffe ohne Leuchte, Schadensersatz aberkannt ist. So geschah es auf den Antrag von Bynkershoeck in einer vor dem hohen Gerichtshofe von Holland pendenten Sache." Questiones Jur. lib. 4, c. 22. "Eben so wurde erkannt von der Rota Fiorentena, den 8ten Mai 1766, in der Sache des Capitains Ramkins." Baldazzeroni, tom. 2, par. 4, tit. 6, § 38.

given of the approach of the barque by her sails intercepting the light from the lighthouse, like that of the lamp from the barque, was also too late, as well as too uncertain to justify the steamboat in taking any other mode of escaping collision than those she did take. The order to starboard the helm before stopping the boat, and reversing her engine, may have been wrong, and it may be true that these latter orders were not fully executed at the time of the collision. It may be true, also, the order of the barque to starboard her helm, and disregard that of the steamboat captain to port it, was correct, and the only way of avoiding a collision which would have destroyed the barque. But these considerations cannot affect the case. It was the fault of the barque, and not of the steamboat, that the vessels were brought into such proximity that such mistakes might be made in the dark, when the pilot of the steamboat could neither judge of the distance between the approximating vessels, the rates of their approach, nor the relative angle of their respective courses. It was the duty of the barque, which could see, to give a wide berth to the boat, which could not see, and not to leave it in the power of her pilot, by a mistake in a moment of surprise, to cause a collision. The rule of passing to the right, or porting the helm, in cases of vessels meeting on the same line, is founded on the supposition, that each party can see the other. But where one is blind, and the other knows it, he should not put himself within reach of injury by any mistake of the blind, or run over him or knock him down for not observing the rule. The court cannot establish any rule to bind vessels navigating the high seas after night to carry signal lights; but where one party does this, and the other does not, we can and will treat (in a case caeteris paribus) the dark boat as the wrong doer, and liable to make reparation. In rivers and narrow channels, and in harbours, there are generally local regulations requiring it. But if there be not, it would still be advisable for vessels sailing either in close or open channels, to keep proper lights if they wish to seek the courts, in case of collision.

KANE, District Judge. The rules of navigation which we derive from the trinity masters, apply to all cases of apprehended collision, and they are so convenient in practice as to make us most unwilling to relax their application. But to make them applicable at all, there must be reason for apprehending collision, as well as a possibility of escaping it without encountering some greater peril; they cannot be invoked therefore where obedience to the rules has been made impracticable or dangerous by the fault or carelessness of the other party. There is no law which requires vessels navigating the high sea after dark to carry signal lights, and very much it is to be regretted. I can imagine no locality so remote or unfrequented as to dispense with the policy of such a practice. There is hardly a month that we do not read speculations about missing ships, especially ships navigating along our coast, and almost every old seaman can tell of encounters in the night with vessels that were run down and disappeared, leaving no memorial behind them. I should be very glad to follow in the wake of the first admiralty judge, who would hold the absence of a properly placed and well trimmed lantern to be prima facie evidence of a culpable want of caution. [In our narrow waters, however, a sense of danger has enforced upon our navigation the adoption of something like a general usage, and the legislatures of some of the states have, in reference to steamers at least, made it the subject of enactments. Thus it seems to be universally understood, that a vessel approaching another in a dark night, should show a light, or, in more accurate words, should show such a light, and in such a place as to indicate at least her position, if not her course. The act of congress of 7th July, 1838 [5 Stat. 306], § 10, which requires steamers to carry one or more lights after sunset, is practically almost inoperative for want of specifying their number and position. Our Pennsylvania act of assembly of 30th April, 1844, is little better; it directs a steamer to carry one signal lantern at least 10 feet above the deck,—an imperfect provision, since it omits a description of the sort of lantern and obviously does not affect to indicate the steamer's course. The New Jersey statute is better than these. It requires steamers to carry two signal lanterns, one at the bow near the deck, the other aloft amidships; a much better provision than either would be that which some of our seagoing steamers have adopted in practice from the British rule, according to which, three lights of different colors are carried at the bow and on the wheel-houses.][1] Indeed, so important is some such regulation as this esteemed among the navigators of our river and bay, that I have been solicited more than once to assume its existence and enforce its observance. I would cheerfully do so, if I could find it among the ordinances of any legally constituted tribunal,—the directions of the port wardens for instance, who have in some respects the supervision of our river navigation,—or if the practice recently introduced by our seagoing steamers, were to a considerable extent recognised by others. For the present I confine my action in the matter to the two classes of cases for which statutory provision exists, or generally known usage.

The evidence in this case of collision is not reconcilable as to the circumstances that immediately preceded it. The steamer was on her way to sea with her signal lanterns in place, heading for Henlopen lights. The barque, without any lights, came into the

[1] [From 4 Am. Law J. (N. S.) 533.]

capes from the eastward, with the wind free to pass up the bay. The sails of the barque shut out the Henlopen lights from the pilot of the steamer. The barque was at this time of course heading to the starboard of the steamer's wake. The proper manoeuvre on the steamer's part at this time, was by an inclination of her helm to starboard, so as to keep out of the barque's track. This manoeuvre she executed, but the barque having executed the same manoeuvre at about the same time, the two vessels approached each other. The difference between them was however in this, that the steamer exhibiting signal lights, her position and course could be well understood by the barque; but the barque exhibiting no lights, and having been last seen when heading to starboard of the steamer's wake, the steamer had no means of ascertaining the barque's approach and no cause for apprehending a collision. A light was shown on board the barque very shortly before the collision took place. But whether it was or was not exhibited early enough to make it strictly possible for the steamer to avert the accident, is not with me an important inquiry. The steamer had her full complement of lights, and it was impossible that the barque could have incurred any hazard at all, if she had been content to hold her course, instead of luffing up as she did across the steamer's bows, obviously for the purpose of keeping well up to windward. Had she had lights, she might have done so with safety. Having none, she voluntarily took the risk of the collision, and must reap its fruits.

Decree accordingly.

Case No. 3,763a.

DELAWARE & H. CANAL CO. v. The ALIDA.

[23 Betts' D. C. MSS. 139.]

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

MARITIME LIENS—WHEN ATTACHING—SUPPLIES.

[A lien on a steamer for fuel arises upon the delivery thereof on a wharf near by in pursuance of the orders of her officers.]

[Libel by the Delaware & Hudson Canal Company against the steamboat Alida for fuel furnished. Decree for libelants. Judgment suspended to enable claimant to move for a reargument.]

Before BETTS, District Judge.

A delivery of the coal on the wharf alongside or near the vessel by order of her officers was tantamount to a delivery on board. It is not denied that a steamship is responsible in rem for fuel supplied her for the purpose of navigation, but it cannot be claimed that the lien goes beyond that and embraces charges for storage of the coal after a legal delivery to the ship. To constitute an effective delivery so as to create the lien it is not necessary the coal shall be ultimately consumed on board, nor in fact be placed within or upon the vessel. It is sufficient if the whole lot was purchased by the vessel and put in her possession to be used as she required it in her navigation. An anchor, spars, rigging or sails supplied for the equipment of a vessel and delivered within her reach and control acquires a privilege against her body equally as if placed upon her deck. The contract of sale is no longer executory; it is entirely completed on the part of the vendor, whether the vessel accepts the property and delays placing it on board or relands it and departs without it. The law indicates no different rule in respect to the lien, whether the supply after it has gone to and been received by the ship as part of her furnishment, remains permanently with her or is put on shore again, or even not hoisted into the vessel. (Cases in rough notes.) Decree for libellants, with order of reference to ascertain the quantity of coal delivered, &c.

NOTE [by the court]. After the above judgment was rendered, a decision made by the supreme court of the United States in December term last was produced and shown me, in which it seems that court has held that a similar sale and delivery of fuel to a domestic vessel does not create a lien upon her. Vanderwater v. Mills [19 How. (60 U. S.) 82]. I shall order suspension of this judgment to enable the claimant to move for a reargument in the cause.

Case No. 3,764.

DELAWARE & H. CANAL CO. v. CLARK.

[7 Blatchf. 112; Cox, Manual Trade-Mark Cas. 187.][1]

Circuit Court, S. D. New York. Jan. 5, 1870.[2]

TRADE-MARK—ACQUIESCENCE IN USE—ESTOPPEL—INJUNCTION.

1. The plaintiffs, being coal-miners, claimed the exclusive right to use the words "Lackawanna coal" as a name or trade-mark for coal, and brought this suit to enjoin the defendant from using those words to designate coal sold by him which was not mined by the plaintiffs: *Held*, that the plaintiffs, by their acts of acquiescence in the use of those words by the defendant to designate coal sold by him which had not been mined by the plaintiffs, had licensed the defendant to use those words to designate the coal sold by him, and were equitably estopped from enjoining the defendant from using those words for such purpose.

2. The basis of the action of a court of equity to restrain the infringement of the right to a trade-mark, is fraud on the part of the defendant.

[See note at end of case.]

[In equity. Bill by the president, managers, and company of the Delaware & Hudson Canal Company against Henry C. Clark.] This was a final hearing, on pleadings and proofs.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 187, contains only a partial report.]

[2] [Affirmed in 13 Wall. (80 U. S.) 311.]

Edward H. Owen and Stephen P. Nash, for plaintiffs.

William Fullerton and Erastus B. Rudd, for defendant.

BLATCHFORD, District Judge. The plaintiffs are a corporation created by the state of New York. The defendant is, and has been for twenty-nine years, a dealer in coal, carrying on business at Providence, in the state of Rhode Island, and having yards there where he stores, and from which he sells, coal. The plaintiffs own and operate a canal, from Rondout, on the Hudson river, to Honesdale, in the state of Pennsylvania, and a railroad from Honesdale to lands in that state which they own, and from which they have, for many years past, been mining coal, which they have afterwards sent to market on said railroad and said canal. They assert, in their bill, which was filed January 2d, 1867, that they have a title to the name of "Lackawanna coal," as a special, particular, and distinctive name or trade-mark for their coal, the product of their mines, in distinction from the coal of other parties; that, for a number of years past, they have sold and consigned, and still continue to sell and consign, large quantities of the said "Lackawanna coal" for sale and consumption in Providence aforesaid, and in its vicinity; that certain dealers in Providence keep on hand for sale, and advertise and sell, the plaintiffs' coal under the aforesaid name of "Lackawanna coal;" that the defendant has carried on and still carries on, at Providence, the business of a coal merchant or dealer in coal, and for that purpose owns and occupies a yard in which he keeps anthracite coal for sale; that he does not purchase, keep, or have for sale any of the plaintiffs' "Lackawanna coal," but exclusively buys, sells and deals in other and different kinds of anthracite coal, which have been named by the producers thereof, and are generally called and known by the names of, "Scranton coal" and "Pittston coal," and are produced by other and different companies; that the coal in which the defendant deals is of the same general appearance as the plaintiffs' "Lackawanna coal;" that the defendant has been wrongfully and fraudulently selling and offering for sale his aforesaid Scranton and Pittston coal by the name of, and as, and for, "Lackawanna coal," and, to carry out and effect such fraud and deception, has erected, or caused to be erected, and has, a sign upon or at his coal yard, whereon is painted or inscribed the name "Lackawanna coal," thereby falsely and fraudulently representing, and designing and intending to have the public to understand and believe, that he keeps and has for sale the plaintiffs' "Lackawanna coal;" that, in order further to carry out his aforesaid false and fraudulent designs and intentions, and to injure the plaintiffs in the sale of their aforesaid coal, he has falsely advertised, and continues to advertise, in the public newspapers printed in the city of Providence, that he has for sale "Lackawanna coal," whereas, in truth and in fact, he has not any of such coal; that he has been and is selling and offering to sell his said coal as and for the "Lackawanna coal" of the plaintiffs; that he is, in these ways, pirating, and wrongfully and fraudulently using, the plaintiffs' aforesaid name or trade-mark, and thereby injuring them in the sale of their "Lackawanna coal," and deceiving the public; that, as an excuse for such wrongful and fraudulent acts, he gives out and pretends, that his coal comes from a region of country in the state of Pennsylvania, known as the Lackawanna region or valley, and that, therefore, he is entitled to advertise and sell his coal by the name of "Lackawanna coal;" that his coal is sold and delivered to him by the original producers thereof, under their distinctive trade-marks or names of "Pittston coal" and "Scranton coal," so given to it by the producers thereof, and that the greater portion thereof, if not all, is taken from the valley or region more properly known as the Wyoming Valley; that, when the word "Lackawanna" was adopted by the plaintiffs as their trade-mark as aforesaid, it had never been used or combined with the word "coal," so as to form the compound word or term "Lackawanna coal," and that it has not, at any time since, been so used by any producer of coal except the plaintiffs; that, so far as respects the use of the word, as applied to coal, the plaintiffs have a prior and exclusive right thereto, in which they should be protected; that the use of the plaintiffs' aforesaid trade-mark or name by the defendant is fraudulent, and is used with the design to obtain for his coal the reputation and credit due to, and possessed by, the plaintiffs' coal, and to injure the plaintiffs in the premises; and that the plaintiffs have never, in any manner, authorized the defendant to use or apply such name to his coal, nor, in any wise, acquiesced in his use thereof. The prayer of the bill is, that the defendant, and his agents, may be enjoined and restrained from keeping or using a sign over, or upon, or about his coal-yard, or place of business, with the words "Lackawanna coal," or "Lackawanna," painted or inscribed thereon, and from advertising "Lackawanna coal" for sale, and from selling, or offering or attempting to sell, his aforesaid coal or any coal which does not come from the plaintiffs' mines, under or by the name of "Lackawanna coal," and that he may account for or pay to the plaintiffs whatever profits he may have realized from the use of the plaintiffs' name or trade-mark, and from the sale of his coal under or by the name of "Lackawanna coal."

The answer, which was filed on the 11th of April, 1867, denies that the name of "Lackawanna coal" ever has been, or now is, either in the city of Providence and vicinity, or elsewhere, the peculiar property and trade-mark of the plaintiffs. It admits that the

defendant has been, and still is, engaged in business as a dealer in coal in Providence, and occupies a yard in which he keeps anthracite coal for sale, and does not purchase or keep for sale any of the plaintiffs' "Lackawanna coal," and deals almost exclusively in the varieties of coal mentioned in the bill by the names of Scranton coal and Pittston coal. It denies that the said varieties of coal are exclusively known by those names, and avers that they are generally known by the name of "Lackawanna coal," and are so regarded and so styled by dealers in coal and the public generally. It admits that the defendant is advertising and selling the two varieties of coal mentioned in the bill as Scranton coal and Pittston coal, by the name of, and as, and for, "Lackawanna coal;" and that he has a sign upon his yard, whereon is inscribed the name "Lackawanna coal." It avers that said sign, "Lackawanna coal," has been upon his said premises during the last seven or eight years; that, during the greater part of said period, the premises adjoining the said coal-yard of the defendant have been used and occupied by the plaintiffs, or by persons in their employment and interest, for the purpose of selling their coal; that, during said period, he has advertised and sold large quantities of the said two varieties of coal mentioned in the bill as "Pittston coal" and "Scranton coal," under and by the name of "Lackawanna coal;" that, during the whole of the above period, and for a considerable number of years previous thereto, he had not purchased any of the coal of the plaintiffs, or offered any of the same for sale, as the plaintiffs well knew; that the plaintiffs, in January, 1860, issued a circular, in which they cautioned consumers of "Lackawanna coal" against coals not coming from their company, and directed buyers to "ask for Lackawanna that comes directly from the Delaware and Hudson Canal Company;" and that the plaintiffs never made any claim or pretence that they were entitled to the exclusive use of the name "Lackawanna coal," to the knowledge of the defendant, until a short time prior to the commencement of this action. It denies that the defendant has intended or practised any falsehood, fraud, or deceit, in advertising, offering for sale, or selling, any of the abovementioned varieties of coal, either towards the plaintiffs, or any other person. It also denies that the plaintiffs have a prior or exclusive right, as respects the use of the word "Lackawanna," as applied to coal, and that they are entitled to any protection in respect thereto, and avers that, even if such prior right to said use of said word or term had existed, as to constitute a trade-mark, such right, and all claim to protection in reference to the same, have been wholly lost to the plaintiffs by their long continued abandonment of the same, and their acquiescence in the common and general use of said word or term by the coal trade and the public, as relating to, and being properly the designation of, all coals mined and produced in the Lackawanna valley.

I have come to the conclusion that, upon established principles of equity jurisprudence, the bill in this case must be dismissed, on the ground that, whatever right or title the plaintiffs may have had, as against the defendant, to the exclusive use of the words "Lackawanna coal," as a trade-mark, their acts, in regard to his use of those words to designate coal sold by him which was not coal mined or put in market by the plaintiffs, have amounted to a license to him to use those words to designate Scranton coal and Pittston coal, and thus to an equitable estoppel against their claim to the relief prayed for by the bill. The defendant has been in the coal business at Providence since the year 1840, engaged in buying and selling coal at wholesale and retail. The coal mined and put in market by the Pennsylvania Coal Company, being that which is called in the bill "Pittston coal," was first put into the market in 1850 or 1851. The coal mined and put in market by the Delaware, Lackawanna and Western Railroad Company, being that which is called in the bill "Scranton coal," was first put into the market in 1856 or 1857. Ever since those coals were so first put into the market, the defendant has been in the habit of selling them as "Lackawanna coal." Until August, 1866, the plaintiffs never complained to the defendant that he was using without right the words "Lackawanna coal," to designate Pittston coal and Scranton coal. From about 1857 to 1860, a Mr. Lawton was agent of the plaintiffs for the sale of their coal in New England, and conducted such agency at Providence, among other places. During that period, Mr. Lawton complained to Mr. Soutter, the vice president of the plaintiffs, that other persons were selling as Lackawanna coal, coal not put into market by the plaintiffs, and, under the instructions of Mr. Soutter, Mr. Lawton placed on the premises in Providence from which the coal of the plaintiffs was being sold by him, Lawton, a sign bearing the words "Old Company's Lackawanna Coal." Mr. Lawton testifies, that the object in erecting such sign was to designate the coal of the plaintiffs sold by him from Scranton coal then being sold by the defendant. The agency of Mr. Lawton at Providence consisted of the exclusive privilege of selling at that place the coal of the plaintiffs shipped by them to that place, for which he received from the plaintiffs a commission. During the year 1860, the plaintiffs kept a yard in Providence for the sale of their coal, for which yard they paid rent. During that year, the attention of their agent at Providence, Mr. Hopkins, was called by Mr. Soutter, who was still the vice president of the plaintiffs, to the fact that the defendant was selling at Providence, as "Lackawanna coal," Pittston coal and Scranton coal. On the 24th of January, 1860,

the plaintiffs issued a printed circular to the trade, dated at their office in New York, and signed by Mr. Soutter, as their vice president, in which this language was used: "We feel constrained to caution consumers of Lackawanna coal against coals not coming from our company, but which are largely sold in the eastern states and delivered as genuine Lackawanna to parties who inquire for, and are led to believe they are getting, our coal. To avoid this, buyers should ask for Lackawanna that comes directly from the Delaware and Hudson Canal Company." From 1861 to 1869 Mr. Hopkins continued to be the agent of the plaintiffs at Providence, under a like arrangement with that before-mentioned as subsisting with Mr. Lawton from 1857 to 1860. The same sign before referred to as put up by Mr. Lawton in 1860, was transferred, in 1862 or 1863, to the building occupied by Mr. Hopkins, and from which the plaintiffs' coal has been and is sold in Providence, and has remained there ever since and still remains there. The defendant has bought no coal from the plaintiffs since about 1862. Ever since 1862 or 1863 he has had upon his premises at Providence, from which he has been selling Pittston coal and Scranton coal, signs with the words "Lackawanna coal" upon them. During the five years from 1862 to 1866, he sold under the name of "Lackawanna coal" over fifty thousand tons of Pittston coal and Scranton coal. Most of it was Scranton coal. Under the foregoing circumstances, whatever rights the plaintiffs may once have been entitled to enforce against the defendant, they have lost those rights as against him by their acquiescence in his use of the words "Lackawanna coal" to designate coal from the Lackawanna region that was not put into market by the plaintiffs.

The basis of the action of a court of equity to restrain the infringement of the right to a trade-mark, is fraud on the part of the defendant. There is no evidence in this case to show that the defendant has ever untruly represented Pittston coal or Scranton coal as having been mined or put into market by the plaintiffs, or has ever untruly sold either of such coals as having been mined or put into market by the plaintiffs. It appears that other dealers in coal in Providence have, for many years past, been selling Scranton coal as Lackawanna coal. Mr. Moses Taylor, who has been for the last fifteen years a director and manager of the Delaware, Lackawanna and Western Railroad Company, which mines and puts into the market what is called in the bill "Scranton coal," testifies, that his company has sold to the defendant thousands of tons of coal of its own production by the name of "Lackawanna coal" simply.

I do not see that the defendant, in what he has done, has been acting otherwise than honestly and fairly. He has not sold as the plaintiffs' coal what was not their coal; and, even assuming the existence, to the fullest extent claimed in the bill, of the right of the plaintiffs, as against others than the defendant, to the exclusive use of the words "Lackawanna coal," as a trade-mark, the defendant, in all that he has done, has done it under such acts of acquiescence on the part of the plaintiffs as are equivalent to a license to him by them to do what he has done. To grant the prayer of the bill, namely, to enjoin the defendant from continuing to keep up the signs referred to, bearing the words "Lackawanna coal," and from advertising "Lackawanna coal" for sale, and from selling Scranton coal or Pittston coal as "Lackawanna coal," and to compel him to pay to the plaintiffs the profits he has derived from the use in his business of the words "Lackawanna coal," in the way in which he has used them, and from the sale of Pittston coal and Scranton coal under the name of "Lackawanna coal," would, therefore, be a violation of every true principle of equity.

The bill is dismissed, with costs.

[NOTE. On appeal by complainants to the supreme court of the United States, this decree was affirmed, mainly upon the ground that there can be no trade-mark in a geographical name. Upon this subject the court, speaking through Mr. Justice Strong, among other things, said: "And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer; and, could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton,' be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations,—it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp, or as Lehigh coal, that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing their goods." Delaware & H. Canal Co. v. Clark, 13 Wall. (80 U. S.) 311. See, also, Alleghany Fertilizer Co. v. Woodside, Case No. 206, and note.]

DELAWARE & H. CANAL CO. (LITTLEFIELD v.). See Case No. 8,400.

DELAWARE & R. CANAL (RUNDLE v.). See Case No. 12,139.

DELAWARE INS. CO. (CORT v.). See Case No. 3,257.

DELAWARE INS. CO. (DEDERER v.). See Case No. 3,733.

DELAWARE INS. CO. (HART v.). See Case No. 6,150.

Case No. 3,765.

DELAWARE INS. CO. v. HOGAN.

[2 Wash. C. C. 4.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.

MARINE INSURANCE—THE CONTRACT — VARIANCE BETWEEN POLICY AND ORDER THEREFOR.

If it appear that the terms of the order had been departed from in the policy of insurance, by fraud or mistake, the court would consider the order as containing the contract between the parties; as where it materially varied from the policy; as if the risk stated in the policy be "from" such a place, instead of "at and from;" or if it contain a warranty not authorized by the order. In such cases, the variance itself, unless contradicted by proof, would be evidence of mistake. But in such cases, the order could only be resorted to so far as it varied from the policy, and in all other respects the policy would govern.

[This was a bill to reform a policy of marine insurance. An action at law was previously brought upon the policy, and judgment given for plaintiff. See Hogan v. Delaware Ins. Co., Case No. 6,582.]

This bill states no new matter, except that the defendant intended to insure according to the order, and calls upon the defendant to declare, if this was not his intention; that is, that the policy effected here was to be void, if a policy were done in England after as well as before this. The defendant denies that this was his intention.

For the complainants it was contended, that the order was the only evidence of the contract, and that the court ought to consider the case as if the very words of the order had been inserted in the policy. 1 Atk. 545; 1 Ves. 318, 319. If so, the construction contended for as law, and which the court seemed inclined to favour, must prevail.

For the defendant. The case is stronger now for the defendant than it was at law; for the defendant swears, that the policy conforms to his intentions. To get at the intention of the parties, so as to discover whether a mistake was made, the order, instruction, and policy must be considered together. If so, there can be no doubt. The policy cannot be departed from, unless fraud or mistake is clearly made out. Marsh 245, 246; Park, 1.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

When this case was decided on the law side of the court, the whole question was taken into consideration; every thing being viewed as done, which a court of equity could properly have directed to be done. The true question was then, and still is, what was the agreement between these parties? The argument urged upon the former occasion, and again repeated, was, that the order alone constituted the agreement. What then is the use of the policy? If it be not evidence of the contract finally concluded upon, it must be considered as a superfluous document, unnecessarily executed, and improperly introduced into a cause. The order contains the heads of the agreement for the information of the party, who is afterwards to give it its proper form. The form, which it finally assumes, is that of an instrument, denominated a "policy;" which is signed by the underwriter, and is the evidence of the contract of indemnity, as understood by him and the assured.

It may and certainly often does happen, that the terms of the order are departed from by consent, by fraud, or by mistake. If by consent, no person will contend that the order should control the policy; and if by fraud or mistake, then the order may be resorted to where it materially varies from the policy, because in reality, that would be the only true evidence of the agreement upon the point of variance. I say "materially variant," as if the risk, stated in the policy, be "from" such a place, instead of "at and from;" as in the case of Mitteaux v. London Ins. Co. So if it contain a warranty which is not authorized by the order, and the like; and in such cases, the variance itself between the two instruments, would, without contradictory proof, be evidence of the mistake. But still, the order could only be resorted to so far as it varied from the policy; and, in all other respects, the policy would be considered as the contract.

But a previous question must always be, is there a variance? and to ascertain this, the whole evidence must be considered. The whole must be taken and construed together; the letter of instructions, the order and the policy. It is from these together, with any other evidence which may be produced, that the real intention of the parties is to be discovered; and whether this intention has, by fraud or mistake, been frustrated by any expressions used in the policy. This brings us to the true point in this cause; does it appear, from the whole evidence, that the policy misstates the contract intended by the parties? The letter of instructions and the order afford no evidence that the intention of the parties was mistaken; because they are expressed in such ambiguous terms, it may well be doubted, whether the clause now complained of, refers to a prior, or to a subsequent insurance effected in London. The defendants, in their answer, swear, that the policy states the contract as they intended it, and there is no evidence in the cause to show

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

that it contradicts the intention of the complainants. Why then should the words of the order be substituted for those of the policy? Not because the latter has mistaken the intention of the parties, for the reverse of this appears to be the fact,—not for the purpose of explaining a doubtful meaning. for it is the order alone which creates a doubt.

If further observations be necessary to render this case clearer, let it be noticed, that the addition to the order, and the insertion of the clause in the policy which is now objected to, were made by the party who now asks relief; and that the policy remained with him, without a suggestion being made that it was repugnant to the real agreement of the parties, until after the catastrophe had occurred, upon which his obligation to indemnify the other party had become complete. All the principles of law and of equity are against him.

Bill dismissed with costs.

DELAWARE INS. CO. (HOGAN v.). See Case No. 6,582.

DELAWARE INS. CO. (KING v.). See Case No. 7,788.

DELAWARE INS. CO. (LE ROY v.). See Case No. 8,270.

DELAWARE INS. CO. (MARSHALL v.). See Case No. 9,127.

DELAWARE INS. CO. (MARTIN v.). See Case No. 9,161.

DELAWARE INS. CO. (MOSES v.). See Case No. 9,872.

DELAWARE INS. CO. (SETON v.). See Case No. 12,675.

DELAWARE INS. CO. (SMITH v.). See Case No. 13,035.

DELAWARE INS. CO. (SNELL v.). See Case No. 13,137.

DELAWARE INS. CO. (SPERRY v.). See Case No. 13,236.

DELAWARE INS. CO. (TALCOTT v.). See Case No. 13,734.

DELAWARE INS. CO. (UNITED STATES v.). See Case No. 14,942.

DELAWARE, L. & W. R. CO. (MILLER v.). See Case No. 9,566.

DELAWARE, L. & W. R. CO. (WARREN v.). See Case No. 17,194.

Case No. 3,766.

DELAWARE MUT. SAFETY INS. CO. v. GOSSLER et al.

[Holmes, 475.][1]

Circuit Court, D. Massachusetts. March Term, 1875.[2]

BOTTOMRY AND RESPONDENTIA BOND—CONDITIONS —"UTTER LOSS" — STRANDING AND ABANDONMENT TO INSURERS—RIGHT TO PROCEEDS.

1. A bottomry and respondentia bond conditioned to be void in case of "utter loss" of the vessel during a certain voyage, is not discharged by the stranding of the vessel during the voyage, and abandonment to insurers as a total loss, and sale by them at the place of stranding as not worth repairing, if the vessel exists in specie at the time of the sale.

[See note at end of case.]

2. The holder of such a bond, in case of shipwreck of the vesel not amounting to an utter loss within the meaning of the bond, is entitled to the proceeds of the cargo saved, as against insurers of the cargo who have accepted abandonment and paid the owners as for a total loss.

[See note at end of case.]

Action at law. The plaintiff corporation was insurer of a cargo of sugar on board the North German bark Francis, from Java to Boston. The vessel sailed from Pasoeroean, Java, with said cargo on board. Soon after leaving her port of departure she encountered a hurricane, and was compelled to cut away her masts to save vessel and cargo. At the neighboring port of Surabaya, Java, she was partially repaired, and thence necessarily proceeded to Singapore, Straits Settlements, in tow of a steamer, where her repairs were completed and she was fitted to continue the voyage. To meet the expenses of repairs upon the bark, the master was compelled to borrow at Singapore the sum of $26,055.43, Singapore currency, and executed, July 12, 1872, a bottomry bond for that sum, with marine interest at 27½ per cent. upon the vessel, cargo, and freight. The bark sailed from Singapore for Boston, encountered a storm in the month of December following, and was cast ashore on Cape Cod, Massachusetts. The defendants, who were agents of the bondholders and assignees of the bond, took measures to save as much as possible from the wreck, and succeeded in saving somewhat less than half the sugar on board, which was forwarded to Boston and sold. The vessel was surveyed as she lay upon the beach, found incapable of repair, and her sails, rigging, &c., and afterwards the hull, were sold by auction for the underwriter. When the vessel was sold, she lay "on the beach, full of water, as high as she could, but so low as to be submerged at high water." The hull was sold for $2,000, and was resold by the purchaser, on the same day, for about $6,000. Upon learning of the disaster to the vessel, the owners of the cargo made abandonment in writing to the plaintiff as underwriter thereon, and claimed payment for a total loss under their policies. The abandonment was before the sales. After the sales the plaintiff corporation paid to each of said owners the amount of a total loss under said policies, and, on the same date, received from each of the owners an assignment and transfer in writing of "the sugar of said owners, and all their right, title, interest, trust, claim, and demand therein and thereto." The defendants, as agents of the bondholders, with the consent of the owners of the cargo, sold the sugar saved, and held the proceeds, claiming them on account of said bond; the net proceeds of the saved

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

[2] [Affirmed in 96 U. S. 645.]

cargo not being sufficient to satisfy the bond. The plaintiff corporation claimed the proceeds of the cargo saved, as underwriter who had accepted abandonment, and paid a total loss thereon; and this action was brought to recover those proceeds.

Sidney Bartlett and Curtis & Reed, for plaintiff.

Sohier & Welch, for defendants.

SHEPLEY, Circuit Judge. This contract of bottomry and respondentia contains the following condition, upon the construction of which, as affecting the rights of the parties at common law, upon the well-settled principles of law applicable to similar contracts, depends the ownership of the fund in controversy: "Provided, nevertheless, and it is hereby agreed, that if, in the course of the said voyage, an utter loss of the said vessel by fire, lightning, enemies, men-of-war, or any other perils, dangers, accidents, or casualties of the seas or navigation, shall unavoidably happen, then the said loan and interest shall not be payable, and all parties liable therefor shall be wholly discharged therefrom, and the loss shall be wholly borne by the said lenders or bondholders, and every thing herein contained for payment thereof shall be void and determined; save and except only, and provided in such case, that the said lenders or bondholders shall be entitled to such average as can be hereby lawfully secured to them on all salvage recoverable in respect to the said vessel, freight, and goods, or any of them." The meaning of the clause of exception at the close of this condition is not obvious at the first glance. It is claimed that the effect of it is to give to the bondholder, to the extent of the sum due to him, all the property saved in case of wreck. If that was the purpose of the clause, it could have been simply expressed in language free from ambiguity. But the language does not entitle the bondholders to the effects saved. It does not entitle them to salvage, but "to such average as can be lawfully secured to them (the bondholders) on all salvage recoverable," &c. Perhaps some light may be thrown upon the history of the use of such a phrase as "average upon salvage," in connection with the right of the lender upon general adventure to a claim upon any of the effects saved, by reading the discussion between Valin and Emerigon, to be found in the commentary of Valin upon the Ordonnance de la Marine, liv. 3, tit. 5. art. 18, "Des Contrats à Grosse Aventure." The article itself provides, "S'il y a contrat à la grosse & assurance sur un même chargement, le donneur sera préféré aux assureurs sur les effets sauvés du naufrage pour son capital seulement." If there be a contract of maritime loan and an insurance upon the same cargo, the lender shall be preferred to the insurers upon the effects preserved from shipwreck for his capital, and no further. In commenting upon this article, Valin zealously contends against what he considers the gross injustice of such a preference of the lender upon bottomry or respondentia upon the goods saved, over the insurer, and he supposes the case of a cargo worth twenty thousand livres, on which the bondholder had a claim for ten thousand, and there was insurance to the amount of ten thousand on the surplus, insisting that in such a case the insurer should share proportionably with the bondholder in the effects saved. He refers the question to Emerigon, who does not concur in the views of Valin, and gives conclusive reasons against the construction contended for by Valin, adding that he has consulted the tribunal of the admiralty at Marseilles, where the opinions were unanimous that this privilege was conceded to the bondholder by the eighteenth article in favor of commerce. Boulay-Paty also agrees with Emerigon. The views of Valin never seem to have been recognized in the commercial code of any nation. It is worthy of note, however, that he contended that the lender upon bottomry or respondentia should share with the insurer or the owner in the effects saved, in proportion to their respective interests in the property at risk. This would have been an "average of the salvage." The insertion of this clause might have resulted from an attempt to establish, by agreement of the parties, a rule of division of the effects saved between the bottomry lender and the insurer, in proportion to their respective interests, in lieu of the well-established rule of the maritime law, which prefers the bondholder to the extent of his original loan.

Sir Robert Phillimore, in the case of The Great Pacific, L. R. 2 Adm. & Ecc. 385 (after adverting to the fact that a stipulation couched in these very words was of common occurrence, and found in the old forms of bonds in the early editions of Abbott on Shipping, and in the edition of 1781 of Westkitt's Digest of the Laws of Insurance), speaks of it as derived, probably, from the mercantile usages of Spain, with respect to vessels trading with the Spanish West Indies, and that it referred to cases in which the ship had been so wrecked that portions of her alone remained, such as planks, spars, rigging, and the like, when, to use the expression of Emerigon, "Les débris du navire naufragé existent, mais le navire n'existe plus." The case of The Great Pacific was heard on appeal from the high court of admiralty to the privy council. Stephens v. Broomfield, L. R. 2 P. C. 516. Sir James W. Colville, in pronouncing the judgment in the case, says, with reference to this clause: "Whatever it means, their lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the ship-

owners. It would meet the case suggested at the bar, in which, the vessel having been voluntarily stranded, with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship. That such average would become due, if the ship, failing to get off, is totally lost, seems to be a question upon which jurists are not agreed. See Abb. Shipp. (10th Ed.) pp. 373, 375, and 2 Phil. Ins. § 1315. But the clause may, nevertheless, have been designed to cover such average, if the right to it existed." The judgment in that case was that, whatever might be the construction of the clause, it could have no operation in the case of The Great Pacific, unless there had been a loss of the vessel wthin the meaning of the clause; and there had been no such loss in that case, because the ship remained in specie, though so much damaged as not to be worth repairing.

It may be well to note that the words in the condition in the case of The Great Pacific were, "in case of loss," and in this case, "in case of utter loss;" and to remark, that the sum for which the hull of the ship sold after the disaster bore about the same proportion to the original value as in the case at bar. Whatever be the true construction of this exception, it is manifest that the exception can have no application to the facts in this case. The exception applies only in case of "an utter loss," and not of a constructive total loss, of the vessel. The words are, "save and except only and provided in such case that the said lenders or bondholders shall be entitled to such average as can hereby be lawfully secured to them on all salvage recoverable in respect to the said vessel, freight, and goods, or any of them." The words "in such case" refer to the contingency, and the only contingency, provided for in the preceding paragraph of the exception, "if, in the course of the said voyage, an utter loss of the said vessel, by fire, lightning, enemies, men-of-war, or any other perils, dangers, accidents, or casualties of the seas or navigation, shall unavoidably happen." The exception is, therefore, applicable only in case of "an utter loss" of the said vessel. In this case, the vessel did not arrive at her port of destination; she was sold at an intermediate place, on the beach, near Truro, Cape Cod, by the voluntary act of the underwriter (who, after the abandonment, was the owner), in the exercise of a wise discretion, because the expense of the necessary repairs would have exceeded the value of the vessel when repaired, and because there was not a reasonable expectation of getting her off the beach where she was stranded, without an expenditure which would not have been justified by the existing state of facts. There was clearly a constructive total loss of the ship, which would have entitled her owners to recover from the underwriter the whole amount of her insurance; but there was not that actual or absolute total loss, or, in the words of the condition of this bond, that "utter loss," which would discharge from his liability the borrower of money upon bottomry, inasmuch as the ship existed in specie at the time of her sale.

"There is not, in respect to the contract" (of bottomry), "any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry." "The property saved, whatever it may be in amount, continues subject to the hypothecation." 3 Kent, Comm. § 359. Lord Ellenborough, in Thomson v. Royal Exchange Assur. Co., 1 Maule & S. 30, says: "In the case of bottomry, nothing short of a total destruction of the ship will constitute an utter loss; if it exists in specie in the hands of the owner, it will prevent an utter loss." In The Catherine, 1 Eng. Law & Eq. 679, 15 Jur. 231, Dr. Lushington, referring to the case last cited, says: "In that case, Lord Ellenborough decided that the bond could not be lost so long as the vessel remained in specie. That was the law of this country long before Lord Ellenborough so declared it. If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." See, also, The Dante, 2 W. Rob. Adm. 427; The Draco [Case No. 4,057]; The Elephanta, 9 Eng. Law & Eq. 553. In Broomfield v. Southern Ins. Co., L. R. 5 Exch. 192, Martin, B., says: "Now, it has been held that, in construing a bottomry bond, 'loss' means a loss by going to the bottom of the sea." This was an action upon a policy of insurance upon the bottomry bond given on the Great Pacific, and the court of exchequer followed the decision of the privy counsel in Stephens v. Broomfield, L. R. 2 P. C. 516. "'Utterly lost,'" says Tilghman, C. J., "is a strong expression, intended, as I conceive, to be distinguished from 'technically lost.' A ship is not utterly lost while she remains in specie in the hands of the owners. Had she been taken by an enemy, she would have been utterly lost to the owner. So, had she been burned or wrecked and gone to pieces. But she is not utterly lost merely because it may cost more than she is worth to repair her." Insurance Co. of Pennsylvania v. Duval, 8 Serg. & R. 138. This was the case of a respondentia bond of a form peculiar to Philadelphia, which, in case of utter loss of the vessel, entitled the lenders to a just and proportional average on cargo not avoidably lost, and made the lenders liable to average and entitled to salvage in the same manner as if they were underwriters. It is clear, therefore, that no utter loss of the vessel has happened which would render the contract void. The rights of the parties are dependent upon the state of facts at the time of the sale of the ship, when she existed in specie, and are not affected by the subsequent total destruction of the vessel. This was so settled

by Mr. Justice Story, in the case of The Draco [supra]. The clause of exception, which only applies in case of an utter loss, has no application to the case at bar. The rights of the bondholders are the ordinary rights of a lender upon maritime contracts of this description, in case of shipwreck, to the salved effects to the extent of his loan. The definition by Bynkershoek of the contract shows what these rights are. He defines such contracts to be a pledge of the vessel, or other effects upon which the loan is made, and of what may remain of them after any event by which the personal responsibility of the borrowers is excused. Bynk. Quaest. Pub. lib. 3, c. 16. By the French ordinance (title 5, art. 17), it was provided that, in case of shipwreck, the contracts of maritime loan shall be reduced to the value of the effects that are saved: "Seront toutefois, en cas de naufrage, les contrats à la grosse, réduits à la valeur des effets sauvés." Emerigon says: "From the moment of the accident, the lender is seised of right of the effects saved. He has a special lien upon them for the payment of his debt, saving the freight and salvage."

By the general marine law, the lender on bottomry is entitled to be paid out of the effects saved, as far as those effects go, if the voyage be disastrous. 3 Kent, Comm. (12th Ed.) 359, 360. "The property saved, whatever may be the amount, continues subject to the hypothecation." The borrowers, in case of shipwreck, are not personally bound, except to the extent of the salved effects, or their proceeds, which come into their hands. The Virgin, 8 Pet. [33 U. S.] 538.

The bond in this case is upon both ship and cargo, a bottomry and respondentia bond united. The maritime risk, however, upon which the bond is conditioned, is that of the utter loss of the ship. It was suggested at the argument, that the two subjects of the hypothecation might be divided, and each governed by its own law-merchant. I think this contradicts that clause in the bond which provides that, in case of an utter loss of the vessel, the bond shall not be payable. If at the time in reference to which the rights respectively of the lender and the borrower are to be determined, namely, the time when the sale took place, there had been an utter loss of the vessel, by either of the risks enumerated, I am of opinion that the bond would have been void, and the bondholders would have lost all claim, under this form of bond, to the cargo saved. A case, in many respects like this, is put and answered in the second title of the twenty-second book of the Digests, entitled, "De Nautico Foenore," 6 Paulus, lib. 25 Quaestionum. "When maritime money is thus given, the lender has no right to demand his money unless the vessel arrives in safety, at the stipulated time. The obligation of the debt is extinguished by the nonexistence of the condition; and therefore the lien on the pledge is also gone, even on those that are not lost." In this case, the vessel did not arrive in safety, but the voyage being terminated by a sale at an intermediate place, while the vessel existed in specie, and was only constructively totally lost as affecting a contract of insurance, but not utterly lost within the meaning of the condition in a bottomry bond, the property salved continues subject to the hypothecation. Judgment for defendants.

[NOTE. On appeal by plaintiffs the judgment was affirmed by the supreme court. Delaware Mut. Safety Ins. Co. v. Gossler, 96 U. S. 645. In the opinion, delivered by Mr. Justice Clifford, the court says: "Authorities, to show that the doctrine of constructive total loss is in no respect applicable to such a contract, are numerous, unanimous, and decisive. Thomson v. Royal Exchange Assur. Co., 1 Maule & S. 30. In the case of bottomry, said the chief justice in that case, nothing short of a total destruction of the ship will constitute an utter loss; for, if it exist in specie in the hands of the owner, it will prevent an utter loss; and text writers of the highest repute adopt the same rule, and express it in substantially the same language. Nothing but an utter annihilation of the subject hypothecated, says Chancellor Kent, will discharge the borrower on bottomry; the rule being that the property saved, whatever it may be in amount, continues subject to the hypothecation. 3 Kent, Comm. (12th Ed.) 359; Williams & B. Adm. Pr. 47. Unless the ship be actually destroyed, and the loss to the owners absolute, it is not an utter loss within the meaning of such a contract. If the ship still exists, although in such a state of damage as to be constructively totally lost, within the meaning of a policy of insurance; or if she is captured and afterwards retaken and restored, she is not utterly lost, within the meaning of that phrase in the contract of hypothecation. Maude & P. Shipp. (3d Ed.) 44; The Catherine, 1 Eng. Law & Eq. 679; The Elephanta, 9 Eng. Law & Eq. 553. Support to that view, of a decisive character, is derived from the case of Pope v. Nickerson (Case No. 11,274), decided by Judge Story, where he says, that, in cases of botomry, nothing but an actual total loss of the ship in the voyage will excuse the borrower from payment; not even when by reason of the enumerated perils the ship shall require repairs greater than her value; and he adds that the proposition is fully borne out by authority; and he adopts and fully approves what was decided in the case of Thomson v. Royal Exch. Assur. Co., to which reference has already been made, that the question in such a case is not, whether the circumstances were such as that, in case of insurance, the insured might have abandoned the ship, but whether it was an utter loss within the true intent and meaning of a bottomry contract; and he held that, in cases of bottomry, a loss not strictly total cannot be turned into a technical total loss by abandonment, so as to excuse the borrower from payment, even when the expense of repairing the ship exceeds her value. * * * Actual total loss of the property by the described perils displaces the lien of the lender, and defeats his right of recovery; but the rule is, that, if the ship is once bottomried, the bond attaches to the very last plank, and the holder of the bond may have that sold for his benefit. The Catherine, 1 Eng. Law & Eq. 679. Abundant authority exists for that proposition, and the court is of the opinion that the same rule is applicable to the cargo in cases where it is without condition covered by the bond. The Virgin, 8 Pet. (33 U. S.) 538. Prior remarks are sufficient to show that the doctrine of constructive total loss is not applicable to

contracts of bottomry, which serves very strongly to show that the maritime lien of the bondholder attaches to every part of the property covered by the bond, as seems to follow from all the authorities upon the subject. Broomfield v. Southern Ins. Co., L. R. 5 Exch. 192."]

Case No. 3,767.

DELAWARE R. CO. v. PRETTYMAN et al.

[17 Int. Rev. Rec. 99.]

Circuit Court, D. Delaware. Oct. Term, 1872.

INTERNAL REVENUE — ENJOINING COLLECTION — JURISDICTION — IRREGULARITIES OF ASSESSOR— CONSTITUTIONALITY OF LAW.

1. An assessor of internal revenue acts judicially in determining what persons and things are subject to taxation under an act of congress levying taxes.

[Quoted in Kissinger v. Bean, Case No. 7,853.]

2. If the subject matter is within his jurisdiction, that is, if he is bound to enquire and determine who and what are subject to taxation, a mistake as to the person or thing taxed, or an irregularity of proceeding on his part, will not invalidate his action as assessor so far as to make the collector, who proceeds on a warrant in proper form to collect the tax, a trespasser.

[Quoted in Kissinger v. Bean, Case No. 7,853. Explained in Kensett v. Stivers, 10 Fed. 524.]

3. A sum of money assessed by a United States assessor, under the provisions of an act of congress, in the exercise of his judicial power to determine what is the subject matter of taxation, is a United States tax, within the meaning of the act of congress prohibiting any court from maintaining a suit restraining the collection of U. S. tax. In such a suit the court will not hear the question of the unconstitutionality of the law, or invalidity of the act of congress, under which the tax has been assessed, argued, however much they may be of the opinion that the law, when tested in another form of action, will be found unconstitutional, invalid, or inoperative.

[Applied in Alkan v. Bean, Case No. 202. Quoted in Kissinger v. Bean, Id. 7,853. Explained in Kensett v. Stivers, 10 Fed. 524. Cited in Snyder v. Marks, 109 U. S. 193, 3 Sup. Ct. 160.]

4. The purpose of the act of congress was to prevent any interference with the prompt and regular collection of the revenue; and the interposition of any defence to a national tax, levied by an assessor acting within his jurisdiction, would be equally fatal to the said purpose of congress, whether said defence is founded on the alleged unconstitutionality of the act, its invalidity, or want of application to the case.

5. Query? Has not this court on general principles of public policy, founded on the relations of the states to the general government, the power to dissolve the injunction, independent of the act of congress requiring it?

[This is a bill in equity by the Delaware Railroad Company against John S. Prettyman, collector of internal revenue, and William C. Davidson.]

Geo. C. Gordan, for complainant.

Anthony Higgins, U. S. Atty., for defendants.

BRADFORD, District Judge. The bill filed is an injunction bill to restrain a United States collector and his deputies and agents from collecting a tax assessed as such by a United States assessor, under and by virtue of divers acts of congress. Under the provisions of an act of congress approved July 13, 1866 (14 Stat. 173), this suit is certified to the circuit court of the United States for the Delaware district, and is thus removed from the state tribunal in which it was commenced to this court, where it awaits an adjudication. The cause has been heard on bill, answer, exhibits, and certain facts admitted on both sides. The tax sought to be collected by the government, and resisted by the complainants, is one of 5 per cent., on certain interest money falling due and payable on the first day of July, 1870, on bonds theretofore given by the said complainants, and a further tax of five per cent. on certain dividends of profits made by the said complainants, and falling due on the day and year last aforesaid. The payment of this tax is resisted on the ground (using the language of the bill) "that there is no authority in law for the assessment of the said taxes on the interest which was payable by the said company on the first day of July, 1870, or the dividend which was payable by the said company on the first day of July of the same year." It is alleged by the answer that there is such authority to assess the taxes in question, and it is further alleged, and not disputed, that the taxes sought to be collected have been regularly assessed by the United States assessor of internal revenue, and were transmitted to the collector of internal revenue, on his list of taxes for the month of September, 1870, to be by him collected. In addition, it is alleged by the answer in bar of this suit, that by virtue of a certain act of congress, jurisdiction of such injunction suit as the present, is forbidden to be exercised by any court, in these words, viz.: "No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." This act was approved March 2, 1867 [14 Stat. 471], more than three years before the filing of this bill.

I conceive it altogether unnecessary to discuss the question of the authority of the assessor under the act of congress to assess the taxes referred to, as the case is disposed of on other grounds, which, in my mind, admit of no doubt.

The United States congress considered that the exigency of public affairs, in connection with the prompt collection of a large revenue, made it unsafe and impolitic to give to every tax-payer the summary remedy of injunction against its sworn officers when in the discharge of their official duties in the collection of the necessary means to support the government, and to make clear and positive that which it is believed on good legal authority rested in the power of the courts to do without the intervention of an act of congress, passed the act forbidding any court to maintain an injunction suit as

above recited. It is a mistake to say that this is a denial of right to the citizen. It is not a refusal to hear his complaint or to give him a full opportunity in the usual course of law to redress his grievances, but it is a refusal to give him and all the tax-payers alike the extraordinary and summary process of injunction, by which all matters are brought to a stand-still, and the public finances locked up until the question of right is determined. Surely it should be no ground of complaint if the citizen's right to this extraordinary and summary remedy has to yield to that view of the public welfare which is taken by the law-making power of the nation.

The case we are now considering is founded on an injunction bill filed in the court of chancery of the state of Delaware. The writ of injunction is not a mere incident of the bill, that is, merely ancillary to some main equitable purpose which the bill seeks to enforce, but it is its whole object and purpose, and when the injunction falls, there is nothing left for the bill to operate upon; and this not affected by the general prayer for relief. It is therefore pre-eminently a suit brought for the purpose of restraining the collection of tax, and for no other purpose, and such a suit the act of congress says shall not be "maintained" in "any court." In the face of this act, which is unequivocal and conclusive in its terms, I do not see how this suit can be maintained. Suppose it to be true, that there was no authority of law to assess the taxes in question, as claimed by the complainants, and that upon judicial investigation it might be so determined, is an injunction bill the proper legal channel by which the complainants can reach this result? Will a conviction in the mind of the court of the illegality or want of legality of the tax justify the court in maintaining this suit? This is the real question to be answered in this case. An illegal or unauthorized tax may in one sense be called no tax, and an assessment of such a tax may be in some cases void of any legal effect, and so not come within the operation of the United States statute. Such is contended by the complainants to be the character of the tax in question.

It is complained that the whole proceeding of assessing such tax is not only without authority, but an absolute nullity, which would make the collector a trespasser if he seized property under a warrant, and takes the case from the operation of the Act of congress. I consider that this question has already been settled both on principle and authority.

The plain purpose of the law was to prevent any person disputing the validity of a tax by injunction process, assessed by a United States assessor under the authority of an act of congress. Any defense to the payment of such a tax by this means, whether founded on irregularity, unconstitutionality, or want of authority to impose such tax, is equally fatal to the purposes and intention of the law. The fair presumption is, that officers of the law, such as assessors and collectors of United States revenue, acting under the obligation of bond and oath, or affirmation, and receiving instructions from the commissioner of internal revenue, present, at least, a prima facie case of authorized taxation. It is within the range of possibility, however, that the tax may be such a clear and manifest violation of the law—something which is so clearly prohibited to be taxed, or distinctly excluded from the subject matter of taxation, as that the assessor cannot be said to have any discretion or judgment in regard to assessing such a tax, and cannot be said to have jurisdiction of the matter. In such a case it has been agreed that the proceeding is a mere nullity, and will not afford thereafter a basis for any legitimate action to be taken thereon; and doubtless the act of congress would not apply. There is a wide difference between the case last supposed, however, and the one before the court. I think there is a rule which governs the case and is recognized by the courts as controlling the question of the applicability of the said act of congress. It is this: Whenever an assessor, in the exercise of his office, assesses a tax, which in his discretion and judgment he is authorized by an act of congress to assess, he being bound from the nature of his office to inquire and determine whether the thing in question is or is not the subject matter of taxation, he is then exercising a legitimate jurisdiction over the subject matter of taxation, and a tax thus assessed, although it may afterwards, in other proceedings, be declared unauthorized, comes within the description and meaning of that tax, the payment of which congress has forbidden to be resisted by bills of injunction.

Let us now examine the position of the United States assessor and his duties in reference to this matter. By the law of 1864 [13 Stat. 14], as subsequently amended by the acts of July 13, 1866, March 2, 1867, and July 14, 1870 [16 Stat. 256], the taxes in question were imposed. On the 2d of March, 1867, congress enacted that these taxes "shall be levied on the first day of March, and be due and payable on or before the 30th day of April, in each year, until, and including the year 1870, and no longer." Under this state of legislation it was considered doubtful whether the tax on this interest and these dividends did not embrace a period of time after the first of January, 1870. Justice Strong, of the supreme court, and a member of the circuit court for this district, decided in Philadelphia & R. R. Co. v. Barnes [Case No. 11,087], that this tax could not be collected on dividends and interest falling due after the first of January, 1870, by process issued before the 14th of July, 1870 (the date of a subsequent act of congress, extending

the time for the liability of this interest and these dividends to taxation to the first day of August, 1870). It is understood that the supreme court (to which this case has been taken on appeal) have not confirmed this opinion, being equally divided on the legal questions involved. Congress, however, on the 14th of July, 1870, enacted a declaratory law evidently to settle doubts (which are proven by this suit referred to, and this division of the supreme court, to have been in existence before the passage of the said act) as to the true time for which such liability to taxation aforesaid should continue. The provision is in these words: "That sections 120, 121, 122, 123 of the act of June 30, 1864 [13 Stat. 223], entitled, 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13, 1866, and the act of March 2, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further tax shall be levied or assessed under said sections." Now after the passage of this last recited act, and in view of all the existing laws on the subject, this tax, now the subject of inquiry, was assessed in regular form by the officer appointed by law to do so. It must be evident that some one was invested with authority to determine—nay, required to do so—whether or not this interest and these dividends, due and payable on the first day of July, 1870, and declared by act of congress of the 14th day of the same month to be the subject matter of taxation, were or were not liable to taxation. The law places that power and duty in the assessor and assistant assessors subject to the control and direction of the commissioner of internal revenue. Where the law gives the power to hear, inquire, and determine concerning a matter, it gives jurisdiction over that matter. When the assessor, therefore, assessed this tax, he put into operation the power to determine whether these dividends and sums of interest were probably the subject matter of taxation; in other words, he exercised his jurisdiction over a matter which was manifestly within it. This case is thus brought clearly within the rule or principle above stated.

On an examination of authorities, the test of validity we shall find to be, that the assessor had jurisdiction of the case as to subject matter and as to person, and as a consequence, we will further find that in such case of jurisdiction, no irregularity or mistake of judgment will make his proceedings void or a nullity. Wise v. Withers, 3 Cranch [7 U. S.] 331, cited by the complainants, is a judgment of the supreme court of the United States, delivered by Chief Justice Marshall, declaring that the imposition of a fine by a court-martial upon a justice of the peace for not performing militia duty, being in violation of the act of congress releasing him from the performance of such duty, was an unauthorized act, by reason of the court having no jurisdiction of the case, and that the court-martial as well as the collector of the fine by distress warrant were trespassers. It will be observed that the chief justice puts this decision on the ground that there was no jurisdiction. The act of congress had taken this person, i. e., this justice of the peace, from the class liable to military duty—the court has no jurisdiction of the person in this case. They were shut out from the exercise of any judgment and discretion in the matter by the plain words of the act of congress, which excluded the person from their jurisdiction. The principle of this case does not appear to war with our position; but, in our judgment, agrees with and sustains it. The case of Mills v. Martin, cited for the complainants from 19 Johns. 7, follows up the decision in Wyse v. Withers, and makes the officer who executes a warrant to collect a fine for non-attendance on militia duty a trespasser, when the court had no jurisdiction of the case. The same remarks are applicable to this case as to Wyse v. Withers, last cited. Weaver v. Devendorf, 3 Denio, 117, cited by the complainants, decides that an assessor is not responsible in a civil suit for a judicial determination in a matter over which he had jurisdiction, however erroneous it may be, or however malicious the motive which produced it. Judge Beardsley says, "The rule extends to judges from the highest to the lowest, to jurors, and to all public officers, whatever name they bear, in the exercise of judicial power." It, of course, applies only when the judge or officer has jurisdiction of the particular case, and is authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. Now if it be admitted that the United States assessor had jurisdiction to inquire and determine on the propriety of making these assessments or ignoring the act of congress, there could not be produced a case more in point to show that the assessments and proceedings thereon are not nullities and cannot be resisted by injunction process.

The next case cited by the complainant is Le Roy v. East Saginaw City Ry. Co., 18 Mich. 233. By the statute law of Michigan "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine in pursuance of any law of this state." This was an action of replevin brought by the plaintiffs for the recovery of goods and chattels taken by the collector of taxes, and the court gave their construction of the statute in these words, viz.: "This provision must therefore be construed as applying only to cases in which a valid tax might by legal possibility have been imposed and collected by regular and proper proceedings under some statute authority. In this latter class of cases this pro-

vision would prohibit the action of replevin, though the statute authority might not have been fully complied with, and the proceedings might have been so far irregular as to defeat a sale of real estate, sold for such taxes." In this case, the right to maintain the action of replevin in all cases where there was no statute authority to assess a tax was allowed, and consequently the inquiry as to such illegality was opened and determined in the action of replevin. This case is in point for the complainants. It is the only authority I have seen on this side of the question. The judge giving his opinion cites no case supporting his decision. On the other hand, in People v. Albany Common Pleas, 7 Wend. 485, Savage, C. J., says: "Replevin will not lie for property taken by virtue of a warrant for the collection of any tax, assessment or fine in pursuance of any statute of the state. Although the warrant may have issued erroneously or irregularly, if on its face it gives authority to the officer to collect the fine, &c., &c., replevin cannot be sustained." In the case before the court we are bound to presume that the warrant, if issued, would have been in due form—would have presented to the complainants an authority to levy upon their property for the taxes assessed. In such case the authority last cited is clearly with the defendant, and in opposition to the case cited from the Minnesota Reports.

The case of Beach v. Furman, 9 Johns. 229, is similar to the one before the court in the principles which govern its decision. The questions there arose upon an action of trespass in a justice's court for taking and carrying away a cow belonging to the plaintiff for non-performance of work upon the public roads. The defendants justified as officers executing a warrant, given by a justice of the peace, who, under the New York statute, was required to issue it on a written complaint made by the overseer of highways. The case was taken by certiorari to the supreme court of the state. The court says: "Whether Sarah Furman, being a woman and a freeholder, was liable to be assessed to work on the highways, is a question which does not necessarily arise in this cause. Admitting her not to have been liable to be assessed, yet, as she was assessed, and on complaint in writing made to the justice by the overseer of highways of her default, the justice was not to inquire into the legality of the assessment, but was bound by the act forthwith to issue his warrant of distress, and the constable was equally bound to execute it. Both the justice and constable acted ministerially in the case, and a mere ministerial officer is not responsible for the issuing or execution of process so long as the authority under which the process is awarded had jurisdiction over the subject matter. Now, the overseer of the highways was the person to designate in the first instance, and to deliver to the commissioners the names of the persons liable to be assessed, and he was also the officer to adjudge what persons were in default, and to demand the warrant. In the exercise of this authority the overseer may have returned the names of persons not liable to assessment, and he may have adjudged persons in default who were not in default. The remedy for the party aggrieved cannot be against the justice and constable, for they had no alternative but to obey, as the law did not give to either of them the right to inquire into the legality of the assessment or the truth and sufficiency of the default."

This case is authority upon the question of jurisdiction of the assessor of internal revenue. It is his duty to inquire who and what are subject to taxation—that is, it is within his jurisdiction to determine this. A mistake as to the person or the thing to be taxed, though remediable by various other means, cannot be reached by proceedings against the ministerial officers, such as the collectors who execute the warrant.

In 7 Barb. pp. 129, 133, the two cases of Van Rensselaer v. Cottrell and Van Rensselaer v. Witbeck may be cited as authority that the action of an assessor of taxes, when within his jurisdiction, cannot be questioned collaterally, that the collector acting under it is protected from being held liable in damages for so doing. The last case establishes the proposition that it is within the jurisdiction of the assessors to determine who are to be taxed and what property is taxable, and in making this determination that they act judicially. O'Reily v. Good, 42 Barb. 520, was decided in New York in 1864, some years before the passage of the act of congress prohibiting injunctions. In that case a tax created by act of congress, and assessed by regular assessment, and demanded in a warrant regular in form, had been levied on certain personal property, and replevied by the owner. By the statute of the state, replevin would not lie to take back property levied on for state taxes. There was no United States statute preventing the use of the writ of replevin in such cases. But Sutherland, J., said: "It is possible, and perhaps probable, that this Code restriction upon the right to obtain the immediate delivery of the property was intended to apply to property taken for a tax under either a state or a United States statute; but, whether this be so or not, the constitutional relation of the state to the United States, and the most self-evident considerations of public policy, at once suggest that it will not do to say that property seized for a tax under an act of congress, and under a warrant regular on its face, can be replevied. Concede the right to replevy in such a case, and innumerable replevin suits might delay, if not totally defeat, the collection of the national revenue. No doubt a party whose property has been seized for a tax under an act of congress, and on a warrant regular upon its face, if he deems the act unconstitutional, or the assessment proceeding irregular, can have the question of constitu-

tionality or irregularity determined in an action or proceeding to recover damages merely." Now, this case goes much beyond the requirements of the one before the court, and is especially interesting as authority which would justify the dissolution of this injunction, and dismissal of the bill, without the existence of the act of congress now demanding it. The supreme court of the state of New York entertains such a proper conception of the relations between the state and the United States governments, or what was due from the authorities of the state, in aid of the necessities of the government of the United States, that they denied to their own citizens the right to disturb a United States collector in the possession of personal property which he had taken on a warrant regular on its face, for taxes levied under the authority of an act of congress, although the statute prohibiting replevin for taxes made no reference to United States taxes. If then the collector could not be disturbed in his possession of the property levied on, by the action of replevin, on grounds of grave public policy alone, there being no act of congress touching the case; the same state of things existing now, as to act of congress imposing the tax, assessment, and regularity of warrant, would require a refusal of the order of injunction; a refusal of the writ of replevin is based on the right of the collector to hold on to that which he has seized, and admits the rightful taking, and is utterly inconsistent with a prohibition or injunction against doing that which is admitted to be right, viz.: collecting a tax regularly assessed under an act of congress by a warrant regular in form. So that this case is an authority for dissolving the injunction were there no act of congress in existence. Savacool v. Boughton, 5 Wend. 171, will be found a leading case reviewing at length the law establishing the proposition "that a ministerial officer is protected in the exercise of process, whether the same issue from a court of general or special jurisdiction, although such court have not in fact jurisdiction in the case, provided that on the face of the process it appears that the court has jurisdiction of the subject matter, and nothing appears in the same to apprise the officer but that the court also has jurisdiction of the person of the party to be affected by the process." This case goes to a great extent in protecting the ministerial officer from liability for trespass, and I take it that whenever he would be so protected the proceedings on which his warrant is based are not void—are not nullities. In Dynes v. Hoover, 20 How. [61 U. S.] 65, the court reviews the law in reference to the liability in trespass of an officer who executes a writ or warrant, and concludes that when the court has jurisdiction over the subject matter, an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence. See, also, on this point [U. S. v. Arredondo] 6 Pet. [31 U. S.] 730; [Voorhees v. Bank of U. S.] 10 Pet. [35 U. S.] 478; and 2 How. [43 U. S.] 338.

In the case of Robbins v. Freeland [Case No. 11,883], certain suits were instituted in the state courts against the collector, and orders were made by the state judge to show cause why the injunction which had been moved for should not be made permanent; they were removed by certiorari (as in this case) to the circuit court of the United States. The objections made to the tax were that it was unconstitutional on various grounds, and Judge Benedict said "that the court was clearly forbidden by this section (that is, by the act of congress prohibiting the maintenance of any suit restraining the collector of tax) from entertaining this motion, and the motion for injunction was denied."

It will be observed that those objections were to the constitutionality of the law. The objection here is that there was no law whatever. The result is the same; if the law was without constitutional authority it was utterly void; it was a nullity, quite as much so as if there was no law or statute in existence authorizing the tax; yet the court would not allow that inquiry to be made, and argued in an injunction suit. In this case congress did intend to and supposed it had extended the time for the existence of those taxes to the first of August, 1870, and used language which manifested clearly (whatever else it failed to do) such intention. Such intention was acted on by the commissioners of internal revenue and by the assessors, as a valid law of congress, and had not been disputed in any court. Now, why should the validity of that act of congress be drawn into question in this injunction bill any more than the unconstitutionality of an act of congress. I cannot see any reason why it should be so.

The next and last case I shall notice is Pullen v. Kinsinger [Case No. 11,463]. It is a decision by the United States circuit court, Judge Emmons, of the sixth circuit, and embraces a great amount of law bearing on the point now before the court. The case arose on taxes by the assessor of the United States on certain distilleries. Restraining orders had been obtained from the state courts, and the cases were certified (as in this case) to the United States circuit court. The legal questions arose on demurrers filed by the United States, and the judge said: "The demurrers therefore will be sustained upon the ground solely that neither this court or the state tribunal from which these cases were removed have any right to restrain the collection of federal tax assessed by an officer having jurisdiction of the subject, be it ever so irregular or erroneous;" and again he says: "Announcing as a rule for the facts in these cases only, it is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and judgment, law-

ful or unlawful, was rendered concerning it So far as this judgment is concerned, whether lawful or unlawful, is deemed quite immaterial." I have thus no difficulty in concluding that the United States assessor was acting strictly within his jurisdiction in assessing the taxes in question; that with the command of an act of congress of July 14, 1870, unrepealed and undisturbed, by any judicial decision, the revenue officers would have been criminal in not yielding obedience to it, and conforming their conduct to its requirements. That, however, it may be determined hereafter in other proceedings as to the validity and legislative efficacy of this act of July 14, 1870, that matter cannot be inquired of and determined in the form of suit now before the court, and that the proceedings of the assessor, being both based on legislative command, and on a discretion exercised by him in reference to a matter strictly within his jurisdiction, cannot in any sense be considered void or a nullity; and that the sums levied under these circumstances are United States taxes—within the meaning of the act of congress—prohibiting courts maintaining suits restraining their assessment or collection. Let a decree therefore be entered dissolving the injunction and dismissing the bill, with costs for the defendants.

Case No. 3,768.

DELAWARE RIVER CO. v. THOMAS.

[The case reported under above title in 20 Int. Rev. Rec. 175, and 20 Pittsb. Leg. J. 19, is the same as Case No. 3,769.]

Case No. 3,769.

DELAWARE RIVER STORAGE CO. v. The THOMAS.

[15 Int. Rev. Rec. 147; 4 Chi. Leg. News, 218; 29 Leg. Int. 116; 6 Abb. Law J. 292; 6 Am. Law Rev. 765; 7 Am. Law Rev. 381; 20 Pittsb. Leg. J. 19; 20 Int. Rev. Rec. 175, 4 Leg. Gaz. 114.]

Circuit Court, E. D. Pennsylvania. April 1, 1872.

MARITIME LIENS—WHARFAGE—ADMIRALTY JURISDICTION.

1. A claim for wharfage as a maritime lien upon the respondent's vessel is not cognizable in admiralty.

2. The admiralty jurisdiction is not to be invoked to enforce common law rights, for which the common law has provided appropriate and efficacious remedies.

[In admiralty. Appeal from the district court of the United States for the eastern district of Pennsylvania.]

J. Warren Coulston, for appellant.

Isaac Hazlehurst, contra.

McKENNAN, Circuit Judge. In Jones v. The Coal Barges [Case No. 7,458], Mr. Justice Grier, with characteristic sententiousness, said: "A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form." And so it may be said here, that the admiralty jurisdiction is not to be invoked to enforce common law rights, for which the common law has provided appropriate and efficacious remedies. The libellants are wharfingers at Philadelphia, and presented their libel in rem, to the district court, to enforce the payment of wharfage as a maritime lien upon the respondent's vessel. There is no authoritative adjudication that a claim of this sort stands upon such a footing. Certainly it has not been so decided by the supreme court. The weight of judicial opinion is the other way. It has generally been treated only as a common law lien, to be enforced by the detention of the vessel by the wharfinger, or to be recognized and paid as such out of the proceeds of the sale of the vessel, which had been brought under the control of the court otherwise than by an original libel, founded upon the dockage demand. This is the import of the opinion of Judge Peters, in Gardner v. The New Jersey [Id. 5,233], and of Mr. Justice Johnson in The St. Iago de Cuba, 9 Wheat. [22 U. S.] 418; and I do not regard the opinion of Judge Story in Ex parte Lewis [Case No. 8,310] as determining a different rule. Until the supreme court shall decide otherwise, I see no reason for expanding the admiralty cognizance of a demand, which rests securely upon a basis of common law right, and for the enforcement of which by the wharfinger himself the common law supplies an effectual remedy. The disallowance of the libel by the district court is therefore affirmed.

DELCOL (ARNOLD v.). See Case No. 556.

Case No. 3,770.

The DELHI.

[4 Ben. 345.][1]

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

DELIVERY OF CARGO — NOT ACCOUNTABLE FOR BREAKAGE—NEGLIGENCE—BURDEN OF PROOF.

1. Under a provision in a bill of lading, that the vessel shall not be accountable for leakage, breakage or rust, the vessel is nevertheless responsible for negligence or want of skill or care in her lading, stowage or delivery of the cargo. But such negligence or want of care or skill must be affirmatively shown by the party alleging it.

[Cited in Vaughan v. 630 Casks of Sherry Wine, Case No 16,900; Wolff v. The Vaderland, 18 Fed. 740.]

2. Where a bill of lading for cases of plate glass contained the clause, "Not accountable for breakage," and it appeared, that, when the cargo was discharged, certain of the cases were

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

placed flatwise on the dock and others placed endwise, and the attention of a clerk of the consignees of the cargo was called to the fact that some of the cases were piled flatwise on each other, but none of the cases appeared to be broken or pressed in, and all the cases were receipted for as in good order, and, on opening the cases at the consignees' store, some of the plates in some of the cases that were piled flatwise were found to be broken, as were also some plates in the cases that were placed endwise, (the claim for damage to the latter having been abandoned); *held*, that the consignees had failed to show that the damage to the glass was caused by the piling of the cases flatwise, or by any other negligence on the part of the ship.

T. J. Glover, for libellants.

R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel to recover the sum of $1,825.20, as the value of ten sheets of plate glass. Twelve cases, containing numerous sheets of plate glass, were brought by the ship from Antwerp to New York, under a bill of lading describing the contents of the cases as glasses, and providing that the ship should not be accountable for breakage. The libellants were the consignees of the cases. When the cases were opened at the warehouse of the libellants in New York, ten of the sheets were found to have been so broken as to be worthless. The ten sheets composed all of the sheets, five in number, which were in one of the cases, two out of the five sheets in another case, two out of the twenty-two sheets in another case, and one out of the six sheets in another case. The bill of lading states that the cases were received on board of the vessel in good condition, and the receipt given to the vessel by the cartman for the libellants, who received the cases from the ship, states that the cases were received in good order from on board the vessel. The libel alleges negligence in the transportation of the goods, and especially negligence in the manner in which several of the cases were discharged from the ship and landed on the dock, and avers that the breakage of the ten sheets was owing to the fact, that, although the cases were marked as containing glass, and to be kept on their edges, and were of great weight, they were improperly laid flat on the dock, and piled one on the other. At the hearing, the claim as to four of the sheets, of the value of $408, was abandoned. These four sheets were the two out of the five sheets that were in one case, and the two out of the twenty-two sheets that were in another case. No evidence was given of any negligence in stowage or transportation. The negligence claimed was the putting in a pile flatwise on the wharf at New York, as they were landed from the ship, seven of the cases, two of which contained six of the broken sheets, one containing the five sheets all of which were broken, and the other containing the six sheets one of which was broken. Five of the cases were shown to have been placed on their edges, on the wharf at New York, when landed; and two of such five cases were the two cases containing the four sheets as to which the claim for damage was abandoned. The allegation of negligence as to the cases piled flatwise is, that heavy and large cases were put on top of lighter and smaller cases. The case containing the five sheets all of which were broken, was the largest case of the twelve, and contained the largest glasses, the largest glass in that case being in size ten feet six inches in one direction, by six feet four inches in the other direction. The smallest case of the seven that were in the pile, contained a glass as large in size as eight feet in one direction, by four feet and ten inches in the other direction, and was not a case which contained any broken sheet. The inference is sought to be drawn, from such piling of the seven cases, that the breaking of the sheets in the two cases in the pile, there being in the pile cases smaller than both of such two cases, was caused by the pressure of a flat side of such large case against the sheets therein, such pressure being due to the great weight of the glass in the large case, as its flat side rested on the flat side of a smaller case.

It is well settled, that, although, under the provision, in a bill of lading, that the vessel shall not be accountable for leakage, breakage or rust, the vessel is nevertheless responsible for negligence or want of skill or care on the part of those in charge of her, in their lading, stowage or delivery of the articles covered by the bill of lading, yet such negligence or want of skill or care must be affirmatively shown by the party alleging it, under a bill of lading containing such recitals and provisions as those before referred to as contained in the bill of lading in this case. Dedekam v. Vose [Case No. 3,729]; The David & Caroline [Id. 3,593]. And not only so, but it must be satisfactorily shown that the negligence proved was the cause of the damage alleged. In the present case, there was no apparent breakage, at the time the libellants received the cases, either of their exterior coverings or of their contents. They were, so far as is shown, in the same apparent good order they were in when they were shipped at Antwerp. The attention of a clerk of the libellants was called to the fact, on the wharf, that seven of the cases were placed flatwise in a pile, and he went so far as to take down the numbers of the other five cases which were placed edgewise on the wharf, and to bring to the notice of the officers of the vessel, then and there, that the seven cases were piled flatwise. Yet no indication is shown to have then existed that any of the sheets of glass were broken, or any of the sides of the cases unduly pressed in, as respected either the cases piled flatwise or the cases placed on edge. It turned out, as before stated, that four sheets were broken in the cases placed on edge, and six sheets broken

in the cases piled flatwise. Notwithstanding the knowledge thus possessed by the libellants as to the piling flatwise, in one pile, of seven of the cases, they receipted for the twelve cases as in good order.

The libellants fail to show that the damage to the glass was caused by the piling of the seven cases flatwise, or by any other negligence on the part of the vessel, and the libel must be dismissed, with costs.

Case No. 3,771.

DELIESSHINE v. The FRIENDSHIP.

[See Case No. 13,807.]

DELIESSELINE (ELKISON v.). See Case No. 4,366.

Case No. 3,772.

The DELIGHT.

[Blatchf. Pr. Cas. 145.] [1]

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

PRIZE.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. This schooner, with a fishing seine and property on board of her, was captured, as prize, by the United States steamer New London, in Mississippi sound, on the 11th of December, 1861, fifty or sixty miles below New Orleans. The vessel was appraised by a naval board of survey, and appropriated to the use of the United States, on that valuation, by the United States flag officer in command in that vicinity, as necessary to the public service; and the property seized was transmitted by the seizing officer to this port, in the United States steamer Massachusetts, to be proceeded against within this jurisdiction. The documentary title to the schooner shows that she was transferred from her American ownership, and enrolled and licensed to citizens of the Confederate States, in the port of New Orleans, in April, 1861. She came out of New Orleans having on board a pass from the Confederate government, a rebel flag, and an old flag of the United States, which had been used on board of her before the Rebellion. She left New Orleans the 2d of December, 1861. The vessel and the articles on board were the property of residents of New Orleans. All the crew on the schooner had known, for four or five months, that New Orleans was blockaded, and that the United States vessels were lying before the place to maintain the blockade. The schooner was to return to New Orleans with the fish taken, for a market. The vessel and her equipments being indisputably enemy property, having also evaded the blockade of New Orleans, and being engaged in procuring supplies for an enemy port, to be conveyed thence for the use of public enemies, the vessel and all the property seized on board are subject to forfeiture for those causes. Judgment entered accordingly.

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

Case No. 3,773.

DELILAH et al. v. JACOBS et al.

[4 Cranch, C. C. 238.] [1]

Circuit Court, District of Columbia. Oct. Term, 1832.

SLAVERY—RIGHTS ACQUIRED UNDER FOREIGN LAW—IMPORTATION OF SLAVES.

1. Where civil rights are acquired under a foreign law, this court will enforce them.

2. The compact between Virginia and Maryland, does not prevent Maryland from prohibiting the importation of Virginia slaves from Virginia.

This was a suit for freedom. The plaintiffs [negro Delilah and others] claimed their freedom under the law of Maryland of 1796 (chapter 67), or the act of 1783, by being imported from Virginia into Maryland by a Mr. Childs, a citizen and resident of Maryland, who gave no list of them to be recorded, &c.

Mr. Neale, for defendants [George Jacobs and others], contended that this was a penal law of Maryland, which this court, sitting in this county, could not enforce.

But THE COURT (nem. con.) said, that where civil rights are acquired under a foreign law, this court will enforce them; and that this point in regard to the right of freedom, had been frequently decided by this court.

Mr. Neale also cited the 12th section of the compact between Virginia and Maryland, which authorizes the citizens of each state to bring their effects into the other state free of duty; and contended that Maryland could not prohibit her own citizens from bringing their slaves from Virginia into Maryland.

But THE COURT (nem. con.) said that the compact only prohibited the imposition of duties by Maryland, on the goods of citizens of Virginia, brought from Virginia, and vice versa, but did not prohibit Maryland from prohibiting her own citizens from importing slaves, or any other property, belonging to them.

Case No. 3,774.

In re DELL.

[5 Sawy. 344.] [2]

District Court, D. California. Dec. 24, 1878.

BANKRUPTCY — PROOF AGAINST SEPARATE ESTATE OF PARTNERS.

Where, out of a firm of four partners two were insolvent and one was bankrupt, and the

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

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

fourth partner paid off and discharged out of his separate estate all the firm debts: *Held*, that he was entitled to prove against the separate estate of the bankrupt one half of the amount so paid by him.

James C. Perkins, for assignee.

R. Thompson, for Baldwin.

HOFFMAN, District Judge. It appears from the testimony taken by the register that the bankrupt was a member of a firm consisting of four partners; of these, two are insolvent, and one is a bankrupt. Baldwin, the remaining partner, has paid off and discharged all the firm debts out of his separate estate, and he now asks to be allowed to prove against the estate of the bankrupt, concurrently with his separate creditors, for one half of the firm debts paid by him. The partnership has been dissolved and its affairs wound up and completely settled. I have not been referred to any case under the late or earlier bankrupt laws of the United States where the question thus raised has been decided.

It seems to be well settled in England that a partner who has paid all the firm debts may prove against the estate of his bankrupt associate for the share which the latter ought to have paid; what that share is seems to be open to question. Mr. Parsons inclines to the opinion that the bankrupt estate is only liable for the share or proportion which would be due from the partner if all the members of the firm were solvent; he admits, however, that Lord Eldon was of a contrary opinion, and held that the equity of the solvent party who had discharged all the firm debts, to treat the bankrupt partner as a co-surety continued after the bankruptcy. Pars. Partn. 476.

Mr. Robson, in his very valuable work on the Laws of Bankruptcy, observes: "If one, either before or after the bankruptcy, pays all the joint debts, he will be entitled to prove as a surety against the separate estate of his copartners for the share which the latter ought to have paid;" and for this he cites numerous cases. Robs. Bankr. 527. And on page 528 he says: "If one partner pays all the joint creditors he is entitled to contribution from the others according to their respective shares; but if any one of them is unable to pay his share of the debts the others must bear his proportion equally amongst them; and, therefore, a partner paying the joint debts will be entitled to prove against the separate estate of a copartner, not merely in respect to his share thereof, but also for a proportion of the share thereof of which any other partner ought to but is unable to pay." In a note, after citing several cases, he observes that Ex parte Watson, in which Sir J. Leach held a contrary doctrine (Buck, 449), may be considered overruled.

I have examined all the cases referred to by Mr. Robson. They are not as explicit and decisive as could be wished, but they seem fairly to justify the doctrine enunciated in the text. See Ex parte Moore, 2 Gly. & J. 190; Ex parte Hunter, Buck, 552; and Ex parte Plowden, 3 More. & A. 402. See, also, Colly. Partn. § 986; Story, Partn. § 407.

I think, therefore, that the proof offered should be admitted.

Case No. 3,775.

DELOACH v. DIXON et al.

[Hempst. 428.][1]

Circuit Court, D. Arkansas. Aug. Term, 1840.

JOINT AND SEVERAL CONTRACT — ACTIONS ON — PARTIES — DISCONTINUANCE AND NOLLE PROSEQUI.

1. In a suit on a joint and several contract the plaintiff may sue all or one or any intermediate number of the co-contractors, although he could not do so at the common law. The statute of Arkansas authorizes this proceeding.

2. The plaintiff may, after bringing suit against all, discontinue as to any defendant before final judgment, although he may be served with process, and this will not operate as a discontinuance of the action, nor can the other defendants avail themselves of it.

3. A discontinuance and nolle prosequi stand on the same ground; neither operating like a retraxit to release and bar the cause of action.

4. A nolle prosequi amounts to no more than an agreement not to proceed further in that suit as to the particular person or cause of action to which it is applied, but does not prevent the commencement of a future suit.

A. Fowler, for plaintiff.

Chester Ashley and George C. Watkins, for defendants.

OPINION OF THE COURT. This is an action of assumpsit, brought by the plaintiff [Isaac Deloach] against the defendants [Thomas Dixon, William Strong, and Thomas J. Curl] upon an assignment by them to the plaintiff of a promissory note, which, after presentment and demand for payment to the makers, they failed and refused to pay. The process having been served on all the defendants, they pleaded in abatement that Dixon was not a citizen of Arkansas at the commencement of the suit. The plaintiff thereupon discontinued his suit against him; and the defendants move the court to enter final judgment for them against the plaintiff; and whether this motion ought to be sustained is the only question to be now considered.

The defendants contend that as the action is founded on a contract, the discontinuance of the suit against one of the joint contractors after service of process on all, operates as a discharge and release of all the defendants from liability, and hence that final judgment should go in their favor. They further contend that the plaintiff can maintain an action against all or one only of the defendants, and not against an intermediate number; and, moreover, as he could not origi-

[1] [Reported by Samuel H. Hempstead, Esq.]

nally maintain his action against two of the defendants, he ought not to be allowed to do that indirectly which he could not do directly. If the rules of the common law upon this subject stood unchanged, the latter part of the defendants' argument is unquestionably sound; because at the common law, upon a joint obligation or contract, the plaintiff is compelled to sue all the joint makers or obligors; and upon a joint and several contract, must sue all or one and not an intermediate number. But the common law in this respect has been changed by the statute law of Arkansas; and in deciding this case we are to look to that law, because the law of the state furnishes the rule, except where the constitution, treaty, or statute of the United States otherwise provide. 2 Stat. 70. In the Revised Statutes of this state (section 64, p. 628), we find the following provision, namely, "Every person who may have cause of action against several persons, and entitled by law to but one satisfaction therefor, may bring suit jointly against all, or as many of them as he may think proper." By which it is clear that the plaintiff had his election to bring the action against the two defendants, Strong and Curl, without joining their co-contractor Dixon. He had the unquestionable right to institute suit against all or one or any other number of the joint contractors. If the plaintiff could maintain the action originally against Strong and Curl, are they at all prejudiced by the institution of the suit against all three of the joint contractors, and its dismissal as to one of them? If so, I am unable to discover it, and certainly the injury has not been pointed out. The plaintiff commenced his suit against all who were liable on the contract, and was proceeding against them; but they file a plea in abatement of the action, averring that one of them, namely Dixon, is not amenable to the jurisdiction of the court. If this be so, shall the plaintiff then not be permitted to discontinue the suit as to the defendant beyond the jurisdiction of this court, and proceed against those within the jurisdiction, when it is plain, that he might in the first place have omitted Dixon altogether, and proceeded against the two resident defendants?

It is well settled doctrine, that in cases of tort against several defendants, the plaintiff may at any stage of the cause before final judgment, enter a nolle prosequi as to some of them, and proceed against the others. 1 Ld. Raym. 597; 1 Wils. 306; 2 Salk. 457; 1 Wils. 90; 1 Saund. 207, note 2. The reason is said to be that the action is in its nature joint and several; and as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution, so he might even after verdict against several elect to take his damages against either of them. Carth. 20. These reasons are equally applicable to the present case; because here, too, the plaintiff had his election to sue all, or two, or one, of these defendants, and having sued all, it must follow that he may be permitted to dismiss against one, and proceed against the others. As he might in the first instance have sued any number he chose, so the right of election continues until final judgment, otherwise the privilege would be worthless. The practice of discontinuing is not injurious to defendants; and it is moreover calculated to suppress litigation, as a contrary practice would often compel a party to bring several suits to guard against the effect of a discontinuance of the entire action. No valid objection is perceived to this practice, and it seems to be sanctioned by authority. There is an act of congress of 1839,—9 Laws U. S. 962 [5 Stat. 321],—which provides, "That where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties, who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit." This provision I consider conclusive in support of the present opinion, and of the jurisdiction of the court.

With regard to the effect of a discontinuance, little doubt can be entertained. A discontinuance and nolle prosequi stand on the same ground; neither of them operating, like a retraxit, to discharge, release, and bar the cause of action. The supreme court of the United States in the case of Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 74, says: "The nature and effect of a nolle prosequi was not well defined or understood in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a retraxit operating as a full release and discharge of the action, and of course as a bar to any future suit. In other cases it was held not to amount to a retraxit, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. And this latter doctrine has been constantly adhered to in modern times, and constitutes the received law." The discontinuance, then, in the present case as to Dixon having no greater effect than a nolle prosequi (3 Bl. Comm. 296), does not operate to discharge and release the cause of action, either as to Dixon or the two remaining defendants. The principles here advanced will be found to be fully sustained by the case just cited in 1

Pet. [26 U. S.] 74, and by the authorities summed up with great accuracy in a note of Mr. Serjeant Williams to the case of Salmon v. Smith, 1 Saund. 207, note 2. The motion must be overruled.

Case No. 3,776.

DE LOVIO v. BOIT et al.[1]

[2 Gall. 398.][2]

Circuit Court, D. Massachusetts. Oct. Term, 1815.

ADMIRALTY JURISDICTION — MARITIME CONTRACTS AND TORTS — MARITIME INSURANCE — JURISDICTION AT LAW—BOTTOMRY BONDS.

1. The admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations.[3] The admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbors within the ebb and flow of the tide. The like causes are within the jurisdiction of the district courts of the United States by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction."

[Cited in Willard v. Dorr, Case No. 17,679; Jenks v. Lewis, Id. 7,279; Steele v. Thacher, Id. 13,348; American Ins. Co. v. Johnson, Id. 303; Ramsay v. Allegre, 12 Wheat. (25 U. S.) 638; Waterbury v. Myrick, Case No. 17,253; Davis v. The Seneca, Id. 3,650; U. S. v. Grush, Id. 15,268; The Tilton, Id. 14,054; The Wave, Id. 17,297; Borden v. Hiern, Id. 1,655; The Gold Hunter, Id. 5,513; The Perseverance, Id. 11,017; The Volunteer, Id. 16,991; Davis v. New Brig, Id. 3,643; Thackarey v. Farmer of Salem, Id. 13,852; House v. The Lexington, Id. 6,737; U. S. v. Mackenzie, Id. 15,691; Dundas v. Bowler, Id. 4,140; The Martha Anne, Id. 9,146; Mutual Safety Ins. Co. v. The George, Id. 9,981; The Lotty, Id. 8,524; Leland v. The Medora, Id. 8,237; Packard v. The Louisa, Id. 10,652; U. S. v. New Bedford Bridge, Id. 15,867; Van Santwood v. The John B. Cole, Id. 16,875; Lowry v. The E. Benjamin, Id. 8,582; Greeley v. Smith, Id. 5,750; Waring v. Clarke, 5 How. (46 U. S.) 473, 478, 486; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.), 421, 436; Taylor v. The Royal Saxon, Case No. 13,803; Kynoch v. The S. C. Ives, Id. 7,958; Tunno v. The Betsina, Id. 14,236; Jackson v. The Magnolia, 20 How. (61 U. S.) 335; Marsh v. The Minnie, Case No. 9,117; The Richard Busteed, Id. 11,764; The Clarion, Id. 2,795; The Sarah Jane, Id. 12,349; Jackson v. The Kinnie, Id. 7,137; Francis v. The Harrison, Id. 5,038; Moir v. The Dubuque, Id. 9,696; The General Cass, Id. 5,307; Bernhard v. Creene, Id. 1,349; The North Cape, Id. 10,316; Salvor Wrecking Co. v. Sectional Dock Co., Id. 12,273; Ex parte Easton, 95 U. S. 76; People v. Supervisors of Richmond County, 73 N. Y. 397; Simpson v. The Ceres, Case No. 12,881; The Canada, 7 Fed. 732; The City of Salem, 10 Fed. 843; Doolittle v. Knobeloch, 39 Fed. 40; Haller v. Fox, 51 Fed. 299. Followed in Baird v. Daly, 57 N. Y. 246; Drinkwater v. The Spartan, Case No. 4,085.]

2. A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction.

See the opinion of Mr. Justice Johnson in Croudson v. Leonard, 4 Cranch [8 U. S.] 434, and Hale v. Washington Ins. Co. [Case No. 5,915].

[Cited in Hale v. Washington Ins. Co., Case No. 5,916; Gloucester Ins. Co. v. Younger, Id. 5,487; New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 35; Insurance Co. of Pennsylvania v. The Waubanshene, 24 Fed. 559.]

3. Courts of common law have a jurisdiction concurrent with the admiralty over maritime contracts.

[Cited in The Gilbert Knapp, 37 Fed. 209; Steele v. Thacher, Case No. 13,348; Plummer v. Webb, Id. 11,233; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 420; Hill v. The Golden Gate, Case No. 6,491.]

[4. Cited in Leland v. The Medora, Case No. 8,237, to the point that the last bottomry bond is to be paid in preference to any former ones.]

Mr. Selfridge, for libellant.
Mr. Welsh, for respondents.

STORY, Circuit Justice. This is a libel brought in the district court upon a policy of insurance, alleging it to be a maritime contract, of which that court, as a court of admiralty and maritime jurisdiction, has cognizance. There is a plea to the jurisdiction, and the present question rests solely on the general sufficiency of that plea as a declinatory bar. It has been argued, and now stands for judgment. I shall make no apology for the length of this opinion. The vast importance and novelty of the questions, which are involved in this suit, render it impossible to come to a correct decision without a thorough examination of the whole jurisdiction of the admiralty. I shall, therefore, consider, in the first place, what is the true nature and extent of the ancient jurisdiction of the admiralty; in the next place, how far it has been abridged or altered by statutes, or by common law decisions; and in the last place, what causes are included in the delegation by the constitution to the judicial power of the United States of "all cases of admiralty and maritime jurisdiction."

The admiralty is a court of very high antiquity. It has been distinctly traced as early as the reign of Edward the First. Fitz.

[1] "This case is a very remarkable one, being, in truth, a learned and elaborate essay on admiralty jurisdiction, and one of the most elementary and luminous views of the subject extant. This great opinion ought to be thoroughly studied by those who aim at solid attainments in this department of the law." 2 Hoff. Leg. Study (2d. Ed.) p. 465.

[2] [Reported by John Gallison, Esq.]

[3] This case, and the doctrine here laid down, has been expressly recognized in Plummer v. Webb [Case No. 11,233]; Steele v. Thacher [Id. 13,348]; Drinkwater v. The Spartan [Id. 4,085]; The Mary [Id. 9,187]; The Tilton [Id. 14,054]; Andrews v. Essex F. & M. Ins. Co. [Id. 374]; The Tribune [Id. 14,171]; The Volunteer [Id. 16,991]; Case v. Woolley, 6 Dana, 21. See Curt. Treat. Seam. 252, 253, 260. See, however, Ramsay v. Allegre, 12 Wheat. 25 U. S.] 638, where Mr. Justice Johnson does not consider the doctrine here laid down as settled. See the whole of his elaborate and learned opinion, from page 416 to 640. See, also, Bains v. The James & Catherine [Case No. 756], where the same doctrine is again discussed in an elaborate opinion of Mr. Justice Baldwin.

Avowry, 192; Selden on Fortescue, 67, note e to c 32); Zouch, Adm. Jur. 114; Spel. Gloss. voce "Admiral;" Godolphin, Adm. Jur. 22–30; Exton, Adm. Jur. 3; Seld. de Dom. Maris, lib. 2, c. 16, p. 161; Id. c. 24; 12 Coke, 79. If it be not of immemorial antiquity, as Lord Coke supposes (Co. Litt. 11b, 260b; Greenway v. Barker, Godb. 260; 2 Brownl. & G. 16), it is almost certain, that its origin may be safely assigned in some anterior age. Godolph. 29; Burroughs, Sover. of British Seas, 7–9; Seld. de Dom. Maris, lib. 2, cc. 14–16, 24; 2 Brown, Adm. 24; 1 Valin, Comm. 1. There is strong probability of its existence in the reign of Richard the First, since the Laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the laws of the admiralty, and could not have been fully enforced in any other court. Seld. de Dom. Maris, lib. 2, c. 24, p. 206; Seld. ad Fletam, c. 8, § 5; Godolph. 143–146; Roughton's Articles, art. 19, and notes C 16, and C 17 in Clerke, Prax. 121; Co. Litt. 11b., 260b.; 3 Reeve, Eng. Law, 198; Exton, 24, etc., 38. And the learned Selden has shown considerable evidence of its juridical authority in the reign of Henry the First. Seld. de Dom. Maris, lib. 2, c. 24, p. 209.

What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known. It is involved in the same obscurity, which rests on the original jurisdiction of the courts of common law. It seems, however, that, at a very early period, the admiralty had cognizance of all questions of prize; of torts and offences, as well in ports within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas. The forms of its proceedings were borrowed from the civil law (Zouch, 88; Seld. ad Fletam, c. 8, § 4; Co. Litt. 11b), and the rules by which it was governed, were, as is every where avowed, the ancient laws, customs and usages of the seas. 3 Reeves, Eng. Law, 198; Exton, 33; Seld. ad Fletam, c. 8, §§ 5, 6; Vin. Abr. p. 506, pl. 8. In fact, there can scarcely be the slightest doubt, that the admiralty of England, and the maritime courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects, as the consular courts of the Mediterranean. Exton, 44, 46, 49, 53; 1 Valin, Comm. 1, 120; Roccus, Assecur. note 80; Cleirac, Juris. de la Marine, 191; Zouch, 87. These courts are described in the Consolato del Mare, as having jurisdiction of "all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, gallies or other vessels; and generally of all other contracts declared in the customs of the sea. Compare Consolato del Mare (Ed. Casaregis) c. 22; Cleirac, Us et Cout. Jurisd. de la Marine, art. 1, note 3, 192; Consulat de la Mer, par Boucher, c. 22; Zouch, 90; 2 Brown, Adm. 30.

In support of these observations, it may not be unfit to trace the early history of the jurisdiction of the admiralty in some of the more ancient records, which have escaped the ravages of time.

The Black Book of the Admiralty asserts, that in the reign of Henry the First, and in the time of many kings before ("en temps du premier roy Henry, et en temps de plusieurs rois devant"), when any man was indicted of felony, the admiral or his lieutenant delivered a capias to the admiral (the marshal) of the court, or the sheriff, to arrest him; and a very particular account is given of the manner of proceeding in case of his avoidance. See Clerke, Prax.; Rough. art. 122, note C 16, 17; Exton, 32; Seld. de Dom. Maris. lib. 2, c. 24, p. 209. Hence its existence and criminal jurisdiction may be inferred at that early period. The celebrated code of maritime laws, commonly called the Laws of Oleron, were compiled by Richard the First, as has been already observed, on his return from the Holy Land. Besides these, he promulgated several maritime ordinances at Grimsby for the government of the admiralty. Prynne on 4 Inst. 108; Exton, 26, 27, 182; Clerke, Prax. 113, C 18. In the reign of King John, several ordinances were made with reference to the admiralty; particularly the ordinance directing the admiralty to make inquisition of all persons unlawfully taking customs, or the fees called anchorage (Exton, 28, 29; Rough. art. 35, 36, note C 26; Clerke, Prax. 139, 140), and the famous ordinance for striking sail (or veiling the bonnet), in token of the superiority of the British sovereign over the adjacent seas. Clerke, Prax. 166; Burrough, Sovereignty, etc.; Seld. de Dom. lib. 2, c. 26, p. 215. In the reign of Henry the Third, the Laws of Oleron were ratified and republished. 1 Bib. Legum cites Prynne on 4 Inst. 108; 2 Brown, Adm. 39, 40. In the reign of Edward the First, there was a memorable ordinance prohibiting the courts having franchises, &c. from taking cognizance of any plea, exceeding 40 shillings sterling, touching merchants or mariners, as well by deed, as by charter of ships, obligations and other transactions; and further declaring, that every contract between merchant and merchant, or merchant and mariner beyond sea, or within the flood mark, shall be tried before the admiral, and not elsewhere.[4]

[4] "Ordonne estoit a Hastynges par le Roy Edw. le premier et ses seigneurs, que comment

The immemorial jurisdiction of the admiralty is still more emphatically asserted, as to all causes arising upon the British seas, in the record in the tower entitled, "De superioritate maris Angliae et jure officii Admiralitatis in eadem," in the 26th year of the same reign.[5]

But it is principally in the records of the reign of Edward the Third, that our attention should be closely drawn to the nature and extent of the jurisdiction of the admiralty; for to this period has the statute of 13 Rich. II., explicitly referred. Edward the Third gave to the laws of Oleron their final confirmation (2 Brown, Adm. 40), and called a solemn convocation of all the judges of the realm, among other things to retain and preserve the ancient superiority of the British seas, and the official rights of the admiralty.[6]

But the most venerable monument is the Black Book of the admiralty itself, which, though it contains considerable additions of later periods, is generally agreed to have been originally compiled in this reign. Exton, cc. 13, 14, p. 185, 191; Prynne on 4 Inst. 106, 115; Preface to Roughton's Articles, Clerke, Prax. 92. This book has always been deemed of the highest authority in matters concerning the admiralty. Besides the Laws of Oleron at large, it contains an ample view of the crimes and offences cognizable in the admiralty, and also occasional ordinances and commentaries upon matters of prize and maritime torts, injuries and contracts. See Roughton's articles in Clerke, Prax. 99, etc., 163, etc. Among other things, it prohibits the suing of merchants, mariners and other persons at the common law for any thing appertaining to the marine law of ancient right.[7] In respect to torts and injuries, the jurisdiction is most explicitly asserted, as well in ports within the ebb and flow of the tide, as upon the high seas, as will appear from the slightest inspection of the articles of the admiralty, and particularly the inquisition at Queensborough in this very reign—49 Edw. III. See Rough. art. 7, D 26; Id. art. 8, D 27; Id. art. 12, D 87; Id. art. 21, D 65; Id. art. 22, D 66; Id. art. 25, D 45; Id. art. 26, D 47; Id. art. 29, D 50; Clerke, Prax. 110, 111, 116, 125, 126, 129, 130, 134; Exton, 172. And the binding authority of the Laws of Oleron and the customs of the sea in the court of admiralty is several times alluded to and enforced in the same inquisition.[8] Indeed, of such high repute were these laws, that by an ancient edict of France, it was declared, that the admiralty ought to do justice

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divers seigneurs avoient diverses franchises de trier plees ou ports, que leurs seneschaulx ni bailiffs ne tendroient nul plee, s'il touche marchant ou mariner, tant par fait comme par chartre de Nefs, obligacions, et autres faits, coment la somme amonte que a 20s. ou a 40s. et s'aucun est endite, qu'il a fait le contraire, et de ce soit convicte, il aura mesme le jugement comme dessus est dit." Chapter 20. "Chacun contract fait entre marchant et marchant, ou marchant ou mariner outre la mer, ou dedans le flode mark, sera trie devant l'Admiral, et nenient ailleurs, par ordinance du Roy Edw. et ses seigneurs." Chapter 21. Clerke, Prax. 144. And in Roughton's Articles the same is thus given. (38) "Item, inquiratur de hiis seneschalis et ballivis quorumcunque Dominorum per costeras maris dominia habentium, qui tenent, vel tenere usurpant, aliquod placitum mercatores vel marinarios concernens, excedens summam 40s. &c. Et haec est ordinatio Edvardi primi apud Hastings, regni sui anno secundo. Et Nota, quod quilibet contractus initus et factus inter calcatorem, et mercatorem, marinarium aut alios, ultra mare, sive intra fluxum maris, vel refluxum, vulgariter dictum flood mark, erit triatus et determinatus coram admirallo, et non alibi, per ordinationem praedictam." Clerke, Prax. 143, 144.

[5] Burrough, Sovereign, 8; Godolph. 28; 4 Inst. 142; Prynne on 4 Inst. 109; Selden de Dom. lib. 2, cc. 19, 24, 28; Exton, 58. After reciting the immemorial right of the King of England to the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas, it proceeds: "Et A de B., admiral de la dit mier, deputey par le roy d'Engliterre et tous les aultres admirals par mesme celui roy d'Engliterre et ses ancestors, jades roys d'Engliterre, eussent est en paiseable possession de la dit sovereign garde, ove la conisance et justice et tous les aultres appurtenances avantditz, &c. especialment pur empechement metre et justice faire, surete prendre de la pees de tout manere de gentz usantz armes en la dit mier ou menans niefs aultrement appareilles ou garnies, que n'appartient au nief de marchants, et en aultres points, en queux homme poit avoir reasonable cause de suspicion vers eux de robbery ou des aultres mesfaitz."

[6] The article stands thus: "Item, ad finem quod resumatur et continuetur, ad subditorum prosecutionem, forma procedendi quondam ordinata et inchoata per avum domini nostri regis (Evardum I.) et ejus consilium, ad retinendum et conservandum antiquam superioritatem maris Angliae et jus officii admirallatus in eodem, quoad corrigendum, interpretandum, declarandum, et conservandum, leges et statuta per ejus antecessores, Angliae reges, dudum ordinata ad conservandum pacem et justiciam inter omnes gentes nationis cujuscunque per mare Angliae transeuntes, et ad cognoscendum super omnibus in contrarium attemptatis in eadem, et ad puniendum delinquentes, et damna pacis satisfaciendum; quae quidem leges et statuta per Dominum Richardum, quondam regem Angliae, in reditu suo a terra sancta correcta fuerunt, interpretata, declarata et in insula Oleron publicata, et nominata in lingua Gallicana 'Le Roy Oleroun.'" Burrough, Sovereignty, 10; Selden de Dom. lib. 2, cc. 32, 24; Godolph. 143; 4 Inst. 144; Exton, 25, 61.

[7] "Soit enquis de tous ceulx qui empledent aucuns merchant, mariner, ou autre homme quelconque a la commune ley de la terre appartenant a ley marine d'auncien droit. Soit enquis de tous juges, qui tiennent devant ceulx aucuns plees appartenants par droiture a la Court de l'Admiraltie." Or as Roughton renders it, "Inquiratur de hiis, qui implacitant aliquos, alibi quam in curia admiralitatis, de his negotiis seu causis, quae ad forum admiralitatis pertinere noscuntur." Rough. art. 18, and note C 35, D 51, D 52; Clerke, Prax. 120; Rough. art. 38; Clerke, Prax. 143.

[8] "Soit enquis de tous mariners, qui mettent en violence main, ou battent leur maistres encontre les loys de la mer et statuts d'Oleron sur ce faitz." Rough. art. 25, note D 45; Clerke, Prax. 129; Rough. art. 26, D 16; Clerke, Prax. 131.

according to the rights, judgments and usages of Oleron. Zouch, 88.

As to maritime contracts, the jurisdiction of the admiralty is expressly affirmed in the same book over all such contracts made abroad and within the flood mark. Rough. art. 38, c. 21; Clerke, Prax. 143, 144. And as to all causes, it is commanded that the admiralty shall do right and justice summarily and by plain process according to the marine law and the ancient customs of the sea.[9] And here it may be proper to guard against the mistake, that the particulars enumerated in these various regulations and ordinances comprehend and limit the whole extent of the jurisdiction of the admiralty. They cannot legally be considered in any other light, than as occasional directions to a court already existing with general powers, to clear away a doubt or to enforce more exactly an observance of an existing right or duty.

The commissions too of the judges of the admiralty in this and the preceding reigns evince a very extensive cognizance over maritime transactions, as well in ports as on the high seas. The admiral is frequently styled therein, in reference to his judicial authority, "custos maritimarum partium," "custos portuum cum costra maris," "custos marinae," "custos portuum et marinae," "capitaneum et admirallum flotae marinae nostrae omnium marium, et tamquamque portuum, &c. quam aliorum portuum et locorum per costeram maris" (Exton, 15, 70, 76; Seld. de Dom. lib. 2, c. 14); and finally (as in the commission of Robert de Herle in 35 Edw. III. as having "plenam, tenore patentium, potestatem audiendi querelas omnium et singulorum de hiis quae officium admiralli tangunt et cognoscendi in causis maritimis, &c."[10]

Such are some of the relics of antiquity, which are to be found in the learned treatises on the admiralty jurisdiction. From a historical review of them; from the consideration that in all other states in Europe, maritime courts were about the same period established; possessing the same jurisdiction, viz. over all maritime torts, offences, and contracts, proceeding by the same forms, viz. the forms of the civil law, and regulated by the same principles, viz. the ancient customs of the sea; from the consideration, that commercial convenience, and even necessity, at the same period, required a court of as extensive jurisdiction in England, and the acknowledged fact, that from its earliest traces the admiralty of England is found exercising a very extensive maritime authority, governed by the rules and forms of proceeding of the civil law, and, where statutes were silent, by the usages of the sea; from all these considerations it has been inferred, and, in my judgment, with irresistible force, that its jurisdiction was coeval and coextensive with that of the other foreign maritime courts. At all events, it cannot be denied upon these authorities, that before and in the reign of Edward the Third the admiralty exercised jurisdiction, 1. Over matters of prize and its incidents. 2. Over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the Laws of Oleron and other special ordinances, and 4. (as the commission of Robert de Herle shows) Over maritime causes in general. And even Lord Coke admits, that maritime causes include causes arising upon the sea shore and in ports; for he declares "maritima est super littus or in portu maris." Hawkeridge's Case, 12 Coke, 129. That this jurisdiction was, from its original establishment, exclusive of the courts of common law in all cases, may perhaps admit of doubt; for it appears from some early cases, on which we shall have hereafter occasion to comment, that the courts of common law did, in some few instances, assume authority to adjudicate upon cases arising upon the seas. But that there is any authority previous to the 13 Rich. II., which, properly considered, impeaches the jurisdiction of the admiralty, as here asserted, may be with some confidence denied.

Let us now proceed to consider such cases, as have been supposed to impugn or weaken the conclusions, which have been attempted to be drawn thus far in favor of the admiralty. And here we must rest altogether upon the citations of Lord Coke in his view of the admiralty jurisdiction in his fourth Institute. 4 Inst. 134. It is well known with what zeal, ability, and diligence, he endeavored to break down the court of chancery, as well as the admiralty. It would have been fortunate for the maritime world, if his labors in the latter case had been as unsuccessful, as in the former. There are many persons, who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord Coke. To quiet the apprehensions of such persons, it may not be unfit to declare, in the language of Mr. Justice Buller, that "with respect to what is said relative to the admiralty jurisdiction in 4 Inst. 135, that part of Lord Coke's work has been always received with great caution, and frequently

[9] "En primes pour faire droit et due justice a toutes parties, si bien poursuyants comme defendants, en la Cour de l'Admiraltie, est de faire sommaire et plain procèss selon loy marisne et anciennes coustumes de la mer." Clerke, Prax. 160, D 71.

[10] The words of this commission are: "Dantes ei plenam, tenore patentium, potestatem audiendi querelas omnium et singulorum de hiis, quae officium admiralli tangunt, et cognoscendi in causis maritimis, et justitiam faciendi, et excessus corrigendi, et delinquentes juxta eorum demerita castigandi, puniendi, incarcerandi, et incarceratos, qui deliberandi fuerint, deliberandi, et omnia alia, quae ad officium admiralli pertinent, faciendi, &c., &c." Exton, 3, 294.

contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction." Smart v. Wolffe, 3 Term R. 348.

The first citation of Lord Coke is of two writs in the register (Fitzh. Nat. Brev. 87, 88), one for taking and carrying away a ship found at H. and the chattels on board of the same ship;[11] the other for drawing wine out of a tun put on board a ship at S. to be brought from thence to S. and filling up the tun with salt water.[12] It is difficult to perceive in what manner these writs can touch the admiralty jurisdiction, for the torts are not even in the writs supposed to be upon the high seas, or within the ebb and flow of the tide.

The next citation is a writ in the register (Fitzh. Nat. Brev. 114), which is thus described by Fitzherbert. "If an English merchant be robbed and his goods be taken from him, beyond seas, by merchant strangers, and the English merchant sue beyond sea to have justice and restitution made thereof, and cannot obtain it, and this matter be testified unto the king in his chancery by divers credible persons; now, upon this testimony, if the merchant strangers come into any place within the realm of England with their goods, then the English merchant shall have a writ out of chancery directed unto the mayor or bailiffs, where such merchant strangers are with their goods, to arrest them and their goods, and to keep them under arrest until they have satisfied the party his damages, which he hath sustained by reason of their misdoing."—"But it seemeth the English merchant shall not have such writ for any debt due to him from a merchant stranger upon a contract made beyond seas, if the merchant do come into England or his goods; quaere tamen hereof."—In the register itself (page 129) the tort is thus alleged "quodcum ipse nuper apud C. in partibus de Spinia in villa de C. causa mercandisandi moram traxisset, et bona et catalla ad valentiam centum librarum emisset, J. et T. et alii malefactores dictae villae mercatores de dictis partibus de S. prefatum S. apud dictam villam de S. vi et armis ceperunt et imprisonaverunt, et catall sua predicta ab eo abstulerunt, et alia, &c. ei intulerunt, contra legem et rationem in ipsius S. damnum non modicum, et depauperationem manifestam." It is manifest that this writ merely respects a trespass to the person and goods of an English merchant committed in the territory of a foreign sovereign; a subject, over which the admiralty never claimed, or exercised any judicial authority. And perhaps it may be inferred from the language of Fitzherbert, that the common law courts did not originally take cognizance of contracts between merchants in foreign countries; and we shall in fact find, that the admiralty did claim to exercise jurisdiction over them at a very early period. Clerke, Prax. 143, 144, C. 21.

Another citation is from Fitzherbert's Abridgment. Corone, 399, in 8 Edw. II.; Staund. Pl. Cor. lib. 1, p. 51, 57. It stands thus. "Nota per Stanton Justice, que ceo nest pas sauce de mere ou home puit veier ceo que est fait bel un part del ewe et del autre, come a veier de l'un terretanque a l'autre, que le coroner viendra en ceo cas et fera son office, auxi comme aventure a vyent en un brace del mere, la ou home puit veier de l'un parte tanque a l'autre, del aventure, que en cel lieu avient, puit paiis aver conusance." The opinion here maintained is, that it is not a creek of the sea, where a person may see what is done from both shores; and that in such place the coroner may exercise his official jurisdiction, as he well may in an arm of the sea, where an accident happens, which may be seen from both shores, for in such case the pais may have cognizance thereof. In respect to the first part of this opinion, it cannot be supported; for a creek, or, (what is the same thing) an arm of the sea, is where, and as far as, the sea flows and reflows, without any reference to the distance of the enclosing shores. 22 Assiz. 93; Hale, De Portubus Maris, c. 4. And admitting, that the opinion of a single judge, (on what occasion we know not,) is to be considered as settling the law, the residue of the opinion proves no more, than that, in those ancient times, in such creeks of the sea the coroner had jurisdiction. Yet from this Staundford, and after him Lord Coke, infer that the admiralty had no jurisdiction in those places, but only upon the high seas. Staundf. lib. 2, p. 51. This inference is inadmissible, since there is very strong evidence, that, at and before the same period, the admiralty exercised authority in the creeks, arms and ports, of the sea; and so the jurisdiction could at most be only concurrent. Lord Hale explicitly asserts, that in ancient times the common law exercised jurisdiction, concurrent with the admiralty, over crimes committed even upon the narrow seas or coasts, though it were high sea; and that this jurisdiction did not cease until about the 38 Edw. III.; and, among other cases in support of his opinion, he cites this very case in 8 Edw. II., and infers from it, that in the present times, as well the coroner of the county, as of the admiral, may take inquisitions upon deaths happening in great rivers, namely, arms of the sea, that flow and re-

[11] S. W. 50, Hen. III. cited in Selden on Fortescue de Laud, c. 32, note e; Register Brev. 95. "Quare vi et armis quandam navem ipsius A. precii decem librarum apud H. inventam cepit et abduxit, et bona et catalla sua ad valentiam viginti librarum in eadem navi inventa cepit et asportavit."

[12] Register Brev. 95b. "Quare vi et armis 60 lagenas de quodam dolio vini ipsius W. precii quinque marcarum in navi predicti I. apud S. posito, abinde usque S. ducendo, extraxit, et dolium illud aqua maritima implevit, per quod &c."

flow, beneath the first bridges (2 Hale, P. C. 12, 13, note a, 14, 15, 16); and that, notwithstanding the statute of 28 Hen. VIII. c. 15, the courts of common law have still a concurrent jurisdiction of all felonies committed in a navigable arm of the sea (2 Hale, P. C. 18. And see Zouch. 114; 40 Assiz. 25; Rex v. Soleguard, Andr. 231). Admitting then, that this case is good proof of the jurisdiction of the common law, it is not shown to be exclusive of that of the admiralty, but is perfectly consistent with it.

The next case is 43 Edw. III. (cited in Dyer, 326), which decides no more than, that marsh land, bordering on the sea, over which the sea ebbs and flows, may be parcel of a manor; from which Lord Coke infers, that it must be parcel of the county. Assuming this inference to be correct, it does not follow, that the jurisdiction of the admiralty is excluded; for in Sir Henry Constable's Case, 5 Coke, 105b, 107, it was clearly held, that the soil, on which the tide ebbs and flows, may be parcel of a manor, and yet that the common law and the admiralty have there a divided empire, the former when the tide ebbs, and the latter when it flows.

The next case is 5 Edw. III. p. 3 (Id. Fitzh. Abr. "Replevin" 41). It was a replevin for goods taken in the vill of W.; the defendant justified, that he took them, as wreck of the sea, by virtue of a franchise of wreck appendant to his manor; and the whole case turned upon a mere point of pleading. There is nothing in it touching the admiralty; and the only possible deduction from it is, that a plea of wreck of the sea was sustained in a court of common law; but nothing can thence be argued, that this was an exclusive jurisdiction. S. P. in 37 & 38 Hen. III., cited Fortes. de Laud. c. 32; Selden's note e.

The next case (43 Edw. III.) stands thus in Fitzherbert's Abridgment (Conusance, 36): "Trespass fait en Kingston sur Hull, port pur A. d'un nyeff prist en le ew de Hull versus certen persons. Le maire et bayles de Hull demandent conusance par chartre le roye a eux grant, quod cives nec burgesses de Hull non implacitentur alibi de aliquibus transgressionibus, conventionibus, contractis infra burgum, quam infra burgum; et fuit challenge eo que l'un partie fuit estranger, et nient burgess, et auximent semble que il n'est enclose en ceux parolx que ils puissont tener plees. Finchdon dixit sic; et pur ceo le conusans fuit graunt," &c. It would seem from the reasons assigned by Finchdon, that the conusance ought to have been, and in fact was, denied; and that the word "non" was omitted in the abridgment by mistake. But Lord Coke asserts that it was granted, and that this "proveth that the haven of Hull, where the ship did ride, was infra burgum de Hull, and by consequence infra corpus comitatus, and determinable by the common law and not in the admiral court." The case authorises no such conclusion. It does not appear, that the place where the ship was taken, was within the ebb and flow of the tide, but only that it was "on the water of Hull;" much less does it appear, that any point, as to the right of the admiralty to entertain suits for acts done in ports, was even glanced at, or put into controversy. The case turned wholly on the claim of the corporation of Hull to withdraw suits arising within its franchises from the courts of common law. For aught that appears, Hull might have had the franchise to hold pleas of things done on tide waters, as it is unquestionable the corporation of Ipswich had. Exton, 138, 142. And even if the claim of conusance by Hull were well founded, it does not follow that a concurrent jurisdiction might not still remain in the admiralty over all things within its general authority. See Rex v. Soleguard, Andr. 331.

The next case is 48 Edw. III. p. 3, in which it would be supposed from Lord Coke's manner of quoting, that it was adjudged "if a mariner make a covenant with me to serve me in a ship upon the sea, yet, if his wages be not paid, they shall be demanded in this court by the common law, and not by the law of mariners,"[13] or the marine law. In fact, on examining the year book, it is incontestable that this was the mere argument of Tankard, as counsel in the cause, and it was not in any manner recognised by the court. Nor did the case in judgment require any such observation. It was an action brought, among other things, for a sum due on a retainer to serve in the war in France; and the exception taken was, that this was triable before the court of the constable and marshal, being of a service in war out of the realm. Finchdon, however, held, that the courts of common law had cognizance of the cause. It is manifest upon this statement, that nothing can be gathered from this case in favor of Lord Coke's favorite position. But there is a pretty strong implication in the argument, that mariners' wages were, at that time, claimed as within the cognizance of the maritime court. And Lord Holt himself has declared (Brown v. Benn, 2 Ld. Raym. 1247) that the jurisdiction of the admiralty, in case of mariners' wages, was a very ancient concurrent jurisdiction, as ancient as the constitution itself (S. P., Queen v. London, 6 Mod. 205). And it should never be forgotten, that this dictum of counsel, frail and untenable as it is, is the only authority previous to the 13th of Richard II., which the diligence of its most strenuous foe has been able to adduce, to take from the admiralty its jurisdiction over maritime contracts. All the other cases apply to the jurisdiction over torts and injuries in ports or in arms of the sea.

But the case, which is mainly relied on against this jurisdiction, is that in the time of Edward the First, as cited in Fitzherbert's Abridgment (Avowry, 192). It stands thus,

[13] "Et ne pur la ley de mariner."

"Replevin de son nyeff prise en le cost de Scarburgh en le mere, et dillonques fist carier en le conte de N. et la le detient, &c. Muttford: Il se pleint de prise en le cost de S., que n'est ville ni liew certen par que pais puit estre prise, quare le cost dure 4 leuks, et auxi de chose fait en le mere cest court ne puit aver conusans, quare certen jugement est done as mayners. Bery: Le roy voit que le pease soit cy auxi bien gard en le mere, come en le terre, et nous trovomus que vous estes venu per due proces, et ne veiomus riens pur que ne deves respondre. Muttford: Il suppos le prise estre fait en la counte de E. et il port son breve al vicecomte de M. [N.] d'aver delivere, et issint suppos le distress prise et amesne de un counte en auter, par que il ad breve don per le statut en ce cas. Howard: Le statut parle des avers amesnes de un counte en auter, et ne des che'ux. Muttford: Le statut parle generalment de distress, que comprehend de ambideux. Howard: Jeo ne crey que je usse eu sur le statut. Muttford: Donques usses eu le vi et armis, car ceo chose encountre le pese et chescun que doit distrein, doit le distres poser en ceo liew ou la deliverance puit estre fait al comen ley. Howard pria conge d'enquerer meliour brief." This is the whole case, from which Lord Coke draws (4 Inst. 140, and 12 Coke, 79) the following extraordinary conclusions. 1. That it is called the sea, which is not within any county from whence a jury may come. 2. That the sea (being not within any county) is not within the jurisdiction of the court of common pleas, but belongs to the admiral jurisdiction. 3. That when the ship came within the river, then it is confessed to be within the county of Northumberland. 4. That when a taking is partly on the sea, and partly in a river, the common law shall have jurisdiction. 5. And (12 Coke, 79) that if a thing be done upon the sea hors del county, the party may plead to the jurisdiction of the court.

As to these conclusions, many remarks might be made. It is true, that Muttford, of counsel for the defendant, did assert that the courts of common law had no jurisdiction of things done upon the sea, for that a certain judgment,—which Lord Coke interprets as meaning the jurisdiction of the admiralty (12 Coke, 79),—is given among or to mariners. But Beryford, C. J., utterly denied it, and so far from allowing the claim of the admiralty to jurisdiction on the sea, or even admitting its legal existence, he expressly declared, that the king willed, that the peace should be kept, as well on the sea as on the land, and that, as the party was by due process before the court, he should be compelled to answer. Of what was he to answer? Of an alleged trespass upon the sea on the coast of Scarburgh. So that there is not any pretence that the injury arose in any port, or within any county of the realm. Nor is there any intimation by the court, that the taking, for which the suit was brought, was within any county, from which a jury might come; nor that the jurisdiction was sustained because, after the taking upon the sea, the ship was brought into port; nor that the sea was without the body of any county. On the contrary, the court expressly claims jurisdiction to keep the peace upon the sea, as well as upon the land, and overrule the objection of the counsel, as to the necessity of the act's being done in some place upon land, from whence a jury might come. So far, then, from its being true, as Lord Coke boldly asserts (12 Coke, 79), that "all these points are directly, without any strain, collected out of the said book," it may be safely affirmed, that not one of them derives any support or countenance from the report; but, as far as the case decides any thing, it is against them. And finally the case went off against the plaintiff upon his own prayer for a better writ. Nor is this all. The same case is more fully and exactly reported by Selden from a manuscript Year Book in his own possession, from which it is here recited verbatim (Selden on Fortescue, c. 32, note e): "William Crake de Hotham fuit sommon a respondre a Robert de Beufs, de play pour que il avoit prise une sune nief, pris de £40, en le mer juste la costere de Scardburgh, et de yleke le amene a Hotham en le counte de Norff. Muttford: Del hore qu'il avute counte de une prise fete en le mer que est hors del conte, issi que si pais se join fists, il ne savereint a quel visconte mander pur fere vener pays, e demand jugement, si ceyns pussont de ces conuster. Ed' autre part, il ly sont assigne Admirall de par le roy sur le mer, a oyer et terminer les pleynts de chose fait en mer, et n'entendons point, que vous volys a eux tolyr jurisdiction. Bery: Nous avons poer general pur my tut Engleterre mes del poer des Admiralls, dont vous parles, ne savons rien, ne rien de nostre poer a eux volumus assigner, si ceo ne seist per commandement le Roy, de quey vous ne monstres rien, &c. Muttf.: Sire, le luy, ou ils dient la neef este pris, n'est in nulle visne de que, &c. Howard: Il est issint visne, que si une homme occist un auter la il serra pris et amesn al terre e pende, aussi ben come pur fet fet sur le terre. Metingham: Nous vous dions que nous avons ausi ben poer de conisans de fet fet en mer come sur terre, dont agard que vous respondes ouster." This is undoubtedly an authentic report, and completely confirms the observations already made upon Lord Coke's extraordinary commentary. It is here explicitly stated by counsel, that the admiralty had jurisdiction to hear and determine all plaints of things done upon the seas; and that the supposed taking was upon the sea without any county. But Beryford, C. J., in answer said, "We have general jurisdiction throughout all England; as to the power of the admirals, of whom you speak, we know nothing, and we will assign to them none of our power, unless by command of the king, of which you

show nothing."—And upon the argument's being again pressed, that the taking was not in any ville or neighborhood, from which a jury might come, Metingham, J., declared, "we again say, that we have power to take cognizance of a thing done as well upon the sea, as upon the land; and we award you to answer over." It is clear, therefore, that the court did claim a common law jurisdiction over the sea at this time. And the learned Selden (who is not an advocate for the admiralty in general) accordingly remarks, "It seems to me by this, that in those times the common law had cognizance of things done upon the British sea, however afterwards it kept its limits infra corpus comitatus, leaving the sea to the admiralty;" and in his treatise upon the dominion of the sea, he deliberately asserts the same doctrine. Selden de Dom. mar. lib. 2, c. 14, p. 155; Id. c. 24, p. 209. In corroboration of this doctrine, there is in Molloy (book 2, c. 3, § 16, p. 224) a copy of a record in the tower of 24 Edw. III., in which an action was brought at common law for an embezzlement on board of a ship on the high seas ("in mari juxta Britanniam") and the plaintiff recovered judgment.[14]

Another case is 7 Rich. II., cited from Statham's Abridgment. "Transgressio" pl. 54. It is thus summarily stated, "En trans d'un neife et certen marchandises pris; Vavasour, Nous le prisomus en le haut mere ovesque les Normandes qu'eux sont ennemyes le Roy, jugement si actionem. Markham, Ceo amount a nient pluis que de riens coupable. Charleton, ceo ple est bone, per quod respondes a ceo." If this case prove any thing, it proves, that a capture on the high seas from the enemy may well be pleaded as a special plea and bar to an action of trespass for the capture; and that a court of common law will sustain such a plea. If it be supposed to affirm the jurisdiction of such a court over matters of prize, it is not law; if to deny it, it has nothing to do with the present controversy.

These are all the cases adduced by Lord Coke down to the 13 Rich. II., to disprove the jurisdiction, which has been asserted in favor of the admiralty. Unless I am very much mistaken, they entirely fail of their intended purpose; and leave the current of ancient authority flowing with an uniform and irresistible force in its favor.

Such then being the ancient or original jurisdiction of the admiralty, it will be in the next place proper to consider, in what respects it has been altered by statutes and decisions made since the period, of which we have been speaking.

The statute 13 Rich. II. c. 5, enacts, "that the admirals and their deputies shall not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward [III.], grandfather of our lord the king that now is."[15] The statute 15 Rich. II. c. 3, enacts "that of all manner of contracts, pleas and quereles[16] (complaints or controversies) and of all other things done or arising[17] within the bodies of counties, as well by land as by water; and also of wreck of the sea, the admiral's court shall have no manner of cognizance, power nor jurisdiction; but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral, nor his lieutenant, in any wise. Nevertheless of the death of a man, and of a maihem done in great ships, being hovering in the main stream of great rivers, only, beneath the bridges[18] of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm; saving always to the king all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities and boroughs, their liberties and franchises." The statute 2 Hen. IV., c. 11, provides, that the statute 13 Rich. II. be firmly holden and kept, and put in due execution; and that, as touching a pain to be set upon the admiral or his lieutenant, that the statute and the common law be holden against them; and and that he, that feeleth himself grieved against the form of the said statute, shall have his action grounded upon the case against him that doth so pursue in the admiral's court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of £10 to the king for the pursuit so made, if he be attained.

It was upon these statutes, that the controversies respecting the admiralty were so zealously and obstinately maintained during more than two centuries. It is not my intention to examine how far the statutes themselves or the preambles thereof, or the petitions, on which they were founded, have been fairly published from the records of the tower.[19] It will be sufficient for my

[14] See, also, Spelman, Reliq. 217; 40 Assizes, 25; Zouch, 114; 2 Hale, P. C. 17; Sea Laws Treatise Dom. Sea, 145; and Exton, 121, etc., where he comments very satisfactorily on this very case.

[15] "Que les admiralx et leur deputees ne soi mellent desorenavant de nulle chose fait deinz le Roialme, mais soulement de chose fait sur le meer selonc ceo q'ad este duement use el temps du noble Roy Edward aiel nostre seigneur le roy q'or est."

[16] "Contractees, plees et quereles."

[17] "Faitz ou sourdantz." Exton, omits "or."

[18] "Pountz."

[19] Those who have curiosity to indulge in such speculations may receive a great deal of

purpose to show, what have been the constructions respectively urged by the advocates and the opponents of the admiralty, and to consider how far the respective opinions are reconcilable with themselves or with sound principles. In the construction of these statutes, the admiralty has uniformly and without hesitation maintained, that they never were intended to abridge or restrain the rightful jurisdiction of that court; that they meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs; and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of those statutes, as well as the manifest object thereof as stated in the preambles, and in the petitions, on which they were founded, is fully satisfied by this exposition. So that consistently with these statutes, the admiralty may still exercise jurisdiction, 1. Over torts and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over matters of prize and its incidents. On the other hand, the courts of common law have held, that the jurisdiction of the admiralty is confined to contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are, in some measure, to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for payment of money; nor of any contracts, though maritime and made at sea, which are under seal or contain unusual stipulations; and to complete the catalogue of disabilities, it has been strenuously held by Lord Coke, that the admiralty is not a court of record, and of course has no power to impose a fine, and that it cannot take a recognizance or stipulation in aid of its general jurisdiction. Thomlinson's Case, 12 Coke, 104; 4 Inst. 134; Empringham's Case, 12 Coke, 84; and cases cited in Cremer v. Tookley, Godb. 385, 387. So that, upon the common law construction of these statutes, the admiralty, as to contracts, is left with the idle and vain authority to enforce contracts, which are made upon the high seas to be executed upon the high seas. We shall have occasion hereafter to notice some extraordinary exceptions to these doctrines. Happily for the admiralty, it has been able to regain the right to fine and punish for contempts (12 Coke, 52; 1 Vent. 1; Styles, 17), and to take and enforce stipulations (Hook v. Moreton, 1 Ld. Raym. 397; S. P., 2 Ld. Raym. 632; Greenway v. Barker, Godb. 261). But let it not be imagined, that the limited powers at present permitted to be exercised by the admiralty have been obtained without a struggle. From a historical review of the cases in the books, it will abundantly appear, that it has been constantly in danger of losing its most useful jurisdiction. On the other hand, the courts of common law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty.—And even as to matters of prize, its exclusive authority was not finally admitted and confirmed until the great case of Lindo v. Rodney, Doug. 613, note, almost within our own times. It is curious indeed to observe the progress of the pretensions of the courts of common law in amplifying their jurisdiction. At first they disclaim all cognizance of things done without the bodies of the counties of the realm; and even over collateral matters done out of the realm, which came incidentally in question upon issues regularly before the courts. Mayn. Y. B. 613; 18 Edw. II.; Litt. lib. 3, § 440; 21 Edw. IV. p. 36; Doct. & Stud. bk. 2, c. 2; Fortescue, c. 32, p. 38; Seld. de Dom. Mar. c. 24, p. 209; and the cases cited in Cremer v. Tookley, Godb. 385, 387. They afterwards held cognizance of contracts originating within the realm, to be executed abroad; of contracts made abroad, to be executed within the realm; and finally, after much hesitation and doubt, by the use of a fiction, often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation. See 1 Rich. III. 4 pl. 7; 32 Hen. VI. p. 25b.; 39 Hen. VI. p. 39; 11 Hen. VII. p. 6; Fitzh. Nat. Brev. 114; Dowdale's Case, 6 Coke, 46; Co. Litt. 261b; 4 Inst. 141, 142; Sir Henry Constable's Case, 5 Coke, 106; 12 Coke, 79; 2 Inst. 51; 2 Brownl. & G. 16; Tucker v. Cappes, 2 Rolle, 497; Spanish Ambassador v. Jolliff, Hob. 78; Zouch, 101, 125. Upon what principles of the ancient common law this extension of jurisdiction can be supported, it is difficult to perceive. It has, however, been established by the usage and decisions of ages; and now rests upon the same basis, and no other, that sustains the immemorial claims of the admiralty.

It will be necessary, in the subsequent examination of the doctrines which the common lawyers have asserted to support their construction of the statutes of Richard II., to class the cases, in order more effectually to investigate the principles upon which they are founded. Before, however, we proceed to that examination, it may be well to dis-

information from the learned labors of Doctor Exton. See Exton, c. 2, p. 288; Id. c. 5, p. 314; Id. c. 6, p. 331; Prynne, Animadversions, 78, 79.

pose of some of the cases cited by Lord Coke (4 Inst. 137, etc.), which cannot properly be reviewed in any other manner. Several of these may be dismissed in a few words. The cases in 12 Hen. VI. rot. 123, 124, in 38 Hen. VIII., and in Rastell's Entries, 23, do not appear to have been adjudged. The same observation applies to the cases of premunire in 38 Hen. VI. rot. 30, and 9 Hen. VII. Indeed, these cases seem open to a more decisive objection, for it is impossible, consistently with any reasonable interpretation of the statute 16 Rich. II. c. 5, or of any previous statute of premunire, to apply the words to the admiralty. The language of all of them is exclusively and directly pointed against the usurpations of the church of Rome; and there is not, as far as I have been able to trace, a single authority to support the dictum of Lord Coke, that a premunire lies against the admiralty. 3 Inst. 120. See Buckley's Case, 2 Leon. 182; Zouch, 116; Exton, 261. Indeed, the extravagance of his doctrines on this subject cannot be better illustrated, than by his pertinaciously including any excess of jurisdiction by the court of chancery in the same penalty; an opinion, which has been long since exploded. In respect to some other cases cited by him, it is impracticable to give any answer; because they are not so stated, as to present any particular points, and no reasons are assigned for the asserted judgments. See cases cited 4 Inst. 136, etc., and Godb. 261. Even the case of Burton v. Put, 6 Hen. VI. rot. 303, 4 Inst. 137, on which he so strenuously relies, is the mere naked statement of a record; and to make it at all applicable to his purpose, Lord Coke gratuitously assumes, that the taking of the ships was actually in the haven of Bristol, within the ebb and flow of the tide, whereas the record itself, as quoted by him, only states the taking to have been "infra corpus comitatus Bristoliae, et non super altum mare." It would seem also, that the ships were prizes taken out of the possession of the captors; for the taking is alleged to be with the plaintiff's prisoners and merchandises on board; and if so, whatever doubts might then exist, it is now clear that the admiralty had jurisdiction. Be this as it may, inasmuch as no reasons are given for the judgment, it cannot be admitted, that it warrants the inferences of Lord Coke. The action was founded on the statute of 13 Rich. II., enforced by 2 Hen. IV. c. 21, which prohibits the admiral to meddle, but only of a thing done upon the sea, according as had been done in the reign of Edw. III. If, at that time, the admiralty had jurisdiction over torts done on tide waters within ports (as it seems to me incontestible it had), there could be no ground to support the action, if the taking was on tide waters in Bristol; and the verdict of the jury would fairly warrant an inference, that the taking was not in the haven of Bristol on such waters, but in some place out of the ebb and flow of the tide. Zouch, 116. It is useless however to comment upon a case, the circumstances of which are not so stated, as to raise any distinct questions.[20]

As to the dictum in 30 Hen. VI. p. 6, respecting the admiralty judges, that "the place and things of which they hold plea, are out of the realm,"[21] if it means to speak of the realm in its largest sense, it will include the British seas (Co. Litt. 259b; 1 Rolle, Abr. 528 l. 13), and is not law; if in a more narrow sense, as including only the bodies of the counties, it will be fully considered hereafter.

Let us now pass to the consideration of the reasons alleged, in the construction of the statutes of Richard II., to exclude the jurisdiction of the admiralty in ports and havens, within the ebb and flow of the tide. As far as these reasons can be gathered from the imperfect light of reports, and from the laborious commentaries of Lord Coke, they resolve themselves into the following propositions. 1. That the body of every county includes all navigable salt waters, "where one may see what is done on the one part of the water and on the other, as to see from one land to the other." 2. That the sea is, ex vi termini, without the body of any county. 3. That all ports and havens are within the bodies of counties. 4. That where the common law hath jurisdiction it excludes the admiralty, and the common law hath jurisdiction in ports and havens.

In respect to the first proposition, it undertakes to define the boundary of a county on the sea coast at common law. The only authority in support of this definition is the opinion of Stanton, J., in 8 Edw. II., already cited (Fitzh. Abr. Corone, 399); for neither Staundford (Staund. P. C. 51) nor Lord Coke pretend to assert it upon any other ground. And even Stanton, J., does not state, that such waters are within the body of a county, but only that the coroner has jurisdiction there; and we have already shown, that in early times coroners and sheriffs exercised a concurrent authority, even upon the high sea itself. Seld. de Dom. Mar. lib. 2, c. 14; Zouch, 114; Spelm. Reliq. 217; 2 Hale, P. C. 17–19. Indeed Lord Hale, in quoting this very case (De Portubus Maris, c. 4, p. 10), considers it as no absolute proof; for he says, "an arm of

[20] It is not a little remarkable, that no actions founded on this statute, for an alleged tort or trespass in ports, are cited in the books, except this case and two others (12 Hen. VI. rot. 123, 124; 4 Inst. 138, 139), which do not appear to have been adjudged. All the other cases reported are upon contracts. Dyer, 159; Godb. 385; Cro. Jac. 603; 1 Rolle, 415; 3 Bulst. 205; 31 Hen. VI. in 4 Inst. 138. The prohibitions so frequent in the books were probably founded on the statute. 15 Rich. II. c. 3.

[21] "Le lieu et les choses dount ils tiendront plea sont hors del roialme."

the sea, which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." And it is undoubtedly true, that by ancient grant or statute an arm of the sea may be within the bounds of a county; and perhaps as to all navigable rivers, where the tide ebbs and flows, since the statute 15 Rich. II. c. 3, the admiralty jurisdiction may be well held to be excluded in all places above the first bridges next to the sea. Exton, 127, etc.; 2 Hale, P. C. 16, 17. And this would be a satisfactory answer to the cases cited by Lord Coke in 4 Inst. 139, 141 (7 Hen. VI. pp. 22, 25;[22] 16 Hen. VIII.; 35 Hen. VIII.; and 36 Hen. VIII.). But to maintain that this is true by the mere force of the common law, something more is necessary than so imperfect a case as that of 8 Edw. II., which, if ever, was adjudged at a time, when the jurisdiction of the common law was concurrent with the admiralty upon the high seas. Zouch, 114; Seld. de Dom. Mar. lib. 2, c. 14, pp. 156, 560, 106; Andr. 231; Exton, 155. Besides, in Violett v. Blake, 2 Rolle, 49, this very case of 8 Edw. II. was by the judges denied to be law, though it was affirmed in some other cases. Owen, 122.

On the other hand, in Sir Henry Constable's Case, 5 Coke, 106, etc., it was expressly adjudged, as has been already stated, that the soil, on which the sea ebbs and flows, may be parcel of a manor, and that, when the sea flows and has plenitudinem maris, the admiral shall have jurisdiction of every thing done on the water, between the high and low water mark, by the ordinary and natural course of the sea; and yet, when the sea ebbs, the land may belong to a subject, and every thing done on the land, when the sea is ebbed, shall be tried at common law, for it is then parcel of the country, and infra corpus comitatus; and so, between the high and low water mark, the common law and the admiralty have divisum imperium. It is probable that the court meant here to speak of land on the open sea coast; but it is very difficult to perceive, why the same principle should not apply as to the tide waters in ports of the sea. If land on the sea coast when the tide is out, be to low water mark within the body of the county, and yet when the tide is at flood, it is deemed within the admiralty jurisdiction, because it is then the sea, why should not the same doctrine apply to the ebb and flow of the tide in ports and havens? Until some strong reason can be assigned for a distinction, it would seem more conformable to law and nature to hold, that the bodies of counties, bounding on navigable waters, are limited at all times by the line of the sea tide; and this is the doctrine asserted by the admiralty. Exton, c. 3, p. 80; Id. c. 4, p. 87; Id. c. 8, p. 121; Zouch, 110; Lacy's Case, Moore, 121. But see 2 East, P. C. 803; Bac. Abr. "Courts of Admiralty," A.

In the next place, it is asserted, that the sea, ex vi termini, imports salt-water without the body of a county, by the definition of the common law. The authority principally relied on, to support this position, is the case in Edward the First's time. Fitzh. Abr. "Avowry," 192; 4 Inst. 140; 12 Coke, 79. That case has been already fully considered, and it is clear, that it does not, in any manner, warrant the assertion. On the other hand, Lord Hale (De Portubus Maris, c. 4, p. 10), in defining what the sea is, says, that it is either, that which lies within the body of the county or without; that arm, or branch of the sea, which lies within the fauces terrae, is, or at least may be, within the body of a county; that part, which lies not within the body of a county, is called the main sea, or ocean.[23] And his lordship is well warranted in this distinction of definition by authority. Besides the cases already cited (in 22 Assizes, 93, and 5 Coke, 107), it was held by Choke, J., in 8 Edw. IV. 19 (and his opinion was approved in 5 Coke, 107), that where the sea ebbs and flows over land, when it flows, it is then parcel of the sea. And in Barber v. Wharton, 2 Ld. Raym. 1452, the court held, that a contract alleged to be made infra fluxum et refluxum maris, might be on the high sea, and was so, if the water was at high water mark. It should have been called, in accuracy of language, "the sea," because the "high sea." or "main sea" (altum mare, or le haut meer), properly begins at low water mark. 1 Bl. Comm. 110. And so is the unquestionable distinction of the admiralty. Exton, cc. 3–5, etc. Nor is this distinction unimportant. The statute of 13 Rich. II. c. 5, prohibits the admiral to meddle, except of things done on the sea ("sur le meer"), which includes the ebb and flow of the tide on the sea coast, and, as the admiralty contends, in ports and havens also; whereas Lord Coke, and the common lawyers, perpetually construe the exception of the statute, as though it were "high sea" (altum mare, le haut meer), and assert, "that where a place is covered over with salt water, and not of any county or town, there it is altum mare, but where it is within the county, it is not altum mare." Leigh v. Burley, Owen, 122; Sir Henry Constable's Case, 5 Coke, 106; 1 Hale, P. C. 424. In fact, what is "the sea," or the "high sea," has nothing to do with the bounds of counties, but is ascertained by high and low water mark, on the sea coast; and, by parity of reason, it should be the same in ports and havens. See

[22] This is probably a wrong citation, for there is no case at all applicable to the subject in the year book of that year.

[23] Lord Hale manifestly considers, that the mere circumstance, that the place is within the body of a county, does not exclude the admiral ty jurisdiction, for, after speaking of the narrow sea, as being within the body of a county or without, he adds, that, in this sea, the king exercises his right of jurisdiction ordinarily by his admiral. De Port. Mar. c. 4.

Godfrey's Case, Latch, 11; Hale, De Port. c. 4, p. 10.

The third proposition is, that all ports and havens are within the bodies of the counties of the realm. By "ports and havens," as the words are here used, are meant, not merely port or haven towns, but all the tide waters included within the harbors and franchises. This proposition is attempted to be sustained as an inference from the prior propositions, and from the authorities already stated (Fitzh. Abr. "Avowry," 192; Id. Corone, 399; Id. Conisance, 36), which have been fully considered and answered. All the subsequent cases, from the earliest to the latest, profess to proceed upon these authorities, feeble and inconclusive as they must be confessed to be.[24] Indeed, some of these cases are perfectly consistent with the claims of the admiralty (Noy, 148; Cro. Jac. 514; and 3 Term R. 315); for, since the statute 13 Rich. II. c. 5, it is admitted, that the admiralty has no jurisdiction in rivers, above the first bridges next to the sea, and the places on the Thames, mentioned in these Reports, would therefore be excluded.

The fourth proposition is, that where the common law hath jurisdiction, it excludes the admiralty; and the common law hath jurisdiction in ports and havens. This proposition also rests on the same authorities, as the preceding. Fitzh. Abr. "Avowry," 192; Conisance, 36; Corone, 399. It has been already shown, that the common law originally had jurisdiction on the high seas, concurrent with the admiralty; and the exercise of that jurisdiction would be just as conclusive against that of the admiralty on the high seas, as it is now assumed to be in ports and havens. It is certain, that the admiralty did anciently take cognizance of suits in ports, and, if the common law did the same, the only reasonable inference is, that the cognizance was concurrent. Zouch, 113; Hale, De Port. c. 7, p. 88. And it is hardly necessary to repeat, that the authorities relied on do not warrant any different doctrine. Indeed, it never was true, and is not now true, that the jurisdiction of the common law excluded that of the admiralty. In cases, now manifestly within the admiralty jurisdiction, the common law claims a concurrent cognizance, as will be abundantly shown hereafter.[25]

In confirmation of the doctrine of the common law, which excludes the admiralty from cognizance of things done in ports and havens, the provisions of the statute of 2 Hen. V., c. 6, and 27 Eliz. c. 11, have been cited. The statute of Elizabeth provides, that such of the offences therein mentioned, as shall be done on the main sea, or coasts of the sea, being no part of the body of any county of the realm, and without the precincts, &c. of the cinqueports, shall be tried and determined before the lord high admiral, and other justices, of oyer and terminer, according to the form of the statute of 28 Hen. VIII., c. 15. And so, says Lord Coke (4 Inst. 137), by the judgment of the whole parliament, the jurisdiction of the lord admiral is wholly confined to the main sea, and coasts of the sea, being no parcel of any county of the realm. To this remark it has been very properly replied: 1. That the jurisdiction here conferred is not on the admiralty, but on the high commission court. 2. That several of the offences, stated in the statute, are such, as never were within the admiralty jurisdiction. The statute of 2 Hen. V. c. 6., commonly called the "Statute of Truces," gives power and authority to the conservators of truces, appointed by that act, "to inquire of all such treasons and offences against the truce and safe conducts upon the main sea ('sur le haut meere') out of the bodies of the counties, and out of the franchises of the cinqueports, as the admirals of the kings of England, before this time, reasonably, after the old custom and law on the sea ('sur le meer') used, have done or used;" and as to similar offences committed within the body of the counties, the conservator, and two commissioners joined with him, are to make inquisition. So far as this statute may have been argued to disprove the jurisdiction of the admiralty in ports, it admits of a decisive answer. 1. That the jurisdiction is special, and no more disproves the admiralty jurisdiction in ports, than on the high seas; or than that of the common law over offences against truces committed on land. 2. That, by this statute, the breaking of truces is declared treason, and is punishable, in the manner stated in the statute, by a special court; but it cannot, by implication, oust either the common law or admiralty of its jurisdiction over any other offences. 3. That if the argument could prevail, it would oust the jurisdiction of the admiralty over homicides and mayhems committed in great rivers beneath the first bridges, which has never been pretended.

Indeed, the argument derived from the collateral provisions of statutes, is generally unsatisfactory, and rarely conclusive; and if there be any weight in the present one, as an exposition of the true jurisdiction of the admiralty since the statutes of Richard II., it is completely counterpoised by other statutes.

[24] Leigh v. Burley, Owen, 122; 2 Brownl. & G. 37; Violet v. Blague, Cro. Jac. 514; 2 Rolle, 49; Moore, 891; Willets v. Newport, 1 Rolle, 250; Dorrington's Case, Moore, 916; Trinity House v. Boreman, 2 Brownl. & G. 13; Butler v. Thayer, Id. 29; Goodwin v. Tomkins, Noy, 148; Tasker v. Gale, 1 Rolle, Abr. 533; 1, 19; Velthason v. Ormsley, 3 Term R. 315. The doctrine in Moore, 891, "that the coasts, shores, and harbors, are all out of the power of the admiral, except in the two cases allowed specially in St. 15 Rich. II," is not law; for it is clear, that on the sea coasts, as far as the tide flows, the admiralty hath jurisdiction, when the sea is full.

[25] Since the statute 28 Hen. VIII. c. 15, the courts of common law still claim concurrent jurisdiction of the offences stated in that statute, committed in creeks and arms of the sea. 2 Hale, P. C. 18–54.

The statute 28 Hen. VIII. c. 15, gives the high commission court (created by that act, and of which the admiral is the chief judge) jurisdiction of all "treasons, felonies, murders, and confederacies, thereafter to be committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral or admirals have, or pretended to have power, authority, or jurisdiction." And it has been argued, that this is a complete recognition of the admiralty jurisdiction in all ports and havens. Lord Coke has attempted to evade the force of the argument, by assuming, that the words, "or pretend to have," &c. are to be understood between the high water mark and low water mark; for though the land, at the reflow be within the county, yet, when the sea is full, the admiralty has also jurisdiction as low as the sea flows; but, that the words extend not to any haven, river, creek, or place, that is within the body of the county. See Leigh v. Burley, Owen, 122; 3 Inst. 113. This construction is perfectly gratuitous, and is unsupported by the words of the statute. There never was any question, that the admiral had jurisdiction within the ebb and flow of the tide on the sea coast. The only controversy, at the time of passing the statute, was, whether he had jurisdiction in ports and havens, and it is certain that he always did "pretend to have" jurisdiction there. And the statute, so far from negativing this claim declares, in the alternative, that he has, or pretends to have, the jurisdiction. Lord Hale, in commenting on this passage in the statute (2 Hale, P. C. 16), says, "This seems to me to extend to great rivers, where the sea flows and reflows, below the first bridges, and also in creeks of the sea, at full water, where the sea flows and reflows, and upon high water upon the shore, though these, possibly, be within the body of the county; for there, at least, by the statute 15 Rich. II., they (the admirals) have a jurisdiction; and thus, accordingly it hath been constantly used at all times, even when the judges of the common law have been named in the commission; but we are not to extend the words 'pretend to have,' to such a pretence, as is without any right at all, and, therefore, although the admiral pretend to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there." And in Lacy's Case (2 Hale, P. C. 19, 1 Leon. 270; and Moore, 121. And see Owen, 122) an indictment before the high commission court was held good for a murder committed at Scarborough sands, though it was alleged to be done "within the ebb and flow of the tide in Scarborough, and to be parcel of the port of Scarborough," and, as some of the reports show, expressly upon the ground that the jurisdiction of the high commission court extended to such places.[26] And, it may be added in confirmation, that the commissions, issued upon this statute, have uniformly authorized inquisitions of all felonies, "super mari, vel aliquo rivo, portu, aqua dulci, creca, seu loco quocunque infra fluxum maris ad plenitudinem maris a quibuscunque primis pontibus versus mare et super littus maris, etc. secundum stylum et consuetudinem regni Angliae et curiae admiralitatis."[27] And the judicial writs, issued by the high commission court, from time to time (Exton, c. 17, p. 245. etc.), and the statute of 11 & 12 Wm. III. c. 7, in pari materia, seem to put this construction beyond all question. The statute of 28 Hen. VIII. does, therefore, warrant a strong inference, that, at the time of its passage, it was understood as law, that the admiralty had jurisdiction upon tide waters, in ports, havens, and creeks of the sea. And Lord Hale's exposition of this statute, and his affirmation of the admiralty jurisdiction in these places, in contradiction to Lord Coke, has been very recently and solemnly recognised by the twelve judges of England, and sentence of death passed in pursuance of that opinion. Bruce's Case (1812) 2 Leach, Cr. Cas. (4th Ed.) 1093. See, also, Coombe's Case, 1 Leach, Cr. Cas. 388.

It may be well, in this connexion, to take notice of another doctrine of the common law, viz. that where an act is done partly upon the land and partly upon the sea, the admiralty is excluded. Hence it is said, that if a ship be taken at sea, and carried to a port within the body of a county, the admiralty loses its jurisdiction. 4 Inst. 140; 12 Coke, 79. It is difficult to comprehend what an act is, that can be done partly on the sea and partly on the land; and still more difficult to perceive, how the bringing the

[26] 1 Leon, 270; Moore, 121. Lord Hale's explanation of this judgment (2 Hale, P. C. 20) does not seem to comport with the grounds of the decision, as stated in Leonard and Moore. In both reports, the case is put upon the point, that it was within the jurisdiction of the high commission court, under statute 28 Hen. VIII., and not (as Lord Hale supposes) the death being on land, by virtue of any common law commission. In the report in Moore, 121, the following additional opinion is imputed to the court, that "by the statute 13 Rich. II., c. 5, the admiral himself is prohibited to intermeddle with any thing within the body of the county, as all havens are, and, on that account, havens are not within the admiralty; yet all the land, upon which the water of the sea flows and reflows, is within the jurisdiction of the admiralty." This remark, in its obvious purport, seems to recognise the doctrine of the admiralty, that it has not jurisdiction in ports and havens, as such, and over the ports and haven towns, but only so far in the ports, &c. as the sea flows; and, if this be the true meaning, it seems to coincide with that avowed by Lord Hale. 2 Hale, P. C. 17.

[27] 2 Hale, P. C. 18. The words of the commission are given somewhat differently by Zouch, 112. The jurisdiction is thus described: "Tam in aut super mari aut aliquo portu, rivo, aqua dulci, creca seu loco quocunque, infra fluxum maris ad plenitudinem, a quibuscunque primis pontibus versus mare, quam super littus maris et alibi ubicunque infra jurisdictionem nostram maritimam aut limites admiralitatis regni nostri et dominiorum nostrorum." And see Zouch, 93, and 2 East, P. C. 795, and Sir L. Jenkins' Charge, 91, 92.

property infra praesidia, (if I may so say) can deprive the admiralty of its jurisdiction. The corpus delicti still remains, and, until the property is so brought within the power of the court, it would seem impracticable to exercise any jurisdiction at all; and it would be strange, indeed, if the only circumstance, which would render the jurisdiction effectual, should take it away. The statute 13 Rich. II. c. 5, allows the admiralty cognizance of things done upon the sea, and yet, upon this construction, it would be entirely lost or useless. It is utterly impossible to support such an opinion; and, accordingly, it has been in other cases qualified or abandoned. 1 Rolle, Abr. 533, 1, 13. Other distinctions, however, have sprung up in its room, to defeat the claims of the admiralty. It has been held, that if the tort be done at sea, and afterwards the property be changed by a sale on land; or, if the tort be not one continuing act, but be severed by the intervention of new parties, the jurisdiction of the admiralty is gone. Spanish Ambassadour v. Jolliff, Hob. 78; Com. Dig. "Admiralty" F, 5; 2 Brown, Adm. 118. These distinctions have, in their turn, been denied, and, after a very severe and doubtful conflict, the reasonable doctrine seems now established, that, where the tort is done at sea, the jurisdiction of the admiralty is not defeated by any subsequent transaction on land, or by any concurrent jurisdiction of the common law. 1 Vent. 308; Radly v. Eglesfield, Id. 173, 2 Saund. 259; Cro. Eliz. 685; 1 Rolle, Abr. 530, 1, 40; Com. Dig. "Admiralty" F, 5, 6. And, it may be added, that this is the unquestionable doctrine in the United States. Rose v. Himely, 4 Cranch [8 U. S.] 241.

We have now considered the principal, if not all the reasons, which the courts of common law have advanced, to exclude the admiralty from jurisdiction in ports and havens.

On the other hand, the admiralty has strenuously contended, that the statutes of Richard II. never intended to deny the jurisdiction in ports and havens, within the ebb and flow of the tide, and in great streams beneath the first bridges. It fortifies its pretensions by the consideration, that such was its undoubted jurisdiction in the reign of Edward III., to which the statute of 13 Rich. II. c. 5, appeals for a determination of its authority; that this is the only statute, speaking affirmatively in respect to the admiralty jurisdiction, declaring it to extend to things done upon the sea; and that the sea (which includes all waters as far as the tide flows) never was within the body of any county; that long after the statutes of Richard II., the admiralty continued to exercise jurisdiction in ports and havens (Exton, c. 17, p. 255); that it was recognised by the courts of common law upon writs of procedendo and consultation, in the reigns of Henry VIII. and Elizabeth (Exton, cc. 3, 10–13, 17–20, pp. 80–276), by acts of parliament, and especially by St. 28 Hen. VIII. c. 15; 32 Hen. VIII. c. 14; and 1 Eliz. c. 17 (Exton, c. 5, p. 104; Id. c. 20, p. 270; Zouch, 112); that it is confirmed by the forms of the commissions of the lord high admiral, which, notwithstanding the statutes of Richard, have, for ages since, continued to include jurisdiction in ports and havens, and rivers beneath the first bridges (Zouch, 92); and, finally, that it seems admitted in 1632, by the concurrent opinion of all the twelve judges.[28] These pretensions, too, have been deliberately adopted by Sir H. Spelman; for he says (Spel. Reliq. Adm. Jur. 226), "The place absolutely subject to the jurisdiction of the admiralty is the sea, which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the shore or banks adjoining, from all the first bridges seaward." Lord Hale seems to admit the same doctrine (2 Hale, P. C. 16; Hale, De Port. c. 7, p. 88); and it has been solemnly recognized and enforced (as we shall hereafter see) by the congress and the supreme court of the United States.[29]

We are next led to the consideration of the jurisdiction of the admiralty over contracts. And here it is held by the courts of common law, that the jurisdiction is confined to contracts made upon the high sea, to be executed upon the high sea, of matters in their own nature maritime. These restrictions purport to be founded upon the construction of the statutes of Richard II., and more especially on that of 15 Rich. II. c. 3. There is, as we have already seen, no authority for them in any anterior reign; and it is certain, that before Richard's time the admiralty did openly assert and exercise jurisdiction over maritime contracts. The statute of 13 Rich. II. c. 5, is the only one, which (as has been already stated) speaks in affirmance of the admiralty jurisdiction, and it allows it of "things done upon the sea." It is difficult, looking to the obvious intent of this statute, as explained in the preamble, and more fully in the petition, to which it was a response (Exton, 289, 290, etc.), to believe, that it meant to abridge the jurisdiction then claimed by the admiralty, except as to things on land within the ports of the realm. It meant to check its usurpations, and not to narrow its ancient rightful authority. And as to cases without the mischiefs of the statute, as contracts beyond seas, on which the com-

[28] "Likewise, the admiral may inquire of, and redress all annoyances and obstructions, in all navigable rivers beneath the first bridges, that are impediments to navigation, or passage to or from the sea, and, also, to try personal contracts and injuries there, which concern navigation on the sea." Exton, 404; Zouch, 122; Agreement in 1632.

[29] In Godfrey's Case, Latch, 11, the opinion of Doddridge, J., seems to assert, that the sea extends to tide waters in ports, for, when he speaks of a contract made on board of a ship at anchor, and says it is then made on the sea, he probably means at anchor in port.

mon law would then afford no remedy, and disclaimed jurisdiction, there was no reason to extend the meaning of the enacting clause, so as to embrace them. And such for some time was the construction adopted in practice. Tucker v. Cappes, 2 Rolle, 497. The words, however, are not "things done upon the sea" absolutely, but according to the usage in the time of Edward the Third. And we have seen that, at that time, the sea comprehended the waters in ports, as far as the flood tide extended; and that maritime contracts were enforced in the admiralty. The true interpretation then of the words "things done upon the sea," in this connexion, would seem to be all things done touching the sea, i. e. maritime affairs in general; and this is the approved interpretation asserted by the admiralty. Zouch, 103; Exton, 321. Nor let it be deemed a strained or unnatural construction of the words: It is adopted by Selden in respect to similar expressions in an ordinance respecting the jurisdiction of the admiralty of France. The ordinance uses this phrase, "pour raison ou occasion de faict de la mer."[30] "Id est (says Selden) ob causam aliquam a re maritimâ ortam." Seld. de Dom. Mar. lib. 2, c. 18, p. 169. Valin, too, recites several ordinances of France respecting the jurisdiction of the admiralty, and particularly one about this very period (Ordinance of 1400) which gives (article 3) "connoissance et jurisdiction de tous les faits de la mer, et des dependences criminellement et civilement;" and again (article 20) "de choses dependants de la mer," which expressions he does not scruple to declare as a grant of jurisdiction over all maritime contracts. He adds, that the judges of the admiralty have always of right, from the very nature and object of their institution, possessed cognizance of them; and this, not only as to contracts then in use, but as to all other contracts of a maritime nature. 1 Valin, Comm. 124. Valin, therefore, affords a distinct authority in favor of this exposition of the words of the statute, for there is no substantial distinction between "choses faits sur la mer" and "faits de la mer;" and this too in a similar controversy as to jurisdiction between the rival courts of France, contested with as much zeal, as it has been in England. But if we waive this interpretation, which rests on the reference to the usage in the time of Edward III., and if we reject this reference altogether (which in common reason we are not at liberty to do), still, in the most literal and rigid sense of the terms, "things done upon the sea," the admiralty must have jurisdiction in all cases of maritime service and labor, for these are strictly done upon the sea. And whether the contract or engagement be made at land or not is immaterial, since the service is actually performed upon the sea, and the jurisdiction attaching to the service, the other things are but incidents. We shall presently see, how far the common law courts have adopted this or any other consistent construction of the statute.

Let us now recur to that, which should principally engage our attention, viz. the statute of 15 Rich. II. c. 3. It prohibits the admiralty from taking cognizance of "all manner of contracts, pleas and quereles, and all other things, done or arising within the bodies of counties, as well by land as by water." The whole question, as to the extent of this prohibition, turns upon the legal meaning of the words "contracts, pleas and quereles arising within the bodies of counties," for no particular stress can be laid upon the word "done," as in every fair construction it must refer to its next antecedent, "other things." In respect to "quereles," if by this word be meant torts or injuries in rem, or in personam, the jurisdiction would seem limited to the place where the act is done, for there it may be said properly to arise. If "complaints or controversies" be meant (as would seem to be the critical sense), the place where they arise must depend upon the subject matter; if torts or injuries in rem, they arise, where the acts are done; if contracts or personal rights, they arise where the performance or breach of performance, or other invasion of right, takes place. The same observation applies to "pleas" or actions, for "ex facto jus oritur, et actio oritur ex delicto." In a more enlarged sense, "controversies, pleas and actions" arise, where the law has appointed the forum competent to try them. Such are the forum rei sitae, the forum domicilii, the forum maleficii, &c. which depend upon the municipal regulations of each particular country. See Pothier's Pandects, lib. 5, tit. 1, § 35, etc. In respect to "contracts," these may be said to arise, where they originate or are made, or, with equal propriety, where they are to be executed or performed. So it is laid down in the civil law, "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit" (Dig. lib. 44, tit. 7, l. 21; 2 Emer. 331); "Contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia" (Dig. lib. 42, tit. 5, l. 3; Exton, 323; Hein. Element. Pandect. pars. 2, § 36). Huberus (De Foro Compet. § 53) asserts the same doctrine; "Non eum esse locum contractus semper, ubi negotium inter partes celebratum, sed ad quem contrahentes respexerunt." The common law has adopted the same doctrine, for it construes a contract by the law of the place, where it is to be performed or executed, and not simply the place of its origin. And it now sustains actions in its own courts upon foreign contracts, solely upon the ground, that such contracts are not local, but exist or arise in every place, where the debtor is found. It proceeds yet further, and takes cognizance of torts and injuries to persons and property without the realm, both

[30] The words of the statute of Rich. II. are "choses faits sur la mer."

upon the high seas and in foreign countries, upon the ground that they are not local, but arise wherever the party resides. And in this respect it seems to have adopted the doctrines of the civilians. Hub. de Foro Compet. p. 731, § 57. It is utterly impossible to reconcile the decisions of the courts of common law with the construction of the statute of 15 Rich. II. c. 3, here stated, or indeed with any other construction warranted by the words of the statute or by consistent principles of interpretation.

Let us now proceed to consider these various decisions. And, in the first place, it is held, that the admiralty has no jurisdiction over matters done upon land in foreign parts. 4 Inst. 134, 139. It ought to be observed, that the admiralty never did claim, as of right, the cognizance of torts or injuries in rem or in personam in foreign countries, nor of contracts made there, which were not of a maritime nature. It may sometimes have entertained suits of a different kind; but the limit, which upon principle it has prescribed to itself, has been to decline all jurisdiction except of foreign maritime contracts.[31] The principal ground, upon which the common law proceeds to enforce this restriction, is that by the statute of 13 Richard II. c. 5, the admiralty is confined to things done upon the sea. It has been already submitted, that this is not a necessary construction, for the principal object of that statute was to prevent the admiralty from intermeddling with things done within the realm, and that it did not mean to abridge its ancient rightful jurisdiction, but left it as it was in the time of Edward III. It is incontrovertible, that at that period the admiralty had cognizance of foreign maritime contracts, for in the ordinance of Edward I. at Hastings (already quoted), it is given in express terms. Clerke, Prax. 143, 144. So reasonable did it in fact appear to allow this jurisdiction as to foreign contracts, that there is a string of adjudications each way. In De la Broche v. Barney (31 Eliz.) 3 Leon. 232, upon a suit in the admiralty, upon an obligation supposed to be made and delivered in France, the whole court held in effect, that the admiralty had a concurrent jurisdiction with the common law over foreign contracts. This doctrine was affirmed in Furnes v. Smith (11 Car.) 6 Vin. Abr. p. 517, pl. 3; 1 Rolle, Abr. 530, 1, 39. And see Spanish Ambassadour v. Plage, Moore, 814; and Slany v. Cotton, 2 Rolle, 486. And notwithstanding divers intermediate contrary cases (Tomlinson's Case, 12 Coke, 104; 4 Inst. 139; Palmer v. Pope, Hob. 79, 212; Bridgman's Case, Id. 11, Moore, 918; Anon., 2 Brownl. & G. 16; Jennings v. Audley, Id. 30; Hob. 79, 213; Tourson v. Tourson, 1 Rolle, 80; S. P., 2 Brownl. & G. 34), it was again, after solemn debate, deliberately held in Tucker v. Cappes, 2 Rolle, 492, 497; it was conceded in the agreements of the judges in 1575, and of the twelve judges in 1632;[32] it was again debated in Cremer v. Tookley, Godb. 385; Latch, 188; and, finally, in the last cases reported in the books, was denied, and the point of jurisdiction adjudged against the admiralty (Ball v. Trelawny, Cro. Car. 603; Jurado v. Gregory, 1 Vent. 32; 1 Lev. 267; 2 Keb. 511). In this conflict of opinion, it may not be unfit to entertain such a doctrine, as comports best with the principles, which ought to regulate the subject. Considering then, that the admiralty from the highest antiquity had this jurisdiction; that it was the only court, which, as the law was then understood, could enforce foreign contracts; that the statute of Richard was made on a special occasion, to check the encroachments of the admiralty; that the language of that statute, "choses faits sur la mer," may well admit the interpretation asserted by the admiralty, viz. such things as are of a maritime nature, and more especially, as that was the rightful usage of the admiralty in the reign of Edward III., which is incorporated into the very exception of the statute; considering also that the admiralty continued to exercise that authority for two centuries after the passage of the statute, and that there is a great weight of common law authority in its favor, it does not seem unfit to hold, that the admiralty has cognizance of all foreign maritime contracts. There is this additional circumstance of great importance, that it is the only construction, upon which whole classes of cases, still acknowledged to be within the admiralty jurisdiction, can be sustained or reconciled with principle. I allude to the right to entertain suits, 1. To enforce the judgments of foreign admiralty courts. 2. To proceed in rem upon bottomry bonds executed in foreign parts. In neither case can

[31] Upon this ground, the cases of Spanish Ambassadour v. Points, 2 Bulst. 322, 1 Rolle, 133; Don Alonso v. Cornero, Hob. 212, 2 Brownl. & G. 29; and Empringham's Case, 12 Coke, 84,—may, consistently with the rightful claims of the admiralty, be held good law.

[32] In the agreement of 1575, it stands thus: "That the judge of the admiralty, according to such ancient order, as hath been taken by King Edward I. and his council, and according to the letters patent of the lord high admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of memory of man, may have and enjoy cognition of all contracts and other things, rising as well beyond as upon the sea, without let or prohibition." In the agreement of 1632, it stands thus: "If suit be commenced in the court of admiralty upon contracts made, or other things personally done, beyond or upon seas, no prohibition is to be awarded." Zouch, 121, 122; Exton, 443. So much, indeed, was the right to entertain suits upon foreign maritime contracts deemed as of course in the admiralty, that in Clerke, Prax. tit. 41, the mode of proceeding is pointed out without any intimation of doubt. "Aliquando etiam factor, vel negotiorum tuorum gestor in partibus transmarinis, signavit tibi quaedam bona ad tuum usum vel commodum, alius tamen ea detinet, vel injuste occupat, in his casibus obtinere potes warrantum," &c. &c.

there be the slightest pretence, that the things are "done upon the sea," or "arise upon the sea," in the sense affixed to these terms by the common lawyers. Yet in both these cases the authority of the admiralty has been admitted in the most ample manner (Com. Dig. "Admiralty," E, 10, 17), and in a recent case of bottomry triumphantly upheld against every objection (Menetone v. Gibbons, 3 Term R. 267). These melancholy remains of its former splendor stand upon the ancient foundations of the admiralty before the reign of Richard II., and if they have survived the assaults of enmity and time, it is because the principles, on which they rest, are solid and immovable.[33] In the second place, it is held that the admiralty has no jurisdiction, where the contract is made at sea to be executed upon land. One reason of this is said to be, that in such cases the courts of common law may entertain suits, and where they can, they exclude all other courts. 4 Inst. 142; Anon., 2 Brownl. & G. 16; Thomlinson's Case, 12 Coke, 104; Tucker v. Cappes, 2 Rolle, 492, 497; Com. Dig. "Admiralty," F, 5, 6; Hale, Hist. Com. Law, 31; 3 Bl. Comm. 106.

The doctrine, that the admiralty is ousted by a concurrent jurisdiction of the common law, would, if true, completely destroy its authority in all cases, except of prize; for, in all others, the common law has now acquired or claimed a concurrent jurisdiction. It cannot, therefore, be maintained. There would be a much stronger reason for contending, upon sound principles, that, where the admiralty possessed jurisdiction, the common law ought to be excluded. As little foundation is there for the suggestion, that this is a proper construction of the statute of 15 Rich. II., c. 3. Contracts made at sea certainly "arise" there in the sense of the term assumed by the common law, and the admiralty jurisdiction ought therefore to attach. And so the court, in an anonymous case in Cro. Eliz. 685, held, and said, that when the original cause ariseth upon the sea, and other matters happen upon the land depending upon the original cause, those matters, although done upon land, shall be tried in the admiralty; and this decision was approved in a still later case.[34] Nevertheless, against the words of the statute and the reason of the thing, the courts of common law have not hesitated to disavow this at least consistent doctrine. It is in the next place held, that if a contract be made at sea upon a subject not maritime, or be under seal, or be afterwards sealed upon land, the admiralty has no jurisdiction. Bridgman's Case, Hob. 11, Moore, 918; Palmer v. Pope, Hob. 79, 212; 3 Salk. 23. Consistently with the interpretation put upon the statutes of Richard II., by the common law, these distinctions ought not to prevail, for the contracts "arise" upon the sea, and are "things done upon the sea;" and there is not a word in the statutes annexing any qualification, as to the nature, objects or form, of the things done upon the sea. And so is the opinion held by Lord Holt in Collins v. Jessot, 6 Mod. 155, where he asserts, that the admiralty has jurisdiction in respect to the locality of the cause of action, let the nature of the action be what it will. The doctrine, however, which we are now considering, abandons this test of jurisdiction, and so far as it regards the nature of the contract, maritime or not, rests wholly upon the exposition of the statute asserted by the admiralty; and is inadmissible in every other view. As to the effect of a seal in ousting the jurisdiction, we shall have occasion more fully to consider it hereafter.

Another and leading principle, asserted at common law, is, that the admiralty hath no jurisdiction, though the thing be done or happen at sea, if the original of the act was upon land. Hence, it is held, if a contract be made at land for any maritime business or thing, to be performed upon or beyond the seas, and there be a breach upon or beyond the seas, the cognizance belongs exclusively to the common law. This, it is said, is a necessary result from legal principles, for the contract and breach are both requisite to maintain an action, and as both are not "done or made upon the sea," the admiralty cannot claim any jurisdiction. It would be a waste of time to go over the different cases in the books, in which, upon this ground, prohibitions have been granted on account of suits in the admiralty on charter parties, affreightments, and other maritime contracts. With a few exceptions they are ranged on one side, and in general state the decision without condescending to illustrate it by any reasons or argument. 4 Inst. 134, 138, 139; Anon., Moore, 450; Bylota v. Pointel, Dyer, 159; Bend. & D. 58; Johnson v. Drake, 1

[33] One argument, and indeed a principal one, urged by Lord Coke against the admiralty jurisdiction over foreign contracts, is, that they are cognizable by the court of the lord constable and marshal, commonly called the "Court of Chivalry." This argument is a full illustration of Mr. Justice Buller's remarks on Lord Coke's (4 Inst. 134), respecting the admiralty. By the statute of 13 Rich. II. c. 2, the jurisdiction of the court of the lord constable and marshal is expressly limited to conusance "of contracts and deeds of arms and of war out of the realm, and also of things which touch war within the realm." Hence it is very clear, that it has cognizance of such contracts only as touch deeds of arms and war (Zouch, 119; 2 Hale, P. C. 33; 3 Bl. Comm. 68); and consequently its jurisdiction over all other foreign contracts is excluded.

[34] Spark v. Stafford, Hard. 183. In this case, there was a suit in the admiralty by the master of a ship against the owner, to recover the amount of a ransom for the ship, which was taken at sea by pirates, and the ransom money was paid by the master on land. Of course the suit was upon an implied contract of the owner arising from a payment on land for his benefit. The court denied a prohibition, "because the original cause of action arose upon the sea, and whatever followed was but accessary and consequential, and therefore well determinable in the court of admiralty." See, also, Godfrey's Case, Latch, 11.

Keb. 176; Merryweather v. Mountford, 3 Keb. 552; Fleminge v. Yate, 1 Rolle, 410, 3 Bulst. 205; Cappes' Case, 2 Rolle, 492, 497; Slany v. Cotton, Id. 486; Cradock's Case, 2 Brownl. & G. 37; Leigh v. Burley, Owen, 122; Spanish Ambassadour v. Jolliff, Hob. 78; Hawkeridge's Case, 12 Coke, 129; Hoare v. Clement, 2 Show. 338; Burton v. Fitzgerald, 2 Strange, 1078; Justin v. Ballam, 1 Salk. 34; 6 Vin. Abr. p. 526, pl. 15, 16. This doctrine affects to be founded upon a strict construction of the statutes of Richard II., because the contract "arises" on land. It is curious to observe the inconsistencies of the common law courts on this subject. In the first place, the admiralty has no jurisdiction of contracts made at sea to be executed upon land, because, though the contracts arise at sea, yet the performance, which is the principal thing, is to be on land. In the second place, the admiralty has no jurisdiction of contracts made on land to be executed at sea, because the contracts arise on land, and the performance at sea, though a principal thing, ought not to oust the common law, whose jurisdiction attached upon the contracts. Upon what principle is it, that the common law assumes jurisdiction in the one case or the other? Where the breach or the performance of the contract is upon or beyond the seas, no foreign venue can be laid, and no jury can come to try the issue joined upon such fact. And for this reason, as we have seen, the courts of common law formerly declined jurisdiction of such causes, because done without the realm. Besides, whatever may be the place of the contract the action, plea or querele "arises" from the subsequent facts done upon the seas, "a fine omnis oritur actio;" and of the action, plea, or querele, the admiralty ought, at all events, to have cognizance. The proper jurisdiction of the courts of common law is of things done within the bodies of counties, and its further enlargement, by means of fictions, can be considered only as ingenious subterfuges and devices, to amplify their powers. The only ground of principle, upon which these courts can stand on this point, must be, that the cognizance of any one matter of fact within the county draws after it the cognizance of all others, as incidents to the exercise of this right (Tremoulin v. Sands, Comb. 462; 4 Inst. 142; Co. Litt. 261); and in this view, that it is perfectly immaterial, whether the jurisdiction vest by the making, the performance, or the breach, of the contract within the county; or that personal contracts, pleas and actions, have no locality, and "arise," and may (as the civilians hold) be enforced, wherever the party or his property is found. In either view, the same reasoning must apply equally to the admiralty and entitle it to all the jurisdiction, which it has ever claimed as of right. Zouch, 104. And in respect to mariners' wages, Lord Mansfield (Howe v. Nappier, 4 Burrows. 1944) evidently adopts the former construction, as indeed it had been held before (Coke v. Cretchet, 3 Lev. 60). He says, "There (i. e. in cases of wages) the contract is only a memorandum fixing the rate, and ascertaining the wages, but the service at sea is the principal matter in consideration. The gist and foundation of the action (in the admiralty) is the marine service." See 3 Bl. Comm. 106; Abb. Shipp. pt. 4, c. 4, § 1. And why, in the case of a charter party, bill of lading, or other maritime contract, is the doctrine less true? The service or other act is at sea, and the gist or foundation of the action is the marine transportation or other service, neglect or injury, and the contract is but collateral to the action. Molloy, bk. 2, c. 2, §§ 2, 13; 1 Hagg. Adm. 226; This principle was forcibly pressed by Noy in the interesting case of Tucker v. Cappes, 2 Rolle, 497, and was in part adopted by the court. It was in effect held by Mallet, J., in Woodward v. Bonithan, T. Raym. 3, and was solemnly supported and adjudged in Coke v. Cretchet, 3 Lev. 60. See 2 Brown, Adm. 86.

Much, indeed, that might be properly urged on this head, has been anticipated in another place. It has been already shown; 1. that in reason and law a contract may be said to "arise," as well where it is executed, as where it is made; 2. that contracts made at land, to be executed at sea, were originally within the admiralty jurisdiction; 3. that contracts, pleas and quereles, whereof part of the facts arise on land, and part at sea, may well support a concurrent jurisdiction of the common law and the admiralty, since, in respect to each, a principal matter arises within its cognizance; and 4. that this construction is consistent with the words of the statutes of Richard II., and avoids all the incongruities of the decisions of the common law. These doctrines are yet further supported by authority. By the statute of 32 Hen. VIII., c. 14, cognizance was expressly given to the admiralty over charter parties and affreightments within the purview of that act. Zouch, 106; Prynne's Animad. 121, 122. In the agreement of the judges in 1575, and again in that of the twelve judges in 1632, the admiralty jurisdiction in these cases is admitted in the most ample and explicit manner.[35] To the

[35] The clause in the agreement of 1575 has been already quoted. In that of 1632 are the following: "If suit be before the admiral for freight or mariners' wages, or for the breach of charter-parties for voyages to be made beyond the seas, though the charter-parties happen to be made within the realm; and though the money be payable within the realm, so as the penalty be not demanded; a prohibition is not to be granted. But if suits be for the penalty, or if the question be made, whether the charter-party be made or not, or whether the plaintiff did release or otherwise discharge the same within the realm, that is to be tried in the king's court at Westminster, and not in the king's court of admiralty, so that first it be denied upon oath, that the charter-party was made, or a denial upon oath tendered." "If suit shall be in the court of admiralty for building, amending, saving, or necessary victualling, of a ship.

former agreement Lord Coke has made some objections, which are not probably well founded (4 Inst. 135); but to the latter no objections can apply, unless we are to deem the opinions of a single judge, or a single court, of more weight than the opinions of the twelve judges,[36] delivered after solemn debate and deliberation before the king's council, upon this very contest as to jurisdiction, and designed to deliver the subject from the endless controversies, to which it seemed doomed by the shifting adjudications of the rival courts. See 2 Brown, Adm. 77. The ordinance too of parliament, made during the commonwealth, (in 1648) completely confirms this jurisdiction in its full extent.[37]

Nor do these authorities stand alone. They are corroborated by the early practice of the admiralty, immediately after the passage of the statutes of Richard; by the recognition of that practice in the courts of chancery and common law, in granting commissions of appeal and writs of procedendo and consultation in the respective reigns of Richard II., Henry IV., Henry VIII., Elizabeth, James I., and Charles I. (Exton, cc. 7-9, pp. 338-394; Spanish Ambassadour v. Plage, Moore, 814); by subsequent common law decisions scattered in the reports (Tasker v. Gale, 6 Vin. Abr. p. 527, pl. 19, 21. And see Godfrey's Case, Latch, 11; Smith v. Tilly, 1 Keb. 712); and lastly, by the uniform language of the commissions of the lord high admiral, granted since the statutes of Richard II., which confer the most ample jurisdiction over all maritime contracts.[38]

There is also an exception to the doctrine, which we have been considering, (viz. that the admiralty hath no jurisdiction, where the contract is made at land, although to be executed at sea) which is wholly irreconcilable with the construction attempted to be given by the common lawyers to the statutes of Richard II., and with every general principle, for which they contend. I allude to the acknowledged right of the admiralty to entertain suits for mariners' wages. The history of this exception is highly instructive; and cannot be studied with too much attention by those, who are in search of the true exposition of the statutes of Richard II., and the rightful jurisdiction of the admiralty.

It was at first held, that the admiralty had no jurisdiction over mariners' wages, because the contract was made on land. Dyer, p. 159, note 38. And the earliest case in the Reports, in which the jurisdiction was affirmed, is in the 19th year of James I. Anon., Winch. 8. A prohibition was there prayed for and denied, "because he did not sue his prohibition in due time, viz. before a judgment given in the admiralty court, which in point of discretion they disallowed; and also these are poor mariners, and may not be delayed of their wages so long, and, besides, they may all join in a libel in the

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against the ship itself and not against any party by name, but such as for his interest makes himself a party, no prohibition shall be granted, though this be done within the realm." If it were pertinent we could here explain the restrictions in these causes, but it would occupy too much time.

[36] They are at least of as great weight, as the resolutions of the judges on a like occasion in the Articuli Cleri (3 Jac.), which, though not enacted in parliament, nor adjudged in any cause pending in court, Lord Coke himself declares, "being resolved unanimously by all the judges of England and barons of the exchequer, are for matters of law of the highest authority, next unto the court of parliament." 2 Inst. 618. Sir Leoline Jenkins has remarked, that the agreement of the judges in 1632, "was punctually observed as to the granting and denying of prohibitions, till the late disorderly times (meaning the times of the usurpation) bore it down, as an act of prerogative, prejudicial (as was pretended) to the common laws and the liberty of the subject." And the same articles were, in substance, re-enacted in the ordinance of parliament, in 1648, given in the next note. Sir L. Jenkins' Works, Argumt. etc., p. 81.

[37] This ordinance is given at large from Scobell's Collection (147) in Mr. Hall's valuable translation of Clerke, Prax. 24. The first section, after reciting the public inconvenience to trade through "the uncertainty of the jurisdiction in maritime cases," enacts "that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel with the tackle, apparel, and furniture thereof, in all causes which concern the repairing, victualling, and furnishing provisions, for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas concerning shipping or navigation, or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter-parties, or contracts for freight, bills of lading, or mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of laying of buoys, except always that the said court of admiralty shall not hold pleas or admit actions upon any bills of exchange, or accounts betwixt merchant and merchant or their factors." This ordinance was made perpetual by another in 1654, but it fell with the other acts of the commonwealth upon the restoration of Charles II.

[38] Zouch (92) has given a copy of the important clauses of one of those commissions. It authorizes the admiralty "to hold conusance of pleas, debts, bills of exchange, policies of assurance, accounts, charter parties, contractions, bills of lading, and all other contracts which may any ways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business or injury whatsoever had or done in or upon or through the seas, or public rivers or fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them or either of them from any of the said first bridges whatsoever towards the sea throughout our kingdoms of England and Ireland, in our dominions aforesaid, or elsewhere beyond the seas, or in any ports beyond the seas whatsoever." And see collection of sea laws (chapter 2, Malyne, Lex. Merc. p. 47). The clause in this commission, as to jurisdiction on the shores, would seem to refer to the meaning of the word "maritime," as stated in Hawkeridge's Case, 12 Coke, 129, where it is said that "maritima est super littus, or in portu maris." Even Lord Hale felt himself bound to admit the antiquity of these claims of the admiralty, while he endeavored to evade the force of the argument. Justice v. Brown, Hard. 473.

admiral's court, but, if they sue here, they must bring their actions several, and therefore it is good discretion in the court to deny the prohibition." This decision, founded upon compassion and laches, does not seem to have been readily acquiesced in, for in Woodward v. Bonithan, T. Raym. 3, the court held, that mariners' wages were not sueable, in the admiralty. Soon after this the courts sustained the jurisdiction in various cases, although constantly contested (Anon., 1 Vent. 146, 343; Alleson v. Marsh, 2 Vent. 181; King v. Pike, 2 Keb. 779); and from that period, this "sufferance," as Keeling, C. J. (Smith v. Tilly, 1 Keb. 712), calls it, became general, and gradually ripened into a right, which has ever since, in cases of ordinary hire, remained undisputed.

The grounds, upon which this exception has been supported, remain to be considered; and the different reasons, which have been assigned by different judges, may be arranged under the following heads:—1. That it is more convenient for seamen to sue in the admiralty, because they may all join in one suit. Anon., 1 Vent. 146; Wells v. Osmond, 6 Mod. 238, 2 Ld. Raym. 1044; Clay v. Sudgrave, 1 Salk. 33, 1 Ld. Raym. 576; 12 Mod. 405; Howe v. Nappier, 4 Burrows, 1944; Ross v. Walker, 2 Wils. 264; Anon., 8 Mod. 279; Mills v. Gregory, Sayer, 127. 2. That by the maritime law, if the ship perish by the mariners' default, they are to lose their wages; which (it should seem from this reason) would be otherwise due at common law. Anon., 1 Vent. 146. 3. That the true reason is, that though the contract be made on land, yet the ship is made liable for the wages. Wells v. Osmond, 6 Mod. 238, 11 Mod. 31, 2 Ld. Raym. 1044; Clay v. Sudgrave, 1 Salk. 33; Hook v. Moreton, 1 Ld. Raym. 397; Ross v. Walker, 2 Wils. 264. 4. That mariners' wages grow due to them for labor or service done at sea, and the charter and contract at land is only to ascertain their rate. Coke v. Cretchet, 3 Lev. 60; Howe v. Nappier, 4 Burrows, 1944. 5. That it is not on account of the service done at sea, but because they are mariners, and the suit is for mariners' wages; and therefore, if the service be done in port, and the voyage be abandoned, the mariners may still sue for their wages in the admiralty. Wells v. Osmond, 6 Mod. 238, 11 Mod. 31, 2 Ld. Raym. 1044; S. P., Anon., 1 Vent. 343; Mills v. Gregory, Sayer, 127. That the jurisdiction of the admiralty over mariners' wages is an ancient concurrent jurisdiction, as ancient as the constitution itself. Brown v. Benn, 2 Ld. Raym. 1247; S. P., Queen v. London, 6 Mod. 205. 7. That it is expressly against the statutes of Richard II.; and is a mere indulgence, and is now grounded upon the maxim "quod communis error facit jus" (Clay v. Snelgrave, 1 Ld. Raym. 576, 1 Salk. 33; 12 Mod. 406), and nothing but constant practice affirms it (Opy v. Adison, Id. 38; 1 Salk. 31; Day v. Searl, Cunn. 32; 7 Mod. 206); and it is not de jure, but by indulgence (Ewer v. Jones, 2 Ld Raym. 934; Day v. Searl, Cunn. 32; 7 Mod. 206; Ridg. 53; 2 Barnard, 419).

A short review of these reasons may not be without use. As to the first, it cannot of itself furnish any solid ground for vesting a jurisdiction otherwise unauthorised. It is an argument merely ab inconvenienti; and, besides, the jurisdiction exists equally, whether one or many mariners sue. Alleson v. Marsh, 2 Vent. 181; Hook v. Moreton, 1 Ld. Raym. 397. The second is founded upon a supposition, that the common law would, in the given case, decide differently from the maritime law, which is not true. The third is not universally true, or rather does not universally apply, for a suit may be maintained for mariners' wages in the admiralty, as well in personam, as in rem. It is an entire mistake, that its jurisdiction is in general limited to proceedings in rem. Alleson v. Marsh, 2 Vent. 181. The fourth is in direct hostility to the construction of the common law, as to all other maritime contracts, and if correct, furnishes a complete recognition of the general doctrine of the admiralty. See Abb. Shipp. p. 4, c. 4, § 1. The fifth is a virtual contradiction of the fourth, and puts the jurisdiction upon the personal privilege of the parties, not upon the nature or the place of the service done, a distinction at war with the statutes of Richard, and not easily reconcilable with the case of Ross v. Walker, 2 Wils. 264. The sixth reason is undoubtedly well founded, and is a complete answer to the laborious commentaries of Lord Coke. But the reason is in itself of no weight, unless it is admitted, that the statutes of Richard II. were not intended to abridge any part of the original rightful jurisdiction of the admiralty, but only to check its usurpations over contracts made at land unconnected with maritime business. In this view it has a most important bearing. The seventh and last reason is indeed extraordinary. It may be truly observed, in the pointed language of Mr. Douglas (Wilkins v. Carmichael, 1 Doug. p. 101, note 1), "surely it is not consonant to legal principle to hold, that any usage or common error can abrogate a statute to any purpose, or give legality to what an act of parliament expressly prohibits." It may be added, that all these reasons, except the fourth and sixth, have not the slightest connection with any possible construction of the statutes of Richard II.; and the fourth and sixth, if they are correct in principle, sustain the whole superstructure of the admiralty jurisdiction over all maritime contracts.

In respect also to mariners' contracts, certain distinctions seem to prevail at common law, which are as purely arbitrary and irreconcilable with sound principle, and the statutes of Richard II., as any, which have been mentioned. I allude to the distinctions, that although mariners may sue in the admiralty for their wages for services wholly rendered in port, or in navigating from port to port

within the realm (Wells v. Osman, 2 Ld. Raym. 1044; 6 Mod. 238; Mills v. Gregory, Sayer, 127; Anon., 1 Vent. 343; 2 Brown, Adm. Append. 533), and this, as well where the contract is in writing as by parol, provided it be upon the usual terms and stipulations (Benns v. Parre, 2 Ld. Raym. 1206; Anon., 8 Mod. 379); yet the master of the ship is not allowed, under any circumstances, to sue there for his wages (Ragg v. King, 2 Strange. 858; Clay v. Sudgrave, 1 Salk. 33; 1 Ld. Raym. 576; 12 Mod. 405; Read v. Chapman, 2 Strange, 937; The Favourite, 2 C. Rob. Adm. 232; Bayly v. Grant, 1 Salk. 33, 1 Ld. Raym. 632; 12 Mod. 440), nor the mariners, if their contract be under seal (Palmer v. Pope. Hob. 79, 212; Opy v. Child, 1 Salk. 31; 12 Mod. 38; Day v. Searle, 2 Strange, 968; 7 Mod. 206; Cunn. 32; Ridg. 53; Howe v. Nappier, 4 Burrows, 1944), or contain any unusual covenants or stipulations. The reason of the distinction as to the master is said to be, that the mariners are presumed to contract upon the credit of the ship, and the master upon the personal credit of owner; a reason altogether gratuitous, for the credit is in fact as much given to the owner in the one case as in the other. And Mr. Abbott justly observes, that "it is difficult to distinguish the case of the master from that of the persons under his command; the nature and place of the service, and the place of the hiring, are in both cases usually the same." Abb. Ship. pt. 4, c. 4, § 1. And there have been cases, even at the common law, where the distinction has been doubted and denied. See cases cited in Clay v. Snelgrave, 1 Ld. Raym. 578; 12 Mod. 405; King v. Pike, 2 Keb. 779; Smith v. Tilly, 1 Keb. 712; Barber v. Wharton, 2 Ld. Raym. 1452; 16 Vin. Abr. 438, pl. 35; 2 Brown, Adm. 89, 95, 104.

The next distinction, as to the contract's being under seal, is no where very fully explained. In Bridgeman's Case, Hob. 11, it is said to be, because an obligation takes its course and binds according to the common law, which would seem to be no reason at all. A more plausible reason is, that the civil law requires two witnesses to prove a sealed instrument,[39] whereas the common law requires but one. See Howe v. Nappier, 4 Burrows, 1944; Menetone v. Gibbons, 3 Term R. 267; Smart v. Wolff, Id. 323; and Buller, J., Id. 348. Assuming this statement to be correct, as to the admiralty practice, it ought not to oust the jurisdiction, but to induce the courts of common law, by proper process, to compel a conformity with their own rules. Richardson v. Disborow, 1 Vent. 291; 2 Poth. Obl. 273, etc., translated by Evans. Besides, the libel is for the service at sea, and the sealed contract comes in collaterally, or in the defence; and if the admiralty have jurisdiction over the subject matter, it has also jurisdiction of all the incidents; and, in such case, though a question arise proper for the common law, yet we are told the admiralty may try it. Tremoulin v. Sands, Comb. 462, 12 Mod. 144; Menetone v. Gibbons, 3 Term R. 267. Another reason has been adduced, viz. that the admiralty is not a court of record, and therefore, like the county court, it cannot hold plea of a specialty. Menetone v. Gibbons, 3 Term. R. 268; 4 Inst. 135. It is not to our present purpose to inquire, how far this is true as to the county court; and if true, what is the foundation of the exception; but in respect to the admiralty, notwithstanding the very positive assertions of Lord Coke, it is by no means admitted, that it is not a court of record. The common law definition of a court of record is, a court that hath authority to fine and imprison. Salk. 200; 12 Mod. 388; 1 Ld. Raym. 213; 3 Bl. Comm. 24; Bac. Abr. "Courts," D 2, p. 101. And accordingly, in Empringham's Case, 12 Coke, 84, it was held, that the admiralty had no power to fine and imprison, because it was not a court of record, and its proceedings were according to the course of the civil law. 4 Inst. 135. The same doctrine had been previously held in Thomlinson's Case, 12 Coke, 104, and in an anonymous case (13 Coke, 52), and yet it was said in the last case, that by custom the admiralty might amerce the defendant for his default at its discretion (19 Hen. VI. p. 7; Brown, Abr. "Admiraltie," 1). But surely this doctrine cannot be true; for it is perfectly clear, that the admiralty from the highest antiquity, has exercised a very extensive criminal jurisdiction, and punished offences by fine and imprisonment. The celebrated inquisition at Queensborough, in the reign of Edward III., would alone be decisive. See, also, Com. Dig. Adm. D 1, 2, E 12, 13. And even at common law it has been adjudged, that the admiralty might fine for a contempt. Anon., Styles, 171; Sparks v. Martyn, 1 Vent. 1; Clerke, Prax. tit. 67; 2 Brown, Adm. 110. As to the other reason for its not being a court of record, viz. that it proceeds according to the course of the civil law, and that an appeal, and not a writ of error, lies from its decrees; they have nothing to do with the question, for whether a court of record or not does not depend upon the form of proceeding in any court. Besides, the admiralty is expressly recognised as a court of record in King Edward's ordinance at Grimsby, where it is said, "La cause estoit pour ce que l'admiral et ses lieutenants sont de record" (Exton, 27); and, in the articles in the Black Book of the Admiralty, it is articulately declared, "Quod admirallus et locum tenentes sui sunt de recordo" (Clerke, Prax. 146; Rough. art. 39). But even admitting, that the admiralty were not a court of record, it would

[39] The civil law never requires two witnesses, nor indeed any witness, unless the execution of the deed is denied by the party on oath, which very rarely can happen. In this respect it holds the chancery rule, that if any fact be denied in the defendant's answer on oath, his denial shall prevail, unless disproved by two witnesses, or one witness, and very strong corroborative circumstances.

not show that it had no jurisdiction over sealed contracts; for the chancery is not a court of record, and yet it may clearly entertain suits on them.[40] And, to apply a strong remark of Lord Kenyon (Menetone v. Gibbons, 3 Term R. 267), if the admiralty has jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the sea to execute the instrument (and, as I would add, to make an unsealed contract) borders upon absurdity. Nor are the authorities uniform on this point. In Coke v. Cretchet, 3 Lev. 60; Clay v. Sudgrave, 12 Mod. 406; Buck v. Atwood, 2 Strange, 761; and Gawne v. Grandee, Holt, pp. 49, 50, pl. 6,—it was in effect held, that there was no difference between the contract's being by deed or by parol.

The other distinction, as to the contract containing unusual covenants and stipulations, is quite as unsatisfactory. It is said in its support, that if the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a mariner to his wages; his right then must depend upon the performance of the stipulated terms; and the construction of the instrument containing those terms is a proper subject for the jurisdiction of the courts of common law. Abb. Shipp. pt. 4, c. 4, § 3. The construction of a written instrument is a proper subject for every court having cognizance of the subject matter; and this rule is equally as applicable to the admiralty, as to any other court. The admiralty certainly has cognizance of written contracts in many cases, as of bottomry, and ransoms; and it was never yet heard of, that it had no right to put an interpretation upon these instruments. Even in relation to written contracts for mariners' wages, its jurisdiction is not contested; and if wages are to be decreed, or denied, it is impossible for the court to do either, with justice, unless it looks into and construes the contract. And it would be worse than idleness to contend, that the rules of construction are different in sealed and unsealed instruments. The other ground is more specious, but not more solid. It is not true, in any case, that the wages are due merely because the service is performed. It must be performed according to the express stipulations of the parties, even in the usual form of the contract, or according to the implied stipulations resulting from the maritime law, where that is silent, otherwise the wages will not grow due. And there is no more reason, why courts of common law should have the exclusive construction of written agreements of an unusual sort, than of those upon the ordinary terms. Do these courts vainly imagine that the admiralty cannot construe maritime contracts with as much equity, sound principle, and good sense, as themselves? It is some pleasure to find, that the soundness of this distinction has, at least in one case, been denied. Benns v. Parre, 2 Ld. Raym. 1206.

All these distinctions are entirely aside from any construction of the statutes of Richard; and if they are to be held as law, they are limitations of judicial discretion in granting "indulgences," which seem nearly allied to the maxim, "Sic volo, sic jubeo, stet pro ratione voluntas." See 2 Brown, Adm. 94, 96, 104.

It has been further asserted, that the admiralty has jurisdiction, only when the parties have bound themselves in rem; for, if they have bound themselves personally, its jurisdiction is said to be ousted. Per Buller, J., in Menetone v. Gibbons, 3 Term R. 267, 270. And see Ouston v. Hebden, 1 Wils. 101. This doctrine is not pretended to be founded upon the statutes of Richard. Yet it is difficult to perceive, how it can be otherwise supported; and no adjudged case rests singly upon it. Indeed, in the very case in which it was alluded to (viz. a maritime hypothecation), the usual form of the instrument includes a personal obligation or covenant. All the forms, which have fallen under my notice, are of this nature, and the customary instrument, a bond, necessarily includes a personal liability. See the forms on Abb. Shipp. Append. Nos. 1-3; Glover v. Black, 3 Burrows, 1394; Marsh. Ins. bk. 2, c. 1, p. 733, etc., and Append. No. 5; 1 Magens, Ins. 25; Molley, De Jur. Mar. bk. 2, c. 11, § 12; 2 Magens, 393; 3 C. Rob. Adm. 31. Yet it is conceded on all sides, that of maritime hypothecations the admiralty has jurisdiction. The case of mariners' wages also involves a personal contract, and nothing is more common, than a libel against the master or owner in personam. In respect also to personal torts on the high seas, such as assaults and batteries, the process is necessarily in personam (2 Brown, Adm. 106, 110, 396, 397), and the same process is familiarly applied in matters of prize (Smart v. Wolff, 3 Term R. 323). So far indeed is it from being true, that the admiralty has no right to proceed except in rem, that in former times, and down to the reign of James I., its proceedings were almost altogether in personam, as they must still be, when the process in rem becomes inapplicable or inefficient. See Spark v. Stafford, Hard. 183; Clerke, Prax. passim; 2 Brown, Adm. 396, 397. The dictum, which we are now considering, seems indeed to have no better or higher origin, than that of a mere inference from the position, that where the common law has jurisdiction, the admiralty is excluded.

We have now finished our review of the doctrines, which the courts of common law have held in the interpretation of the statutes of Richard II. It has been shown, that the decisions are not reconcilable with each other, or with the words of the statute, or with any sound and uniform principle of

[40] In the United States courts, there could be no ground for this argument, since all those courts are courts of record.

construction. There seems indeed some foundation for the declaration of Lord Holt (Hoop v. Mareton, 1 Ld. Raym. 397), that "heretofore the common law was too severe against the admiralty;" and for the severe censure of the learned Dr. Browne, that these decisions were founded "more in prejudice than in reason" (2 Brown Adm. 85); that they were "not founded in any system, nor fraught with any consistency;" and that they have "involved the subject in endless perplexity" (Id. 100).

In addition to the considerations, which have already been submitted, against the common law interpretation of these statutes, there are no small difficulties, which still remain behind. Whole classes of cases are yet within the acknowledged cognizance of the admiralty, which are at war with that interpretation, and can be sustained only upon the more liberal and consistent doctrines of the admiralty. I have already stated the cases of the execution of foreign sentences, and of foreign maritime hypothecations. These are not alone. Until a comparatively modern period, notwithstanding the statutes, the admiralty exercised undisturbed jurisdiction over petitory or proprietory suits (The Aurora, 3 C. Rob. Adm. 136; 2 Brown, Adm. 114, etc.; Clerke, Prax. tit. 42, 41); and it still continues, with the approbation of the common law, to entertain suits, 1. For possession of ships. 2. Upon controversies among part owners as to the employment of ships, and 3dly, Stipulations made on land in causes pending in the court. This last class may properly be deemed a mere incident to the cognizance of the principal cause; yet the common lawyers resisted it, as an infringement of the statutes, and it was not finally established in favor of the admiralty, until after a struggle for a century. 4 Inst. 135; Zouch, 125; Par v. Evans, T. Raym. 78; Degrave v. Hedges, 2 Ld. Raym. 1285; Justice v. Brown, Hard. 473. But, as to the four remaining classes, the admiralty has had jurisdiction from the highest antiquity; and yet these are not "things done upon the sea." It is therefore a necessary inference, either that the common law interpretation is too narrow, and ought to be rejected; or that these authorities, still allowed to be exercised, are gross usurpations. That the latter construction is correct will not be affirmed by any person, who has examined the subject with due diligence and candor. That the former is dictated by general reasoning, public convenience, and great weight of authority, will scarcely be denied. Nay even the prize jurisdiction imperiously demands a similar doctrine, at least so far as it is exercised over prizes captured in rivers, creeks or ports, accessible to the sea; and on land by naval forces. Lindo v. Rodney, Doug. 613, note. See Hubbard v. Pearse, cited in Le Caux v. Eden, Doug. 594, 606, note. For whether, as seems the better opinion (Rob. Coll. Marit. preface VII.) the prize jurisdiction be an immemorial and inherent attribute of the admiralty, or depend upon the commissions issued from time to time during wars, the words of the statutes of Richard as much apply to the prize as to the instance court. And if the prize commission be evidence, that, notwithstanding the statutes, the court may take cognizance of captures in creeks and ports, the ordinary commission of the admiralty is just as good evidence of the extent of its ordinary jurisdiction in the same places.[41] It would seem to be a mistake of Lord Mansfield (Lindo v. Rodney, Doug. p. 613, note 1) that the courts of common law never considered prize causes within the statutes, and that no complaint ever was made respecting them. There are various cases in the books, which intimate a contrary doctrine (Willets v. Newport, 1 Rolle, 250; Weston's Case, 2 Brownl. 11; Thermolin v. Sands, Carth. 423; Anon., March. 110; Anon., 12 Mod. 16; Shermoulin v. Sands, 1 Ld. Raym. 271; Anon., 1 Vent. 308), if the very elaborate judgment of his lordship, to prove the exclusive jurisdiction in matters of prize, were not of itself a strong proof, that nothing was before that time well settled on the subject. Indeed an examination of the various doctrines, found in our common law reports, would not only confirm this statement, but would exhibit many strange and curious deviations from what would at the present day be deemed common place learning in matters of prize. And it is very doubtful, whether, until a recent period, any such distinction, as a prize and instance side of the court, was known among the common lawyers. After some research, I have not been able to detect the slightest allusion to it in any report before the case of Lindo v. Rodney, Doug. 613, note.

Considerations and consequences, like those, which have been mentioned, cannot but forcibly impress every one, who has examined this subject with accuracy and diligence, and lead to the conclusion (adopted by Dr. Brown) that the jurisdiction of the admiralty depends, or ought to depend, as to contracts, upon the subject matter, i. e. whether maritime or not; and as to torts, upon locality, i. e. whether done upon the high sea, or in ports within the ebb and flow of the tide, or not. 2 Brown, Adm. 88, 90, 110. Such is the limit of its jurisdiction, which the admiralty has strenuously asserted at all times, notwithstanding a torrent of prohibitions has compelled it to yield its rights to superior authority. Even in our own times, it has vindicated some of its ancient claims (Velthasen v. Ormsley, 3 Term R. 315; Smart v. Wolffe, Id. 323;

[41] In recent statutes, the prize jurisdiction is expressly given in ports and creeks; but the same jurisdiction was exercised by the admiralty before any statutes were made to this effect, as a part of its original powers. See Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 371, 391.

Menetone v. Gibbons, Id. 267; Ladbrooke v. Crickett, 2 Term R. 649); and Dr. Brown has pointedly observed, "If a party should institute a suit in that court on a charter party, for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain them; and I have some reason to think, that this my opinion is supported by very high authority." Sir Leoline Jenkins has also ably pointed out the inconveniences to the public and to trade, if the admiralty jurisdiction be evaded in four of the great branches of maritime contracts. 1. As to foreign contracts, or those made abroad. 2. As to mariners' wages, freight and charter parties. 3. As to building and victualling ships, and as to material men, i. e. those, who furnish materials or supply work for ships. And 4. As to disputes between part owners.[42] Nor should it be forgotten, that in the agreement of the twelve judges in 1632, these claims of the admiralty were most amply admitted and confirmed.[43]

On the whole, the result of this examination may be summed up in the following propositions. 1. That the jurisdiction of the admiralty, until the statutes of Richard II., extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries, and offences, on the high seas, and in ports, and havens, as far as the ebb and flow of the tide. 2. That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea. 3. That this interpretation is indefensible, upon principle, and the decisions founded upon it are inconsistent and contradictory. 4. That the interpretation of the same statutes by the admiralty does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, and all torts, injuries and offences, upon the high sea, and in ports as far the tide ebbs and flows. 5. That this is the true limit, which upon principle would seem to belong to the admiralty; that it is consistent with the language and intent of the statutes; and is supported by analogous reasoning, and public convenience, and a very considerable weight of authority. 6. That under all the circumstances, the courts of law and of admiralty in England are not so tied down by a uniformity of decisions, that they are not at liberty to entertain the question anew, and to settle the doctrines upon their true principles; and that this opinion is supported by some of the best elementary writers in that kingdom.

But whatever may in England be the binding authority of the common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles. The constitution has delegated to the judicial power of the United States cognizance "of all cases of admiralty and maritime jurisdiction;" and the act of congress (Sept. 24, 1789, c. 20, § 9) has given to the district court "cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade, of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen; within their respective districts, as well as upon the high seas."

What is the true interpretation of the clause "all cases of admiralty and maritime jurisdiction?" If we examine the etymology, or received use, of the words "admiralty" and "maritime jurisdiction," we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea. Cowell, Interpreter, voce "Admiral;" Spel. Gloss. voce "Admiral," sub finem; Godolph. Jur. c. 1; 1 Valin, Comm. 1; Seld. De Dom. Mar. lib. 2, c. 16, p. 160; Stypman, Jus. Marit. par. 1, c. 6, pp. 76, 77; Id. par. 5, c. 1, p. 602; Loccenius, Jus. Marit. lib. 2, c. 2. In all the great maritime nations of Europe, the terms "admiralty jurisdiction" are uniformly applied to the courts exercising jurisdiction over maritime contracts and concerns. We shall find the terms just as familiarly known among the jurists of Scotland, France, Holland and Spain, as of England, and applied to their own courts, possessing substantially the same jurisdiction, as the English admiralty in the reign of Edward the Third.[44] If we pass from the

[42] 2 Brown, Adm. 77, note 5. I have to regret, that I have not been able to consult the originals of two works quoted in this opinion, which would probably have materially aided my inquiries by their learning and ability. I allude to Sir Leoline Jenkins' works, and Prynne's Animadversions on the 4th Institute. These works were not to my knowledge in New England at the time of delivering this opinion; and I have been always obliged to cite them at second hand.

[43] See Wood, Inst. 494. It is apparent, that the late learned Mr. Justice Winchester adopted these claims in their full extent. I know not any man in the United States, who seems to have had more profound and accurate views of the admiralty jurisdiction, than this very able judge. Stevens v. The Sandwich [Case No. 13,409].

[44] Cleirac, Jurisd. de la Marine, p. 191, etc.; Valin, Comm. 1, 112, 120, 127, etc.; Zouch, 87, 91; Exton, 45, 46, 49; collection of sea laws in Malyne, Lex Merc. 47; 2 Brown, Adm. 30. The coincidence between the general authorities delegated in the admiral's commission in Scotland, and still exercised there, and those in the commission of the admiral in England, is so striking as distinctly to show a common origin. The admiralty in Scotland has cognizance of "all complaints, contracts, offenses, pleas, exchanges, assecurations, debts, counts, charter parties, covenants, and all other writings concerning lading and unlading of ships, freights, hires, money lent upon casualties and

etymology and use of these terms (i. e. "admiralty jurisdiction") in foreign countries, the only expositions of them, that seem to present themselves, are, that they refer, 1. To the jurisdiction of the admiralty as acknowledged in England at the American Revolution; or, 2. At the emigration of our ancestors; or 3. As acknowledged and exercised in the United States at the American Revolution; or, 4. To the ancient and original jurisdiction, inherent in the admiralty of England by virtue of its general organization.

As to the first exposition, it is difficult to perceive upon what ground it can be reasonably maintained, for it would enlarge and limit the jurisdiction by the provisions of statutes, which have been enacted for the government and regulation of the high court of admiralty, and which proprio vigore do not extend to the colonies. It would further involve qualifications of the jurisdiction, which are perfectly arbitrary in themselves, inapplicable to our situation, and contradictory to the commissions and practice of the vice admiralty colonial courts. Even if this exposition were to be adopted, are we to be governed by the doctrines of the common law, or of the admiralty? I am not aware of any superior sanctity in the decisions at common law upon the subject of the jurisdiction of other courts (to which at least they bore no good will), which should entitle them to outweigh the very able and learned decisions of the great civilians of the admiralty. And where could we so properly search for information on this subject, as in the works of those jurists, who have adorned the maritime courts from age to age, and made its jurisdiction the pride and study of their lives?

The second exposition is liable to the same objections; for it is clear, that the statutes of Richard do not extend in terms to the colonies, and it is quite certain, that they were not included in any supposed mischiefs, for they then had no existence. Besides, it is a very material consideration, that, at the emigration of our ancestors, the contest between the courts of common law and the admiralty was at its height; and very soon after (in 1632) it was, by the agreement of the twelve judges, decided in favor of the admiralty. And here again it may be asked, whose doctrines are to be adopted, those of the common law or of the admiralty?

The third exposition requires an examination of the authority and powers of the vice admiralty courts in the United States under the colonial government. In some of the states, and probably in all, the crown established, or reserved to itself the right to establish, admiralty courts;[45] and the nature and the extent of their jurisdictions depended upon the commission of the crown, and upon acts of Parliament conferring additional authorities. The commissions of the crown gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas.[46] And acts of parliament enlarged, or rather recognised, this jurisdiction by giving or confirming cognizance of all seizures for contraventions of the revenue laws. The Fabius, 2 C. Rob. Adm. 245. Tested, therefore, by this exposition, the admiralty jurisdiction of the United States would be as large, as its most strenuous advocates ever contended for.

The clause however of the constitution not only confers admiralty jurisdiction, but the word "maritime" is superadded, seemingly ex industria, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "causae civiles et maritimae." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the con-

hazard at sea, and all other businesses whatsoever among sea-farers done at sea, this side sea, or beyond sea; the cognization of writs of appeal from other judges, and the causes and actions of reprisal and letters of mark; and to take stipulations, cognoscions and insinuations in the books of the admiralty." Collect. Sea Laws, c. 2, Malyne, 47. See, also, 1 Bl. Comm. 94, 95; post, p. 444, note 47.

[45] In the charter of Massachusetts, in 1692, there is an express reservation of the exclusive right in the crown to establish admiralty courts, by virtue of commissions issued for this purpose. See, also, Colon. Acts 1668, 1672; Mass. Col. & Prov. Laws (Ed. 1814) p. 716.

[46] It is presumed that the commissions were usually in the same form. One of the latest is to the governor of the royal province of New Hampshire in 6 Geo. III. Stoke's Hist. of Colonies contains (chapter 4, p. 166) a like admiralty commission in the same words. He says this was the usual form. It authorizes the govern or "to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, inquiries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice admiralty of our said province, &c. or between any other persons whomsoever had, made, begun or contracted, for any matter, thing, cause or business whatsoever done, or to be done, within our maritime jurisdiction aforesaid, &c. &c.; and moreover in all and singular complaints, contracts, agreements, causes and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the seashores, public streams, ports, fresh waters, rivers, creeks and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province," &c. In point of fact the vice admiralty court of Massachusetts, before the Revolution, exercised a jurisdiction far more extensive, than that of the admiralty in England. See, also, The Little Joe, Stew. Vice Adm. 394.

stitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. Montgomery v. Henry, 1 Dall. [1 U. S.] 149; Talbot v. Commanders and Owners of Three Brigs, Id. 95. One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word "maritime" would be mere tautology; but in this sense it has a peculiar and appropriate force. And Mr. Justice Winchester (speaking with reference to contracts) has very correctly observed, that "neither the judicial act nor the constitution, which it follows, limit the admiralty jurisdiction of the district court in any respect to place. It is bounded only by the nature of the cause, over which it is to decide." Stevens v. The Sandwich [Case No. 13,409]. The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind. Zouch, c. 1, p. 87, etc.; Seld. ad Fletam, c. 8, § 5; Rob. Collect. Marit. 105, note; Le Guidon, c. 3; 1 Emer. 21. Of this great system of maritime law it may be truly said, "Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebit." Cic. Frag. de Repub. lib. 3 (Editio Bost. 1817, tom. 17, p. 186).

At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction. And most cordially do I subscribe to the opinion of the learned Mr. Justice Winchester, in the case already cited (Stevens v. The Sandwich [Case No. 13,409]), "that the statutes of Richard II. have received in England a construction, which must at all times prohibit their extension to this country," and "that no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction; independent of the statutes or the works of jurists, who have written on the general subject." Indeed the doctrine that would extend the statutes of Richard to the present judicial power of the United States seems little short of an absurdity. It is incorporating into the text of the constitution an exception, not only unauthorized by its terms, but wholly inappropriate in phraseology to any other realm than England. We have not as yet any "admirals or their deputies;" we do not refer their jurisdiction to the reign of "the most noble King Edward the Third;" much less would an American citizen dream, that the constitution authorized the admiralty "to arrest ships in the great flotes for the great voyages of the king and of the realm;" and "to have jurisdiction upon the said flotes during the said voyages only," and "saving always to the king all manner of forfeitures and profits thereof coming," and "to the lords, cities and boroughs their liberties and franchises."

There are moreover decisions of the courts of the United States, which completely establish the proposition, that the statutes of Richard, and the common law construction of them, do not attach to this clause of the constitution. We have already seen, that the courts of common law, after these statutes, held, that the admiralty had no jurisdiction of things done within the ebb and flow of the tide, in ports, creeks, and havens. It has, notwithstanding, been repeatedly and solemnly held by the supreme court, that all seizures under laws of impost, navigation and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well within ports and districts of the United States, as upon the high seas, are causes of admiralty and maritime jurisdiction. U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297; Same v. The Sally, 2 Cranch [6 U. S.] 406; Same v. The Betsey and Charlotte, 4 Cranch [8 U. S.] 443. This limitation, as to the place of seizure, is prescribed by an act of congress (Act Sept. 24, 1789, c. 20, § 9 [1 Stat. 76]), but it is perfectly clear, that congress have no authority to include cases within the admiralty jurisdiction, which the terms of the constitution did not warrant. And the ground is made stronger by the consideration, that the right

of trial by jury is preserved by the constitution in all suits at common law, where the value in controversy exceeds twenty dollars; and by the statute, this right is excluded in all cases of admiralty and maritime jurisdiction. It is therefore utterly impossible to reconcile these decisions which in my humble judgment are founded in the most accurate and just conceptions of the admiralty jurisdiction, with the narrow and perplexed doctrines of the common law. The argument then, that attempts to engraft them upon the constitution, is wholly untenable.

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance. S. P., Johnson, J., in Croudson v. Leonard, 4 Cranch [8 U. S.] 434; Cleirac, Le Guidon, c. 1, p. 109; Id. c. 3, p. 124; Id. Jurisd. de la Marine, p. 191; 1 Valin, Comm. 112, 120, etc., 127, etc.; 2 Emer. 319; Godolph. 43; Zouch, 90, 92; Eaton, 69, etc., 295, etc.; Malyne, Lex Merc., 303; Id., Collection of Sea Laws, c. 2, p. 47; Consol. del Mare, c. 22; 2 Brown, Adm. c. 4, p. 71; 4 Bl. Comm. 67; Stevens v. The Sandwich [supra]; Targa, Reflex. c. 1. And in point of fact the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance, as maritime contracts; and a similar claim has been uniformly asserted on the part of the admiralty of England. 2 Boucher, Consol. del Mare, p. 730; 1 Valin, Comm. 120; 2 Emer. 319; Roccus de Assec. note 80; 2 Brown, Adm. 80; Zouch, 92, 102; Molloy, bk. 2, c. 7, § 18. There is no more reason why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses.[47]

My judgment accordingly is, that policies of insurance are within (though not exclusively within) the admiralty and maritime jurisdiction of the United States.[48] I therefore overrule the plea to the jurisdiction, and assign the respondent to answer peremptorily upon the merits.

In making this decree, I am fully aware, that from its novelty it is likely to be put to the question with more than usual zeal; nor can I pretend to conjecture, how far a superior tribunal may deem it fit to entertain the principles, which I have felt it my solemn duty to avow and support. Whatever may be the event of this judgment, I shall console myself with the memorable words of Lord Nottingham, in the great case of the Duke of Norfolk, 3 Ch. Cas. 52: "I have made several decrees, since I have had the honor to sit in this place, which have been reversed in another place; and I was not ashamed to make them, nor sorry when they were reversed by others."

DE LOYNE v. DAVIDSON. See Case No. 14,921.

DELPHOS, The (UNION TOW-BOAT CO. v.). See Case No. 14,400.

Case No. 3,777.

The DELTA.

[Blatchf. Pr. Cas. 133.][1]

District Court, S. D. New York. April, 1862.[2]

PRIZE—TEST OATH—MORTGAGES IN PRIZE COURT—WHAT IS ENEMY PROPERTY—TRANSFER TO NEUTRAL—BLOCKADE.

1. A test oath is an oath of ownership simply, and all papers annexed to such oath will be

[47] Roccus de Ass., note 80, declares: "These subjects of insurance, and disputes relative to ships, are to be decided according to maritime law; and the usages and custom of the sea are to be respected. The proceedings are to be according to the forms of maritime courts, &c." Targa, in his Reflections (chapter 1), defines maritime contracts to be those, which, according to mercantile usage, respect or concern maritime negotiations and their incidents. It has been already stated that the jurisdiction of the admiralty in England and in Scotland were originally the same. And the admiralty in Scotland still continues to exercise jurisdiction over all maritime contracts, and particularly over policies of insurance, upon the footing of its ancient and inherent rights. In Dow's Reports of decisions in the house of lords in 1813 and 1814, are no less than eight insurance causes, which were originally brought in the admiralty in Scotland, and finally decided on appeals by the house of lords; Lords Ellenborough, Eldon and Erskine, assisting in the decisions: Watt v. Morris, 1 Dow, 32; Tennant v. Henderson, Id. 324; Watson v. Clark, Id. 336; Brown v. Smith, Id. 349; Sibbald v. Hill, 2 Dow, 263; Hall v. Brown, 367; Smith v. Macneil, Id. 538; Smith v. Robertson, Id. 474.

[48] There can be no possible question, that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it.

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

[2] [Affirmed in Case No. 3,778.]

stricken from the record as irregular. The fact of the ownership, with a general denial that the captured property is lawful prize of war, is all that is proper to include in the claim.

[Cited in The Napoleon, Case No. 10,012; The John Gilpin, Id. 7,343.]

2. A mortgagee of captured property has no right to assert his mortgage in a prize court, and demand its payment out of the proceeds of the property if condemned. All liens upon captured property, which are not in their very nature open and apparent, like that of freight upon the cargo laden on board a captured vessel, are utterly disregarded in prize courts.

3. Property belonging to a merchant residing and trading at an enemy port is, when captured, liable to condemnation as enemy property. The evidence discussed, showing that the transfer of the vessel by an enemy to a neutral was colorable and not real.

4. A transfer of an enemy vessel by an enemy to a neutral during the war, and for the pur pose of her continuance in trade with the enemy, is void, even though made in good faith and for a valuable consideration.

5. The true destination of the vessel in this case was not disclosed upon her papers. The defence set up, that the vessel made inquiry at a neutral port as to the blockade, and was informed that it had been raised, and then directed her course towards a blockaded port in order to make inquiry there as to the existence of the blockade before attempting to enter, shown to be groundless.

6. A contingent destination to a blockaded port, if it in fact existed, must appear on the ship's papers.

7. Where knowledge of a blockade exists at the commencement of the voyage of a vessel, she cannot lawfully approach a blockaded port, even for the bona fide purpose of inquiring as to the continuance of the blockade; and, if she does, she is liable to capture.

[Cited in The Empress, Case No. 4,477; Stokely v. Smith, Id. 13,473.]

8. Vessel and cargo condemned.

BETTS, District Judge. The brig Delta was captured on the 28th of October, 1861, while attempting to enter the blockaded port of Galveston, in Texas, by the United States ship-of-war Santee, commanded by Commodore Henry Eagle, and sent to the port of New York for adjudication. A libel was filed in this court, containing the usual averments of the capture as lawful prize of war, and praying for a decree of condemnation of the vessel and cargo, on the 27th of November, 1861. On the 17th of December thereafter, Seth Adams and Isaac Adams, citizens of Massachusetts, intervened and claimed the vessel, as assignees of Charles W. Adams, the mortgagee of the vessel, for the sum of £1,900 sterling. They alleged that, at the time of the capture, the said Charles W. Adams, the mortgagee, and the assignor of the mortgage, was in possession, under a charter-party between himself and the mortgagor, one John A. Marsh, of Liverpool, England. The claim contains a general denial of the validity of the capture, and is supported by the test affidavit of Isaac Adams, one of the claimants. On the 7th of January, 1862, John A. Marsh, of Liverpool, England, a British subject, intervened, through Williams, the master, and filed his claim as owner of the vessel. On the same day, and by the same proctor, Charles W. Adams, interposed his claim to the cargo laden on board the brig, as its sole owner, and to the vessel, as charterer for the voyage; and also set up an interest sought to be covered by the transaction, which it is supposed was secured and effectuated in his after arrangements with and through the two other claimants, his brothers, Isaac Adams and Seth Adams.

The points developed upon the direct issues in the suit, through the preparatory proofs, and the vessel's papers found on board at the time of her seizure, had been pressed upon the court by the respective counsel, in oral and written arguments of great thoroughness and force, in which they have been allowed by the court a range of debate beyond the ordinary measure of judicial discussions. Under the decision of the court in previous cases, the voluminous matter sought to be introduced by the claimant in this case, by way of notarial protest annexed to the test oath, is to be stricken from the record, as irregular and inadmissible in a prize proceeding. The test oath in a prize cause is the oath of ownership simply, and the fact of this ownership, with a general denial that the captured property is lawful prize of war, is all that it is proper to include in the claim. In the course of the argument, the counsel for the captors cited and commented upon the following authorities: The Spes and The Irene, 5 C. Rob. Adm. 76; The Betsey, 1 C. Rob. Adm. 332; The Neptunus, 2 C. Rob. Adm. 110; The Little William, 1 Act. 141; Wheat. Capt. Mar. 343, 353–355; Wheat. Int. Law, 345; 2 Wheat. [10 U. S.] Append. 4; The Hiawatha [Case No. 6,451]; The Revere [Id. 11,716]; 1 Kent, Comm. 149, 153; Yeaton v. Fry, 5 Cranch [9 U. S.] 335; Maryland Ins. Co. v. Woods, 6 Cranch [10 U. S.] 29; Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 185; Radcliff v. United Ins. Co., 7 Johns. 38; The Diana, 5 C. Rob. Adm. 67; The Twilling Riget, Id. 82; The Tobago, Id. 218; The Marianna, 6 C. Rob. Adm. 24; The Charlotta, 1 Edw. Adm. 252; The Ann Green [Case No. 414]; The Frances, 8 Cranch [12 U. S.] 418; The Betsey, 1 C. Rob. Adm. 98; The Mentor, Id. 181; The Sarah Christina, Id. 239; The Aquila, Id. 37; The Hope, 4 C. Rob. Adm. 215; Several Dutch Schuyts, 6 C. Rob. Adm. 48. The counsel for the claimants cited the following authorities: The Little William, 1 Act. 141; Yeaton v. Fry, 5 Cranch [9 U. S.] 335; Maryland Ins. Co. v. Woods, 6 Cranch [10 U. S.] 29; Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 185; 2 Elliott, Dip. Code, 665; Id. 528, 530; Wheat. Capt. Mar. Append. 343, 352–355; 3 Wheat. [16 U. S.] Append. 4; The Henrick and Maria, 1 C. Rob. Adm. 148; The Aina, 18 Jur. 682; The Constantia Harlessen, Edw.

Adm. 232; The Belvidere, 1 Dod. 356; Conkl. Pr. 374; Die Jungfer Charlotta, 1 Act. 171; 3 Phillim. Int. Law, § 311; The Columbia, 1 C. Rob. Adm. 154; The Dickenson, 1 Hay & M. 1; Fland. Mar. Law, 168, note 3; Radcliff v. United Ins. Co., 7 Johns. 38, 9 Johns. 277; Phil. Ins. (3d Ed.) 459; Sperry v. Delaware Ins. Co. [Case No. 13,236]; The Shepherdess, 5 C. Rob. Adm. 264; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; Die Fire Damer, 5 C. Rob. Adm. 357; The Maria Powlona, 6 C. Rob. Adm. 237; The Fortuna, 2 C. Rob. Adm. Append. 385.

Preliminary to the main question of prize or no prize, to be determined upon the proofs, is one in relation to the character of the claim of Isaac and Seth Adams, and their right to assert the same as against the libellants and captors. Although the conclusion at which the court has arrived upon the main question cannot be affected by a determination as to the right of a mortgagee of captured property to assert his mortgage in a prize court, and demand that it be paid out of the proceeds of the property, if condemned, it is, nevertheless, proper to consider that question. Charles W. Adams, being the sole owner of the brig, executed a bill of sale to the claimant Marsh, on Liverpool, and took back from him a mortgage, to secure the purchase money, amounting to the sum of £1,900 sterling. The claimants, Isaac and Seth Adams, come into court solely as the holders and owners of this mortgage. There is, perhaps, no doctrine better settled in the law of maritime capture than this, that all liens upon captured property, which are not in their very nature open and apparent, (like that for freight upon the cargo laden on board a captured vessel,) are utterly disregarded by prize courts. The great principles of international law in respect to prize require that no such liens, no mortgages, no bottomry bonds, no claims for repairs, supplies or advances, should be allowed to cover and protect private property while sailing on the ocean. If the door was once open for the admission of equitable claims and liens, there would be no end to discussion and imposition, and the simplicity and celerity of prize proceedings would be alike sacrificed. The Francis [Case No. 5,032]; Id., 8 Cranch [12 U. S.] 354; The Josephine, 4 C. Rob. Adm. 25; The Tobago, 5 C. Rob. Adm. 218; The Marianna, 6 C. Rob. Adm. 24; The Sisters, 5 C. Rob. Adm. 155; The Vrow Anna Catharina, Id. 161.

The claim, therefore, of the brothers Isaac and Seth Adams, is one which cannot be regarded in this court. The points at issue, upon which the validity of the capture must rest, are these: 1. Was the captured property, or any portion of it, the property of the enemy, or was it the property of a neutral, or of a loyal citizen? 2. Was the destination of the vessel disclosed by her papers her true destination, or was it simulated and fraudulent? 3. Did the vessel approach the port of Galveston knowing the same to have been effectively blockaded at and prior to the commencement of her voyage, with the bona fide intent to inquire if the blockade was still in force, and not to attempt an entrance without such inquiry; or did she approach designing to enter, if possible, without inquiry? 4. Knowing of the effective blockade at and before the commencement of her voyage, could the vessel lawfully approach the very mouth of the blockaded port, even for the bona fide purpose of inquiry; and was not such approach, under the circumstances, an unlawful act, subjecting the captured property employed in it to confiscation?

1. Upon the first point—the question of ownership—were there any doubt as to the conclusion which must be reached upon the other points in the case, it might be considered that a proper case was presented in which an order should be made for further proofs solely as to the residence of Charles W. Adams, the owner of the cargo of the vessel, and of the vessel herself, at the commencement of the war, and until August 31, 1861. It may be presumed, from the statements which have been made, that such further proof would disclose the fact that Adams was a merchant, resident at Galveston, in Texas, and that he now had a house of trade there, and a partner there domiciliated. Assuming these to be facts susceptible of proof, it is very clear that the captured property is liable to condemnation, as enemy property. The transfer of the vessel by Adams to Marsh, a British subject, is open to grave supicion, as colorable and false. There is neither proof nor assertion of the payment of any consideration upon the alleged transfer, and the inference that no payment was in fact made would seem to be justly deducible from the fact that a mortgage was retained for £1,900 sterling—certainly not far from the value, when new, of a vessel of the description of the Delta. The pretended vendor of the vessel, in addition to the mortgage, received from the pretended vendee, at the same time, a charter-party of the vessel for the voyage, and the terms of this charter-party, as to possession, as to payment, as to insurance, and, indeed, as to all its provisions, are such as to preclude the idea of any real interest in the property in the claimant, Marsh. The purpose of the transfer is apparent from the facts concomitant and subsequent. It was to give the vessel the semblance of a neutral bottom, while she was actually navigated in the interest of a belligerent party for the purposes of trade with, and aid and benefit to, the enemy of the captors. But, supposing the transfer to Marsh to have been made in good faith and for a valuable consideration, such a transfer could, upon the assumption as to the residence of Charles W. Adams, have no validity; because, being made by one whom the law clothes with a hostile character by virtue of his residence, and being made to a neutral during the war, and, as the sequel shows, for

the purpose of continuing in the trade with the enemy, the transfer was void, as in fraud of vested belligerent rights, and, having no validity whatever, the vessel remains in the same position in law as if the title to her had never passed out of Charles W. Adams.

2. Was the destination of the vessel disclosed by her papers her true destination, or was it colorable, false and fraudulent; and did the vessel approach the port of Galveston, Texas, knowing the same to be effectually blockaded at and prior to the commencement of the voyage, with a bona fide intent to inquire if the blockade was still in force, and not to attempt an entrance without such inquiry; or did she approach designing to enter, if possible, without inquiry? These two points are intimately connected. Much of the evidence in the case having a bearing upon the one, is alike applicable to the other. The answer to the one question necessarily involves the answer to the other, and they will be considered together.

In the examination of the question as to the true or simulated destination of the vessel, as disclosed by her papers, the first thing which presents itself is the extraordinary fact, that a portion of the papers designate Minatitlan as her port of destination, and a portion the port of Matamoras—two Mexican ports many miles apart—the one being in the Vera Cruz province, and the other on the river which separates the United States from Mexico. Now, it is of course perfectly credible that in the incipiency of the adventure the destination of the vessel might have been in good faith changed, and the incongruity in the papers be thus fairly explained. But this incongruity assumes importance when considered in connexion with the other circumstances of the case, all tending to show the fraudulent character of the documented destination. It is then that the question becomes significant. Does not the fact that a portion of the vessel's papers designate Minatitlan as her port of destination, and a portion Matamoras, have a strong tendency to show that her true destination was neither the one port nor the other? The master and the supercargo both assert, in their examination on the standing interrogatories, that the vessel was destined to Matamoras. But upon material points their testimony is so conflicting as to be unreliable upon any; and whether the destination were Minatitlan or Matamoras, the vessel, from the time of her entry into the gulf, had been pursuing a course many miles wide of either port, and when captured was close into Galveston, and steering directly for that harbor. By way of explanation of the locality of the place of capture of the vessel, it is set up, not as in some cases, that she was driven there by stress of weather, or for want of water and provisions, but that the vessel stopped at the island of Grand Cayman, and there made inquiry as to the blockade, and was there informed that it had been raised, or there received some information to that effect, and that this caused the alteration in the vessel's course. Now, if this explanation turns out, upon investigation, to be untrue, it affords a very conclusive presumption of the actual criminal intent of the vessel at the outset. Grand Cayman is an island in a group of three, which together contain a fishing population of about 300 souls, lying about 150 miles northwest of Jamaica. Is it credible that the vessel should pass by the numerous British ports of commercial importance in Jamaica for the purpose of inquiry at this petty island, whose humble inhabitants had probably never heard even of a war in the United States? But this is averred in the claims; and, further, that there, at Grand Cayman, they learn that peace negotiations were in progress, and that they were hence induced to change their destination. The testimony in preparatorio completely disproves this. The master swears, answering the 12th interrogatory: "The vessel touched at Grand Cayman, in the West India Islands. We stopped there to get information; we wanted information as to the war in America. I heard that the parties were negotiating peace." The master is contradicted in this by the positive testimony of every other witness. Taylor, the supercargo, answering the same interrogatory, swears: "On the present voyage we stopped nowhere. We passed close to the island of Grand Cayman, but did not stop." And he says not a word as to any information got from the fruit boats which came off. Davidson, the mate, says, answering the same interrogatory: "We touched at no port or place after we left Liverpool before we were taken." He says nothing about Grand Cayman, or information there, or anywhere, received on the voyage, but, on the contrary, ignoring all this, he testifies as follows, when interrogated as to the alteration of the vessel's course: "The captain changed his mind. He called me and the supercargo into the cabin. They then made an entry in the captain's log-book to the effect that we would proceed to Galveston and ascertain if that port was blockaded." Kent, the steward, in answering the 12th and 36th interrogatories, makes no mention of any stop made by the vessel on that voyage. The log-book of the vessel, kept by the mate, contains careful daily entries of the vessel's course, distance, and position, and not only makes no mention of stopping at Grand Cayman, but shows the vessel to have been proceeding steadily on her way, day and night, at the very time fixed by the master as the time of her alleged stopping at Grand Cayman. The captain's log-book is produced, containing the entry alluded to by the mate, and it is a notable circumstance that it is about the only entry contained in it. That it is a false entry is sufficiently established by the testimony before recited. It declares that the vessel stopped at Grand Cayman; that fruit boats came

off; that they got no positive information, but were given to understand that peace was in negotiation. It further states that the alteration of the destination was "by direction of the supercargo."

It is impossible to consider the facts in proof, with all their attending incidents and circumstances, and arrive at any other conclusion than this: that the destination of the vessel declared by her papers was false and fraudulent, and that, from the beginning, she was bound to Galveston, not with any design of making honest inquiry before attempting to enter, but with the deliberate purpose, on the point of being accomplished, and which the capture alone defeated, of entering that port, in spite and in violation of the blockade. But, again, as matter of law, the falsity of the destination of the vessel, as set forth in her papers, is established by the fact that she is documented for a voyage to Matamoras or Minatitlan, disclosing no contingent destination to Galveston. If, as is averred, the voyage was undertaken with instructions to go to Galveston—if, upon inquiry, it was found that the blockade of that port was raised—then the ship's papers are false, because they fraudulently conceal the fact of the contingent destination to Galveston, and represent the destination to be absolutely to Matamoras or Minatitlan. The dishonesty of purpose in the approach to the harbor of Galveston, which is so clearly established by all the circumstances of the case, is confirmed by the fraudulent omission to state on the paper the intent to approach it at all. In The Carolina, 3 C. Rob. Adm. 75, Sir William Scott says: "Had there been any fair contingent deliberative intention of going to Ostend, that ought to have appeared in the bills of lading; for it ought not to be an absolute destination to Hamburg, if it was at all a question whether the ship might not go to Ostend, a port of the enemy. There is, then, an undue and fraudulent concealment of an important circumstance which ought to have been disclosed." See, also, The Margaretha Charlotte, 4 C. Rob. Adm. 78, note. The same principle is laid down in the late case of The Union, 1 Spink's Prize Cas. 164. The evidence in the case thus plainly indicates that the voyage of the Delta was conceived with the fraudulent design of violating the belligerent rights of the United States, and, by evading the blockade established by authority of the government, to give aid and assistance to the enemy. To accomplish this, she was furnished with a simulated, neutral ownership, and with papers concealing her true destination and proclaiming a false one. Being captured at the mouth of the blockaded port in the attempt to enter it, hundreds of miles away from her course to the port of her ostensible destination, a story is invented, by way of explanation, which turns out to be utterly false, a mere fabrication, and therefore tending only to cumulate the proof of culpability and dishonesty. Upon the second and third points at issue, then, the court can entertain no doubt of the validity of the capture, and of the necessity of decreeing condemnation of both vessel and cargo.

4. Knowing of the effectual blockade of Galveston at and before the commencement of the voyage, could the vessel lawfully approach the very mouth of the blockaded port, even for the bona fide purpose of inquiry, and was not such approach, under the circumstances, an unlawful act, subjecting the captured property employed in it to capture and confiscation? This point is distinctly raised by the arguments of counsel in the cause, and is legitimately developed by the proofs and papers, as well as by the claims. It is, therefore, proper, that it should be passed upon by the court, although its determination may not affect the result in this suit, by reason of the conclusion arrived at upon the previous points.

It is conceded—and if not, it is a part of the history of the case, and sworn to by all the witnesses—that all concerned in the adventure had knowledge, full and complete, of the actual effective blockade of the port of Galveston, at and prior to the commencement of the voyage in which the vessel was captured. It is well established by repeated decisions of Sir William Scott, the great master of British prize law, that a neutral trader cannot, with knowledge of a blockade, lawfully go to the station of a blockading force under the pretence of obtaining information as to its continuance. The inquiry must be made elsewhere, not there. "The merchant," says the learned judge, "is not to send his vessel to the mouth of the river, and say, 'If you don't meet a blockading force, enter; if you do, ask a warning and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that after knowledge of the existing blockade, you are not to go to the very station of the blockade upon pretence of inquiry." The Spes and The Irene, 5 C. Rob. Adm. 76; The Betsey, 1 C. Rob. Adm. 334; The Neptunus, 2 C. Rob. Adm. 110; The Little William, 1 Act. 141, 161. The reason and necessity of the rule, as laid down by Sir William Scott, is too obvious to require argument in its support. Were it once relaxed, so as to allow the approach of neutral traders to the mouth of a blockaded port for the purpose of inquiry, the blockade of the ports of the insurgent states could not be made effective by the combined naval forces of all nations. Such a relaxation would operate as a universal licence to the merchant vessels of the world to attempt to enter a blockaded port, for a failure to do so would be attended with no hazard. The soundness of this principle has not been called in question by any decision of the courts of this country, and its wisdom will probably be approved so long as a belligerent blockade is recognized in

international law as a legitimate and efficient method of prosecuting a public war.

This decree was affirmed, on appeal, by the circuit court, July 17, 1863 [Case No. 3,778].

Case No. 3,778.

The DELTA.

[Blatchf. Pr. Cas. 654.][1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—BREACH OF BLOCKADE—PROCLAMATION OF APRIL, 1861—RIGHT TO WARNING.

1. Decree of the district court condemning vessel and cargo for an attempt to violate the blockade, affirmed.

2. Under the proclamation of blockade, of the president, of April, 1861, as construed by the supreme court, a neutral vessel is not entitled to a warning at the blockaded port, if her owner or master had previous knowledge or notice of the existence of the blockade; but, in the absence of such knowledge or notice, the master is entitled to make inquiry and receive the warning before condemnation can take place.

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

[Prize. The vessel was condemned in the district court (Case No. 3,777), and the claimant appealed.]

NELSON, Circuit Justice. This vessel and cargo were captured, on the 27th of October, 1861, off the port of Galveston, Texas, by the United States ship Santee. At the time of her capture she was steering for that port, to make inquiry if it was under blockade, intending, if it was so found, to sail for Matamoras. She had on board a cargo of salt, and had left Liverpool about the 1st of September, bound for Matamoras, Mexico, the cargo to be delivered at the port of Minatitlan. J. A. Marsh, of Liverpool, a British subject, is owner of the vessel, and Charles W. Adams, of Boston, an American citizen, is owner of the cargo. The latter sold the vessel to the former at Liverpool, a few days before the commencement of the voyage, and took a mortgage back to secure the purchase money, and took also a charter of the vessel for the period of eighteen months.

It is urged, on behalf of the owners of the vessel and the cargo, that, at the time of sailing from Liverpool, in the fore part of September, 1861, neither the master nor the owners had any knowledge or notice of the actual blockade of the port of Galveston; that they only knew of the existence of the war, and of an intention to blockade the Confederate ports, by the proclamation of the president, in the April preceding; and that the change of course from Matamoras or Minatitlan to Galveston, was with a view to make inquiry and ascertain whether an actual blockade had been established at the latter port. I agree, that, upon the construction given by a majority of the supreme court to the terms and effect of the president's proclamation, the neutral ship is not entitled to a warning at the blockaded port, if the owner or master had previous knowledge or notice of the existence of the blockade; but, in the absence of such knowledge or notice, the master, as I understand the construction, is entitled to make inquiry, and receive the warning, before condemnation can take place. If it appears, in this case, that the owners or the master were not in possession of that knowledge at the time of the sailing of the Delta from Liverpool, I should be inclined to sustain the right of the master to steer for the port of Galveston, for the purpose and with the intention stated by him. But, as I understand the deposition in preparatorio of Taylor, who was the supercargo employed by Adams, the owner, at Liverpool, he expressly states that he knew that the port of Galveston was under blockade before the vessel left England. Kent, the steward, also testifies to substantially the same effect, in respect to his information. It also appears, from the deposition of the mate, Davidson, that, after the vessel reached the Gulf of Mexico, the captain changed his mind as to the course of the vessel, and called into consultation Taylor, the supercargo, and the mate, and then resolved to proceed to Galveston, instead of Matamoras or Minatitlan, and inquire if that port was blockaded, and had an entry to that effect made in the master's log-book, but not in the vessel's log-book, kept by the mate. As I have already stated, two of the persons engaged in the consultation admit that they knew, at the time they left Liverpool, that the port of Galveston was blockaded, and it is difficult to believe that the master was not also aware of the fact. It is suggested that the master learned on the voyage that negotiations for peace had taken place and were pending, but the suggestion is feebly sustained by the proofs in the case. I may add, that the circumstances attending the sale and mortgage of the vessel are calculated to excite suspicion in respect to the bona fides of the voyage. Upon the whole, after some hesitation, I am inclined to concur in the decree below [Case No. 3,777] both as to vessel and cargo.

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

[2] [Affirming Case No. 3,777.]

DELVALLE (UNITED STATES v.). See Case No. 14,943.

DEMARCHI (UNITED STATES v.). See Case No. 14,944.

Case No. 3,779.

DEMARTINI v. AMBRAMOVIC.

[Cited in American Ballast Log Co. v. Cotter, 11 Fed. 729. Nowhere reported; opinion not now accessible.]

Case No. 3,780.

DEMERITT v. EXCHANGE BANK.

[1 Brunner, Col. Cas. 598;[1] 20 Law Rep. 606.]

Circuit Court, D. Maine. April Term, 1857.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

A state insolvent law cannot discharge or suspend the obligation of a contract, though made and to be performed within the state, if it is a contract with a citizen of another state, nor can it defeat the right of action of a citizen of another state in the circuit court of the United States.

[Cited in Hale v. Baldwin, Case No. 5,913; Baldwin v. Hale, 1 Wall. (68 U. S.) 234; Green v. Collins, Case No. 5,755.]

[This was a suit by John Demeritt against the president, directors, and corporation of the Exchange Bank.]

Mr. Rowe, for plaintiff.

Mr. Kent, for defendant.

CURTIS, Circuit Justice. The only question I can consider on this motion of the plaintiff for a judgment on the agreed statement of facts is, whether that judgment ought to be entered. The consequences of that judgment, and the means by which it may lawfully be satisfied, are matters to be decided hereafter, upon proceedings proper to raise those questions. The action is founded on bills of the bank, the genuineness of which is admitted. The defense is rested on certain laws of the state of Maine, by force of which, before payment of the bills demanded, the bank was temporarily enjoined from doing any business, by an order of a justice of the supreme court of that state, preliminarily to an investigation into its condition, in order to ascertain whether a receiver should be appointed, pursuant to statutes of that state, respecting insolvent banking corporations; and after this action was commenced receivers were appointed. These statutes are relied on to defeat the action, in one or both of two ways. The first is, that by the eighth section of the one hundred and sixty-fourth chapter of the acts of the legislature of Maine for the year 1855, it is enacted: "And no action shall be maintained against any bank after the appointment of receivers thereof; but all its creditors shall have their remedy under the provisions of this bill." That remedy is to present the claim to the receivers, and if disallowed by them to file exceptions to their report, which the law requires to be made to the supreme court of the state; and that court is thereupon to decide finally on the validity of the claim. It is apparent, that if this law be allowed to defeat this action, a suit by a citizen of Massachusetts against citizens of Maine, brought pursuant to the constitution and laws of the United States, in a circuit court of the United States, cannot be tried and determined in such circuit court, but is put an end to without a trial, by force of the state law, and its subject-matter transferred for judicial cognizance to tribunals of the state. It is clear, both upon principle and authority, that this cannot be done. Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; Union Bank of Tennessee v. Vaiden, 18 How. [59 U. S.] 503; Hunt v. Danforth [Case No. 6,887]. It was argued that this state law furnishes one of the rules of decision, which are adopted in trials at the common law by the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92). But it is not the purpose of the state law to afford a rule for the ascertainment of any right upon a trial, but to prevent a trial of the right in the action which it requires to be discontinued, and to substitute another mode of proceeding in which the right is to be tried. It is altogether a law of procedure, and is not adopted by the thirty-fourth section.

The other ground upon which the defense was rested is, that these bills being payable in the state of Maine, it is competent for that state to discharge the bank altogether from the causes of action thereon, though the bills are payable to bearer, and held by a citizen of Massachusetts; and as the contract is thus subject to the control of the state laws, the injunction by which the bank was ordered to do no more business rendered it unlawful for the bank to pay their bills when demanded, and so suspended the plaintiff's right of action; and consequently there was no existing and operative cause of action on these bills when this action was brought. Without investigating minutely this train of reasoning, I consider it sufficient to say that under the constitution of the United States, it is not competent for the state of Maine to pass any law, discharging or suspending the right of action on a contract made with a citizen of another state, by citizens of the state of Maine, or by a corporation created by the legislature of Maine. This was settled in Ogden v. Saunders, 12 Wheat. [25 U. S.] 213. See Boyle v. Zacharie, 6 Pet. [31 U. S.] 348. It is urged that where the contract is to be performed in the state, it is not within the decision of the supreme court in Ogden v. Saunders [supra], and it has been so held by a majority of the supreme court of Massachusetts in Scribner v. Fisher, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be, that a state law cannot discharge or suspend the obligation of a contract, though made and to be performed within the state, when it is a contract with a citizen of another state. Such was Mr. Justice Story's understanding—Springer v. Foster [Case No. 13,266]—of the decisions of the supreme court, in which he took part. See, also, Woodhull v. Wagner [Id. 17,975]; Donnelly v. Corbett, 3 Seld. [7 N. Y.] 500; Poe v. Duck, 5 Md. 1.

The plaintiff is entitled to judgment on the agreed statement of facts.

NOTE. State insolvent laws cannot discharge the obligation of contracts made with citizens

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

of other states. See Baldwin v. Hale, 1 Wall. [68 U. S.] 234; Hale v. Baldwin [Case No. 5,-913], citing above case.

Case No. 3,781.

In re DE METZ.[1]

District Court, D. New Jersey. Sept. 6, 1872.

PARTNERSHIP—EVIDENCE OF—BANKRUPTCY—PROOF OF CLAIM—COSTS.

[1. One who—partly through friendship, and partly through a desire to promote a profitable business, in order that he may receive payment of an antecedent debt—advances money to another for the purchase of materials to be manufactured, retaining a lien thereon as security, will not be *held* liable as a partner merely because of his debtor's representation to that effect, made without his knowledge or authority, coupled with the fact that he looked carefully after the property, which constituted his only security, and was consulted and gave his assent to a sale thereof to his debtor's brother.]

[2. Costs will not be allowed to a claimant in bankruptcy proceedings, who, by failing to make a clear and frank disclosure of the transactions on which his notes were founded, misleads the assignee so as to cause delay and expense in the proof of his claim.]

[In bankruptcy. In the matter of Leonce De Metz. On objection to proof of claim of M. G. Lane.]

There is a lack of precision and distinctness in stating the objections to the proof of this claim, which has somewhat embarrassed me in their consideration, and these objections may be reduced in substance to the following: (1) Because the personal property sold by the claimants to George De Metz, and by the latter to the bankrupt, was in fact the property of the claimant, and liable for the debts of Lane and George De Metz, and hence that said sales were fraudulent, covinous and void. (2) Because at the time of the said sales and transfer of the property to the bankrupt the claimant and George De Metz were partners doing business under the name of the "American Zinc Works," which owed debts and was insolvent. (3) Because the bankrupt, although not a partner, was the superintendent for the firm, and had been and was held liable by the creditors for the debts of the firm. (4) Because the sale to the bankrupt was a device to deceive the creditors of Lane and George De Metz. Upon the argument the counsel for the bankrupt and assignee put himself mainly upon the ground of a failure of consideration for the notes proved by the claimant, which may be regarded and treated, not as a new reason, but as the legal result of some of the foregoing objections.

The testimony taken and relied upon to sustain these objections is very voluminous. I have given it a close examination, and I think this state of facts is made to appear. In the summer of 1869 one George De Metz, a brother of the bankrupt, and Albert Harnickle, established at Elizabethport, New Jersey, a manufactory for the purpose of converting spelter dross into zinc. Their means being limited, they prevailed upon the claimant—who was a friend of both, and who had special reason to be interested in George De Metz, as his intended son-in-law—to loan to them his credit in the purchase of the raw material from which they were to manufacture a marketable product. An arrangement was made with Ackerman, a dealer in new and old metals in New York, by which Lane was to be responsible to him for all the dross and zinc skimmings furnished by him to the American Zinc Works, the manufactured article to be sent to Ackerman for sale, and out of the proceeds Lane to be secured for his advances in the purchase of the raw material, and the residue to be paid to the concern for profit. Matters not succeeding satisfactorily under Harnickle's management, he withdrew from the firm in the latter part of the year, and the business was continued by George De Metz alone, his brother, Leonce, the bankrupt, being taken in as superintendent in the place of Harnickle. It does not appear that any other arrangement was made for supplying the new firm with the raw material. Mr. Lane still remained responsible to Ackerman, who seems to have furnished all that was used in carrying on the business. The zinc dross and skimmings were stored by Ackerman in New York, on account of Lane, and were forwarded to De Metz, at Elizabethport, as he required the same for manufacture. In February, 1870, at the suggestion of some of the parties, it was agreed that the factory building at Elizabethport should be used for the storage of the raw material furnished by Ackerman on the credit of Lane,—the latter claiming ownership in the property until paid his advances thereon to the former. Upon its delivery, Metz gave to Lane a receipt as follows: "New York, February 14, 1870. Recd. of M. G. Lane, on storage, 113,-000, or about, of galvanized zinc, and 25,000 pounds of zinc skimmings, to be delivered to said M. G. Lane at any time on his order, or any part thereof. George De Metz." Thus matters stood until March 12th following, when a contract was entered into between George De Metz and Lane that the former should purchase all the material on hand at the price of $3,616, Lane holding his lien upon the same until the sum was paid to him. The business failed under George De Metz's management; the factory was closed, and Lane was largely out of pocket for advances made to him. In September, 1870, his brother, Leonce, proposed to purchase the concern; had an interview with Lane about it; met him subsequently, with George and Ackerman, at the store of the latter; and finally agreed to pay for all the property and good will of the establish-

[1] [Not previously reported.]

ment the sum of $4,500; $100 in cash and 22 promissory notes for $200 each, payable monthly. A bill of sale was executed by George to Leonce, specifically enumerating the property, and warranting the title against all claims bearing date September 13th, 1870. and the 22 notes were drawn to the order of George De Metz, and were endorsed by him to the claimant, who took them in lieu of notes of equal amount which he held against him. The one first maturing was paid, and the other 21 notes, of $200 each, constitute the claim of Lane, the proof of which is sought to be set aside.

Without considering in detail the several objections urged against the claim, it is only necessary for me to say that the evidence in the case does not seem to sustain any of them. Lane's conduct in and connexion with the business from the start may be satisfactorily explained without assuming that he was a partner therein. De Metz and Harnickle were his friends, and, as it appears, were also his debtors, arising from other business transactions, and he was probably influenced by mixed motives in his endeavours to assist them in this new enterprise. He desired to befriend them, if he could do so without incurring too much pecuniary risk. He doubtless hoped they would succeed, both on their own account, and also in reference to the payment of the other claims which he held against them. I find no evidence which is not explainable upon other grounds than that he was a partner.

"A partner is liable," says Parsons, in his treatise on Partnership (page 31), "either because he is in fact a partner, or that he ever said that he was or that he suffered himself to be held out as one." That George De Metz admitted or alleged that he was did not make him one, or fix any liability upon him as such, unless Lane knew of it, assented to it, or suffered others to act upon the information without correction. It will hardly be safe to infer a partnership because he was anxious for the success of the firm, or because he looked carefully after property which he reckoned his only security for advances made, when such conduct can be so readily accounted for from the pecuniary interests involved, and from the personal relations existing between them. If he was not a partner, then his assent to the sale from George De Metz to the bankrupt, we may presume, only had reference to the lien which he claimed to hold upon a portion of the property. That is a sufficient explanation as to why he was consulted by them both as to the sale by the one and the purchase by the other.

The other material allegation, that the consideration for the notes failed because the property sold by George to Leonce was subsequently taken to pay the debts of the old firm, is founded upon a misapprehension of the facts of the case. George warranted the title of the property in his bill of sale to his brother. That title has not been impeached. A portion of it was, indeed, taken to pay a debt of the former partnership, upon the allegation that Leonce was a member of the firm. But it was seized as his property, not as Lane's or George De Metz's, and hence the validity of the transfer from George to him was fully recognized, not disregarded. It was held in judicial proceedings taken that Leonce had acted in such a manner in the conduct of the former's business, that he had rendered himself legally liable as partner. But upon what principle can Lane be held responsible for that? There is no evidence that he either did or said anything to conduce to such a result.

Upon the whole case I am of the opinion that the objections to the claim must be overruled.

Whether I should allow to the claimant his costs in these proceedings is a different question, as he seems, at least in part, responsible for them. The twenty-second section of the bankruptcy act [of 1867 (14 Stat. 527)] requires that, in order to entitle the claimant to have his demand against the estate of the bankrupt allowed, his proof of claim inter alia must set forth the true consideration of the debt or demand. It has been held under this section that when the debt consists of a promissory note the proof ought to set forth the consideration of the note,—In re Loder [Case No. 8,456],—and that it is competent for the register, or the court, after exceptions made, to allow any mistake or defect in the proof to be amended,—In re Elder [Id. 4,326]. In the present case the claimant has not fully and fairly stated the consideration of the notes, which evidence his claim against the bankrupt's estate; but I think this defect of proof has arisen rather from a misapprehension of the register, arising from the want of clearness in stating the transaction by the claimant, than from any wilful or fraudulent suppression of the facts by the claimant. With this view, in the absence of fraud, I recognize the right of the complainant to explain the proof made, and, if need be, to amend it. But I have the impression that the assignee has been misled by this lack of exactness in revealing the consideration of the claim, and that expense and delay have been made, by the claimant, because he did not more frankly and clearly expose the whole transaction to the register. This at least would be the natural tendency and result of such defective proof. Under the circumstances I am not willing to allow his costs, but order each party to pay their own.

Case No. 3,782.

DE MILL et al. v. LOCKWOOD.

[3 Blatchf. 56.][1]

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

ACTION TO RECOVER LAND—EQUITABLE ESTOPPEL—ENTAILED LANDS—LEGISLATIVE RELEASE.

1. What considerations, by way of equitable estoppel, will n)t operate to prevent a recovery by a plaintiff, in an action at law to recover the possession of land.

2. A., by his will, devised land to J., for life, and, after J.'s death, to P. and the heirs male of P.'s body. After J.'s death, P. conveyed his interest in the land to M. By his will, M. devised his interest in it to the then children of the said P., one of whom was T., an heir male of P.'s body. Afterwards, by a resolution of the legislature of Connecticut, Q., the guardian of those children, was authorized to sell and convey, for their benefit, their interest in the land under the devises. The resolution declared the estate to be a fee simple. Q. made a conveyance under the resolution. Afterwards, P. died: *Held*, that the legislature had authorized the conveyance of the right which would belong to the children, as P.'s issue, on his death; and that, by the conveyance by Q., T. was divested of all title to the land under the will of A.

3. Semble, that the fee tail given to P. by the will of A.. became, by such resolution, a fee simple in the said children, and passed by the conveyance made by Q., so as to bar the rights of heirs male of P.'s body who were born after the conveyance by Q.

4. At the time of the passage of the resolution, the legislature exercised judicial powers; but, whether the resolution is to be regarded as a judicial decision, quaere.

This was an action [by Thomas A. De Mill and others against Augustus Lockwood] for the recovery of a tract of land situate in Stamford. The plaintiffs, four in number, were the children and the only heirs male of Peter De Mill. The title to the land was originally in Anthony De Mill. He, by his will, made the 15th of July, 1790, devised the land to his nephew Joseph De Mill, for life. At his decease, the land was given by the will to Peter De Mill, a son of Anthony, and to the heirs male of his body. The will was admitted to probate on the 13th of August, 1790. Joseph died in the year 1800. Peter died in July, 1852. One of the plaintiffs, Thomas A., was born in 1799, one in 1804, one in 1807, and one in 1811. On the 21st of July, 1798, Peter conveyed to Mary Arnold all the right, title, and interest which he had in the premises, without stating what that right was. There was, in the deed, a covenant that he had good right to convey the same. Mary Arnold, by her will, made on the 24th of October, 1800, devised all her right and interest in the premises, to "the children of Peter De Mill." Mary Arnold died early in 1801. In October, 1801, Peter Quintard was appointed guardian of the children of Peter De Mill who had then been born, namely Thomas A., two daughters, and a son who died in 1839. As such guardian, he presented his petition to the legislature of the state, in which he alleged, that his wards were the owners in fee of the premises, by devises from Anthony De Mill and Mary Arnold, and prayed for power to sell, for the benefit of his wards, all the right, title, interest and claim which they derived under either of those devises. The legislature passed a resolution authorizing Quintard, as such guardian, to sell, for the benefit of his wards, all the right, claim and interest which they acquired to the premises by virtue of those devises, and, in that resolution, declared the estate which it authorized to be sold, to be an estate in fee simple. At that time, the legislature exercised not only legislative but judicial power. In pursuance of that resolution, Quintard, as such guardian, on the 10th of April, 1802, sold the interest of his wards in the land to David Holly. On the same day, Holly sold all his interest to Isaac Ambler; and, on the 1st of April, 1809, Ambler conveyed to the defendant. Ever since that date, the defendant had been in possession of the premises, claiming them as his own, and had made extensive improvements on them, adding greatly to their value. At the trial, evidence was offered by the defendant tending to prove, that Quintard was paid the full value of the land; that that full value was paid to the plaintiffs when they became of age; that they received it, knowing that it was the avails of the land; that they still kept it; that they knowingly permitted the defendant to go on making improvements on the land, supposing it to be his own, without telling him of their claim; that Peter De Mill died in the city of New York, where he was domiciled, and had been for several years, leaving a will; and that, by that will, he devised real and personal estate of some value, in that city, to the plaintiffs.

Charles Hawley and Henry Dutton, for plaintiffs.

Thomas C. Perkins and Thomas B. Butler, for defendant.

INGERSOLL, District Judge, in submitting the case to the jury, charged them as follows:

The plaintiffs, if there were nothing else in this case but the will of Anthony De Mill, would be entitled to the property in question, in fee simple. For, the statutes of this state have declared, that every estate given in fee tail shall be an absolute estate in fee simple, in the issue of the first donee in tail. The plaintiffs would, therefore, be entitled to a verdict, to recover possession of the premises.

It is urged, however, by the defendant, that, in the year 1802, the fee of the land was attempted, at least, to be sold by Quintard, the then guardian of Thomas A., one of the plaintiffs, and of the other children of Peter who had then been born, by virtue of power given to him by the legislature;

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

that a deed of the land was given by Quintard to Holly, from whom the defendant claims; that Quintard was paid the full value of the land; that that full value was paid to the plaintiffs and their sisters, with their consent, when they became of age; that they received that full value, knowing it was the avails of the land sold by Quintard; that they keep that full value; that the plaintiffs have knowingly permitted the defendant to go on making improvements on the land, supposing it to be his own, without telling him of their claims; and that, therefore, the plaintiffs are now estopped from saying, either that the power with which the legislature invested Quintard was a defective or invalid power, or that it was defectively executed. Whatever the rule might be in a court of equity (and it is not necessary to decide what the equity rule would be), these facts would not, in a court of law, estop the plaintiffs from saying, that the power which was given to Quintard by the legislature, to convey the right which was acquired by the plaintiffs or either of them, under the will of Anthony, or the fee of the land, was an invalid power for that purpose, or that it has been defectively executed. The defendant further urges that, in the deed of July, 1798, from Peter to Mary Arnold, there are certain covenants which are binding upon the plaintiffs, as his heirs at law; and that, in consequence of the covenants in that deed, and of the devise to the plaintiffs under the will of Peter, the plaintiffs cannot now claim the land. But these facts, even if they were as claimed by the defendant, would not, in law, deprive the plaintiffs of the right to demand the land.

The defendant also urges, that he has held the land adversely ever since the year 1809, claiming it as his own, and denying all right of every one else to it; and that such adverse possession, under such a claim of right, gives him, in law, a title to it. If any one, having no right to land, enters upon it and holds it adversely, claiming title to it as against all the world, the person who has the actual title and the present right of possession, will after the lapse of fifteen years, be deprived of all title, if, for that fifteen years, he permits such adverse possession, without exercising his right of possession. This is the general rule. There are certain exceptions to it, in favor of individuals under certain disabilities, which it is unnecessary to specify. If, then, the defendant has had possession of the land between forty and fifty years, claiming title to it, and denying the right of every one else, the question arises: Did the plaintiffs, for a period of fifteen years of such adverse possession, have the right to the immediate possession, and permit the defendant, for that period, to exercise that right, without exercising it themselves? If they did, then their title is gone.

By the will of Anthony De Mill, neither of the plaintiffs had any right of possession, until the death of Peter De Mill, in 1852. The right of possession, after the death of Joseph De Mill, was in Peter. By his deed to Mary Arnold, in 1798, that right in Peter became vested in her. By her devise, which took effect early in 1801, to Thomas A. De Mill, one of the plaintiffs, and the other children of Peter who were then born, the right of possession, which, by the deed from Peter to Mary Arnold, was vested in her, became vested in Thomas A. and the other devisees named in her will. Then, if there were nothing else in the case, the right of immediate possession would, from about the year 1801, have been vested in Thomas A. and the other devisees named in the will of Mary Arnold. As, then, Thomas A. would, for more than fifteen years after he became of age, have permitted the defendant to exercise the right of possession to the land in question, claiming it as his own, without exercising the right which he, Thomas A., had, the defendant would, as against him, have the right to the land. But there is a deed, executed in 1802, from Quintard, as guardian of Thomas A. and the other devisees in the will of Mary Arnold, made by virtue of a resolution of the legislature; and, if that deed conveyed the life-right which Peter had under the will of Anthony, and which became vested in Thomas A. and the other three devisees in the will of Mary Arnold, by virtue of that will, and that life-right only, then, after that deed, during the life of Peter, there was no right of possession in Thomas A. Under those circumstances, no adverse possession by the defendant would affect Thomas A.'s present legal title, for the reason that, from the time such adverse possession commenced, up to the time of the death of Peter, in 1852, there was no right of possession in Thomas A. The plaintiffs admit that, at least, that life-right was conveyed by that deed, though they deny that any thing more than such life-right was conveyed. But, it is claimed by the defendant, that the deed executed by Quintard to Holly, in pursuance of the resolution of the legislature, will prevent a recovery in this action; and the court is of opinion, that that deed affords to the defendant a complete defence in this suit.

There are several reasons urged on the part of the defendant, why that deed will deprive the plaintiffs of the right to recover in this action:

1. It is admitted that, if any one of the plaintiffs has no title to the land in question, though the other plaintiffs may have the whole title, no recovery can be had in this action. To entitle the plaintiffs to a verdict, all the plaintiffs must have a right to demand the possession. And it is claimed by the defendant that, at all events, the resolution of the legislature authorized Quintard to sell all claim which Thomas A. had to the land in question under the will of An-

thony; and that, after the deed from Quintard was executed, Thomas A. could have no right under that will. It is admitted by the plaintiffs that, after that deed, Thomas A. could have no claim under the will of Mary Arnold. But they deny that he was, by that deed, deprived of the right which he had under the will of Anthony. They say that what he took by the will of Anthony, was not a right that could in law be conveyed by deed; that it was a mere possibility, a mere expectancy, during the life of Peter, a mere capability of inheriting, without any rights of property attaching to it, so long as Peter should live. The estate given to Peter by the will of Anthony, was an estate tail male. That estate, upon the death of Peter, he leaving male issue, would, in such issue, become an estate in fee simple. During the life of Peter, his issue had no interest in the land which could, in law, be conveyed by deed. Such was the common law, and the legislature had never, by any general law, altered the common law in this respect. It is admitted, that the legislature could, by a general law, alter the common law in this respect, and authorize the issue of the tenant in tail to convey by deed the right or claim which would belong to him, as such issue, or the possibility to which he was entitled, as such issue. It is claimed by the defendant, that, by the resolution of the legislature, in this particular case, they authorized that to be done. And such is the opinion of the court. The legislature could, by a general law, authorize it to be done. They could, by a particular special law, authorize it to be done in a particular case. They adopted the latter course. After that resolution of the legislature, and the deed from Quintard which followed it, Thomas A. could, at no time, claim any title to the land by virtue of the will of Anthony. He, therefore, has no present right to the land, and there can be no recovery in this case, whatever the rights of the other plaintiffs may be.

2. It is also claimed by the defendants, that, by virtue of the proceedings had before the legislature in October, 1801, the estate tail given to Peter by the will of Anthony, and which estate had, by the devise of Mary Arnold, vested in the four children of Peter then living, became in them an estate in fee simple; that, as what they had was sold and conveyed by the deed of Quintard, the fee simple to the land was conveyed; and that, as a consequence, none of the plaintiffs have any right to the land. It has already been decided that Thomas A. has no right to the premises, and that, therefore, there can be no recovery in the present action. It is not necessary, therefore, for the purposes of the present case, to decide the question whether the other plaintiffs would have any right to the land in controversy. But, as the determination of this latter question may be desirable to the parties contesting, in reference to any contemplated future proceedings, I will express my views in regard to it. The resolution of the legislature which authorized the sale of the land, called that which was to be conveyed a fee simple, and authorized Quintard to convey a fee simple. The legislature would have had a right, by a general law, to declare every fee tail to be a fee simple in the tenant in tail; and, after such general law, an estate in fee tail would, in the tenant in tail, be converted into a fee simple. Such was the course adopted several years ago by the legislature of the state of New York. The legislature, by so doing, would not take any right of property from any one and vest it in another. They would not take any strict legal right from any one. For, the issue of the donee in tail, has no strict legal right until after the death of such donee. During the life of such donee, such issue has no right in the entailed estate which can be conveyed; but only a possibility or expectancy or capability of inheriting. He has no right to convey; and, by the common law, such issue may, in various ways, without any act done by him, or any act left undone by him, be deprived of that possibility or expectancy. The legislature have a right, at all times, by general law, to change the course of the inheritance, and deprive such issue of the capability of inheriting. If, then, the legislature had, in the year 1801, as was done by the legislature of the state of New York a few years previously, passed a general law, declaring all fee tails to be fee simples, that which Peter took by the will of Anthony, and which had become vested, by the will of Mary Arnold, in the four children of Peter then living, would, in them, have become a fee simple. If this could be done by a general law, it could be done by a particular special law. And the proceedings had before the legislature may be considered as a particular special law, by which the fee tail which was given to Peter by the will of Anthony, and which was then vested in those four children, became in them a fee simple. As, therefore, what they had a right to was sold by the deed of Quintard, it follows that the fee simple was sold; and that, consequently, none of the plaintiffs have any right to the land.

3. Another reason urged by the defendant, why the deed from Quintard deprives the plaintiffs of the right to recover the land is, that the proceedings had before the legislature in October, 1801, became a judicial decision, binding upon all the world, establishing the estate to be conveyed to be a fee simple. In 1801, the legislature exercised judicial as well as legislative powers. But, it is not deemed necessary to determine this last question. Enough has been said to show that the plaintiffs have no right to the demanded premises, and that there must be a verdict in favor of the defendant.

DEMING (UNITED STATES v.). See Case No. 14,945.

Case No. 3,783.

DEN v. BACON et al.

[4 Wash. C. C. 578.][1]

Circuit Court, D. New Jersey. April Term, 1826.

EJECTMENT—POSTPONEMENT OF TRIAL — COSTS IN FORMER EJECTMENT.

After notice of trial, the defendant cannot move to put off the trial until the costs of a former ejectment be paid; without notice that such a motion would be made; nor can it prevail under any circumstance, if the costs be demanded on an ejectment, which had been decided in the state court.

[Action in ejectment.] Motion by defendants' counsel to postpone the trial until the plaintiff has paid the costs of a former ejectment between the same parties, for the same premises; which was decided in favour of the defendants, in the supreme court of this state. Cases cited in favour of the motion: Roberts, Costs, 448; 2 W. Bl. 1158. On the other side were cited Adams, Ej. 322; Roberts, Costs, 446.

Ellmer & Wall, for plaintiff.

Richard Stockton and Mr. Jeffers, for defendants.

WASHINGTON, Circuit Justice. Whether this court would, under any circumstances, postpone the trial of an ejectment until the costs of a former ejectment, incurred in a state court, be paid, is a question not necessary to be decided in this case; although I am by no means prepared, as at present advised, to adopt such a practice. It appears from one of the cases cited, that this is the practice of the king's bench and common pleas in England; and there it may be attended by no inconvenience. But it by no means follows that it ought to be adopted by the courts of the United States, in reference to a state court; or vice versa. Those courts are altogether differently constructed; and are governed by different rules of practice. The present case strongly exemplifies the inconvenience which might result from the practice. It seems at least doubtful whether, under a rule of the supreme court, which has been referred to, the defendants have not forfeited their right to claim costs in that court; although it is possible, as has been contended for by the defendants' counsel, that upon a proper application to that court, this objection might be removed. But this is a matter in which this court ought not to interfere. But be this as it may, this motion comes too late. Notice of the trial of this cause has been regularly given, and being now called, the defendant is for the first time informed that payment of the costs of a former ejectment is demanded as a preliminary to the trial. To yield to such a demand would be subversive of the ends of justice, by producing delay, and subjecting the other party to an injury, without his being subject to the imputation of the slightest fault. He had no reason, nor was he bound to anticipate such a demand, so as to come prepared to meet it. Surely he ought to have received reasonable notice that this motion, or at least that the demand would be made, that he might not be taken by surprise. So far from this, it is not pretended that a demand of these costs has ever been made, and it is even admitted that they were not taxed until to-day. But this is not all. At the last term of this court the lessor of the plaintiff, being a non-resident of this state, was ruled to give security for costs in this action, without any intimation being then, or at any time afterwards, given of this motion; or that the costs now claimed would be demanded. The plaintiff then might reasonably conclude that such a claim was waived, so far as it might affect the trial of this cause. Motion denied.

The cause was afterwards continued upon an affidavit of the absence of a material witness.

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

Case No. 3,784.

DEN v. HILL et al.

[1 McAll. 480.][1]

Circuit Court, California.[2] Jan. Term, 1859.

ACTS OF PUBLIC OFFICERS—PRESUMPTION OF AUTHORITY — GRANTS OF MEXICAN GOVERNORS OF CALIFORNIA.

1. The public acts of public officers, purporting to have been done in an official capacity, shall not be presumed to be usurped, but that a legitimate authority had been previously conferred, or subsequently ratified.

2. The reasons which gave application to this rule arose out of the powers of the Spanish monarch, and his relations with his vice-regents in the New World, and do not apply to the territorial or departmental governors of California.

3. Their granting powers must be exercised in conformity with the colonization decree of Mexico, of 1824, and the regulations of 1828.

4. No presumption in favor of the validity of their acts arises, to the extent to which that rule has been carried in the cases of Spanish titles.

This cause was left to be determined by the court, on the law and facts, without the intervention of a jury.

James McDougal and Isaac Hartman, for plaintiffs.

Thompson, Irving & Pate and Eugene Lies, for defendants.

McALLISTER, Circuit Judge. This is an action brought for the recovery of damages for the detention and conversion of certain live stock, and other personal property. The damages are laid at $50,000. A jury has been waived, and the cause left by consent of parties, on the law and facts, to the court.

[1] [Reported by Cutler McAllister, Esq.]

[2] [District not given.]

It appears that defendants, as the highest bidders at public outcry, became on the 4th December, 1845, the lessees for the term of nine years, of the mission of Santa Barbara, together with the live stock and personal property; which arrangement was made in conformity with the decree of the 25th May, 1845, and the regulations of 28th October, in the same year. At the expiration of the lease, the plaintiff claimed to be the owner of the personal property, and demanded possession of a portion of it. The defendants refused to recognize the ownership of plaintiff; whereupon he brought this suit. To sustain his title, he produced a paper purporting to be made on the 10th June, 1846, by Pio Pico, constitutional governor, and which professes to convey the reversionary interest of Mexico to the mission of Santa Barbara, after the expiration of the lease, with all its property, tenements, and stock, to the plaintiff. To prove the due execution of this document, the plaintiff relies on the admission of the genuineness of the signature of Pio Pico. This is doubtless presumptive evidence of due execution at the time it bears date. It is but a presumption, however, and may therefore be rebutted by evidence. Neither Pico nor Moreno the secretary whose signature is on the grant, was sworn as a witness, although the latter certifies officially on the grant, that an entry of it had been made in the proper book; and such official statement has been falsified by the fact that no such entry has been found in the proper book, or in any of the records or archives of the government. This grant purports to have been made on the 10th June, 1846, a period near the time when the government of the territory had passed from his (Pico's) hands, and, indeed, during the very heat and conflict of the struggle in which his power was overthrown. Add to this, that this grant never saw the light, so far as the evidence ascertains, until 1848, after the return of Pio Pico to California, from his visit to Mexico; and it is much to be regretted, that the plaintiff has been content to rest solely on the genuineness of the signature of Pio Pico, in a case the circumstances of which render the admonition of the highest judicial tribunal of our country peculiarly impressive, namely, that in such a case careful inquiry and scrutiny is necessary as to the authority of the governor, and the bona-fide exercise of it. U. S. v. Cambuston, 20 How. [61 U. S.] 64.

Now, in this case it is urged, that there are facts elicited by the testimony which disaffirm the presumption arising from the fact of the genuineness of the signature of Pico, and facts independently of the time and the condition of Pio Pico when he exercised the granting power, which show that the grant was made long after its apparent date.

These facts are, that the government archives contain no "espediente" note, or memorandum, of this grant, while there are record-notices of other grants of similar character issued about the same time. That the certificate that an entry of the grant was made in the proper book, is false. That none such has been produced, and its non-production is not satisfactorily accounted for. That the sale of this property itself being public, was at a private sale. That this grant was not only not archived, but its existence unknown to witnesses who, it was to be supposed, must have known of it had it been in existence. That plaintiff in 1848 and 1850 disclaimed by his acts and declarations having any interest in the mission of Santa Barbara. L. T. Burton swears, he was assessor of Santa Barbara county in the latter year, and applied to the plaintiff for a list of his property; that he received a list of particulars from him; that no mention was made of any interest or claim in the mission of Santa Barbara. That in that year the property was not assessed, for the reason that he believed it to be government property. In 1848, I. D. Stephenson was also in an official position, and "received orders to look into the tenures of the mission property, cattle, &c.; was instructed to send a secretary for the documents and titles. I received information that Dr. Den and Mr. Hill (the defendants) were the lessees of the mission in Santa Barbara. The only gentleman I knew of the name of Dr. Den, is the gentleman in court. He was riding by my quarters. I applied to him. He referred me to his brother, as having possession of the mission of Santa Barbara. I went immediately to the mission, saw Den and Hill, received the requisite information, and communicated it to my superior. Dr. Richard Den said he had no interest in the mission, and referred me to his brother." An additional circumstance, which is ascertained by the expediente of Thomas H. Robbins, is invoked, which shows that a portion of the same lands alleged to have been granted to plaintiff, was granted some twenty days after that time, to the said Robbins, with full knowledge by Pico that they belonged to the mission of Santa Barbara. Now, the foregoing circumstances afford intrinsic testimony which create no inconsiderable doubt as to the due execution of the grant, and lead to the conclusion that the grant was ante-dated, and was, in fact, ushered into existence at a much later period than the date it bears, and when any authority which had existed was at an end. This question, as to the valid execution of the deed, was a legitimate issue for a jury; and had this court anticipated this question would have arisen, it would not have assumed the responsibility of a jury in deciding it. The court will not undertake to determine this question, as it proposes to place the disposition of this case on a ground independent of it. If the decision of the court shall be found to be correct, there is no necessity to decide whether the execution of the grant has been satisfactorily proved. If

deemed to have committed error, the party aggrieved will have an opportunity of explaining the circumstances of this case.

The questions arise, 1st. At the time, and in the position in which Pio Pico was, and in the then condition of the country, did he possess the power to grant the reversionary interest of Mexico in the mission of Santa Barbara, and its live stock, and other personal property? 2d. Apart from the peculiarity of his position, did he, as governor, have the power to sell the personal property, cattle, &c., of a mission?

As to the first question. In the case of U. S. v. Palmer [Case No. 15,989], decided some months since in the district court of the United States, sitting as a land court under the act of 3d March, 1851 (Brightly, U. S. Dig. 111), a grant made by Pio Pico, as governor (and Moreno, the secretary, in this case), came under consideration. In relation to that grant, the court had occasion to discuss the power of Governor Pico to grant anything at the time, and in the position he then held; and as the presiding officer of that court, I had occasion to say, "It must have been with a knowledge that hostilities between the United States and Mexico had commenced on the Rio Grande, that the American squadron was on the coast awaiting orders to take possession of this county, which they did immediately. It was at such a time, and in such a condition of affairs, that Pio Pico undertook to grant" &c. "The condition of things rendered the consummation of the contract impracticable, and practical dominion had passed from Mexico." The court concluded by saying, "that it admitted of great doubt whether on that ground alone the grant should not be deemed invalid." As in that case, however, although the grant was alleged to have been signed by Pio Pico and Moreno, the secretary, as in this, the court was satisfied it was antedated, and declined to decide on the ground of want of authority but predicated their decision on the ground that proof of the execution of the grant had not been made,—so in this case, though strongly impressed with the belief that all practical power to grant, in Pico, if it ever had been vested in him, had ceased to exist, the court will waive the further consideration of it, and proceed to the last view it entertains of this case, and the ground on which it will predicate its decision. Had Pio Pico at any time, as governor, the power to sell or alien the personal property of missions, devoted by law to pious uses, without the intervention of any other department of the government?

In the case of U. S. v. Cambuston, 20 How. [61 U. S.] 64, the court say, that a grant issued under the circumstances which characterize the present, "should be inquired into and scrutinized with great care, as to the authority to make it." In the opinion of the court, it requires little scrutiny to ascertain that no authority existed here. By the laws and regulations of Mexico, whatever may have been the occasional violations of them by unfaithful public agents, the governor had no authority to sell the personal property of the missions, because it belonged to the neophytes, the fruit of whose labor it was. These neophytes, with the fruits of their labor by those laws, were at first placed under the tutelage of the missionary priests; afterwards, under that of the administrators or major domos, appointed by the territorial governors; and then, again, under the administration or curatorship of the missionary priests, to whom the property was restored by Governor Micheltorena, acting under the order of the supreme government. The manifesto of Figueroa gives a history of the laws, —Figueroa, the governor, who, in the estimate of this court (formed from its acquaintance with their transactions), stands pre-eminent among the departmental governors as a faithful and honest public servant. Figueroa's Manifesto, pp. 14, 17–22, 29–32; Figueroa's Regulations; Rockwell, p. 156, arts. 1–10; also, clause 4, art. 23, Alvarado's Regulations; Rockwell, 462, 466, art. 16; Id. 471, 475. Figueroa, in his Manifesto, says (page 31), "Then, and always, the neophytes of the missions were reputed owners of the property pertaining to them; because all was acquired by their personal labor in community under the direction of the missionary friars, who, as tutors, have administered and economized the property remaining, after maintaining, clothing, and supplying the necessaries of the subjected natives, as minors whose education had been committed to them by government."

The foregoing authorities ascertain that the authority exercised by the government over the missions as to their personal property, was as curators of the Indians or neophytes; and that any disposition of that property must be in subordination to their rights. Don Pablo de la Guerra, a witness, says that the governor only exercised control of the property as curator for the Indians; and Alvarado, another witness, deposes that the property was held by the government for the benefit of the Indians and religious services of the missions. Pio Pico, in his grant, has referred to the sources of his authority. He first alludes to the full power with which he was vested by the supreme government to promote the general defense. He next refers specially to a decree of the honorable assembly of the 13th April immediately preceding the date of the grant (1846). He has not given nor has any one else, the specific fountain from which his full powers flowed. The court, therefore, supposes that, for the source it is to look to the general principle which has been enunciated: "that the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped; but that a legitimate authority had been previously conferred, or subsequently

ratified." This principle has been applied to Spanish titles, and was prominently enunciated in the cases of U. S. v. Arredondo, 6 Pet. [31 U. S.] 729; U. S. v. Clarke, 8 Pet. [33 U. S.] 436; and in Delassus v. U. S., 9 Pet. [34 U. S.] 135. The reasons which grew out of the powers of the Spanish monarch, and his vicegerents in the New World, which called for the application of the principle, do not exist in regard to the territorial or departmental governors of California; or the relations which subsisted between them and the government of Mexico. Their power to grant even vacant lands was restricted, and could be legally exercised only when in conformity with the provisions of the colonization decree of 1824, and the regulations of 1828. [U. S. v. Cambuston] 20 How. [61 U. S.] 64. The power of a territorial governor to alienate the cattle and other fruits of the labor, belonging to the neophytes of missions, is not a matter of presumption, particularly in a case like the present, where the circumstances under which it was exercised demand careful scrutiny into the existence of such authority.

We now turn to the second source of power to which Pio Pico refers in his grant (the decree of 13th April, 1846), in conformity with which he states in the grant, he had resolved to make a genuine and effectual sale to Richard S. Den, of the Mission of Santa Barbara, with all its property, tenements, stock, and lands. Now, no such decree has been proved even to have been in existence. It is urged that the date of the 13th April was a mistake, and that the decree intended to be referred to, was that of 3d April, 1846, inserted under that date in Rockwell, 475. Suppose that such inference is correct, an inspection of that decree as set forth by Rockwell, shows no warrant for the action of Pio Pico. That decree on its face shows it could not have been the source of any power in relation to the mission of Santa Barbara. By its first article, it is clear that this mission was not intended to be included. For the purpose of saving from ruin certain missions which could not find tenants who would lease them under the previous efforts made by the government, and were, therefore, falling into decay and ruin, it was decided that the departmental government should act in the manner which may appear best, &c. The mission of Santa Barbara was, therefore, excluded; for it is ascertained from the testimony, it had been rented previously to the defendants, in conformity with the decree of 28th May, and the regulations of 28th October, 1845, and they were in possession of the mission at the time. By the article 3, the decree provides, should government, by virtue of this authority, find that in order to prevent the total ruin which threatens said missions, it will be necessary to sell them to private persons, this shall be done at public auction, the customary notice being previously given. Article 4, provides that in case of sale, if after the debts be paid, any surplus should remain, this shall be divided among the Indians of the premises sold, government taking care to make the most just distribution possible. This legislation exhibits the same spirit which always regulated the Mexican legislation toward the Indian convert. The titles to the lands where the missions were located, were never deemed out of the government; but that the government, in relation to the personal property of the Indians, acquired by their labor and production, acted towards it as curators and guardians, there can be little doubt. When, then, Pio Pico referred to the decree of 13th April, 1846, if he intended to allude to the decree set forth by Rockwell, and stated he was acting in conformity with it, he simply stated that which is disproved.

The court considers it needless to refer in detail to the Montesdioca document, to the proceedings of the departmental assembly of 15th April and 13th of May, 1846, or any other documents to show that the grant was made without authority but in contravention of the orders of the supreme government. Judge Hoffman, in the district court of the United States, sitting as a land court, under the act of 3d of March, 1851 (Brightly, U. S. Dig. 111), in the Case of the Orchard of Santa Clara, has referred in detail to some of the decrees and orders. His opinion has been published, and is easy of access. The conclusion to which the judge came was, "that admitting the governor's right to grant the vacant lands of the missions, or even to sell them, as to which latter I express no opinion, it is nevertheless clear that he had no authority either to grant or sell the vineyards, orchards, &c.; which on the petition of the bishop, had been recognized by the president as belonging to the Fathers, which had been restored to them by Micheltinevo, and the sale of which, under the assembly decree of May 28th, 1845, the supreme government had promptly interposed to prevent." This is the conclusion to which the court came, on the general power of the governor to sell personal property of the mission. In a case where the sale was private and to private individuals; where the evidence of it professes to have been entered on the records, where no entry on record of the grant is produced, and its non-production not accounted for; where the existence of the grant for some time after its alleged execution was unknown; where the party had, by his act and speech, disaffirmed having any interest in the property; where a portion of the same land alleged to have been granted to the present plaintiff, was granted by the same grantor, with full knowledge that it composed a portion of the mission of Santa Barbara, within twenty days after the time the grant to the plaintiff is alleged to have been made; where the grant was made at a time, and under circumstances which require careful scrutiny, to ascertain the authority of the grantor and the bona fides of its exercise;

and in view of the authorities hereinbefore referred to, as reported in Rockwell, — the court cannot consider the authority of Pio Pico to make the grant, under which plaintiff claims title, as having been established. The court, therefore, acting as a jury, find a verdict in favor of the defendants.

DENEALE (BANK OF ALEXANDRIA v.). See Case No. 846.

DENEALE (BETTY v.). See Case No. 1,375.

DENEALE (STUMP v.). See Case No. 13,-560.

DENEALE (UNITED STATES v.). See Case No. 14,946.

Case No. 3,785.

DENEALE v. YOUNG.

[2 Cranch, C. C. 200.][1]

Circuit Court, District of Columbia. April, 1820.

APPEAL FROM ORPHANS' COURT—SECURITY FOR COSTS.

An executrix has a right to appeal from a sentence of the orphans' court, to this court, without giving security to prosecute the appeal with effect; and this court will grant a mandamus accordingly.

On the motion of Mary Deneale, executrix of the will of George Deneale, a rule was granted her against Robert Young, Esq., the judge of the orphans' court, to show cause why a mandamus should not issue commanding him to allow her appeal to this court from the judgment pronounced by him on the petition of John Stump's agent, without requiring from her the performance of the conditions annexed by him to his order for allowing the said appeal; which conditions were the paying the costs which had accrued, and giving bond and security (pending the appeal,) in the sum of $15,000, to prosecute her appeal with effect.

Mr. Mason, for the executrix.

Mr. Swann, for the judge.

THE COURT (nem. con.) made the rule absolute and issued the mandamus.

Case No. 3,786.

DENEALE v. YOUNG.

[2 Cranch, C. C. 418.][1]

Circuit Court, District of Columbia. Oct., 1823.

ASSUMPSIT—SET-OFF—NOTICE.

Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence, upon non assumpsit.

Mr. Fendall and Mr. Lear, for plaintiff.

Key & Dunlop, for defendant.

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

Mr. Key, for defendant, offered to prove a set-off without notice given before the suit was called for trial.

The plaintiff's counsel objected that it was too late.

THE COURT (nem. con.) so decided.

DENIG (BURDELL v.). See Case No. 2,142.

Case No. 3,787.

DENIKE v. ROURKE.

[3 Biss. 39;[1] 3 Chi. Leg. News, 345.]

Circuit Court, N. D. Illinois. June Term, 1871.

SECOND TAX SALE—POSTPONES DEED—MUNICIPAL TAXES.

1. Under the statute of Illinois, if the purchaser at tax sale allows the land to be again sold, within two years, whether for the same class of taxes or for other taxes properly assessed, his right to a deed is postponed, and a deed obtained within the limitation from the second sale is void and inoperative.

2. Municipal taxes are levied under the same general authority as state and county taxes, and a sale by municipal authority is essentially a sale by state authority.

3. In claiming title under a tax deed, the purchaser, having served a notice upon the person in whose name the land was taxed, as required by section 4, art. 9, of the constitution of Illinois, must show affirmatively by proof that such person, at the time of such service, resided in the county where the land is situated.

4. Constitutional provisions for the protection of tax-payers must be strictly construed.

Ejectment for lot 6, of Mayer's subdivision of lots 1 and 4, in block 22, in the canal trustees' subdivision of the south fractional half of section 29, township 39, range 14, situated in Cook county, Illinois.

Homer Cook, for plaintiff.

Wm. B. Snowhook, for defendant.

BLODGETT, District Judge. Upon the trial the plaintiff exhibited a chain of title from the United States government to himself, such as, if no defense were interposed, clearly showed the fee simple in the property to be in the plaintiff as averred in his declaration. But the defendant, to defeat the plaintiff's right of recovery, claimed title under a tax deed executed by the sheriff of Cook county to P. W. Snowhook, and a deed from P. W. Snowhook to the defendant. Said tax deed was predicated upon a sale made by the collector of Cook county to said P. W. Snowhook on the 27th day of August, 1866, for the taxes of 1865. Defendant also showed the assessment of said taxes, a warrant for the collection thereof, return by the collector as delinquent, due notice of application for judgment against said lot for delinquent taxes, and judgment, the issue of precept, and sale in pursuance of said judgment, and also an affidavit filed by said P. W. Snowhook before

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

the issue of said deed, setting forth in substance that notice had been served on Hugh Maher, in whose name said lot was taxed for the year 1865, of the said purchase, and the time when the redemption would expire; also, that no person was in possession of said premises, and a publication of a notice, substantially the same as the one served on Maher, in the Chicago Post, for three successive publications, three months prior to the expiration of the time for redemption.

The plaintiff, for the purpose of defeating the tax title thus set up, adduced proof showing that said lot 6 was duly assessed for taxes by the municipal authorities of the city of Chicago, for the year 1866; that said taxes not being paid, said lot was sold for said taxes in March, 1867, whereby plaintiff insisted that the right of said Snowhook as purchaser at the tax sale in August, 1866, to a deed of said lot was postponed for two years; or, in other words, that the deed given by the sheriff to Snowhook, and introduced in testimony, was void, for the reason that Snowhook was not entitled to his deed at the time the same was issued.

The statutory provision relied upon by the plaintiff reads as follows: "If any purchaser of lands sold for taxes shall suffer the same to be again sold for taxes before the expiration of two years from the date of his or her purchase, such purchaser shall not be entitled to a deed for the land until the expiration of two years from the date of the second sale; during which time the land shall be subject to redemption upon the terms and conditions prescribed in this act, but the person redeeming shall only be required to pay, for the use of such first purchaser, the amount paid by him, and double the amount paid by the second purchaser." Act Feb. 12, 1853 (Sess. Laws, p. 956; Gross' St. 1870, p. 609).

It was contended, on the part of the defendant, that this provision only applies to tax sales made for state, county and town purposes, and that the purchaser at a tax sale was not postponed in his right to his deed by the sale of the land for taxes under municipal authority. But I am of opinion that it becomes, under this clause of the law, the duty of any purchaser of lands or lots at tax sales to see to it that they are not again sold within two years; and that in case the lands are so sold, whether for the same class of taxes or for other taxes, properly assessed, the right to the deed is postponed.

The evident purpose and object of the law was to make sure that all taxes would be paid during the time the purchaser's inchoate right to a deed was maturing, and it is as much his duty to see that the taxes levied by the municipal authority are paid, as to look for those levied directly for state and county purposes. Municipal taxes are levied by virtue of the same general authority which levies and enforces a payment of state and county taxes—the municipal authorities acting by virtue of the power delegated to them by the state government, and a sale by municipal authority is, therefore, essentially in all respects a sale by state authority. Upon this point then I am clear, that the defendant's deed was void and inoperative, and I should be obliged to find for the plaintiff; but on looking further into the papers I observe that the only notice which was served in this case as an attempt at compliance with the constitutional requirements found in section 4, art. 9, of the constitution of Illinois, was by service of notice on Hugh Maher, in whose name said lot was taxed for the year 1865. The constitutional requirement is, "that such purchaser shall serve, or cause to be served, a written notice of such purchase on every person in possession of such land or town lot, three months before the expiration of the time of redemption from such sale; in which notice he shall state when he purchased the land or town lot, the description of the land or lot he has purchased, and when the time of redemption will expire. In like manner he shall serve on the person or persons in whose name or names such land or lot is taxed, a similar written notice, if such person or persons shall reside in the county where such land or lot shall be situated."

The evidence in this case shows that the notice substantially required by the foregoing provisions, was served on Hugh Maher; and it also shows that no person was in possession of the lot in question at the time of the service of such notice. It seems very clear to me that it should appear affirmatively by the proof, not only that the notice was served upon the person in whose name the property was taxed, in the event of the property's being unoccupied, but also that such person was a resident of said county at the time of such service. This being a constitutional provision for the protection of tax-payers, it is to be construed strictly. No person is to take any rights under a tax title, without following literally the directions given by the constitution. This objection was not raised at the trial, and I do not now intend to base my decision solely on that; but it seems to me that this alone is an insuperable objection to the defendant's title as exhibited on the trial. Judgment for the plaintiff.

DENISON (MICHAELSON v.). See Case No. 9,523.

DENISON UNIVERSITY (STURGES v.). See Case No. 13,566.

DENMEAD (WINANS v.). See Case No. 17,-860.

DENN ex dem. FISHER v. HARNDEN. See Case No. 4,819.

DENNEE (UNITED STATES v.). See Cases Nos. 14,947 and 14,948.

Case No. 3,788.

DENNER v. PALMER.

[1 Pac. Law Mag. 291.]

[This case, though relating to the powers and duties of federal judges, was determined in a subordinate court of the state of California. It seems to have been nowhere else reported.]

Case No. 3,789.

DENNETT v. MITCHELL.

[6 Law Rep. 16; 1 N. Y. Leg. Obs. 356.]

District Court, D. Maine. Feb., 1842.

BANKRUPTCY—PRIOR BONA FIDE CONVEYANCES.

A conveyance of property by a bankrupt, bona fide, made more than two months before he filed his petition, for a fair and adequate consideration, is not void, although he may have been insolvent at the time; provided the other party had no notice of a previous act of bankruptcy, or of his intention to take the benefit of the bankrupt law [of 1841 (5 Stat. 440)].

[Cited in Ashby v. Steere, Case No. 576.]

In bankruptcy. This was a petition of Gardner Dennett, assignee of David D. Ruggles, a bankrupt, claiming certain property, which had been transferred by Ruggles to G. & D. N. Ropes, which had been taken into possession by their assignee, as having been transferred in fraud of the bankrupt law, and for the purpose of giving them a preference over the creditors. The material facts were as follows: The Messrs. Ropes, being creditors of Ruggles and indorsers of his paper to a considerable amount, became dissatisfied with the state and prospects of his business, and called upon him on the 17th of June for security. Ruggles declined giving security, but offered to transfer, by an absolute bill of sale, any of his property to pay the debts due to them, and further to pay the amount of their liabilities for him, on condition of their assuming and undertaking to pay them as their own proper debts. This proposition was accepted, and he accordingly conveyed to them on that day, by an absolute bill of sale, all the stock in trade, in the store he then occupied, with other property of various kinds, including several promissory notes and other choses in action, to the amount of $2,703.06. The Ropeses at the same time surrendered to him his notes to them and other obligations to an equal amount. On the 20th, Ruggles made a further transfer to them to the amount of $870, and gave his note for $1,977.95, and received in payment and satisfaction other of his notes given up, and an obligation of the Ropeses to assume absolutely and pay his paper, on which they were indorsers, to the amount of $2,366.09, the whole consideration being $2,847.95. It is not denied that the consideration paid was the full value of the property. At that time the Ropeses were in good credit, and remained so until about the 25th of July, when, finding themselves insolvent, they filed their petition in bankruptcy. After the sale and transfer, Ruggles continued to dispose of his property, collect his debts, and pay his creditors until the Ropeses failed, but made no new purchases. He does not appear to have considered himself insolvent until after their failure, or at least had not till that time contemplated going into bankruptcy. After that event, he discontinued business entirely, and on the 25th of August filed his petition to take the benefit of the bankrupt law.

Mr. Rand, for petitioner.

Mr. Preble, for respondent.

WARE, District Judge. The validity of the transfers by Ruggles on the 17th and 20th of June to the Messrs. Ropes is objected to as having been made in contemplation of bankruptcy and for the purpose of giving to them a preference and priority over the general creditors of the bankrupt. The second section of the act applies to the case. That provides: "That all future payments, securities, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety or other person any preference or priority over the general creditors of such bankrupts, * * * shall be deemed utterly void and a fraud upon this act, and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy." All payments or transfers of property, which fall within the provisions of this clause, are absolutely null and void, and convey either no right or title, or at least no title valid against the assignee of the bankrupt. But in order to bring the payment or transfer within the statute, it must have two qualities: First, it must be made in contemplation of bankruptcy; and, secondly, it must be for the purpose of giving to the creditor, to whom the payment or transfer is made, a preference or priority over the general creditors of the bankrupt. The legal validity of the payment or transfer is made to depend on the state of the bankrupt's mind, and his purpose and intentions in making it.

In the first place, then, to render the transfer void it must be made in contemplation of bankruptcy. The precise import and force of these terms were one of the questions which arose in the case of Arnold v. Maynard [Case No. 561], and it was decided that the phrase did not necessarily imply an intention on the part of the debtor to take the benefit of the bankrupt law, or to commit an act of bankruptcy, which would render him subject to be proceeded against as a bankrupt by his creditors. But the act comes within the prohibition of the law when done in contemplation of a state of insolvency or of "bankruptcy," in the popular sense of the word; that is, when it is done with the knowledge and belief of his inability to pay

the whole of his debts and continue his business. The question is, then, whether the transfer and sale to the Messrs. Ropes was made "in contemplation of bankruptcy" in this popular sense of the words. For if it was done with the knowledge and belief that he was unable to pay all his creditors, the law will presume the intention on his part of preferring and giving priority to the creditor thus paid. The deposition of the bankrupt has been taken by the petitioner, who seeks to set aside the conveyance, and all objections to its admissibility are waived on the other side. He states distinctly that he did not make the payment and conveyance to the Ropeses in contemplation of bankruptcy, and with an intention of taking the benefit of the law; that he had never thought of that until after the failure of the Ropeses; that when he made the conveyance to them he thought he should be able to pay the whole of his debts if his creditors gave him the same indulgence that they had been accustomed to give, but that he had since ascertained that he could not; that after the conveyance he continued to collect what was due him, turn his property into money, and pay his own debts, until the failure of the Ropeses; and that it was his intention, at the time he made the transfer, to continue his business so far as was necessary to convert his property into cash for the purpose of paying his debts, but no further.

I do not understand that the good faith of the bankrupt, in what he states as to his intentions and expectations, when he made the sale and transfer to the Ropeses, is called in question. But, however confident his expectations of being able ultimately to pay the whole of his debts may have been, it is quite certain that he was then deeply insolvent. From the exhibition he has since made of his debts and assets, it appears that his own proper debts, independent of his liabilities as indorser for the Ropeses, amounted to about fifty per cent. more than the whole nominal amount of his assets, including all debts due him. It would be a liberal estimate of his property to put it effectively at one half of his own debts. The payment and transfer to the Ropeses then, in point of fact, whatever may have been the intention of the bankrupt, operated to give them a preference over his other creditors. It is contended by counsel that the bankrupt ought not to be heard to say that he believed himself able to pay the whole of his debts, when by his own showing, his own proper debts amounted to upwards of $9,000, exclusive of his liabilities as indorser, while the whole nominal amount of his property, according to his own valuation, made a short time after, was but about $6,000; that, if he was a person of ordinary prudence and discretion in the management of his affairs, the natural presumption that he knew his insolvency ought to prevail, as a presumption of law against his own declaration to the contrary, not on the ground of a wilful violation of truth on his part, but on the ground of the general policy of the law. This view of the matter would certainly deserve great consideration if the question was simply one between the different creditors.

But the decision of this question does not affect the creditors alone; it reaches the bankrupt also. For the statute not only declares such preferential payments and transfers void, but it adds "that the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act." Now if the bankrupt honestly believed, when he made the transfer or payment, that he was able to pay all his debts, it would be a harsh construction of the law to hold that it intended to deprive him of his discharge, although in the result it might appear that he acted under a delusion; and I do not see how the court can hold the transfer or payment fraudulent in one respect and not in the other,—that it shall be deemed fraudulent to render the transfer void, and not fraudulent to bar the bankrupt of his discharge. It appears to me, therefore, that there is a serious difficulty in holding the payment and transfer void on any grounds of general policy, if it be admitted that it was made by the bankrupt, under a belief, fairly entertained at the time, that he was able to pay the whole of his debts. But in this case the payments and transfers to the Ropeses were made on the 17th and 20th of June. Ruggles filed his petition to be declared a bankrupt on the 25th of August, more than two months after the payments were made. The transaction, therefore, falls within the proviso of this section of the law: "That all dealings by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act, provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." If the sale and transfer was made in good faith, and the Ropeses had no notice of Ruggles' intention to take the benefit of the act, then it is not rendered void. Now, what is necessary to give to the act the character of good faith within the proviso? Is any thing more required than that it should be actually done more than two months before the filing of the petition, and that it should be for a fair and adequate consideration, without notice on the part of the purchaser of any prior act of bankruptcy, or of an intention on the part of the bankrupt to take the benefit of the act? The fact that the vendor was insolvent at the time, and that he knew himself to be so, would not, it seems, deprive the transaction of its character of good faith, so as to render the act void. For if that would invalidate the act,

no distinction would exist between dealings and transactions more than two months before the bankruptcy and those less. The distinction between preferential payments and transfers made more than two months before the bankruptcy and those made within that time is, that in the latter case a payment or transfer is deemed fraudulent and void when made in contemplation of bankruptcy and for the purpose of giving the creditor a preference, without notice on his part, and in the former it is not so deemed, unless the other party has notice of a previous act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act. If, indeed, the bankrupt at the time knew himself to be deeply insolvent, and the fact of his insolvency was known to the other party, but without the knowledge of any intention on his part to take the benefit of the act, and then the bankrupt should present his petition some three or four months afterwards, it might present a case deserving consideration. But whether the transaction in such a case would be sustained under the law need not be decided in this case, for from the whole evidence on the record it is apparent that the bankrupt did not at the time of the sale consider himself insolvent, nor did he suppose himself so until after the failure of the Ropeses. Then finding that the debts which they had assumed, and for the payment of which he had furnished the means, would come back upon him, he became satisfied of his insolvency, and on a more careful examination of the state of his affairs he became satisfied that he was actually insolvent at the time of the settlement and transfer. My opinion, on the whole, is that the transaction was valid, and that the property must be retained by the assignee of the Ropeses, and be administered as part of their estate.

Case No. 3,790.

DENNEY v. ELKINS.

[4 Cranch. C. C. 161.][1]

Circuit Court, District of Columbia. May Term, 1831.

WAGERS—VALIDITY OF NOTE FOR ELECTION BET.

An action cannot be maintained upon a promissory note given upon a wager that A. J. would not obtain the electoral vote of the state of Kentucky for the office of president of the United States, the consideration being illegal, although the parties themselves were not qualified to vote at the election; and because such a contract tends to draw in question the validity of the election of the chief magistrate of the nation.

[Cited in Fleming v. Foy, Case No. 4,862.]

This was an appeal from the judgment of a justice of the peace given against the appellant [John R. Denney] upon a promissory note to the appellee [Jere Elkins], upon a wager that Andrew Jackson would not have the electoral vote of Kentucky for the office of president of the United States.

Mr. Wallach, for appellant, contended that the consideration was illegal, and cited Bland v. Collett, 4 Camp. 158, note; Lansing's Case, 8 Johns. 454; Bunn v. Riker, 4 Johns. 426; Vischer v. Yates, 11 Johns. 23; Atherfold v. Beard, 2 Term R. 615; Cotton v. Thurland, 5 Term R. 405; Lacaussade v. White, 7 Term R. 535.

Mr. Coxe, for appellee, cited Denniston v. Cook, 12 Johns. 376; Allen v. Hearn, 1 Term R. 56; Andrews v. Herne, 1 Lev. 33; and Yates v. Foote, 12 Johns. 12.

CRANCH, Chief Judge, delivered the opinion of the court (nem. con.).

This is an appeal from the judgment of a justice of the peace in a suit brought by the appellee against the appellant upon a promissory note given by the appellant to the appellee, upon a wager that Andrew Jackson would not obtain the electoral vote of the state of Kentucky for the office of president of the United States. The note was made in the District of Columbia, in October, 1828, and before the electoral vote was given; the appellee and the appellant being, at the time of the wager, both residents and citizens of the District of Columbia, and neither of them having a right to vote in the election of electors for president in any part of the United States. It is objected that the note is void, because the wager was illegal, as being contrary to the principles of public policy upon which our elective governments are founded. If the parties, or either of them, had been qualified to vote at the election, it is clearly settled that the wager could not be enforced by a court of law. The only doubt, in this case, arises from the fact that neither of the parties was qualified to vote at that election. It is contended that the reasons, given by the courts which have decided such wagers to be illegal, rest mainly on the ground that one of the parties, at least, was a legal voter. There is a case cited in the books, from 1 Lev. 33 (Andrews v. Herne), where a wager was laid "that Charles Stuart would be king of England within twelve months next following," he being then in exile. After verdict for the plaintiff, it was moved in arrest of judgment, that there was no consideration; for he was king of England at the time of the promise. But the court said that the consideration was good; for the words must be taken according to the subject-matter; and that being out of possession at the time of the promise, it must be understood to be, that if the king shall be in possession within twelve months. No objection was made that it was against public policy, nor was any intimation of such an objection made by the bar or the bench. It is therefore a case not at all applicable to the present question, unless the absence of the objection may be considered as an argument against

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

its validity. But Mr. Justice Buller, in Good v. Elliott, 3 Term R. 697, said he presumed no one would say that an action could now be maintained on any bet of that kind. The principle, that a wager against public policy is void, has been since conclusively established; and the question now, in all these cases, is whether the circumstances of the case bring it within the general principle. In the case of Jones v. Randall, Cowp. 39, A. D. 1774, Lord Mansfield said, "Many contracts which are not against morality are still void, as being against the maxims of sound policy." But, in considering whether the wager in that case, (which was, "whether a decree of the court of chancery would be reversed on appeal to the house of lords,") was void because contrary to the principles of morality, he puts the case of a person who was a candidate for a bishopric laying a wager, with a person of great influence at court, that he would not have the bishopric. So he says that if, in the case then before the court, the wager had been made with one of the judges, or one of the lords, it would have been a bribe; or even if it had been a wager laid with the attorney or counsel in the cause. The court was of opinion, that the wager was neither against morality nor public policy. But, in delivering the opinion of the court, Lord Mansfield said, "But it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall in with the one or the other of them." The case of Allen v. Hearn, 1 Term R. 56, was upon a wager between two voters with respect to the election of a member of parliament. The bet was made before the poll began. This wager was adjudged illegal, as being against public policy. The case of Jones v. Parry, cited in 1 Term R. 58, 59, was a bet upon the Bristol election, and was tried before Lord Mansfield at Guildhall. There it did not appear whether the parties were voters or not; for the moment Mr. Wallace had opened the case, Lord Mansfield thought it was a color for bribery, and nonsuited the plaintiff. In the case of Allen v. Hearn, 1 Term R. 59, Lord Mansfield said, "Whether this wager had any other motive than the spirit of gaming and the zeal of both parties, I do not know; but this question turns on the species and nature of the contract; and if that, in the eye of the law, is corrupt and against the fundamental principles of the constitution, it cannot be supported by a court of justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise; that the election of members of parliament should be free; and particularly that every voter should be free from pecuniary influence in giving his vote." The case of Atherfold v. Beard, 2 Term R. 610, was upon a wager, whether the Canterbury collection of the duties upon hops in 1786 would exceed that of 1785. In that case, Mr. Justice Ashhurst said, "Now I am of opinion that the present case falls within the principle of those which have been determined not to be good. The courts have said that wagers should not be allowed which, in the event, may have an influence upon the public policy of the kingdom. On this principle, a wager on the event of an election for members to serve in parliament was held to be illegal, because the persons laying the wagers were interested in altering the free course of election. The present wager, also, appears to me to fall under the same class of objection, because it is against the same policy of the kingdom. The plaintiff's counsel have admitted that the officers of excise were not bound to produce the public books. Now that goes the whole length of determining this cause; for if the wager be such that the best evidence by which it must be proved is improper to be admitted, that circumstance shows that the wager is in itself illegal." Mr. Justice Buller, in the same case, said, "This is the case of an idle wager between two persons who have no concern in the subject, to draw into question a matter that respects the interest and general importance of the country; and on that ground I think the wager illegal. I do not find that it has been established as a position of law, that a wager between two persons not interested in the subject-matter, is legal. But this wager could not be proved without searching the books relating to the revenue of the country; and I am glad to find that in the only two cases where this question has arisen at nisi prius, Lord Mansfield and my Brother Ashhurst, were both of opinion that the officers were not bound to produce the revenue books." It may be observed, that although in that particular case (Atherfold v. Beard) the defendant had confessed that he had lost the wager, and, therefore, it was not necessary to produce the revenue books in evidence, yet, as the books would have been the best evidence, and must have been produced to support the action, if the fact had not been admitted by the defendant, and as public policy prohibited the production of those books, the court thought that circumstance conclusive of the illegality of the wager. It was observed, also, by Mr. Justice Buller, that "what Lord Mansfield said in the case of Murray v. Kelly was applicable, when he said that that wager was good because it was on a private event; from whence it is to be inferred that, in his opinion, it would have been void had it been on a public event."

The principle, upon which the case of Atherfold v. Beard was decided, was, that the wager was against the public policy of the kingdom; and it was against the public policy because it brought into discussion, in a judicial tribunal, at the will of individuals having no particular interest in the subject, matters concerning the public revenue which the government might think it improper to disclose, and which could only properly be discussed in parliament, and required the production of evidence which could be properly called for by parliament only. In the case of Good v. Elliot, 3 Term R. 699, Mr. Justice Buller said, "I take it to be agreed by my brethren, from whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action." And on page 700 he says, "It is established, that if the action lead to improper inquiries, it may be stopped in limine." The same point was afterward adjudged by the common pleas in Shirley v. Sankey, 2 Bos. & P. 130.

In the case of Lacaussade v. White, 7 Term R. 535, the wager was whether articles forming the basis of a treaty of peace between England and France, would not be signed before the 11th of September, 1797; and it was admitted that the wager was illegal; and no doubt on the same ground. In Bunn v. Riker, 4 Johns. 426, the wager was between two voters, Riker and Graham, upon the event of the election of governor of the state of New York. Riker had voted the day before the wager; Graham had not, and probably was too far from the place where he was entitled to vote at that election. The defendant, Bunn, was the stakeholder. Riker, the plaintiff, was the winner of the wager. This wager was adjudged illegal upon the ground that it was against the principles of sound policy, because it involved an inquiry into the validity of the election of the chief magistrate Judge Van Ness observed, "It is enough that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy. The discussion, to which it gives rise, ought to be discouraged, unless the public good, or the due administration of justice, renders it unavoidable. It is a discussion calculated to endanger the peace and tranquility of a community already sufficiently heated and agitated." The wager was also decided to be against sound policy because it created a corrupt interest in the voters themselves. Judge Spencer, however, although he admitted that a wager against public policy is void, did not concur in the opinion of the court, that that wager was against public policy; because he thought that it could not bring into question the validity of the election, since the statute renders the decision of the canvassers conclusive and final; and because, as Riker had already voted, and Graham was not in a situation where he could exercise his right of voting, the vote of neither could be influenced by the wager. The principle of that case was confirmed in the case of Lansing v. Lansing, 8 Johns. 454, where the wager was upon the election of governor of New York, after the close of the poll; and each party deposited his note with a third person. After the event was known, the notes were delivered to the winner, who indorsed to the plaintiff the defendant's note after it was payable. The court said, that the case was within the principle decided in Bunn v. Riker, that a bet involving an inquiry into the validity of the election of governor, was void, on principles of policy, and reversed the judgment which had been rendered below for the plaintiff. In the case of Vischer v. Yates, 11 Johns. 23, the action was against the stakeholder, to recover the money deposited by the plaintiff in a wager upon the election of governor. After the event of the election was generally known, but before the money was payable according to the terms of the wager, the plaintiff gave notice to the defendant not to pay over the money. The court sustained the action, upon the ground that the wager was against the principles of public policy. In that case, the bet was made before the election, and all the parties were legal voters at the time of the election.

Kent, C. J., in delivering the opinion of the court, said, "In this case, the parties referred to the decision of the canvassers as the true and only test of the determination of the bet; and that test had not been given when the money was demanded of the defendant; the risk had not been run, and determined within the purview of the contract. This objection, however, was founded upon a strict construction of the contract; and, though it would be sufficient to avoid much of what was urged on the part of the defendant, yet we choose rather to place the decision of this case upon those great and solid principles of public policy which forbid this species of gambling, as tending to debase the character and impair the value of the right of suffrage." Although the judgment in that cause was reversed in the court of errors and appeals, yet it seems, by the opinion of the only senator whose opinion is reported, that it was upon the ground that the plaintiff, by depositing the money in the hands of the stakeholder, had executed the illegal agreement on his part, and could not recall it, because "in pari delicto melior est conditio possidentis;" and "fieri non debet, sed factum valet."

The general principle, running through all the cases, is, that a contract, which it would be contrary to the maxims of sound public policy to enforce, is void at law. It is one of the maxims of sound public policy in all elective governments, that elections should be pure and free. Any contract which would tend to substitute a corrupt for a pa-

triotic motive to influence a vote either directly or indirectly, would be contrary to that maxim. It is not necessary that it should operate directly as a bribe to a voter. If it create a contingent pecuniary interest, dependent upon the event of the election, it operates as a corrupt motive to influence that election; and whether the influence of the party be more or less, the violation of the principle is the same, and equally affects the validity of the contract. It is the nature and tendency of the contract, not the degree of mischief which it may effect, that decides its validity. Although the parties may not be qualified voters, yet their means of influencing the election may be very great. They may form themselves into clubs or committees, and by exciting the passions, by holding up the promise of their influence in obtaining offices for those who seek them, or by denouncing those already in office; by circulating false reports, by hiring writers and printers to extol their candidate and slander his opponent, and by many other means, may have actually as much influence in the election as if they were, themselves, qualified voters. The maxim, being founded on the tendency of the contract to produce the public mischief, must be as extensive in its operation as the mischief itself. This is one great advantage which common law has over statute law, that being bottomed upon the mischief, it follows it through all its forms; whereas statute law is confined to the cases which it describes. So far as the influence used in an election is prompted by a pecuniary motive, so far it is corrupt, and in violation of the maxim, that elections should be pure. No vote can be perfectly pure which is not given exclusively with a view to the public good. Nor can the use of corrupt means be justified by the belief of him who uses them, that the end is the public good. We are, therefore, of opinion that the contract in question was contrary to the maxims of the public policy upon which our elective government is founded, and, therefore, void in law, although the parties themselves were not qualified to vote at the election.

There is another principle of public policy also, which may, perhaps, render this contract void; namely, that it tends to draw into question, in a judicial tribunal, the validity of the election of the chief magistrate of the nation, and to require the production of evidence which it might be inconvenient, if not improper, for the government to furnish. Upon this point, however, the court is not so clear, and, therefore, rests its decision mainly upon the tendency of such contracts to introduce corruption into our elections. The judgment must be reversed, with costs.

DENNEY (ODIORNE v.). See Case No. 10,431.

Case No. 3,791.

DENNIS v. ALACHUA COUNTY.

[3 Woods, 683.][1]

Circuit Court, N. D. Florida. Dec. Term, 1877.

REMOVAL OF CAUSES—REPEAL OF LAWS—REMAND—DEFECTS IN BOND AND TRANSCRIPT.

1. The act of March 2, 1867 (14 Stat. 558), for the removal of causes from the state to the federal courts, is not repealed by the act of March 3, 1875 (18 Stat. 470), on the same subject.

2. It is not necessary that the petition for removal should be signed, or the affidavit required by the act of 1867 made by the petitioner in person. Both may be done by his attorney in fact.

[Cited in Duff v. Duff, 31 Fed. 774.]

3. The facts that the bond for removal was signed by the petitioner by attorney, or that the sureties on the same are insufficient, are not good grounds for remanding the cause to the state court.

4. When a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects in the bond for removal, insufficiency of sureties thereon, or other irregularities which can be remedied or have not worked any prejudice to the opposite party.

[Cited in Woolridge v. McKenna, 8 Fed. 668; Chambers v. McDougal, 42 Fed. 697.]

5. A defect or omission in the transcript of the record of the state court can be cured by certiorari. It is not a ground for remanding the cause.

6. The approval, by the state court, of the bond of removal of a cause, is not necessary to the jurisdiction of the federal court.

The cause was removed from the circuit court of Alachua county to the United States circuit court, upon affidavit by the attorney in fact of the plaintiff, that from prejudice or local influence the plaintiff would not be able to obtain justice in the state court. The counsel for defendant thereupon moved to remand the cause to the state court, on grounds which are stated in the opinion of the court.

Thomas F. King, R. T. Taylor, L. I. Fleming, J. J. Daniel, and F. P. Fleming, for the motion.

E. M. Cheney, J. B. C. Drew, and A. A. Knight, contra.

SETTLE, District Judge. Nine reasons are assigned by the counsel for the defendant, in support of the motion to remand this case to the circuit court for the county of Alachua, fifth judicial circuit of Florida.

First. It is contended that the application of the plaintiff, for the removal of the suit from the state to the federal court, was not made "before or at the term at which the suit could be first tried." The suit was commenced in April, 1877, by the plaintiff, a citizen of Massachusetts, against the county of Alachua, in the state of Florida. It does

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

not appear from the record that any action was taken at the November term, 1877, of the circuit court for the county of Alachua, further than to file the order of the state judge overruling the plaintiff's demurrer to the defendant's seventh plea. It does appear, however, that the plaintiff joined issue upon the defendant's seventh plea, on the first day of May, 1878, after the suit had been removed to this court. So it would seem the suit was not at issue in the state court at the time the plaintiff filed his petition for removal. But if it be conceded, as contended for by the defendant, that the plaintiff should have joined issue upon the defendant's seventh plea at November term, 1877, and that the suit should then have stood for trial, still, in view of such decisions of the courts as I have been able to examine, and upon the reason of the law, I am constrained to hold that the application is in apt time if the petition be filed at any time before the trial or final hearing of the suit in the state court; if, before or at the time of filing said petition, the party makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in the state court. The act of 1875 (18 Stat. 470) does not, in express terms, repeal the act of 1867 (14 Stat. 558), nor, indeed, any other acts, and it can not do so by implication, unless there be "such positive repugnancy between the provisions of the new law and the old, that they can not stand together or be consistently reconciled." Wood v. U. S., 16 Pet. [26 U. S.] 342. "A repeal by implication is not favored. The bearing of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together." McCool v. Smith, 1 Black [66 U. S.] 459. So far from there being any conflict between the acts of 1875 and 1867, they stand together in perfect harmony, and with them also stand other enactments, which are necessary to cover the whole ground and meet all the cases which congress seems, from time to time, to have had in contemplation; e. g., the legislation which provides for the removal of suits brought in state courts against the officers of the United States. Instead of restricting the right of removal of causes from state to federal jurisdiction, it seems to have been the purpose of congress, in the act of 1875, to extend the jurisdiction of the circuit courts to the utmost limit allowed by the constitution, with the single exception as to the amount involved, in certain classes of cases.

Judge Dillon, in his able brochure on the removal of causes from state courts to federal courts, at page 28, says: "The third subdivision of that section (639, Rev. St., corresponding to the act of 1867) is broader than the act of 1875, provides for a class of cases not provided for by that act, and while the point is not free of doubt, the true view seems to be that at all events this portion of the 639th section remains unrepealed. This has been decided to be so in the eighth circuit by Mr. Justice Miller, and generally in the courts of that circuit, and, so far as we are advised, by the circuit courts elsewhere." In the United States circuit court, district of Kentucky, at May term, 1877, in Cooke v. Ford [Case No. 3,173], Ballard, District Judge, delivered an able opinion upon the precise question now under consideration, and after quoting with approbation the above extract from Judge Dillon, says: "There seems to be the most substantial reason for allowing such citizen of another state to remove a suit at any stage before trial or final hearing, when it appears, owing to such prejudice or local influence, he cannot obtain justice in the state courts. * * * This prejudice or local influence may not exist in the first stage of the cause, or if it existed, it may not then be discovered. It may be subsequently developed." Mr. Justice Miller, in Arapahoe Co. v. Kansas Pac. Ry. Co. [Id. 502], says: "I have decided that the act of 1867, concerning prejudice, remains in full force. The reason is that this statute (of 1875) does not repeal all acts on the same subject, but only such as are in conflict. It is very guarded. * * * In all cases of removal under this act (of 1875), application must be made at the first term, or before the term at which it could be tried or heard. No such provision is made in the act of 1867 [supra], or in that of 1866" [14 Stat. 306].

Second. The second ground in support of the motion to remand is: "That the petition for removal is not made by the plaintiff in person." It is not necessary that it should be so made. The petition, in this case, is evidently copied from the form which Judge Dillon says is in common use in the eighth circuit, and following that form it is signed by the attorney for the plaintiff. This, I think, is in accordance with the usual practice, and entirely sufficient.

Third. "That the affidavit for removal is not made by the plaintiff in person." The affidavit, of prejudice and local influence, is made by one Leonard G. Dennis, who swears that he is the agent and attorney in fact of the plaintiff. Judge Dillon (Removal of Causes, pp. 61, 62) says that this affidavit should, whenever possible, be made by the party himself; but he adds: "As the party himself is a non-resident, and may not be as well advised as his local agent or attorney as to the existence of local influence or prejudice, there would seem to be no reason for requiring the affidavit, in all cases, to be made by the party, and some parties, as infants or persons non compos mentis, could not make it." I concur in this reasoning, believing that cases are of frequent occurrence, wherein the local agent or attorney can make the affidavit with better knowledge and much more propriety than the non-resident party could do so.

Fourth. "That the bond is not executed by the plaintiff or his attorney-in-fact."

Fifth. "That the bond is signed by the attorney-at-law of the plaintiff."

True, the bond is signed "Richard C. Dennis, by Ed. M. Cheney, attorney," but it is also executed by three other parties. and what possible difference can it make, to any one, whether the bond be executed by A or B, provided it be in all respects sufficient? The bond is copied, verbatim, from the form given by Judge Dillon, as appropriate in such cases.

Seventh. The seventh ground is, "that the bond is not in fact a good and sufficient security." In support of this objection to the bond, the counsel for the defendant has filed with the clerk of this court an affidavit made by one Carlisle, and taken before a justice of the peace for Alachua county, on the 10th day of December, 1878, which tends to prove that the bond is insufficient. The petition and bond for removal were filed in the state court in April, 1878, and a copy of the record and papers was filed in this court on the first Monday in May, 1878. As I can only look at the record and papers properly in the case in passing upon the questions before me, I do not see that this affidavit can have the slightest weight in influencing my judgment upon the motion to remand; it possibly should be considered in determining what action this court shall take upon the bond. There are many cases to be found in the recent numbers of law publications, to the effect that when a case is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects connected with the giving of the security or bond, or other irregularities which can be remedied, or which have not worked any prejudice.

Eighth. The eighth objection is, "that the bond does not provide for the payment of costs, as prescribed by the act of congress of March 3, 1875." Let it be conceded that the act of 1875 requires the bond to be in the form suggested; still, from what has been said, it follows that the defect furnishes no sufficient ground for remanding the cause. In order, however, to obviate all the objections to the bond on file, I deem it proper to require the plaintiff to file in this court a sufficient bond, under the act of 1875, within the next thirty days.

Ninth. "That the clerk of the state court does not certify that copies of all the papers and proceedings in said court have been transferred to this court." If the counsel for the defendant are prepared to suggest a diminution of the record, they will be entitled to a certiorari to bring into this court a full and true record of all the papers and proceedings in the state court.

Sixth. Having disposed of all the other grounds relied upon in support of the defendant's motion, we will now consider the sixth, which was pressed with much zeal upon the argument: "That the bond was not accepted or approved by the judge of the state court." While the supreme courts of some of the states, among them Massachusetts, Wisconsin and Virginia, have held this to be necessary before a removal can be effected, others, Rhode Island and Missouri, for instance, have held that the filing of the petition and bond, ipso facto, suspends the jurisdiction of the state court. The supreme court of Missouri, in the case of Herryford v. Aetna Ins. Co., 42 Mo. 148, uses the following emphatic language: "When a party makes an application for a removal of the cause in the manner required by the act of congress, it is error in the state court to proceed further in the matter, and every subsequent step is coram non judice." While there is this conflict of opinion between the supreme courts of the different states, there is a uniform current in the decisions of the federal courts, to the effect, that if the case be within the act of congress, and the petition is in due form, accompanied by the required bond, the jurisdiction of the state court ceases, eo instanti, upon the filing of the petition and bond, in the state court, either in term time or in vacation. Drummond, Circuit Judge, and Blodgett, District Judge, in Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604], say: "Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the court to act at all. No order is to be made in court, at least the statute names none, unless the mandate that the court shall accept the petition and bond implies one." Judge Dillon expresses the same opinion at page 66 of his pamphlet on the Removal of Causes. Woods, Circuit Judge, in Ellerman v. New Orleans, M. & T. R. Co. [Id. 4,382], says: "The presentation of the proper petition and bond is, by the act of congress, as well as by the decisions of the supreme court of the United States, effectual to suspend all the powers of the state court in which the suit is," and he cites, for this position, the cases of Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 214; Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445; Kanouse v. Martin, 15 How. [56 U. S.] 198; and Gordon v. Longest, 16 Pet. [41 U. S.] 97.

I might well stop here, but the language of Mr. Justice Strong, sitting in the United States circuit court for the western district of Pennsylvania, in June, 1878, since the passage of all the acts on the subject of removals, is so forcible and so appropriate to the point under consideration, as to justify a quotation from him, even after citing the decisions of the supreme court to the same effect. In Taylor v. Rockafeller [Case No. 13,802], where the state court had adjudged that the record and petition did not exhibit a case proper for removal under the acts of congress, and had refused to part with its juris-

diction, Mr. Justice Strong says: "If the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The act of congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed in the suit. It is thus made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It is to be observed, that no order of the state court for a removal is necessary, certainly none since the act of 1875; nor is any allowance required. The allowance is made by statute." Learned counsel contend that this construction is not courteous to the state tribunals, and that it will destroy the comity which ought to exist between the federal and the state courts. I should much regret such a result, since there is in this state at least, the best understanding, both officially and personally, between the judges of the federal and state courts. But the ruling will give no just cause of offense, and I apprehend none will be taken, for it is not a matter of courtesy or comity. but one of positive law, made in pursuance of the constitution of the United States, and binding alike upon the federal and state courts. Neither should be superserviceable in the effort to appear courteous, when both are bound by a positive rule of law which compels the one to relinquish and the other to take jurisdiction. The state is supreme within its sphere, but the "constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const. U. S. art. 6. The federal government cannot submit the interpretation of its constitution and laws to any tribunals save its own, and this fundamental principle has been so long and so well understood that its application should not produce the least sensitiveness in any quarter. The motion to remand the case to the state court is denied.

Case No. 3,792.

DENNIS v. CROSS et al.

[6 Fish. Pat. Cas. 138; 3 Biss. 389; Merw. Pat. Inv. 340.] [1]

Circuit Court, N. D. Illinois. Nov. Term, 1872.

PATENTABLE INVENTION—LANTERNS.

1. Where the patentee claimed "the application of a spring-catch and lips substantially as and for the purposes set forth," and the patent described the application of the catch and lips to the purpose of securing the glass globe in the bottom of the lantern; and it appeared that spring-catches had been previously used for fastening the oil-pot in the bottom of lanterns: *Held*, that the patent could not be sustained.

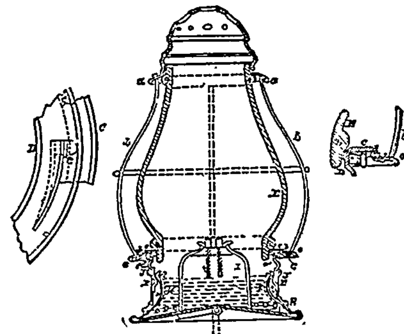
[Cited in Hancock Inspirator Co. v. Jenks, 21 Fed. 916; Kuhl v. Mueller, Id. 513.]

2. Semble, that a claim for the "application of the spring-catch and lips" would be infringed by the use of catches alone or lips alone.

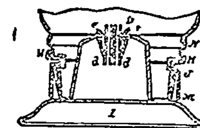
[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 340, contains only a partial report.]

In equity. Final hearing upon pleadings and proofs.

Suit brought [by Joseph S. Dennis against James E. Cross, James F. Dane, and William Westlake] upon letters patent [No. 13,286] for "improvement in lanterns," granted to Charles Waters, July 17, 1855, and assigned to complainant. The following engraving (Fig. 1) represents the Waters lantern. The globe is sustained by a band, D, having a flange, C, which, when in place, is directly below an annular plate to which the guard-rods are attached. It is held in place by lips attached to the flange, and projecting over the annular plate on one side, and on the opposite side by a latch, e.



No. 1.



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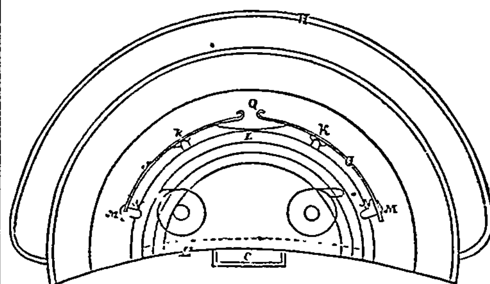

No. 3.

Figures 2 and 3 represent the Sangster and Carpenter lanterns. In the former, the oil-pot, I, is held in place by the spring-catches, H, H; and in the latter, by the latch-springs, J, J, provided with latches, M, N. These springs are operated at Q, and have their fulcrums at K, K.

An abstract of the specifications and the claim of the patent will be found in the opinion.

L. L. Coburn, for complainant.
West & Bond, for defendants.

BLODGETT, District Judge. It appears from the pleadings and proofs that Charles Waters, claiming to have invented a useful improvement in the construction of lanterns, which consisted in the peculiar manner of securing the glass shade in the lantern, and also in the peculiar manner of securing the lamp to the lantern, applied to the patent office for letters patent thereon, describing in his specification the manner of constructing and applying his invention, substantially as follows:

"The top or dome of the lantern is of the usual form, designated in the drawings by the letter A, from the lower edge of which a flange, a, projects outward, and into which the upper ends of the guard-rods are firmly secured. The lower ends of the guard-rods are secured in an annular plate, C, which encompasses the lower part of the lantern.

"A metallic band or rim, D, was then constructed, having a flange, C, around its upper edge, which projects outward from the rim or band. The outer edge of the rim or band is bent or curved downward, so as to present a shoulder, d, on the flange. To the under surface of the flange c is attached a spring-catch, e, the end of which passes through the ledge or shoulder, d. Opposite, or diagonally opposite, the spring-catch, two or more lips, f, are permanently attached to the shoulder, projecting outwardly, so as to pass over the annular plate, C, when the parts are brought into juxtaposition."

The patentee also describes at length, as another part of his invention, his method of attaching the oil-pot to the band, D; but, as this is not involved in the case under consideration, it need not be recapitulated here. After thus describing his device, the patentee proceeds to say:

"The above invention is extremely simple, and allows the ready adjustment of the base to the lantern, and its ready detachment therefrom. No springs are required to be depressed by the hand in order to withdraw the lamp from the lantern or secure it therein; and the glass shade is firmly secured in the lantern without the aid of plaster or cement, thus enabling the shade to be detached with facility for purposes of cleaning. What I claim as new, and as my invention, and desire to secure by letters patent, is the application of the spring-catch, E, and lips, f, substantially as and for the purposes set forth."

It will thus be seen that, after carefully and elaborately describing the mechanical combination of parts whereby the inventor constructs a loose globe, or removable globe-lantern, and the method by which he attaches the upper and lower parts of his lantern together, the inventor contents himself by claiming as new, and asking a patent on, the spring-catch and lips by which the band, D, is secured to the annular plate, C.

Probably no principle of patent law is better settled than that the patentee is limited by his claim. And the courts are only allowed to look at the detailed specification, models, or drawings, for the purpose of construing the claim; as, for instance, if any doubt existed as to the parts of the lantern to be attached together by the catch and lips, a reference to the preceding part of the instrument is allowable for the purpose of settling that point. Whipple v. Baldwin Manuf'g Co. [Case No. 17,514]. "Although the inventor might have claimed something different from what he has claimed, the court must, in the construction of the patent, be governed entirely by the claim he makes." Kidd v. Spence [Id. 7,755].

No patent is here asked or granted upon the top, A, with the flange, a, the annular plate, C, the band, D, with its flange, c, and shoulder, d, either singly or in combination; but the claim is solely for the spring-catch, e, and lips, f, although the inventor reserves to himself the right to use one or more spring-catches and two or more lips. The only question in the case, then, is, whether the proof makes out a case of infringement of this claim against the defendants. The defendants are engaged in the manufacture of lanterns, the top and guard of which are constructed substantially in the manner indicated by the specification in Waters' patent—the wire ring at the bottom of defendants' guard being in all respects, to my mind, the equivalent of the annular plate, C, in Waters' lantern; while the band, D, with the flange, c, and shoulder or ledge, d, are all found in defendants' combination. But, as before remarked, neither of these parts, nor all of them in combination, are covered by the Waters patent.

The defendants connect the base of their lantern to the lower ring of the guard by two spring-catches, instead of spring-catches and lips in combination. And it is insisted by them that Waters limits his fastening to the combination of spring-catches and lips, as shown or provided for in his specifications; but under the well-established rule, that courts should construe a patent liberally, and give the patentee the benefit of every fair intendment, I incline to the opinion that this patent would not be thus limited. So that, although he describes the use of catches and lips, yet he might use catches alone, or lips alone, if he was the inventor of the device.

I do not, however, intend to be understood as expressing a confident opinion on this point, as it is not, in the view I take, decisive of the case. The evidence introduced shows abundantly, to my satisfaction, that spring-catches, such as are used by defendants to connect the lower and upper parts of their lantern, are old devices for that purpose. They are found, as I think, in the application

of H. & J. Sangster, made as early as November, 1851, to the United States patent office, and rejected for want of novelty; also in the letters patent granted to L. B. Carpenter, on July 25, 1854, for an improvement in lamp-fastenings.

It is true, all these devices were for the purpose of fastening the oil-pot or lamp to the rest of the lantern; but this is precisely what the defendants do. When Waters had connected his oil-pot to his band, D, by his springs, K, K, as described, it was still nothing but an oil-pot. And if those parts had been permanently fastened together in his lantern, as they are in some of the cheaper ones made by defendants, then the springs used by defendants perform precisely the same functions as the springs in Sangster's and Carpenter's devices. The spring-catches are old, and the uses to which defendants apply them in their lantern are old; and, although they perform the same function as the catch and lips in Waters' lantern, yet Waters, not being the inventor of these springs, can not cover them by his patent.

It is possible that the Waters catch and lips may, when used in combination with the flat annular band, C, described by Waters, make a better fastening; and if that specific combination was used by defendants, and was covered by Waters' patent, they might be liable; but if, as complainant's witnesses testify, the defendants' two spring-catches are the equivalents of Waters' catch and lips, then the catch and lips are but the two catches, and both are old.

For these reasons, which seem to me controlling and sufficient, the bill must be dismissed.

It is proper to add, by way of explanation, that the proofs show that Waters, in his original application, made his claim broadly for the combination by which the loose globe-lantern, described in his specifications, was constructed, in the following language: "Securing the glass shade, E, in the lantern, by means of the beads or projections, g, h, on the upper and lower ends of the shade; said beads bearing against the lower edge of the top, A, of the lantern and the upper edge of the rim or band, D, which is secured to the annular plate, C, by the spring-catch, e, and lips, f, as herein shown and described. I also claim securing the base, H, to which the lamp, I, is attached to the lantern by means of the springs, K, K, fitting over the head or projection, F, on the inner side of the rim, D, as described." But the patent office rejected this claim, in which decision he acquiesced, and amended his claim by substituting the one now appearing upon the patent, and by that he must stand. If he was really the inventor of the loose globe-lantern described in his specifications, he might have appealed from the decision of the examiner who rejected his application, and probably his broad claim to the entire invention would have been allowed. Bill dismissed.

Case No. 3,793.

DENNIS v. EDDY et al.

[12 Blatchf. 195.][1]

Circuit Court, N. D. New York. June 16, 1874.

TAXABLE COSTS — WITNESS FEES — ATTENDANCE WITHOUT SUBPOENA—PRINTING OF PAPERS.

1. Act Feb. 26, 1853 (10 Stat. 167), in regard to the fees of witnesses, prescribes, as fees to witnesses, "for each day's attendance in court, or before any officer, pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning:" *Held*, that the fees of necessary witnesses, who reside within less than 100 miles of the place of examination, in a suit in equity, and whose attendance and examination are procured in good faith, by the party on whose behalf they are examined before an examiner, can, under said act, be taxed and allowed against the adverse party, even though it be not shown that they were served with a writ of subpoena to attend.

[Cited in Gunther v. Liverpool, L. & G. Ins. Co., 10 Fed. 830; Wooster v. Handy, 23 Fed. 61; U. S. v. Sanborn, 28 Fed. 304; Re Williams, 37 Fed. 326; Wooster v. Hill, 44 Fed. 819.]

2. The cost of printing papers which, by a rule of court, a party is required to have printed, can be taxed against the adverse party.

[Cited in The E. Luckenback, 19 Fed. 847; Wooster v. Handy, 23 Fed. 61; Baker v. Howell, 44 Fed. 114; Hake v. Brown, Id. 735; Ferguson v. Dent, 46 Fed. 95; Gird v. California Oil Co., 60 Fed. 1011.]

[This was a bill in equity by Paul Dennis against Daniel Eddy and others.]

Edward F. Bullard, for plaintiff.
Esek Cowen, for defendants.

WOODRUFF, Circuit Judge. Both parties appeal from the taxation, by the clerk, of the costs awarded to the complainant herein.

1. The complainant appeals from the disallowance of the fees of witnesses who attended and testified, who are sworn to have been necessary witnesses, who resided within less than one hundred miles of the place of examination, and whose attendance and examination were procured in good faith. The disallowance was on the sole ground, that it is not shown that the witnesses were served with a writ of subpoena, so that their attendance was compulsory. Act Feb. 26, 1853 (10 Stat. 167). Some cases have been cited by the defendants, in which it appears that some circuit courts, in other districts, have so held. Woodruff v. Barney [Case No. 17,986]; Spaulding v. Tucker, [Id. 13,221]; Dreskill v. Parish [Cases Nos. 4,075, 4,076],—decided prior to the act of 1853. But, in this district, it has been decided, that a person who attends the court as a witness, in good faith, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and that such fees may be taxed against the party liable for costs. Cum-

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

mings v. Akron Cement & Plaster Co. [Case No. 3,473]. See, also, Prouty v. Draper, [Id. 11,447]; Whipple v. Cumberland Cotton Co. [Id. 17,515]; and Hathaway v. Roach [Id. 6,213],—decided prior to the act of 1853. I concur in that decision. I find no sufficient reason for holding that the words "pursuant to law" were intended to prevent the allowance to the party of such fees paid to witnesses, when there was actual attendance and examination by his procurement. A person volunteering to attend court, without either subpoena or request, cannot demand fees. But, where his attendance is required, and is actually given, and he is examined, his attendance is "pursuant to law," in a just sense; that is to say, he is in attendance lawfully, for a lawful and necessary purpose, on the requirement of a party who has a right to compel him to attend. This satisfies the whole reason of those words in the statute. The question, whether the witness shall waive the form and expense of a legal service of a writ of subpoena, is purely a question between him and the party who desires his attendance. It does not concern the adverse party; or, if it affects him at all, it is for his advantage, in diminishing the charges which he may be compelled to pay. If a party to the suit relies on the willingness of the witness to attend on request, he cannot have an attachment against the witness for not attending. The object of serving a subpoena is to enable the party to resort, if necessary, to that further compulsory process; but none of this proceeding is of any benefit to the adverse party. Why, then, should it be held, unless the terms of the statute are very clearly imperative, that a witness must put the party to the trouble and expense of a writ of subpoena, and to the expense of the traveling fees and service by a marshal or other proper person, often amounting to a large sum, or otherwise the witness' own fees be not allowable? Such a rule is simply to require costs and expenses in a suit to be increased without advantage to any one. All question of good faith, the materiality of the witness, and the question whether he did, in fact, make the journey for the purpose, or, being casually present, was examined, are, of course, open. But the mere fact that the party induced the witness to save expense and trouble, by waiving the procurement and service of a subpoena, ought not, and, I think, does not, deprive the witness of his fees, or the party of their allowance as costs. A party to a suit may waive the service of mesne process and voluntarily appear, and, having done so, the suit is held to proceed according to law. It would be strange if a witness could not make such waiver without losing his just claim to compensation. "Pursuant to law" may properly mean—in a proper case; where the attendance and examination of witnesses are necessary and may be compelled; before a proper officer, whose duty it is to receive the examination of witnesses; at the instance of a proper person, who has a right to require and may compel such attendance; for such reasonable and necessary time as is proper; and, generally, under all the conditions and circumstances which make the attendance a legal and proper one.

It may be well suggested, that the change in the language of Act Feb. 28, 1799 (1 Stat. 626, § 6), made in the act of 1853, whereby the word "summoned" was omitted, was made in view of the conflicting decisions above cited, under the former act, and the more rational provision made to which I have given interpretation. Why, else, was not the word "summoned" continued in the statute?

These reasons are applicable with equal force to the attendance before an examiner in chancery, in a suit in equity. The allowance of witness' fees, on a voluntary attendance, may properly be limited, in respect to traveling fees, to the distance which he might have been compelled to travel, as held in a case in the southern district,—Anonymous [Case No. 432],—but that question is not material in this case. The appeal of the complainant is sustained, and an order entered by which the witness' fees in the bill of costs are taxed and allowed.

2. The appeal of the defendant is from the taxation of the cost of printing the papers, which, by rule of court, the complainant was required to have printed. It was a necessary disbursement, made by order of the court. I am of opinion, that the act of congress of February 26, 1853 (10 Stat. 161), was not intended to prohibit the allowance of indemnity for such disbursements as were made necessary by the order of the court, and that it does not prohibit such allowance. After the decision in Hussey v. Bradley [Case No. 6,946], this court adopted the rule which made the printing imperative. The appeal of the defendants must be overruled.

Case No. 3,794.

DENNIS v. EDDY et al.

[4 Fish. Pat. Cas. 423.] [1]

Circuit Court, N. D. New York. March, 1871. [2]

PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—CHANGE OF FORM—PLOWS.

1. A claim for an "inclined shovel mold-board, formed and mounted substantially as described and constructed," highest at its outer edges, so as to form on each side of the standard a recess through which a portion of the earth may, after rising upon the mold-board, descend into the furrow in rear of the plow, is a claim for the mold-board, and does not include, as an essential element of the combination, an adjustable wheel which forms part of the "mounting" of the mold-board.

[See note at end of case.]

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

[2] Reversed in 95 U. S. 560.

2. Nor does such a claim extend to every form of recess in the top of the mold-board, but it embraces only the curved form of the recesses shown in the mold-board of the patentee.

[See note at end of case.]

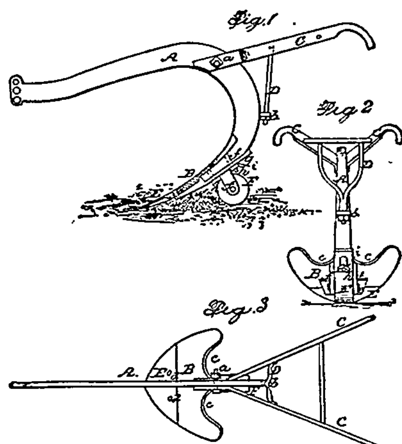
3. A mere change of form, when the instrument remains in substance and in its mode of operation the same, will not avail an alleged infringer.

4. But sometimes form is of the very substance of an invention, and change of form is invention itself.

This was a bill in equity filed [by Paul Dennis against Walden Eddy and others] to restrain the defendants from infringing letters patent [No. 19,412] for an "improvement in cultivators," granted to the complainant February 23, 1858, and reissued August 4, 1863 [No. 1,515]. The invention related to the class of cultivators known as shovel plows, and consisted of a peculiarly constructed mold-board, an adjustable gauge roller, and a point or share made separate from the mold-board, and attached to it in such a manner that the share and mold-board might be made to penetrate the soil at a greater or less depth, as desired. By means of two curved recesses on each side of the top of the mold-board, the soil was made to pass over the mold-board into the furrow, so that the surface was left in a mellow but level state, with all the weeds and grass cut up. The claim of the original patent was as follows: "The bar A, and mold-board B E, in combination with the adjustable rollers F; the whole being constructed and arranged substantially as and for the purpose set forth." The disclaimers and claims of the reissue will be found in the opinion of the court.

J. H. Dennis, for complainant.
E. Cowen, for defendants.

WOODRUFF, Circuit Judge. The specification annexed to the complainant's patent declares what he claims to have invented, and what he does not claim, in these words: "I do not claim broadly the idea of passing a portion of the earth over the mold-board into the furrow behind. Neither do I claim applying a movable mold-board to one of the outer edges of the share, as described in an application of J. Drummond, rejected October 25, 1844. Neither do I claim the use of projecting blades at the outer edges of the share, as described in the patent of B. Langdon, granted June 22, 1842, and others. But what I claim as new in my invention, and desire to secure by letters patent, is: 1. The inclined shovel mold-board B, formed and mounted substantially as described, and constructed highest at its outer edges, so as to form, on each side of the standard A, a recess C, through which recess a portion of the earth may, after rising upon the mold-board, descend into the furrow in the rear of the plow. 2. The combination with the beam A, and mold-board B, of the adjustable wheel F, arranged and operating substantially as and for the purposes specified."



Manifestly, the adjustable wheel F is the leading feature in the combination described in the second claim. The suit is founded upon a reissue of a prior patent, in which the combination of the wheel, mold-board, and hoe, was the only thing which the complainant claimed to be his invention. If the second claim in the reissued patent differs in construction and meaning from the sole claim in the original patent, it is in giving especial prominence to the use of the wheel F, in the combination claimed to be invented, and the importance of this member of the combination is made very prominent by the description of its uses; and the claim to its great utility is enlarged upon in the specification; by its revolving motion it diminishes friction; by its adjustability it controls the depth of the furrow. There is no claim nor proof that the defendants have used the wheel F. Their plows were entirely on a horizontal base bar, which was called, by the witnesses, a "shoe," sustaining the plow and forming a fulcrum on which the operator, by pressure on the plow-handles, raises the point of the share like the similar base formerly constructed of wood, on which plows rested and moved long before the plaintiff made any invention.

This shoe is not an equivalent for the wheel. It is neither like it in construction, nor in the office it performs. It is subject to all the friction, when the plow is in use, which the revolution of the wheel is claimed to avoid, and instead of being adjustable, it is fixed and permanent. So far, therefore, as the complainant relies upon the second claim, there is no cause of action.

It is argued, with much plausibility at least, that the first claim is also for the same combination, and though in different phrase, it means the same thing as the second, and nothing less or more; that is to say, the mold-board B, formed and mounted substantially as described, necessarily includes the beam and wheel, and therefore it describes the combination of the three as truly as the other, or if the term "mounted as described," includes also the other parts of the plow,

shown in the drawings, it is still a claim to a combination, which the defendants, who have not used the wheel, have not infringed.

My conclusion, however, is that this first claim is for the mold-board, and not for the combination. It is quite true that the manner of its employment to make it useful is described. That is usually done in specifying new and useful parts of a machine; and, unless on the mere description of the thing itself, its utility and the manner of its use are obvious, that should always be done in such manner that a mechanic, of proper skill, can not only construct the thing itself, but can give it practical application to the purpose for which it is useful.

But the claim of the complainant is confined within very narrow limits. He has no exclusive right to construct the mold-board in a shovel form. That he did not invent. He has no monopoly of mold-boards over which the earth will pass and fall into the furrow behind. He disclaims this in his specification, and, if otherwise, the proofs show that this was not new. He does not claim that its movable or detachable characteristic, in its attachment to a distinct and separate share, was new, and in terms he disavows any claim to the use of projecting blades on each side, or wings, as shown in the Langdon patent.

To this must be added, that he is not entitled to the exclusive construction of mold-boards so made that the end of the wing or point is higher than other parts of it, producing a passage way on each side of the upright bar of the plow, through which the earth may pass and fall into the furrow. This was accomplished in the plow described in the Langdon patent, and if the claim in the plaintiff's patent must be construed to include every form of recess or passage way, I should be compelled to pronounce it void.

There remains but a narrow field within which to define the complainant's invention, and that, in my opinion, embraces only the curved form of the recesses made in his mold-board. Mere form is often immaterial, and therefore it is always held, in regard to infringements, that a mere change of form, when the instrument remains in substance and in its mode of operation the same, will not avail an alleged infringer. But sometimes form is of the very substance of an invention, and change of form is the invention itself. Upon the evidence, and in view of the disclaimers by the complainant in his specification, I think that the invention in question is of the character last mentioned.

By curved recesses on either side of the central bar of the plow, the complainant accomplishes a useful result—recesses in that form do not appear to have been before made in such mold-boards. The proofs show that this construction is useful. It is not very clear to my mind why a square recess, or a mold-board straight upon its upper edge, with an elevated end or point at the extremity of the wing, would not be equally useful; but, whether facility of construction, more perfect pulverization of the earth, or other advantage in its use, entitled it to a preference, I am of opinion that the complainant is entitled to it by his patent, and that any like shovel mold-board, with substantially the same curved recesses, is an infringement.

The mold-boards made by the defendants are, in this respect, substantially the same. That made before the reissue appears to be exactly identical, and to have been cast in the same precise pattern, a mold-board made by the complainant having probably been used as a pattern. That, however, being before the reissue, furnishes no ground for recovery.

The plows made by the defendants since the reissue are not substantially different; a very close comparison, it is true, shows that the length of the wings is not exactly the same, and the curvature of the recess is not precisely like the complainant's, but in substance and in practical operation they are alike. The complainant is entitled, therefore, to a decree enjoining the defendants against constructing that form of mold-board, and directing an account of their gains and profits, resulting from the manufacture and sale of mold-boards in that form.

[NOTE. The judgment was reversed by the supreme court on an appeal taken by defendant. That court held that the first claim of the patent was void for want of novelty and invention, and that the second claim was not infringed. Eddy v. Dennis, 95 U. S. 560.]

Case No. 3,795.

DENNIS v. EDDY et al.

[11 O. G. 833.]

Circuit Court, N. D. New York. March 22, 1877.

PATENTS—SHOVEL PLOWS.

[The Dennis patent, No. 55,630, for an improvement in shovel plows, construed, *held* valid, and found to have been infringed.]

[This was a bill in equity by Paul Dennis against Walden Eddy and Abram Reynolds, survivors of Samuel Langdon, to restrain the alleged infringement of letters patent No. 55,630, granted to P. Dennis, June 19, 1866.]

JOHNSON, Circuit Judge. This cause coming on to be heard upon the pleadings and evidence, and it being suggested that the defendant Langdon has died since this action was commenced, and after hearing E. F. Bullard, counsel for the complainant, and E. Cowen, counsel for the defendants, and the court having duly considered the same, and being of the opinion that the complainant was the first and original inventor of certain new and useful improvements in shovel plows, not known or used before, as described and claimed in his patent bearing date June 19th, 1866, adjudges and decrees that the defendants, and each of them, have infringed the said patent in making and vending shovel plows with wings, embracing the invention

and improvement covered by said letters patent.

And it is further adjudged that the wings upon the mold-board of the plow, made by the defendants, and marked "Complainant's Exhibit T—Dennis," and referred to in the complainant's evidence, are in substantial accordance with the specifications annexed to said patent, and are an infringement of the rights secured to the complainant by said patent dated June 19th, 1866, referred to in said complaint.

And it is further adjudged and decreed that the said defendants, their agents and servants, and each and all of them, be restrained and enjoined from making, vending, or using, or in any manner disposing of shovel plows, or mold-boards for such plows, embracing the inventions and improvements described in said letters patent.

And it is further adjudged and decreed that this cause be referred to E. W. Paige, of Schenectady, as a special master, to ascertain and report the number of shovel-plows made, and the number sold by the defendants, or either of them, with steel wings of the form mentioned in said "Exhibit T—Dennis," or substantially of the form covered by the said patent, and the damages the complainant has sustained, and the profits derived by the defendants, or either of them, by reason of such infringements. And upon the coming in and confirmation of the said report, that said complainant have a decree and execution for the amount found due him, and also for the costs of this suit to be taxed.

DENNIS (JAFFRAY v.). See Case No. 7,171.

Case No. 3,796.

DENNIS v. The LEAR.

[Bee, 213.][1]

District Court, D. South Carolina. Nov. Term, 1805.

PRIZE—VALIDITY OF SALE—FOREIGN ADJUDICATION.

Sale by order of the provisional agent at Barracoa is valid, being subsequently confirmed by the proper jurisdiction at Guadaloupe, under a law existing before the capture.

The libel filed in this case states that Dennis, owner of the brig Lear, sent her in November last on a trading voyage to St. Domingo, and bound to Cape Francois, where she arrived in December, and sold her cargo. Having taken in a return cargo, she proceeded, in February, to Port de Paix, for the sole purpose of joining sundry other American vessels, some of which were armed, and might protect her against the brigand cruizers. She staid at Port de Paix only two days, and sailed from thence on the 2d of March last, in company with the other American ships, and bound to Philadelphia. On the 5th March following she was captured by the French privateer Rencontre, and carried into Barracoa. Here the cargo was taken out, and the vessel illegally sold to one Taylor, without any previous investigation or sentence of condemnation, according to the law of nations. She is now in the harbour of Charleston.

To this libel a claim and answer, interposed by Taylor and Tavel, owners of the brig, state that, being on a voyage from Cape Francois or Port de Paix, where she had been trading with the revolted negroes, she was lawfully captured and carried into Barracoa by the privateer. That as the vessel was in a leaky, disabled, and perishing condition, the captain of the privateer presented a petition to the agent of the government of Guadaloupe, stating the circumstances under which she had been captured, and her then bad condition, and requesting that a provisional sale might take place. That this was granted, conformably to French ordinances and regulations, and she was accordingly sold at public auction to the highest bidder; the money arising from the sale being deposited to await the definitive sentence. That at the said sale, Taylor, as agent for Tavel, purchased the brig for 875 dollars, and, after she had undergone considerable repairs, sent her here with a cargo from Barracoa. Several exhibits have been filed with these pleadings, among which are, 1st. The order for a provisional sale by the French agent at Barracoa, with a certificate from the American consul, that the said agent is duly authorized and appointed by General Ernouf, commander of Guadaloupe. 2d. The actual sale made under the said authority, and certified by said agent. 3d. The decree of condemnation of said brig and her cargo by the colonial prefect of Guadaloupe, and the commissary of justice for the said island; assisted by the commissary of marine, charged with preparing the trial of prizes, the colonial inspector, and the secretary of commission. The decree is founded on an arrêté issued 4th June 1804, by the captain-general of Guadaloupe, declaring that all vessels found trading to or from ports in possession of the revolters shall be considered as enemies of France, and shall be condemned as legal prizes, agreeably to the regulations in such cases.

BEE, District Judge The questions for me to determine are, 1st. Whether the provisional order for sale was sufficient to change the property. 2d. Whether the decree of condemnation can be reconsidered in this court, and altered and revised by me.

Nothing is more common in courts of civil law than interlocutory orders and decrees, which, if subsequently confirmed by a definitive sentence, have never been called in question. Sales under such orders are frequent; especially of articles of a perishable nature. This seems to have been the case here, and I do not think that the propriety

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

of the proceeding can be questioned by me. The decree of condemnation expressly ratifies the sale, and condemns both vessel and cargo as the property of enemies, according to their own previous regulation as to trade with the revolted negroes. How far they were justified in making such a rule is, in my opinion, a matter of executive or legislative interference. I do not consider this court as competent to reverse the sentence of a foreign court where the property is condemned as belonging to enemies: it would lead to a right of appeal from such decisions, and would be highly improper. On this principle I decided the case of Sheaf and Turner [Case No. 12,730]; that decree was affirmed on appeal, and must therefore be considered as a precedent. The case of Rose and Himely [Id. 12,047, 12,048] differed altogether from the present. There the condemnation is expressly declared to be in pursuance of an arrêté, passed subsequent to the capture. The decree was founded in error apparent on the face of it, for a law not in existence could not be infringed. The property, too, was in the hands of the marshal of this court, as belonging to the original owner, previously to the sentence of condemnation; nor had an order for sale ever been made. In Rose and Himely, the trade to Hispaniola was not interdicted till after the capture; in the present case the French arrêté had been published in all the American papers many months before. This was so well understood that most of the vessels engaged in this trade went armed, or under convoy of others that were armed; and it appears from the libel that the Lear knew the risque she ran, and went from the Cape to Port de Paix expressly for the purpose of sailing with armed ships from that place. Insurance had risen considerably upon risques like the present, when the Lear sailed; which was not the case as related to the voyage in Rose and Himely.

Upon the whole I think myself bound in the present instance by the sentence at Guadaloupe, the court there being competent to the condemnation of property as belonging to their enemies, under regulations that existed before the condemned voyage was undertaken. I dismiss the libel, with costs, subsequent to the filing of the sentence of condemnation.

Case No. 3,797.

DENNIS v. RIDER et al.

[2 McLean, 451.] [1]

Circuit Court, D. Illinois. June Term, 1841.

RELEASE OF SURETY — PRINCIPAL'S INSOLVENCY— EXTENSION OF TIME—SUBROGATION—LEGAL AND EQUITABLE REMEDIES.

1. The surety by giving notice to the creditor, and requesting him to sue the principal debtor, who is in failing circumstances, does not release himself, though the principal should become insolvent.

2. The relief of the surety, under such circumstances, is in equity.

3. Where the obligee changes the contract, by giving longer time, &c., the surety is discharged. And this matter may be set up at law.

4. In such a case the discharge of the surety does not depend on the insolvency of the obligee, but on the alteration of the contract. But the solvency or insolvency of the principal debtor can better be ascertained in chancery, where his answer may be required.

5. The surety, on the payment of the debt, is entitled to be substituted to all the rights of the creditor.

6. This does not mean that the original obligation, which is discharged by the payment, shall be assigned to the surety; but mortgages, &c.

Robbins & Welles, for plaintiffs.

Mr. Logan, for defendants.

OPINION OF THE COURT. This action is brought on a promissory note. The defendants pleaded nonassumpsit; and four special pleas, substantially, that Pierson was the security of the other defendants. That he gave notice to the agent of the plaintiffs, that the principals were in doubtful circumstances, and requested him to commence suit. That his co-defendants were then solvent, and able to pay the amount, but the plaintiffs neglected to bring suit until, &c., at which time their co-defendants became insolvent. To these pleas the plaintiffs' counsel demurred.

In this state there is an act entitled "An act for the relief of sureties, in a summary way, in certain cases," approved 24th March, 1819, which provides that the surety may give notice to the promisee or holder of the note, in writing, forthwith to sue, &c., and if he shall fail to do so he shall forfeit the right to recover from the surety. The pleas are not filed under this statute, but at common law. It is not pretended that the notice to the holder of the note was given in the manner required by the statute. To sustain these pleas the case of Pain v. Packard, 13 Johns. 174, is relied on. In that case it was said, if an obligee, or holder of a note, who is requested by the surety to proceed without delay and collect the money of the principal, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be exonerated. That case was decided without argument, and no authority was referred to except a decision in 10 East. 34. In the case in East, there was a plea filed similar to the pleas in this case, which was not demurred to. Lord Ellenborough said: "The only question is, whether the laches of the obligee, in not calling upon the principal so soon as they ought to have done, if the accounts had been properly examined from time to time, be an estoppel, at law, against the sureties. I know of no such estoppel at law, whatever remedy there may be in equity."

The defendants' counsel, also, relies on the

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

case of King v. Baldwin, 17 Johns. 384. That was an appeal from the decision of the chancellor, before whom relief was asked by a defendant, against whom judgment, as surety, had been obtained. He pleaded to the suit, at law, that the plaintiff neglected to bring suit, although specially requested, on the ground that his principal was about to become insolvent. The court overruled the evidence under the plea. A motion was made for a new trial, but not prosecuted. And on the ground that the promisee might have recovered from the promisor, had the suit been prosecuted as requested, the bill was filed praying relief. Chancellor Kent dismissed the bill on the ground that the complainant was entitled to no relief. He examined the doctrine at large, and maintained that there could be no relief at law. And that the circumstances of the case entitled him to none in equity. In the court of errors Judge Spencer reviews the opinion of Chancellor Kent, and reaffirms the doctrine in the case of Paine v. Packard. The judges who decided that case were Thompson, C. J., Spencer, Vanness, Yates and Platt. The court of errors being equally divided, the presiding officer reversed the decision of the chancellor. Platt, J., changed his opinion, being convinced that the decision in Paine v. Packard was erroneous. Yates concurred with him, and, if I mistake not, Vanness. In the case of Bank of Steubenville v. Carrol's Adm'rs, 5 Hammond, 207, the defendant pleaded that he signed as surety, &c., to which the plaintiff demurred, and the court decided that, if any change be made between the creditor and the surety that it discharges the surety, and that his defence may be set up at law as well as in equity. A case is cited in 14 Wend. 165, in which it was held that a notice to the agent of the promisee to prosecute the principal, by the surety, was sufficient.

The rule in New York may be considered, perhaps, as settled by the decision above cited in the court of errors. A decision in that court establishes the law for the state of New York; but it is believed that, beyond the jurisdiction of that state, the decisions of the supreme court are chiefly consulted as authority. The rule is well established that where an indorser has become fixed by demand and notice, if the holder of the bill shall, for a valuable consideration, agree with the drawer, or acceptor, to give him more time, it discharges the indorser. McLemore v. Powell, 12 Wheat. [25 U. S.] 554; Bank of U. S. v. Hatch [Case No. 918]; Id. 6 Pet. [31 U. S.] 250. This is upon the ground that the surety has a right, at any time after the bill becomes payable, to pay the holder, and be substituted to all his rights. Not that he is entitled, as has been ruled by several courts, to an assignment of the bill, because that is discharged by the surety, but he is entitled to all the collateral securities, such as mortgages, pledges of personal property, &c., which the creditor may hold. But if the creditor make a contract to extend the time of payment, this suspends this right of the surety, and he is, consequently, released. And so if the creditor, without the consent of the surety, changes the nature of the obligation of the principal in any respect. In these cases relief may be had at law. The question is not whether the surety has, in fact, been injured, but whether his right to pay the bill or note has not been suspended; or, whether the contract has not been materially altered by the creditor and principal. But, until the case of Paine v. Packard, in 13 Johns. and Bank of Steubenville v. Carrol's Adm'rs, 5 Hammond, no case has been found where relief to a surety beyond this has been given at law. The case of Paine v. Packard introduced a new rule. It was so considered by many of the most learned and able men, who gave opinions in the case of King v. Baldwin, in 17 Johns. And this rule is essentially different from the one which, prior to that time, had been recognized at law. That was founded upon an essential change of the contract, either as to the time of payment, or the acts to be done, without the assent of the surety. But the case of Paine v. Packard held, if the creditor neglected to prosecute the principal, on being required to do so by the surety, and the principal proved to be insolvent, the surety was discharged. And this without any indemnity offered by the surety, as to the costs incurred. Now, the rule has been, at law, that the creditor, beyond demand and notice, is not bound to active diligence. And there seems to be reason in this. For the surety confided more in the principal debtor than the creditor. The creditor, until the surety became bound, was unwilling to trust the principal. Now, if the creditor or the surety must be subjected to inconvenience and expense on account of this confidence, should it not fall upon the surety? He was the active agent in inducing the contract, and justice would seem to require that to save himself from loss he should again become active. And this is an established principle. In pursuance of former decisions he could pay the money and claim all the rights of the creditor, or he could file a bill, and, on the special circumstances of the case, ask the court to compel the creditor to bring suit. The New York rule, however, gives, at law, the same effect to a notice as results from a decree under the former rule. Now, the law having established the rule, that a suit in chancery is necessary, it would seem not to be advisable to change it on mere notions of policy or convenience. But, if this question were now open, it might be considered a matter of doubtful policy to adopt the New York rule. There are many matters which, under that rule, it might become necessary to investigate, and which more safely and properly might be examined in chancery than at law. Complicated matters of fraud, connected with the circumstances of the

principal debtor, might arise; the time of his insolvency, &c., which could not be well inquired into, or understood, without his answer, and his answer can only be required in chancery.

In a plain case where the principal debtor was solvent when the notice was given, and afterwards became insolvent, it would seem the New York rule would be salutary. But such a case, it is presumed, would seldom occur. The former rule rested upon the change of the contract. This was a matter of fact and of law, which the jury, under the instructions of the court, could determine. But whether the surety had been injured by the neglect of the creditor to prosecute the principal debtor, must often give rise to questions which can only be investigated in chancery. The old rule, therefore, seems to be safer and better than the new one. And this is, no doubt, the reason why the new rule has had so limited an influence. Mr. Justice Story, in his Equity Jurisprudence (volume 1, p. 592, § 639), says—if the debt is due, and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility. In cases of this sort, he says, there is not, however, any duty of active diligence incumbent upon the creditor. It is for the surety to move in the matter. But if the surety requires the exercise of such diligence, and there is no risk, delay, or expense, to the creditor, or a suitable indemnity is offered against the consequences of risk, delay, and expense, it seems that the surety has a right to call upon the creditor to do the most he can for his benefit, and if he will not a court of equity will compel him. Nisbet v. Smith, 2 Brou, Ch. 579; Hayes v. Ward, 4 Johns. Ch. 123. In the 322d page, § 327, of the same volume, Mr. Justice Story says—whether the surety can thus compel the creditor to sue the principal or not, he has a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor, as to all securities held by the latter for the debt, and to have the same benefit, that he would have therein. Craythorne v. Swinburne, 14 Ves. 162; Wright v. Morley, 11 Ves. 12, 22. In the case of Wright v. Simpson, 6 Ves. 734, Lord Eldon admits that the surety might have a right to compel the creditor to proceed against the debtor under some circumstances. But, then, in such a case, the surety is compellable to deposit the money in court for the payment of the creditor. So that, in fact, it is but the case of an indirect subrogation to the rights of the creditor, upon a virtual payment of the debt by such a deposit. A surety in a bond will be released when the obligee does some act which varies the terms of the original contract: but forbearance to sue is not such an act, and if the surety think otherwise, he should apply to the court of equity and compel the obligee to sue. Burn v. Poaug, 3 Desaus. Eq. 604. The indulgence granted to a principal, which is to discharge from his engagement, must be of that kind whereby the value of the contract is changed, or, whereby the creditor, without the consent of the surety, and by his own act, puts it out of his own power to enforce the payment of the debt by the principal. It does not mean a mere forbearance to sue the principal, which a court of equity, on application of the surety, might direct him to do, on pain of foregoing his claim against the surety. Buchanan v. Bordley, 4 Har. & McH. 41. A surety apprehending danger from the delay of the creditor, may come into this court and compel the creditor to sue the principal debtor, on giving an indemnity against the consequences of risk, delay and expense. Hayes v. Ward, 4 Johns. Ch. 129. To require the creditor to sue the principal on a mere notice of the surety, without an indemnity, when the surety could not be included in the suit, would seem to be unreasonable. Upon the whole we think that the case of Paine v. Packard [supra] is not sustained by authority, and, on principle, it is not recommended by such considerations of policy, as should lead to the adoption of the rule sanctioned by it. We think it safer to follow the old rule, which is well established in practice. The demurrer to the pleas is sustained. Judgment for the plaintiff, with stay of execution, until the next term, by consent, &c.

DENNIS (UNITED STATES v.). See Case No. 14,949.

Case No. 3,798.

DENNISON v. LARNED.

[6 McLean, 496.][1]

Circuit Court, D. Michigan. June Term, 1855.

NEGOTIABLE NOTES — BLANK INDORSEMENT—FEDERAL JURISDICTION—CITIZENSHIP.

1. A note with a blank indorsement authorizes the holder to receive the amount as the prima facie owner, and to sue the indorser by filling up the indorsement.

2. When the action is brought against the indorser by the indorsee, the action is maintainable in this court, though the assignment was made by a citizen of Michigan to a citizen of New York.

Mr. Hand, for plaintiff.
Mr. Clark, for defendant.

OPINION OF THE COURT. This suit is brought on a note given by Roloefson to defendant, for the payment of fifteen hundred dollars at Lyell's Bank, in Detroit. The note was not paid at maturity, and it was protested. It seems that the note was given for the accommodation of the defendant. The

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

note was the property of Fields & Stephens, who left it at Lyell's Bank for collection; after protest it was returned to the holders. The note was then sold to plaintiff, with whom the firm of Fields & Stephens do a large business in New York. The defense is, that Fields & Stephens are still the owners of the note, and that it was handed over to the plaintiff to bring suit in this court. It was proved by Stephens, that this firm, having large dealings with the plaintiff, in New York, the note was assigned to him, and charged to his account. This action being brought by the indorsee against the indorser, there can be no objection to the jurisdiction of this court. The indorsement by Fields & Stephens was made by the defendant in blank when the note was handed to the bank for collection, as an authority to the bank to receive the proceeds. The note having been returned to the owners, they filled up the blank indorsement, to the plaintiff. This they had a right to do; or if the note was sold to the plaintiff with a blank indorsement, the plaintiff, being the holder of the note, had a right to fill the blank indorsement at any time during the trial or before it. It is proved that the defendant applied to Stephens to intercede with the plaintiff for indulgence in the payment.

The jury found for the plaintiff. Judgment.

DENNISON (MARVIN v.). See Case No. 9,-180.

Case No. 3,799.

DENNISON et al. v. The WATAGA.

[11 Leg. Int. 7; 1 Phila. 468.]

District Court, E. D. Pennsylvania. 1854.

MARITIME CONTRACTS—CARRIAGE OF PASSENGERS—CONTRACT TO FORWARD.

[1. Certain passengers engaged with a ship-agent at Cork for passage to New York. The vessel in which it was proposed to carry them not being ready for sea, they were placed on board another ship, bound for Philadelphia; the agent giving each passenger a certificate engaging that he should be carried to Philadelphia on the latter ship, with a written indorsement that he should then be forwarded to New York free of expense. The master received these certificates from the passengers without dissenting from their provisions, and kept them until arrival at Philadelphia. There, however, he disclaimed further responsibility for the passengers. *Held*, that the contract was a maritime contract, made with apparent authority, and was binding on the ship.]

[2. The contract was an integral one, not separable as to the two stages of transportation; and therefore the ship was liable for the expense of forwarding the passengers to New York, whether she carried them herself, or caused them to be sent by another ship, or by land.]

KANE, District Judge. This case came before me in a summary form a few days ago, and was then decided; but the principles it involved were so important, that I have thought it best to have a record of my adjudication.

The libellants, in number more than a hundred, had engaged with a certain Brennan, ship-agent at Cork, in Ireland, for a passage to New York. Some of them had purchased tickets in the first instance, to sail direct to that port; but the vessel in which it was proposed to carry them, not being ready for sea, as soon as was desirable, Brennan chartered, as it is said, the "between decks" of the Wataga, a vessel then in port, and bound to Philadelphia; and gave to each of the libellants a certificate in the usual form, partly printed and partly written, by which he engaged that they should be carried to this city on board of her, with a written endorsement, that on her arrival here, they would be forwarded to New York free of expense. The libellants repaired on board the Wataga, bearing these certificates, exhibited them to the mate, who was for the time in command, and afterwards to the master, who took possession of them before the vessel sailed, and retained them until required, by the terms of the libel, to produce them before this court. On the arrival of the vessel at this port. it appears that the ship-agent, Brennan, had no representative here, and neither the master nor the consignees of the ship recognized any obligation to receive or forward the passengers. On the contrary, from the time that she was fastened to the wharf, the master ceased to issue rations or provide fires for cooking; and the party to whom, it is said, the ship-agent had written to act in his behalf, declined interfering, averring that he had never authorized Brennan to expect his aid. Two days after this, the passengers were induced to leave the ship and bring their baggage ashore, by the assurance that a steamer was waiting to convey them to New York. After carrying their chests, at their own expense, for a mile or more along the city wharves, they found that the steamer had gone without them. It does not, indeed, appear that any steamer or other means of conveyance had, at this time, ever been engaged for them, by the representatives of the ship-agent, or of the ship; but propositions to have the passengers carried forward had been made within an hour or two, to the proprietors of the steamer, by persons, who, disclaiming everything of legal obligation in the matter, protested that they were moved by charitable feelings alone. These propositions, moreover, being altogether conditional upon further notice, and never carried out into an engagement. The master, protesting a similar absence of liability, had sent after them a supply of food; but the steamer having set out before its arrival, it remained with the libellants. Men, women and children, crowded under an open shed on the pier, from before noon until after the city lamps were lighted for the night. Thus destitute, an appeal was made in their behalf to H. B. M.'s consul, to the mayor of the city, and to several citizens;

and by the charity of these, or some of them, the passengers obtained food and lodging. The next day this libel was filed, under the advice, as we have been given to understand, of Mr. Consul Mathew.

In considering the case, I threw out of my mind all reference to the asserted charter party. It was altogether res inter alios, and formed no part of the contract with the libellants. I found, then, an agreement made with them by a person who announced himself publicly as a ship-agent, and who was proved to have been in communication with the master of the ship; this agreement, made with apparent authority from the master or his owners, since under it the passengers were received on board, and transported to Philadelphia; and the certificate or ticket which expressed its terms having passed into the master's possession before the vessel left her harbor of Cork, and retained by him ever since, without his controverting or disaffirming it in any respect or degree. I had no difficulty upon this aspect of the facts, in considering these agreements as made with his concurrence, and therefore, binding as the acts of the master. I held also, that this, being a contract for transportation to a place beyond sea, and for diet during the voyage, was a maritime contract, and that as such, according to the repeated adjudications and established practice of the courts in this and the adjoining district, it was a proper subject of the admiralty jurisdiction. See The Aberfoyle [Case No. 17]; The Pacific [Id. 10,643]; The Achsah [Id. 10,586]; M'Afee v. The Creole [Id. 8,655]; and other cases in this court. The contract I treated as an integral one; the indorsement having as much effect as the part which was written or printed on the face; the parties, the consideration, the object, altogether one throughout. And inasmuch as it was not set out in any part of the instrument whether the distance between Philadelphia and New York was to be traversed by the same ship or by another, or by steamers, or on the open sea, or through a canal, or even by railroad, I held it to be only the closing stage of the transportation contracted for. As such it was binding on the ship, not capable of being divided up into parcels involving distinct and limited obligations, but as one single integral liability. Had even the certificate or ticket set out that the vehicle was not to continue the same, I should have likened the case, I said, to that of goods shipped to or from Bremen, which are for convenience carried by lighters, between Bremen and Bremerhaven, where, as we decided some months ago, the ship is bound for the safety and despatch of the subsidiary conveyance—to that of passengers, a familiar one some years ago, who engaged for the voyage from Europe to Wilmington, in Delaware, thence to be conveyed by steamer to Philadelphia—to the contract for passage from England via Halifax to New York, when the line of steamers was interrupted at the former port—and to the great variety of cases, familiar in the contracts of commercial men, where shipments are made for places not directly accessible to the ordinary class of seafaring vessels—in all of which I suppose the ship to be bound for the delivery of the goods at the place mentioned in the bill of lading. In a word I ascertained it to be the law, that a contract, legal in its terms, and to be performed principally on the ocean, could be enforced against the ship, although the alleged breach of its provisions occurred in port. I think this may be fairly deduced from the adjudications I have already referred to in a neighboring district. But unless I am mistaken, it may be traced back in principle to a period earlier than the Roman Code. It was the necessitas navigatium, the exigencies of maritime commerce, precluding inquiry, for the most part, into the ownership of the vessel or the authority of the master, which implied a liability as under contract from the simple acceptance of the goods on board for carriage. Dig. bk. 14, T. 1, "De Exercitatoria Actione," § 5. It is not till within the 18th century, that the books speak of this liability as restricted in amount to the value of the vessel and her freight; though from some of the analogies which are traceable between it and the qualified liability of owners for the unauthorized acts of their servants, I do not doubt that the equity, which entered so largely into the administration of the Roman Law, must have introduced the limitation practically, at an earlier day. The oldest compilations that have come to us of the customs of the sea, regard the goods as bound in the nature of a privilegium for their freight (Judgments of Oleron, art. 34), and require that the goods, though landed at the port of destination, shall be protected there at the primary charge of the ship, until their delivery to the owner (Arts. Pardessus' Numeration); and Cleirac ("Res et Contumes," 24, 34) affirms that this privilegium is reciprocal between the ship and the cargo.

Now, it would be easy to show that the agreement in favor of the specific liability, as deducible from either the Digest, or the, perhaps, less ancient laws of the sea, applies with equal force and clearness to all the obligations which were contracted in the case before me. The Roman Law held, that goods on their way in lighters from the ships in the place of delivery, retained their rights against the remaining interests for an average loss (Dig. bk. 14, 1, 2, Fr. 4, "De Jaetu"); and that goods when so transhipped still remained at the risk of the vessel (Dig. bk. 19, T. 2, Fr. 13, § 1, "Locat. Conduct"). The articles I have referred to from the Judgments of Oleron (articles 24 and 34) show a continuing liability, even after the voyage has been terminated and the goods have been landed. The import of them both, and of many other provisions that are found in the books, is merely this, that the shipper, when

he places his goods in a vessel under a contract for transportation, is not to be embarrassed by questions of ownership or authority, or purposes of which he knows nothing. He trusts what he sees. If even the person who receives them on board was not constituted by the owner of the ship; if even the master's orders from his owners were that he should admit no substitute in his place; nay, even if they prohibited specially the substitution of that particular person, who was found acting on board; the rights of the innocent shippers without notice were held not to be affected. De Exercit. Act. loc. cit. The reason of it all is found in the policy of facilitating maritime commerce, ("producendum ubilitatem navigantium.")

The reason then applies to all contracts of transportation and to all portions of such contracts, whether made or sanctioned by the master, as it might be reasonably supposed that he was authorized to enter into on the ship's behalf; not merely to such as were to be executed on board the ships, for we have seen that the Roman law extends the principle to the case of goods in lighters, and of goods landed but not delivered; and so did the Laws of Oleron. The question narrows itself down to this: Was the particular contract, which claims as incidental to it a hypothecation of the vessel, such as might be reasonable, regarded to be without the authority of the party professing to make it? Now, as the hypothecation, in the ordinary case of affreightment, is the one most frequently and familiarly noticed in the books, and as its incidents, so far as regards the ships, are the same as those of the passenger contract, I will consider for the moment that the case before me was one of the ordinary sort, for the carriage of goods. Suppose then a contract such as is disclosed in the facts before me, but for the carriage of goods—goods to be transported by ships from Cork to Philadelphia, and thence forwarded to New York—a gross freight reserved for the entire service. In such a case, it is plain that the freight would be payable only at New York, not susceptible of pro rata apportionment at the will of the carrier. It must be the same with the privilegium, or security for its payment. We cannot apprehend such a thing as a security for an accruing debt, only incapable of enforcement at once because the liability has not yet been fully matured, which must necessarily be invalidated and become null by consummation of the liability. The implied liability of the goods to the ship must subsist therefore in the case I have supposed till the entire contract has been perfected; that is to say, till the goods reach New York and the freight is paid for the entire carriage. But the lien of the ship and goods being mutual and reciprocal, why should not the hypothecation of the ship to the goods be equally enduring with that of the goods to the ship? Where is the principle, or the statute, or the case, that, professing to recognize mutual and reciprocal securities, between two parties to a contract, divides the liability of one party into segments, and attaches the security to one of those segments only; yet leaves the other's liabilities integral, and its security integral also? And if this argument would dispose of the question, supposing it to be one of the ordinary affreightment of goods, we must rescind all our adjudications on passenger contracts, and disregard those made in other districts, or we must hold the same law applicable to passenger contracts, and the Wataga therefore liable for the entire performance of her contract.

Passing from this discussion, into which I could scarcely enter the other day, to the question of damages, I observed that the admiralty is not the appropriate forum of vindictive justice. Our object here is rarely to do more than indemnify the party who has been aggrieved. This we have heretofore sought to do, in the case of The Creole [supra] and others, where the breach complained of presented no aggravating circumstances, by treating the passenger contract as rescinded, and allowing each passenger to receive back the amount he had paid, with a moderate allowance in addition for his necessary expenses while awaiting redress from this court. I made my decree accordingly, directing the commissioner to ascertain its amount. I will take care so to mould the further proceedings in the case, as to reimburse H. B. M.'s consul, and any others who have charitably intervened in behalf of these destitute emigrants, such sums as they have actually expended for their protection and support.

Case No. 3,800.

DENNISTON et al. v. CHICAGO, A. & ST. L. R. CO.

[4 Biss. 414.][1]

Circuit Court, N. D. Illinois. April Term, 1864.

CLAIMANTS AGAINST INSOLVENT RAILROAD CO—PROMISES BY RECEIVER.

1. Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bond-holders, until the bonds are paid. Such claimants have no specific lien upon the property.

2. Promise of payment by the receiver does not change their case; they can only take the surplus after specific liens have been discharged.

In equity.

A. W. Church, for defendant.

DRUMMOND, District Judge. This is an application by the petitioners Denniston and others, creditors of the Chicago, Alton & St. Louis Railroad, against the receiver, Mr.

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

Robb, to be paid out of the funds in his hands as receiver.

The petition was filed on the 19th day of January, 1864, after decrees had been rendered in this court in November, 1859, and in August, 1862, which decrees purport to make, substantially, a final disposition of all the property of the railroad company, and which last decree ordered a sale. Out of that sale some of the funds were realized which the court has under its control. These petitioners claim that they had an equitable lien upon the moneys received from the earnings of the road.

One of the creditors claims that he recovered a judgment against the company in the superior court of this county, on the 7th of December, 1859, for $747, for supplies furnished while the road was running under what is termed the Spencer lease. Another claims that he has a judgment against the company in the same court for $842.62 for supplies furnished under the same circumstances. Another creditor alleges that the railroad company was indebted to him in the sum of about $300 for supplies furnished, without particularly referring to the manner in which, or the time when, the supplies were furnished. Another creditor says he has obtained a judgment, without naming the court in which the judgment was obtained, for $932.68, which judgment was rendered for iron spikes and other supplies furnished to the railroad company in 1858 or 1859.

The main ground of the application is that the road was leased to Hamilton Spencer, and the supplies were furnished to the road while it was run by him, and when the assignment was made by Spencer to Matteson and Litchfield, they agreed to pay the expenses which had been incurred in running the road by Spencer, and that when the road came into the hands of the receiver, under the decree of this court, these parties had an equitable lien upon the funds realized from the earnings of the road, out of which they were to be paid.

These petitioners have no specific lien, legal or equitable, upon this property. The fact that Spencer and Matteson and Litchfield agreed to pay them, did not create a specific lien. It may be conceded that, after the railroad came into the hands of Matteson and was run by him when the parties who had liens upon the road were paid, that other parties might have an equitable lien upon the earnings of the road; but certainly they would have no right to be paid until prior incumbrances and liens had been satisfied. The fact that Matteson and Litchfield received the personal property cannot make any difference. They received it with the conveyance of real property, and these parties could not follow that personal property, merely because Spencer or Matteson, or various other parties who may have had control of the company, owed them a debt.

It may be admitted that, if this road had remained in the hands of the receiver, and the parties for whose benefit he was appointed had been paid, then these petitioners might have been entitled to receive from the proceeds in the hands of the receiver any surplus; but what are the facts? Here were large mortgages upon this railroad which had become hopelessly insolvent. Application was made to the court to put it in the hands of a receiver, in order that it might be operated for the payment of these mortgages. It was so done. It remained in the hands of the receiver for some years. Subsequently, other creditors applied to the court, it being manifest that the mortgages could not be paid in that way, or, at any rate, that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold, and the fund arising from the sale came under the control of the court. Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them because those with whom they have dealt cannot do so.

Upon general principles I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all except specific liens, and those, of course, have to be paid in their order.

The petition will, therefore, be dismissed.

Case No. 3,801.

DENNISTON et al. v. COQUILLARD et al.

[5 McLean, 253.] [1]

Circuit Court, D. Indiana. May Term, 1851.

SPECIFIC PERFORMANCE—CONSIDERATION.

1. A contract was made for the purchase of certain tracts of land, as a consideration for

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

which six thousand dollars were to be paid, and certain work was to be done. The money was paid, but the work was not done. A bill being filed under such circumstances, it was dismissed.

2. There is no principle in chancery better established, than that the party who asks a specific performance, must show performance on his part, or that he has offered to perform, and been prevented from doing so, by the acts of the defendant.

In equity.

Smith & Jernagen, for complainants.
Morrison & Thayer, for defendants.

OPINION OF THE COURT. This is a case in chancery in which the complainants pray the specific execution of the following contract: On the 1st June, 1835, Fellows and Denniston purchased from Coquillard several tracts of land at South Bend, in this state, on the conditions that they will pay Coquillard six thousand dollars at certain times stipulated, with the privilege of paying that sum before it becomes due. And in the language of the contract, the purchasers "are furthermore to build or construct a sufficient dam across the river St. Joseph, and cut a mill-race from said dam to intersect the said river at a point below or at the mouth of the brook, near the ferry at Water street, in the town of South Bend, within one year from and after the time that they shall obtain from the legislature of the state of Indiana, an act for that purpose. And they are to use their exertions to procure of the legislature an act for the purpose of constructing a mill-dam at the next session thereof, if possible. But if any accident should intervene to hinder the progress of said dam, then they are to have twelve months further time to complete the same. If the money should not be paid when due, ten per cent. was to be paid. Now, should the said Fellows and Denniston well and truly fulfill the conditions aforesaid, in all things, and pay to the said Coquillard the full amount of the purchase money, then, and in that case, the said Coquillard will execute to them a deed of general warranty for the premises. At the next session of the legislature the desired act was passed, on condition that a lock for the passage of steamboats and other crafts should be constructed and kept. The money consideration has all been paid. Arrangements were made for cutting the race, and funds were placed in the hands of Coquillard, who was to superintend the work, as the agent of the purchasers. A man was employed who cut a part of the race, perhaps one half of it, and to whom Coquillard made advances exceeding the amount of work done, some seven hundred and fifty dollars, and who refused to go on with the work unless an additional advance was made. In consequence of this, Coquillard agreed to extend the time for the completion of the work one year. The progress of events brought the parties to that period in our history, in the west, when a revulsion in prices took place. Coquillard became insolvent. Judgments were obtained against him, and his real property, including the purchase of Fellows and Denniston, were sold by the sheriff. Christopher W. Emrick, in April, 1845, received a transfer of a judgment against Coquillard, without recourse, from the Bank of Indiana; and he afterwards purchased the lands embraced by the above contract, for two thousand dollars. He had full notice of the purchase by Fellows and Denniston.

The bill is filed against Coquillard and Emrick, and a conveyance of the land is prayed for, under the above contract, when only a part of the consideration, on which the deed was to be made, has been performed. In addition to the payment in money, of the sum of six thousand dollars, the purchasers were to build a sufficient dam across the river St. Joseph, and cut a mill-race from said dam to intersect the river at Water street, in the town of South Bend. Neither of these works have been completed. A part of the canal has been cut. The dam has not been built. The question arises whether the party who has failed on his part to perform the contract, can ask specific execution of it. If there be any thing settled, it is, that a party who asks the aid of a court of chancery, must show that he has performed his part of the contract, or has been prevented from performing it, by the act of the party against whom he prays relief. The question whether time is of the essence of the contract does not arise in this case. The time was extended by Coquillard, one year, but that had expired long before the bill was filed. In fact, the contract seems to have been abandoned by the complainants, before they applied to chancery for relief. And the only principle on which they contend for relief is, that compensation can be made to Coquillard for the injury sustained by him, by reason of a failure by the complainants to build the dam and cut the race. This is not a case where compensation can be made for the failure to perform. Where a sum of money is to be paid, and there are no changes in the subject matter of the contract, to prevent a specific execution of it, it may be decreed, and interest on the deferred payment is held to be a compensation for the delay. But in the case before us, if, by the nature of the contract, the dam and the race might be completed, after the expiration of the year extension by Coquillard, yet they must be completed before a conveyance of the land could be required. Courts of equity can neither make contracts for parties nor modify them, to suit the convenience and interest of one of the parties. It would be difficult, if not impracticable, to ascertain what damage Coquillard suffered by the non-performance of the complainants. He is shown to be insolvent, and this may have resulted from their failure. To obtain a specific performance, the individual seeking it must show vigilance on his part. He

must prove that he has performed his contract, or offered to perform it, and was prevented by the defendant. The authorities on this point are so numerous and so well known to the profession, that a citation of them would be useless. The bill is dismissed at the costs of the complainants.

Case No. 3,802.

DENNISTON et al. v. IMBRIE.

[3 Wash. C. C. 396.][1]

Circuit Court, D. Pennsylvania. April Term, 1818.

PAYMENT BY BILL OF EXCHANGE — FAILURE TO PRESENT — INTEREST — USAGE—DEBT TO ALIEN ENEMY—AGENCY DURING WAR.

1. If a debtor remit a bill to his creditor, in payment of the debt, and he receives it as such, and credits the debtor, it is a payment; and he can only sue the debtor as endorser; and if he neglect to present it in time for acceptance and payment, and to give notice of its dishonour, he makes the debt his own; whether the drawer had funds in the hands of the drawee or not.

[Cited in Ward v. Smith, 7 Wall. (74 U. S.) 453.]

2. A usage to add interest at the end of the year, to the annual account, and interest on the balance, does not apply in a case in which the commercial intercourse between the two countries in which the parties reside, had ceased, when the account was transmitted; nor will it authorize the creditor to make other rests in the account.

[Cited in Bainbridge v. Wilcocks, Case No. 755.]

3. If an alien enemy has an agent here, and this is known to the debtor, interest ought not to abate during the war.

[Explained in New York Life Ins. Co. v. Davis, 95 U. S. 432.]

Action by the plaintiffs, merchants of Glasgow, for goods shipped to the defendant, a merchant of Philadelphia. The defendant claimed, amongst others, the following credits:

1. The amount of a bill of exchange for £300 sterling, drawn by Eves & Wistar in favour of the defendant, on Barber & Co. of Liverpool, at sixty days, payable in London. This bill, which bore date the 2d of October, 1806, was enclosed by the defendant to the plaintiffs, with directions to place the same to his credit. On the 6th of November it was noted for non-acceptance, and for non-payment on the 30th of January, 1807. The protest for non-payment, states, that the drawees were asked, whether, if the bill had been presented for payment when at maturity, they would have paid it; and was answered, that they would not, for want of funds of the drawers; but that it was probable, Mr. Guest would have provided for it. This bill was credited by the plaintiffs to the defendant, in their account, on the 6th of November, 1806, and was charged to him on the 24th of February, 1807. It was returned to the defendant, in a letter from the plaintiffs, dated the 31st of January, 1807, (which was the first notice the defendant had of its dishonour,) in which they admit, that it had been overlooked, and had not been presented for payment at the proper time; but that the validity of their claim against the drawers, was not impaired, as payment could not then, or at any subsequent period, have been obtained. On the 14th of March, 1807, the defendant wrote to the plaintiffs, that not having heard any thing respecting the bill, he presumed it had been paid. In a subsequent letter, in answer to the plaintiffs' of the 31st of January, he regretted that the tottering circumstances of the drawers of the bill, rendered it doubtful if they would be able to take it up; but promised to do what he could to secure it; stating, at the same time, that in consequence of their negligence, he should consider the loss as the plaintiffs', should a loss happen. By a letter from the drawees to the drawers, inclosed in another from the plaintiffs to the defendant, and referred to by the plaintiffs, it appeared, that if this bill had been presented for payment in time, it was probable it would have been provided for. The reading of this letter was objected to by the plaintiffs' counsel, and allowed by the court to be read, as part of the correspondence; but without deciding how far it was to be considered as evidence of the facts it contained. This letter spoke of Mr. Guest, in relation to the payment of this bill; and the plaintiffs offered to read a letter from Mr. Guest, explanatory of it, which was overruled by the court. Evidence was given, both by the plaintiffs and the defendant, as to the circumstances of the drawers of this bill, from December, 1806, to April, 1807, when they stopped payment; to show, on the one side, that if the bill had been duly protested, and notice given, payment might have been secured; and on the other, that it could not.

2. The next credit claimed, was for an abatement of interest during the late war. It was proved, that one of the plaintiffs was in New-York during a part of the war, from some time in 1813, of which the defendant had notice.

3. The plaintiffs had been in the habit of forwarding their accounts annually to the defendant, from 1806 to 1809; in which the balance of interest was credited, or debited, as the case might be, and added to the balance of principal, on which aggregate, interest was regularly charged. From 1809, the mercantile transaction between these parties ceased. Some time in the year 1814, the agent of the plaintiffs called on the defendant with his account, stating the principal and interest to that time; and the demand being resisted, or not complied with, this suit was brought. The defendant objected to paying interest on interest, after

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

the commercial transaction between these parties ceased, in 1809. Evidence was given to prove, that the uniform usage of this trade was, for the merchant in Great Britain, to send forward annually his account current to his correspondent here, and to add the balance of interest to the principal, and this aggregate to carry interest.

Mr. Levy, upon the first point, contended, that want of effects in the hands of the drawees, or other circumstances, showing that no injury was sustained by an omission to protest in time, and to give due notice, would not invalidate the claim of the holder. Chit. Bills, 68, 86.

2. Upon this head, he relied upon the treaty of 1794, between Great Britain and the United States (article 10), and upon the unreasonableness of abating interest during the war. But in this case, the plaintiffs were in the United States, of which the defendant had notice.

3. On the third point, he relied on the usage, as proved, and cited 1 Vern. 194; 1 Swift's Laws Conn. 388, 389.

Chauncey & Binney, for defendant, on the first point, cited Chit. 224, 158, 162; Lovelace, 80, 81; 16 East, 247; 3 Johns. Cas. 5; 12 Mass. 89; 10 Mass. 52; [French's Ex'x v. Bank of Columbia] 4 Cranch [8 U. S.] 141; 2 Caines, 344; 11 East, 113; Chit. 130; 3 Bos. & P. 241.

2. They objected to the account, only so far as interest was compounded, after 1809, when all transactions between the parties ceased, and the annual accounts current were not sent in.

3. They relied on the decision of this court in the case of Conn v. Penn [Case No. 3,105], during this term.

WASHINGTON, Circuit Justice (charging jury). The first point to which we shall draw your attention is, the credit claimed by the defendant on account of the bill of exchange, drawn by Eves & Wistar on Barber & Co. in favour of the defendant, and by him remitted to the plaintiffs, on the 8th of October, 1806; which the plaintiffs were desired to place to the credit of his account. This bill was received early in November of the same year, and was credited on the 6th of that month. It was noted for non-acceptance on the same day; and, of course, was at maturity on the 6th and 9th of January, 1807. It was, however, not presented for payment till the 30th of that month; and was then noted for non-payment. It was charged to the defendant, on the 24th of the succeeding month. Notice of the dishonour of the bill was given to the defendant, by a letter from the plaintiffs, bearing date the 31st of January. We forbear, at this time, to notice more of the evidence relative to this bill, lest it should be supposed by the jury, or by others, that the circumstances detailed in that evidence have any influence upon the opinion of the court.

We understand the law to be, that, if a debtor remits to his creditor a bill of exchange, in discharge, or on account of the debt he owes, the creditor may receive it as such, or decline to do so, and return it; or he may present it for acceptance and payment, as the agent of his debtor. If he gives his debtor credit for the amount of the bill, as payment, or in any other manner accepts it as such, it is a payment of so much of the debt. He stands then as an endorser of the bill for consideration paid, and may have his recourse against the drawer and endorsers, in case it should be dishonoured. But if he has been guilty of negligence, in not presenting the bill in time for acceptance and payment, and giving timely notice to all those he means to resort to, of the dishonour of the bill, he stands in the situation of all other holders of bills of exchange. He can never re-charge the bill to his debtor, and do away the credit once given, or to which he was once entitled. This has been decided in this court, in two or three cases. If a doubt could exist, whether this bill was received by the plaintiffs, in part discharge of the debt due to them, and that they had made it their own; their letter of the 31st January, 1807, to the defendant, would be sufficient to remove it. What, then, is incumbent on the holder of a bill of exchange to do, in order to charge the drawer and endorsers, in case it should be dishonoured? He must, in due time, present it for acceptance; and when at maturity, allowing the days of grace, he must present it for payment. If acceptance or payment be refused, he must cause it to be protested, or, at least, noted for non-payment, on the day of refusal; and he must also give timely notice of the same to the drawer and endorsers, against whom he means to resort. What was the conduct of the plaintiffs in relation to this bill? It was noted for non-acceptance on the 6th of November, and was neither presented at maturity, nor protested for non-payment. Payment was not demanded at any time; not even on the 30th of January, upwards of 20 days after it should have been; since it appears by the protest, on that day, that the only inquiry made of the drawees was, whether they would have paid, had the bill been presented in due time? No notice was given of the non-acceptance, until after the informal demand of payment 20 days after it was payable. It is said that the drawers had no funds in the hands of the drawees, and therefore a timely protest and notice were unnecessary. It will readily be admitted, that, if this were an action against the drawers, they could not defend themselves, by alleging the negligence of the holder in these respects, if they had no funds in the hands of the drawees, or had no right to draw upon them. But as to the endorser, it is perfectly immaterial whether the drawers had

authority to draw, or not. The implied contract, which, by his endorsement, he entered into with the holder, was to pay, upon condition that the bill was duly presented and protested, and notice given to him of the refusal of the drawees.

It is contended, that if all these "formalities," as they are styled, had been strictly attended to, still the situation of the defendant would not have been improved, by reason of the failing circumstances of the drawers. If the fact were so, (and there is strong evidence to the contrary,) still the court and jury have nothing to do with considerations of this nature. The rule of law is imperative; and if it were subject to be controlled by such circumstances, it would cease to be a rule.

Another objection made to this credit is, that the defendant, in a letter addressed by him to the plaintiffs, in the year 1809, stated that he had some small deductions to make from his account; which the counsel considers as amounting to a promise to relinquish his claim to this credit. How far he would have been bound by such a promise, had it been distinctly made, is a question not necessary to decide. But, as the defendant, from the time he first had notice of the plaintiffs' irregularity in respect to this bill, had uniformly insisted, that the plaintiffs had made the bill their own,—it would be giving to the general expressions of the letter, a most extravagant and unnatural construction; to make them amount to a promise to submit to the loss of so large a sum of money. This objection, therefore, cannot be sustained.

The last objection made to this credit is, that the bill having been returned to the defendant, and retained by him, to this moment, so far as appears, he ought to be now debited with the amount. The answer to this is obvious. The defendant received the bill, as the agent of the plaintiffs, to collect the amount for the plaintiffs, from the drawers, if he could. He did receive a small part of it from the assignees, and debited himself with the same, in account with the plaintiffs. If, as agent, he has been guilty of any neglect, he is answerable for the same, whenever an action is brought against him, fitted for such a case. That question cannot be investigated in this action, which is for goods sold and delivered.

Upon the whole, the court is of opinion, that if this action were upon the bill of exchange against the defendant, as endorser, the plaintiffs, for the reasons mentioned, could not recover. Much less reason is there, for charging him with the amount of the bill, in this action; or, in other words, expunging from the account, the credit once given; and to which he is entitled in part discharge of that account.

The second question respects the mode of charging interest on the plaintiffs' account. The court need only refer to what was said in relation to this subject, in the case of Barclay & Co. v. Kennedy [Case No. 976], decided at this term. Whether the usage is sufficiently proved by the evidence, is submitted to the jury; as also, whether the mode of charging the interest in this case, is conformable with the usage so proved. We shall make but this observation; that if the usage proved, is applicable only to cases of running accounts, annually stated, and furnished to the merchants here, it will not govern a case where an account is sent, after all commercial transactions have ceased; and particularly where the adding the interest to the principal, has not received the implied sanction of the debtor; but, on the contrary, payment is refused, and a suit is brought to recover such balance. Neither would such a usage authorize the creditor to make other rests in the account—thereby accumulating the amount, by converting the interest into principal.

The last question respects interest during the war. The opinion delivered in the case of Conn v. Penn [Case No. 3,104] continues to receive the approbation of the court. We think, that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate. If the agent be in the state where the debtor resides, a general knowledge of that fact may be sufficient, without bringing it home to the debtor. The debtor might have paid his debt, either to the creditor, or his agent, in this country, without the danger of violating his duty, or the laws of the land. It is said, that the abatement of interest, during the war, upon a debt due to an alien enemy, is a hardship which should prevent the adoption of the rule which this court has approved. If it be so, the rule must nevertheless be enforced, as we do not sit here to establish or to uphold a flexible system of laws, to be bent sometimes one way, and sometimes another, according to our notions of hardship. But even this argument, slight as its influence should be, when aimed against a legal principle, is unfounded in fact; since the creditor may always remove the objection, by having an agent on the spot, authorized to receive the debt.

Case No. 3,803.

DENNISTON v. McKEEN.

[2 McLean, 253.][1]

Circuit Court, D. Indiana. Nov. Term, 1840.

PAYMENT—PRESUMPTION FROM LAPSE OF TIME.

1. After the lapse of twenty years a presumption of payment of a bond or note arises, and, under peculiar circumstances, it may arise on a shorter time. This presumption may be rebutted by circumstances.

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

2. A new trial will not be granted against strong circumstances of equity.

Mr. Cooper, for plaintiff.
Mr. Lockwood, for defendant.

Before HOLMAN, District Judge.

Declaration by assignee on a note executed by defendant, and two others, as partners, in the state of Ohio, in the year 1817, and assigned without recourse. The defendant pleaded payment. Defendant rested his case before the jury on the presumption of payment arising from the length of time since the note was executed. To rebut this presumption the plaintiff proved that the defendant had been for a long time living in this state in embarrassed circumstances, and that a suit was instituted against him on this note in the circuit court of Cass county, in 1836, which was afterwards dismissed. It appeared, also, in proof, that one of the partners had died many years ago. That the other, the principal in the firm, was still living in the state of Ohio, and had resided at the place, where the firm transacted their business, ever since the note was executed; and that defendant must have been very young, if, indeed, he was of age at the date of the note.

THE COURT instructed the jury that, after a lapse of twenty years, a note was presumed to be paid if no demand of payment had been previously made. And even a shorter period would raise a presumption of payment, under peculiar circumstances, but that there were, also, circumstances which would rebut this presumption, and excuse the making of a demand, or the institution of a suit, as when the defendant was insolvent, or his place of residence unknown. That they should consider all the circumstances of this case, and give their verdict accordingly.

The jury found for the defendant.

Motion for a new trial.

PER COURT. The circumstances in this case warrant the finding of the jury. If the lapse of time is considered as limited to the time when the suit, in the Cass circuit court, was instituted, it then amounted to nineteen years. And as the defendant's residence in this state had long been known, and although he was embarrassed in his circumstances, there is no proof that he was insolvent. And as there was no evidence whatever of the insolvency of the firm, or that any application had ever been made to the principal of the firm, who still resided where the business had been originally transacted, and who would be presumed to know more about it than a partner so young as the defendant must have been at that time, and as the note had been received by the assignee not in the regular business way, but apparently as a matter of speculation, the presumption of payment, prior to 1836, was sufficiently strong to authorize a verdict for the defendant.

New trial refused.

Case No. 3,804.

DENNISTOUN et al. v. DRAPER.

[5 Blatchf. 336.][1]

Circuit Court, S. D. New York. July 14, 1866.

REMOVAL OF CAUSES — RIGHT OF REMOVAL—HOW TESTED—MOTION TO REMAND—REPLEVIN—SALE OF PROPERTY.

1. Where the proceedings taken by a defendant, in a suit brought in a state court, to remove the suit into this court, under the provisions of the 3d section of the act of March 2, 1833 (4 Stat. 633), are in conformity with the act, the removal is imperative; and the question whether the defendant had in fact a right to remove the suit cannot be raised by a motion to this court, before the trial, to remand the suit to the state court.

[Cited in Murray v. Patrie, Case No. 9,967; Fisk v. Union Pac. R. Co., Id. 4,827; Chicago R. R. Co. v. Whitton, 13 Wall. (80 U. S.) 287. Distinguished in Galvin v. Boutwell, Case No. 5,207. Followed in Lands v. A Cargo of 227 Tons of Coal, 4 Fed. 479. Explained in Mackaye v. Mallory, 6 Fed. 750; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 864.

2. Any question as to the jurisdiction of this court in the premises, based on the point of an alleged absence of right in the defendant to remove the suit, can be raised at the trial.

[Cited in Cushing v. Laird, Case No. 3,508; Jones v. Oceanic Steam Nav. Co., Id. 7,485; International Grain Ceiling Co. v. Dill, Id. 7,053; Eaton v. Calhoun, 15 Fed. 159. Explained in Mackaye v. Mallory, 6 Fed. 750.]

3. Property in custody, involved in a replevin suit removed into this court, ought to be sold, and the proceeds should be brought into this court and deposited, on interest, to abide the result of the suit.

This was an action of replevin, originally brought in the supreme court of New York to recover the possession of sundry bales of cotton. The defendant [Simeon Draper] removed the case into this court, and the plaintiffs [Alexander Dennistoun and others] now moved to quash the writ of certiorari issued by this court in the case, and to remand the case back to the state court.

Charles O'Conor, William M. Evarts, and Edwards Pierrepont, for plaintiffs.

Samuel G. Courtney, Dist. Atty., and Charles Eames, for defendant.

NELSON, Circuit Justice. The 3d section of the act of March 2, 1833 (4 Stat. 632), provides, that the jurisdiction of the circuit courts of the United States shall extend to all cases, in law and equity, arising under the revenue laws of the United States, &c.; and the 3d section provides, that, in any case where a suit shall be brought in a state court, against any officer, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States, it shall be lawful for such defendant, at any time be-

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

fore trial, upon a petition to the circuit court of the United States in and for the district in which he has been served with process, setting forth the nature of the suit, and verifying the petition by affidavit, together with a certificate of an attorney or counsellor, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true, which petition, &c., shall be presented to the said circuit court, &c., and shall be filed in the office of the clerk, and the cause shall thereupon be entered upon the docket of the court, and shall be thereafter proceeded in as a cause originally commenced in that court. The section then provides for the issuing of a writ of certiorari to the state court, requiring it to send to the circuit court the record and proceedings in the cause, and enacts, that, thereupon, it shall be the duty of the state court to stay all further proceedings in such cause, and the same shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void.

The defendant in this action claims that he was an officer under the revenue laws of the United States, having been appointed by the secretary of the treasury in pursuance of law; and that he was in possession of the cotton, and held it as captured, abandoned and confiscable property, under legal authority, and especially under the acts of congress of August 6, 1861 (12 Stat. 319), March 12, 1863 (Id. 820), and July 2, 1864 (13 Stat. 375), and has taken the proper proceedings for the purpose of removing the said cause from the state to the circuit court under the said act of 1833, usually called the "Force Act." This motion has been made to remand the cause back to the state court, or to quash the proceedings in this court, on the ground that the defendant did not hold the cotton, at the time of the replevin suit in the state court, as an officer of the revenue laws, or as a person authorized to hold it under the same, but, on the contrary, held it wrongfully and in violation of the rights of the plaintiffs in the property, and that he was simply a tortfeasor. I agree, that, if the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has also not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the act of removal. But, in cases where the proceedings are in conformity with the act, removal is imperative, both upon the state and the circuit court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction belongs to the federal court, and must be heard and determined there. The statute is peremptory, that "the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court," and "shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void." It is true, that the plaintiff, after the removal of the cause into the circuit court, has no means, according to the course of proceeding in that court, to raise the question of jurisdiction upon the pleadings; and such disability, doubtless, furnishes some plausibility of reason for the hearing of the question upon motion. But this mode of prosecuting it, which must be upon affidavits, oftentimes conflicting and irreconcilable, is most unsatisfactory, and should not be entertained unless from unavoidable necessity, with a view to ascertain the appropriate tribunal to hear and determine the cause. I am of opinion that no such necessity exists in this case. On the contrary, the very circumstance that the plaintiffs can have no opportunity to present the question upon the pleadings, should and will enable them to avail themselves of the objection to the jurisdiction in any stage of the trial. If, when the evidence is closed, it shall appear that the cause is such as not to come within the cognizance of the court under the act of 1833, it will be its duty to instruct the jury that the court has no jurisdiction of the cause, and to remand it back to the state court. The case of Pollard v. Dwight, 4 Cranch [8 U. S.] 421, is an authority for this view. That was the case of a removal under the 12th section of the judiciary act [1 Stat. 79]. The objection was taken to the jurisdiction, on error to the circuit court, and Chief Justice Marshall, after overruling the objection, observed: "Were it otherwise, the duty of the circuit court would have been to remand the case to the state court in which it was instituted, and this court would be bound now to direct that proceeding." See, also, Diggs v. Wolcott, 4 Cranch [8 U. S.] 179.

In cases where original jurisdiction is conferred directly upon the circuit court, as in the 2d section of the act under consideration, in behalf of a person who has received an injury for an act done in protection of the revenue laws, the jurisdictional question, whether or not the act was done within the meaning of the statute, may be raised by a plea in abatement, or to the jurisdiction. It has been held that, as it respects the citizenship of the parties, as an ingredient of jurisdiction, advantage can be taken of the point only by the proper plea in abatement. D'Wolf v. Rabaud, 1 Pet. [26 U. S.] 476. Whether this principle is applicable to an objection founded upon every other jurisdictional fact, is a question which, so far as

I know, has not yet been decided. But the principle has no application to the case of original jurisdiction acquired indirectly by a removal from the state court to this court, as the defendant, then, is concerned, so far as the question of the removal is involved, to maintain the jurisdiction; and, as we have seen, the plaintiff, on the removal, has no opportunity, according to the practice of the court, to present the question upon the pleadings. Although the act gives to the person the right to sue in this court for an injury to his person or property, for an act done in protection of the revenue, it does not give the same right to the party claiming to have sustained an injury from such person; and hence the only judicial remedy is by a suit in the state court, subject to the indirect original jurisdiction of this court, in cases where it is given, by removal into it.

The cause, therefore, in question was properly instituted in the state court, leaving the only question for consideration, on this motion, as to the legal effect of. the removal; and, as to that, I am of opinion, that, inasmuch as the act of congress has been fully complied with, it is not proper, if it be competent, for this court to determine, upon motion, the disputed jurisdictional facts involving the right or legality of the removal; and that, inasmuch as the question of jurisdiction involving them cannot be raised upon the pleadings, the proper place to hear and determine them is on the trial, where the plaintiffs will be at liberty to take advantage of the objection.

This case affords a very strong illustration of the impropriety, if not impossibility, of determining this question upon motion, where the jurisdictional facts are contested. The petition for removal places the right upon the ground that the suit is brought in the state court on account of acts done by the defendant under the revenue laws, or under color thereof. while acting as an officer, by virtue of the authority of the same. As is more fully developed in the papers, the defendant claims to hold the cotton as captured, abandoned, and confiscable property, under the acts of August 6, 1861, March 12, 1863, and July 2, 1864; and, in addition, it is suggested, that the cotton is confiscable as having been purchased for the purpose of running the blockade. The plaintiffs insist that the cotton, neither at the time it came into the possession of the defendant, nor at any time previously, fell within the provisions of either of these statutes, and that their (the plaintiffs') title to the same was complete and perfect at the time they were deprived of it. It is. also, further insisted, that they have been deprived of the possession without due process of law, and against the guarantees of the constitution; and that it is not competent for two of the departments of the government, the executive and the legislative combined, to confiscate the property of a citizen, without resort to the judicial department of the government. As will be readily seen, the case involves some of the gravest questions of fundamental law, and which are incidentally connected with the question of jurisdiction; and the facts upon which they arise should be presented in the most authentic form.

Having arrived at this conclusion, the case must be retained in this court, as the proper tribunal to hear and determine the question of jurisdiction; and, as it cannot be heard and determined except on the trial, a question arises as to the disposition of the cotton in the meantime, which is now in the hands of the sheriff. The act of 1833 provides, that "all attachments made, and all bail and other security given, upon such suit or prosecution, shall be and continue in like force and effect, as if the same suit or prosecution had proceeded to final judgment and execution in the state court." I do not doubt the authority of this court to deal with this cotton, so as to preserve the rights of all parties to the same during the litigation, and, if it should turn out, in the end, that this court had no jurisdiction, to remand the same, or its proceeds, with the cause, to the state court. If no disposition is made of the cotton by amicable adjustment, the subject may be brought before me by either party, on reasonable notice to the other. I would, however, respectfully suggest the propriety of a sale of the article under the direction of the court, the proceeds to be brought into the registry, to abide the result of the litigation. The practice of this court is, to direct such proceeds to be deposited with the United States Trust Company, of the city of New York, at such interest as may be agreed on, for the benefit of whom it may concern.

Case No. 3,805.

DENNY et al. v. BROWN.

[2 Betts' C. C. MS. 51.]

Circuit Court, S. D. New York. Jan. 8, 1844.

ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—ARBITRATION—CONCLUSIVENESS OF AWARD—REVIEW OF AWARD—REFERENCE—EFFECT OF REPORT—HOW REGARDED IN FEDERAL COURTS—AGREEMENT FOR COGNOVIT—ENFORCEMENT IN FEDERAL COURTS.

[1. The submission of a controversy to arbitration by an attorney binds his client.]

[2. An arbitration award is conclusive as to the parties thereto, and can only be avoided or vacated for fraud or gross misconduct.]

[3. Mistakes of law by arbitrators, or errors of judgment by them on the evidence, cannot be reviewed or rectified.]

[4. An attorney may confess judgment for his client in an action on contract.]

[5. State statutes authorizing and regulating references have no application to federal courts.]

[6. Consent to a reference does not authorize a judgment in invitum on the report.]

[7. The federal courts will not entertain questions on a referee's report, but will regard and treat it as an award by arbitration.]

[8. The reservation in a submission to referees of the right to move to set aside their report takes away its character of a submission to

arbitration. Consequently, an agreement in the submission to give a cognovit for the amount of the report will be deemed to refer to the amount as finally settled by the court, and not the amount reported by the referees.]

[9. A reference under state statutes not being recognized by the federal courts, a stipulation to confess judgment for the amount reported by the referee will not be enforced therein.]

At law. Action by Thomas Denny and others, trustees under the absconding debtors' act, against Hugh Brown.

H. E. Davis, for plaintiffs.

J. Cook, for defendant.

BETTS, District Judge. The plaintiffs move for an order compelling the defendant's attorney to sign a relicta cognovit actionem for the sum of $17,483.02. It appears by the affidavit of their attorney that in a suit in assumpsit pending in this court, between these parties, a written agreement was entered into between the attorneys for the respective parties that the cause be referred to three persons designated; and in the same agreement the attorney for the defendant stipulated and agreed to give a relicta cognovit, that judgment may be entered thereon for such sum as shall be found by said referees due from him to the plaintiffs, and that either party may move to set aside the said report. This agreement was executed December 15, 1840, and a report of the referees was made, bearing date the 10th of August, 1843, finding there was due from the defendant to the plaintiffs the sum of $17,483.02. The affidavit states that since the referees commenced acting under the agreement, the attorney who signed it has ceased to conduct the case, and that it has come under the direction and management of J. Cook, Esq., and that Mr. Cook and the attorney who signed the stipulation both decline executing the relicta cognovit, in fulfilment of the agreement.

The defendant avers in his affidavit that he supposed the reference in the cause was by the authority and direction of the court, and that he never signed any paper authorizing such reference or authorizing his attorney to confess judgment against him, and that he never saw the stipulation given by his former attorney until notice of this motion was given; that in May, 1843, Mr. Cook was substituted his attorney in the cause, on the written consent of his former attorney, Mr. O'Connor; and that the deponent has refused his consent to the execution of the cognovit. He further states that he is advised and believes he has good grounds of exception to the proceedings and decisions of the referees, and that he is preparing to have the report reviewed and set aside by this court.

The courts of the United States possess no power to refer causes, and the acts of the parties in this case were therefore virtually a submission of the matters in controversy in the action to arbitration. By the local law, a cause pending in court may be submitted to arbitration by parol (Wells v. Lane, 15 Wend. 99), and the knowledge or acquiescence of the parties in the acts of their attorneys should be regarded as of the same effect as if done directly by themselves. Without such acquiescence, it would appear to be the result of the authorities that the attorney may himself submit to arbitration his client's cause, and that the principal is bound by the submission. Holken v. Parker, 7 Cranch [11 U. S.] 436; Somers v. Balabrege, 1 Dall. [1 U. S.] 166; Buckland v. Conway, 16 Mass. 396.

The award of arbitrators is conclusive between the parties. It can only be avoided or vacated for fraud or gross misconduct; and accordingly mistakes of law or errors in judgment on the evidence, by the arbitrators, cannot be reviewed or rectified by the court. Shephard v. Watrous, 3 Caines, 166; Barlow v. Todd, 3 Johns. 36; 9 Johns. 212; 5 Cow. 425; 10 Cow. 580. If then the report in this case is to be reviewed as an award on arbitration, the parties could not be heard on any objections to the decisions of the arbitrators in admitting or excluding matters of charge on the one side or the other, and must accordingly be treated as conclusive of the right of the plaintiff to recover the entire sum reported.

The competency of the attorney to bind his principal by a confession of judgment in a suit pending on contract cannot be questioned. 6 Johns. 696; 6 Cow. 387. It would seem to result that his solemn stipulation in writing, to give such judgment, would be enforced by the court, as the proceeding in the conducting of the cause to which the plaintiff was entitled. 6 Cow. 387. The after refusal of the client to allow the agreement to be executed, unless sanctioned by the court for sufficient cause shown, ought not to intercept or diminish the rights conferred to the plaintiff by the stipulation, any more than if the agreement had been executed by the defendant in person. The conclusive effect then of such arbitration would induce the court to examine critically the agreement to determine whether the parties in arranging their submission have subjected themselves to these peremptory consequences.

Certain classes of cases are by the state law subject to reference, by act of court, or at the instance of either party to the suit. The reference becomes then a part of the procedure in the action, and the decisions of the referees are subject to revision upon as ample rules of relief as those of courts and juries. The revision is summary by the court out of which the reference proceeds. This method of proceeding, being instituted by statute, does not apply to the courts of the United States, nor can they adopt it as a rule of decision or practice, compulsorily, because the constitution secures the right of jury trial in all common law cases, when

the matter in demand exceeds $20. Const. U. S. Amend. 7. And in this circuit it has always been held that a reference by consent did not authorize a judgment in invitum on the report, and, if recalled, that error would lie on such a record, because of the want of a verdict to determine the damages. The court would not accordingly entertain any question on a report of referees, always regarding it as an award, and not open to examination and correction by the court, as a part of the case before it.

In the stipulation in question, the right is reserved to each party to move to set aside the report; this provision clearly indicates that it was considered a reference according to the practice of the state courts and subject to all the rules of these procedures. The defendant asserts in his deposition that he supposed he was compelled to submit to a reference, and, had he understood his rights in that respect, he would not have allowed the submission; and he, in corroboration of that understanding, states that his counsel took exceptions to the decisions of the referees, and is preparing to move the court, to set aside the report upon those exceptions. It would be grievously unjust now to give the report a sanctity and efficacy so entirely transcending the expectations and intentions of the parties. The right or privilege to move the court to set aside the report is to be regarded as essential a part of the agreement as the submission or reference itself, and, as the court cannot give the parties the benefit of that condition, it ought not to act on the agreement as if the conditions had never been inserted, and enforce the report as absolute and conclusive.

My opinion is that this qualification takes away from the reference the character of a submission to arbitration, and that the agreement to give a cognovit for the amount of the report must be understood to refer to the amount as finally settled and approved by the court, and not the amount reported by the referees. Since, therefore, the report cannot, as was contemplated in the stipulation, be brought before the court to be corrected or set aside for mistakes in law or fact, it is not that adjustment and liquidation of accounts between the parties for which the defendant was bound to confess judgment absolutely, and for this cause I will deny the motion, but without costs.

Case No. 3,806.

DENNY v. HENDERSON.

[2 Cranch, C. C. 121.][1]

Circuit Court, District of Columbia. Nov. Term, 1816.

LIMITATIONS—DISCHARGED INSOLVENT.

The act of limitations runs in favor of an insolvent debtor, notwithstanding his discharge under the insolvent act.

This was a chancery attachment against the effects of Henderson, in the hands of Mills and others. Henderson appeared and pleaded the statute of limitations. This suit was brought in 1812. The plaintiff replied, that Henderson, in 1806, took the benefit of the insolvent act, and returned this as a debt; and that in 1812 he acquired property enough to satisfy this debt. To this replication there was a general demurrer and rejoinder.

Mr. Swann, for plaintiff, contended that the insolvent act gives a new right of action upon the defendant's acquiring property, notwithstanding the act of limitations; that is, that after the discharge under the insolvent act, the statute of limitations does not run.

Mr. Taylor, for defendant.

THE COURT sustained the demurrer to the replication, and rendered judgment for the defendant on the plea of limitations.

At April term, 1819, two other cases were decided in the same way, viz.: Beverly v. Henderson [Case No. 1,378], and Bowie v. Henderson [Id. 1,730].

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

Case No. 3,807.

DENNY v. QUEEN.

[3 Cranch, C. C. 217.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

REVIEW OF JUSTICE'S DECISIONS.

In a jury trial before a justice of the peace, there is no mode in which the law of the case can be brought before this court, separated from the question of fact.

Appeal from the judgment of a justice of the peace, upon a verdict found before him. A paper was sent up, purporting to be a prayer to instruct the jury as to the law arising upon certain facts therein stated. It was not certified as a bill of exceptions.

THE COURT (nem. con.) said that as the court had heretofore decided, that when a cause had been tried by a jury before a justice of the peace, we could not constitutionally try the cause again by a jury in this court, and the court could not try it without a jury, there was not left, for this court, upon the appeal, any thing but the law of the case, as it appeared before the justice; but the act has not prescribed the mode by which the question of law should be made to appear to this court. It certainly was not now regularly before the court.

THE COURT (nem. con.) ordered the appeal to be dismissed.

DENNY v. The THOMAS SPARKS. See Case No. 10,115.

DENNY (WOOD v.). See Case No. 17,942.

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

Case No. 3,808.

The DEN ONZEHEREN.

[Cited in Stoughton v. Taylor, Case No. 13,-502. Nowhere reported; opinion not now accessible.]

DENSLEY (STOVER v.). See Case No. 13,-508.

DENSLEY (TENNY v.). See Case No. 13,-834.

DENSLOW (ANDREWS v.). See Case No. 372.

Case No. 3,809.

DENSMORE et al. v. SCHOFIELD et al.

[4 Fish. Pat. Cas. 148.] [1]

Circuit Court, N. D. Ohio. Nov. Term, 1868.

Patents—Infringement of Combination—Character of Combination — Construction of Claims.

1. If an alleged infringer uses less than all of the elements of a combination, and substitutes something for the part which he omits, unless the substitute is a mere mechanical equivalent, there is no legal liability.

[Cited in Cross v. Livermore, 9 Fed. 608.]

2. Undoubtedly, independent separable and separate things, provided they relate to the same subject, may be separately claimed in the same patent.

[Cited in McComb v. Brodie, Case No. 8,708.]

3. A combination complete in itself and more or less extensive, is in the eye of the law, so far as its patentable quality is concerned, as much an identity and separate thing as if it were not a combination, but a single thing.

4. Where a patent contained a claim for "two tanks B, B, or their equivalent, when constructed and operating in combination with an ordinary railway car," and, also, a claim for "the frames C, C, C, C, the bolts 1, 2, 3, 4, and the cleats H, H, H, H, when constructed and operating, in combination with tanks B, B, and an ordinary railway car:" *Held*, that although both of these claims were for combinations, yet they were for combinations separate in their nature, and capable, if desired, of separate use.

5. It is error to say that a patent of that kind is a unit, and that all the parts, including frames, bolts, and cleats, must be used in order to infringe either claim.

This was a motion for a new trial, in an action on the case, brought [by James and Amos Densmore against William C. Schofield and others] to recover damages for the infringement of letters patent [No. 53,794] for an "improved car for transporting petroleum," granted to plaintiffs April 10, 1866, and reissued May 29, 1866 [No. 2,261]. The case was tried in February, 1867, and resulted, under the charge of the court, in a verdict for the defendants. The grounds upon which the motion for a new trial was based, the description of the invention, and the claims of the original and reissued patents, will be found in the opinion.

J. C. Clayton and S. J. Andrews, for plaintiffs.

Ranney & Bolton, for defendants.

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

SWAYNE, Circuit Justice. This is a motion for a new trial, upon the ground that in the charge to the jury, the specifications of the patent were wrongly construed in a material particular by the court; and the question of the propriety of the instructions given comes before us for review, and is the only question to be considered. The entire charge is in writing, and is a very clear and comprehensive view of the subject before the jury. The particular part of the charge, to which exception is taken, is this: "On the part of the plaintiffs, it is claimed that their patent consists in securing two tanks upon a common railway car over its trucks, for the purpose of carrying oil in bulk. The defendants claim that the patent consists of the car with tanks fastened to it in the mode described in the specification, and for the same purpose. The only difference between them is in that that refers to the fastening of the tanks to the car. Without going into a lengthened argument, suffice it to say, that in my judgment the true construction of the letters patent is that the patent consists of the railway car with two tanks placed over the trucks, and secured and fastened to the platform substantially similar and in the way described in the specification. That a patent of this kind is a unit, and that all its parts are material, viz: the railway car, the two tanks, and the fastening. The question is then directly raised whether the cleats used by the defendants in their machine for fastening the tanks to the platform are substantially similar to the frame-work, rods, and bolts described in plaintiff's patent."

The effect of that instruction on the point of law was, that the specifications comprised as it were, one thing, an entirety; that the patent was for a combination; that combination not consisting of several separate and distinct parts of patentable and independent things, but a combination consisting of all the parts united. So that the well-known rule of law upon the subject applied that one using any particular part of one entire instrument or machine, would not be a violator of the rights secured to a plaintiff by his patent; and that if only one part, or a portion of this combination were used by the defendants—if the infringement complained of by the plaintiffs consisted in that, and that alone—then there could be no recovery: that there was no patent except for the entire combination, and that if the defendants were guilty of any infringement, it was an infringement upon the separate parts of the patent and not upon the entire combination.

The effect of this instruction upon the verdict was necessarily fatal to the cause of the plaintiff, and a verdict was accordingly rendered for the defendants.

The correctness of this instruction, which was the turning point of the case, is now before us for re-examination, and the question is, as has already been said: Is this a patent for a united and single combination, made up

of several parts, indeed, but still a unit; or is it a patent for several distinct things which may or may not be used together, and which, as separate and distinct claims, the patentee claims to cover by his patent?

In the examination of this subject, in order to avail ourselves of all the light accessible to us, it will be useful to advert to the patent issued to these plaintiffs, the patentees, April 10, 1866, which was their first patent upon the subject. That patent describes at length and with clearness in its specifications the same things, no more, no less than are described in the letters patent of May following, which is the reissued patent. After a full description of the several parts, which the plaintiffs claim as their invention, the summary proceeds as follows: "What we claim as our invention and desire to secure by letters patent, are the two tanks B, B, attached to the platform of a car A, A, by means of the frame work C, C, C, C, and C′, C′, C′, C′, together with the bolts, 1, 2, 3, 4, and 1′, 2′, 3′, 4′, directly over the trucks, when the same are constructed in the combination as hereinbefore described, and for the purpose set forth hereinbefore, or any other mechanical construction substantially the same and which will produce the same result."

Now in this patent and in this summary of the claim or claims of the patentees, one general combination is described. There is no separate claim, and there is no attempt to make a separate claim—nothing which looks in that direction, in respect to the separate parts of which the general united combination is made up. Upon this patent undoubtedly the law arising would be as it is laid down in numerous cases, that where a patent is obtained as one combination of a number of parts which in themselves are not new, there is no infringement, in the eye of the law, of the right secured by such a patent unless the entire combination is used. If the alleged infringer uses less than all of the combination and nothing else, he is not liable. If he uses less than all and substitutes something for the part omitted different from that which he omits, and which answers the same purpose, unless the substitute be a mere mechanical equivalent used for the combination, then for the reasons I have stated, and according to the rule of law as well established on the subject, there is no legal liability.

Such undoubtedly would be the rule arising upon this original patent. But that original patent was surrendered and a reissued patent was taken out by the patentees in May of the same year. That patent is also in terms for an improved car for transporting petroleum, as was the original patent. The description contained in the specification is stated at length, as follows: "On the platform of an ordinary railway car A, A, erect two large, light, tight, firm, stout tanks B, B, of wood-staves, hoops, or sheet-iron united and caulked, or of other material, and put each tank directly over one of the trucks, so that the strain of the weight of the load will be upon those parts of the car that are stronger and better able to bear it. On the top of each tank put a frame of four bars, C, C, C, C, through the corners of the frame, close to and outside of the tank, and down through the platform of the car, pass the bolts, 1, 2, 3, 4; on the ends of the bolts, above the frame and below the platform, put screws, and nuts, and washers, and fasten and press the tanks down upon the car firmly, and by means of the frame, and bolts, and screws, besides attaching and fastening the tank and car together, the frame and bolts will act as guys or braces and tend to prevent any shock or jog from the swaying of the car. Upon the platform, close to the outside and bottom of the tank, bolt the cleats or steps H, H, H, H, to keep the tank firmly in its place and prevent any jar or moving from any sudden stopping or starting of the car. In the top head of each tank make a man-hole through which to pour in the substance to be carried. Also, for a man to get into the tank for any purpose. Around the man-hole, put a casing, and over the casing and man-hole put a man-head or cover D to prevent rain or snow, or any thing from leaking or falling into the tank. At the bottom of each tank put in a faucet E by which to draw off the contents. Up the sides of each tank, next the end of the car, put the steps F, to enable one to get on and off the tank readily. And across from one tank to the other, put a run-way G, to enable brakemen and others to pass over the car with facility."

So far the specifications are nearly verbatim with the original patent. Then it proceeds: "The nature of our invention consists in combining two large, light, tight, firm, stout tanks with an ordinary railroad car, and making the tanks practically a part of the car so as to carry the desired substance in bulk in the car itself, or in a permanent fixture or part thereof, instead of in barrels, casks, hogsheads, tierces, or other movable vessels, as is now universally done on railway cars, and thereby save the carrying the barrels, casks, tierces, hogsheads, or other movable packages."

So far, this is verbatim the description in the original patent, and, if the specification stopped there, the legal result would be the same as in the case of the original patent. But it proceeds further; let us see if the further claims affect this legal result. "What we claim as our invention, and desire to secure by letters patent, are: First. The two tanks, B, B, or their equivalent, when constructed and operating in combination with an ordinary railway car substantially as and for the purposes set forth. Second. The two tanks, B, B, or their equivalent, when set directly, or nearly so, over the car-trucks, and when constructed and operating in com-

bination with an ordinary railway car, substantially as, and for the purposes, set forth."

Viewing these two claims as a summary, in the light of the preceding description—and the whole instrument must be construed by its entire language—viewing these two claims in this light, it seems to me to be very clear that they mean substantially the same thing. One goes a little more into detail than the other, but in the view which I take of their proper construction, upon the face of the paper, my conclusion is that they mean, as I have remarked, substantially the same thing, and that the two claims intend to claim, and do claim a combination of two tanks with a railway car, each tank put over one of the trucks; or if the combination of the tanks with the car be too broad, it is not too broad in the light of the obvious meaning of this claim—that the tanks may be used in this way applied and made fixtures to the car; or the vessel used to hold the oil may be constructed originally with the car, and in the language of the prior part of the specification "made a part of the car." The difference is immaterial, and one would be equivalent to the other. Here again, in my judgment, is a combination claim, a combination to the limited extent only to which I have adverted in giving this construction. It is a combination of the tanks, or the equivalent of tanks, with the car, each tank resting over one of the trucks of the car.

Then comes the third claim: "Third. The frames C, C, C, C, the bolts 1, 2, 3, and 4, and the cleats H, H, H, H, when constructed and operating in combination with tanks B, B, and an ordinary railway car, substantially as, and for the purposes, set forth." In my judgment this is another separate, distinct, and independent claim for a combination—a combination to be made with the prior combination made by the first and second claims, and which first combination has been already sufficiently considered. The second claim is for a particular instrumentality. This third claim is substantially distinct, or it is to be used in combination with the prior combination, if used at all.

Then comes the fourth claim: "Fourth. The steps F, F, the man-holes and the man-heads D, D, the faucets E, E, and the run-way G, when constructed and arranged in combination with tanks B, B, and an ordinary railway car substantially as herein set forth and described." In my judgment, this is for another instrumentality to be used in combination with the first one described.

To speak more specifically of the claims in this patent, the proper construction of the claims is, that the two first claims are for a combination of a car and tanks. The third claim is for another and distinct, separate, and separable thing, to be used with the prior combination. Then the fourth claim for the steps, etc., is to be used also in combination with the first combination as expressed in the first and second claims.

Now, it is true, in the view which I take of this part of the patent, that these are combinations, but separate in their nature, and may be used separately; and it was the meaning of the patent or of the patentees in the specification that they should be separated, or they might be separately used, if any one desired to so use them. Now, undoubtedly, independent things, separable and separate things, where any combination arises, provided they be cognate, relate tto the same invention and have relation to the same subject, the same object to be accomplished; undoubtedly these separate claims can be made in the same patent. If they have no such tie of connection as I have mentioned; if they are for separate and entirely different things, then the patent would be void because it attempted to unite what can not be united; but if they be connected by a common tie, a common object or purpose, then undoubtedly these different claims can be united in one and the same patent. So far as I am advised, an objection, such as that adopted in this case, has never been sustained, founded upon a patent of this character.

Now, here, as I have remarked, there are combinations in this case, and the patent is for such combinations throughout. It claims nothing new from the beginning to the end. But undoubtedly there may be separate combinations and each separate combination may or may not all be covered by the same patent, as there may be separate and several things in the combination all covered by the same patent. When there is a combination complete in itself, more or less extensive, it is in the eye of the law, so far as its patentable quality is concerned, as much an identity and separate thing as if it were not a combination, but a single thing independent and complete in itself, and having no element of combination in it. Then I hold that the first and second claims, in the summary of this patent, are for such a combination, and there they stop. Then there is the third claim to be used in combination with the prior and independent combination; and then there is the fourth claim, still relating to the other claims, and also for old things, to be used with the separate and independent combination described in the first and second claims.

Now if this construction of the patent be correct, an infringer might be guilty of an infringement of the combination of the tanks with the car, although he did not use the frame work described in the third claim, nor the steps described in the fourth. This, after the closest investigation I have been able to give the subject, and I have examined it with a good deal of care; is the conclusion to which I have been constrained to come.

Now if this were the proper construction

of the patent, then there would be still another branch of the case with respect to the question of novelty and utility; but that would be a question exclusively for the jury, and it may be that here the testimony showed that there were no such elements of invention in the subject as are indispensable —as would be requisite—in the patent law.

But however clear that may have been, that was a conclusion for the jury. It was a question upon which the plaintiffs had a right to the benefit of an investigation before the jury—of course under the enlightened instruction of the court. The construction of the patent given in this case below, as I understand it, in effect withdrew this question entirely from the action of the jury. However that might have been, under that instruction, it seems to me very clear that there were questions—the questions I have mentioned—which should have been submitted to the jury.

The effect of the claim for an independent combination, as made in the first and second claims of the patent, the legal presumption flowing from such a state of the case, is, that the plaintiffs, however clear the evidence may have been against them upon the points of utility and novelty, may have sustained prejudice, and if that be so, there is but one step further, and that is, the verdict must be set aside. The verdict will be set aside, a new trial granted, and costs will abide the result.

[NOTE. A suit in equity between the same parties for infringement of the same patent resulted adversely to the complainants, and the decree was affirmed, on appeal to the supreme court, on the ground that the patent was void for want of novelty and invention. See Denmore v. Scofield, 102 U. S. 375.]

Case No. 3,809a.

DENT v. ASHLEY.

[Hempst. 54.][1]

Superior Court, Territory of Arkansas. April, 1828.

ADMINISTRATORS IN DIFFERENT STATES — PRIVITY —ACTIONS ON JUDGMENTS.

Where administration of an estate is granted in two states, there is no privity between the administrators, and hence a judgment against one cannot be made the basis of an action against the other.

[Action at law by Frederick Dent against Chester Ashley, administrator of William M. O'Hara.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, Judges.

[1] [Reported by Samuel H. Hempstead, Esq.]

ESKRIDGE, Judge, delivered the opinion of the court.

This is an action of debt, brought by the plaintiff against Ashley, administrator of the estate of William M. O'Hara, deceased, upon a judgment recovered in the state of Missouri by the plaintiff Dent against Susan O'Hara, administratrix, and Paul Anderson and Robert Simpson, administrators, of the estate of William M. O'Hara, in the state of Missouri. The defendant filed five several pleas; to the second, fourth and fifth of which, the plaintiff demurs generally; and takes issue upon the first and third. This state of pleading enables us to look back to the declaration, and ascertain whether a sufficient cause of action has been set forth in it, to authorize a judgment in favor of the plaintiff. Beauchamp v. Mudd, Hardin, 174. The judgment upon which this action is founded, is against the administrators of O'Hara, in Missouri, and we are at a loss to see how it can be used as evidence of debt, or be the basis of a suit against the administrators of O'Hara here. There is, unquestionably, according to the well-known rules of law, no connection or privity between the administrators in Missouri and the administrator in Arkansas. 3 P. Wms. 369; 2 Rawle, 431; 5 Mass. 67. The principle is universally acknowledged, that no one can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. The reason is obvious. He has no power of cross-examining witnesses, or of adducing evidence in maintenance of his rights; in short, he is deprived of all means provided by law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice, that he should be bound by the result of an inquiry to which he is altogether a stranger. Wood v. Davis, 7 Cranch [11 U. S.] 271; Davis v. Wood, 1 Wheat. [14 U. S.] 6; Paynes v. Coles, 1 Munf. 373; Turpin v. Thomas, 2 Hen. & M. 139; Jackson v. Vedder, 3 Johns. 8; Case v. Reeve, 14 Johns. 79,—are in illustration of this rule. In the case of Grout v. Chamberlin, 4 Mass. 613, it is decided that a judgment recovered by an executor is no bar to an action brought by the administrator de bonis non cum testamento annexo, for the same cause, there being no privity. The first judgment cannot, at common law, be enforced by the administrator de bonis non, but becomes inoperative. We are, therefore, of opinion that the declaration is insufficient in not setting forth a ground of action.[2] Judgment for defendant.

[2] Stacy v. Thrasher, 6 How. [47 U. S.] 44; Pond v. Makepeace, 2 Metc. [Mass.] 114; (as to privity, 1 Greenl. Ev. § 523;) Chapman v. Fish, 6 Hill, 554; Aspden v. Nixon, 4 How. [45 U. S.] 467.

Case No. 3,809b.

DENT v. ASHLEY.

[Hempst. 55.][1]

Superior Court, Territory of Arkansas. April, 1828.

NEGOTIABLE INSTRUMENTS—LIABILITY OF ASSIGNOR.

The assignee of a bond or note is bound to use due diligence, by prosecuting the maker to insolvency, before he can resort to the assignor, unless the maker is notoriously insolvent, or has removed from the state, so as to render suit unnecessary or impossible or an useless act.

[This is an action of assumpsit brought by Frederick Dent against Chester Ashley, administrator of William O'Hara.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, Judges.

OPINION OF THE COURT. This is an action on the case brought upon the assignment of a promissory note, given by W. S. Townsend to O'Hara, and assigned by him to the plaintiff, in the following words: "I transfer the within note to Frederick Dent, and guarantee the ultimate payment of the same. W. M. O'Hara." The plaintiff has demurred to two pleas in bar, filed by the defendant, and the only questions made at the bar, relate to the sufficiency of the declaration. The material averments in the declaration are, that the note was executed by the obligor to O'Hara, and by him assigned to the plaintiff in the words above recited, and at the time the note became due and payable, was duly presented to the obligor for payment; that the obligor failed and refused to pay the amount or any part thereof to the plaintiff; and that O'Hara in his lifetime, and since his death the defendant, have failed and refused to pay the amount due by the note. Are these averments sufficient to maintain the action? The assignment in this case is not in the usual form, but contains an express guarantee or promise by the assignor for the ultimate payment of the note. This does not change or vary his liability from that of an ordinary assignor where no such guarantee is expressed, and this position is clearly supported by the cases of Goodall v. Stuart, 2 Hen. & M. 105, and Campbell v. Hopson, 1 A. K. Marsh. 228; the assignment in these cases being virtually the same with the one in this case. What is the liability of the assignor of a bond or note? The statute of this country, which authorizes the assignment of bonds and promissory notes, is substantially the same with the statutes of Virginia and Kentucky upon that subject, and it has been long settled in those states, by a uniform current of decisions, that the assignee of a bond or note, not being negotiable as a mercantile instrument, must, to enable himself to recover of the assignor, prosecute the payor or obligor to insolvency. 2 Wash. [Va.] 219; 2 Hen. & M. 105; 5 Hen. & M. 456; 1 Bibb, 542; 2 Bibb, 34; 5 Litt. [Ky.] 331.

The assignee of a bond or note is bound to use due diligence by suit to recover the debt from the maker of the note, before he can resort to the assignor; unless, indeed, there are special circumstances in the case, rendering it unnecessary or impossible to sue the obligor, such, for example, as notorious insolvency, or removal from the state. This doctrine having been settled by the highest courts of Virginia and Kentucky, and approved by the adjudications of the supreme court of the United States, we are not disposed to give a different construction to a statute precisely analogous to that upon which those decisions were based. We think the doctrine supported as well by reason as by authority. Applying it to the case before the court, the declaration will be found to be defective, and insufficient to maintain the suit. There is no averment of any diligence whatever to recover the money of the obligor of the note, except a bare demand. To entitle the plaintiff to recover in the present action, it is indispensable that he should have averred, that without delay he instituted suit against the obligor; had held him to bail, if bail was demandable; had pursued him to insolvency by taking a ca. sa. against his body; and after using due diligence, and all the means which the law provided to coerce the payment of the debt, he failed to obtain it. The declaration in this case, containing no allegation of due diligence by suit, to recover the money of the maker of the note, is, therefore, fatally defective, and insufficient to maintain the action. It has been argued, that by the statute authorizing the assignment of bonds and notes, they are placed upon the same footing with bills of exchange. It is true, that by the statute of Anne, bonds and notes, when assigned, are placed upon the same footing with bills of exchange; but it is by express provision that they are placed upon the same footing, and no such provision is to be found in the statute of this country. The legislature, with the statute of Anne before them, have made notes, etc., assignable without using the expression, "in like manner with bills of exchange;" have enabled the assignee to maintain an action in his own name; and have declared that they shall be subject to the same obligations in the hands of the assignee, that they were subject to in the hands of the assignor. This proves that our legislature, patterning after Virginia, whose laws on the subject are the same in substance, did not intend to elevate them to the rank of mercantile paper, nor that they should be governed by the law of merchants.

But if the doctrine applicable to bills of exchange were applied to this case, still no cause of action is shown in the declaration.

[1] [Reported by Samuel H. Hempstead, Esq.]

To make the assignor of a bill of exchange liable, notice of the non-payment of the bill must be averred and proved. No such averment is to be found in the declaration.

There is another objection to the declaration, which renders it fatally defective. The assignment is not averred to have been made for any good or valuable consideration, which we deem a material averment. The assignment itself is a prima facie evidence of a valid consideration, but this does not dispense with the necessity of averring it in the declaration. The demurrer is overruled, and the declaration adjudged insufficient.

Case No. 3,810.

DENTAL VULCANITE CO. v. WETHERBEE.

[2 Cliff. 555;[1] 3 Fish. Pat. Cas. 87.]

Circuit Court, D. Massachusetts. May Term, 1866.

SUIT BY CORPORATION — PLEA OF NO CORPORATE EXISTENCE—PATENTS — ASSIGNMENT — SURRENDER AND REISSUE—INVENTION AS BETWEEN EMPLOYER AND EMPLOYEE—ABANDONMENT.

1. Certain persons in Massachusetts associated themselves together, prior to the filing of the bill in this case, by articles of agreement in writing, and formed a corporation by the name used in the bill of complaint, to manufacture and sell certain articles under letters-patent which were by the inventor assigned to the company. It was contended that the associates were not a corporation under Gen. St. Mass. c. 61, p. 341. The defence was not set up in the answer to the bill, but defendant gave notice of his intention to plead the same in bar of the suit. *Held*, that such defence must be pleaded in abatement, not in bar, and could not be put in under the general issue.

2. Corporations may have the same remedies at law or in equity as natural persons; and the general issue pleaded to a suit brought by the corporation is an admission of its corporate existence.

3. The entire interest in a patent was assigned by the inventor, and subsequent to such assignment an application for reissue was signed by and the reissue granted to him. *Held*, that in the absence of fraud or concealment it could not be said that the reissue was void, the assignment being duly recorded in the patent office, and the surrender having been made with the knowledge and consent of the assignee.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

4. Under such circumstances a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings which led to the reissue were irregular, unless it be shown that the proceedings were contrary to law, or that the patent was granted to the wrong party.

5. The act of congress does not in terms require that a surrender shall be in writing.

6. Where it appeared that a person was employed by an alleged inventor to make experiments upon the invention, and that such employee before that time had tried a single imperfect experiment; that previous to such person being employed, the alleged inventor had filed a caveat upon the invention; that a contract was entered into between the two, in which the patentee was treated as inventor and the other party as an employee, and the employee had never in his lifetime made any claim as the inventor: *Held*, that although the experiments were conducted to a successful issue, the person employed could be considered neither a sole nor joint inventor of the improvement.

7. An application for a patent was first made in 1855, and rejected, on appeal to the commissioner, in 1856. No further appeal or new application was made till March 25, 1864, when a second application was made, which was successful. Between 1856 and 1864 the invention had gone into public use with the inventor's knowledge and consent, as shown in the testimony, and the inventor had made certain assignments and sales of interests in the invention. *Held*, that these facts did not show actual abandonment.

[Cited in Bevin v. East Hampton Bell Co., Case No. 1,379; Weston v. White, Id. 17,459; Colgate v. W. U. Tel. Co., Id. 2,995. Explained in Johnsen v. Fassman, Id. 7,365; Goodyear Dental Vulcanite Co. v. Smith, Id. 5,598. Followed in Goodyear Dental Vulcanite Co. v. Root, Id. 5,597.]

8. Delays in the patent office, which the inventor cannot prevent, should not under any circumstances affect the validity of his patent when granted.

[9. Followed in Goodyear Dental Vulcanite Co. v. Gardner, Case No. 5,591, as to points not specified.]

Bill in equity [by the Dental Vulcanite Company against Isaac J. Wetherbee] founded upon letters-patent [No. 43,009] for a new and useful improvement in artificial gums and palates. Pending the suit and subsequently to the filing of the answer the patent was twice reissued. Subsequent to the last reissue the complainants filed a supplemental bill of complaint, to which answer was duly made, and the cause was fully heard upon pleadings and proofs. The original patent was granted to John A. Cummings, June 7, 1864, and in the June following it was assigned to the complainants. In October following the first bill was filed, and in December the respondent answered. The first reissue was granted to the inventor, and not to the assignees as it should have been, but on return to the patent office the error was corrected. The second reissue was to correct a date erroneously given in the first, and was granted to the complainants at the request of the inventor and original patentee. The petition for the second surrender and reissue was also signed by the original patentee, and in terms purported to surrender the original patent instead of the first reissue. The date of the first reissue was January 10, 1865; that of the second, March 21, same year. [No. 1,904.] It appeared that John A. Cummings first made an application for a patent for his invention in 1855, and that the same was, after three examinations, finally rejected, upon appeal by the commissioner of patents, in 1856. The application was not further appealed, and was not renewed till March 25, 1864, when a new application was filed, upon which the patent issued. In the interval between the filing of the original appli-

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

cation and that of 1864, the invention had gone into use to a considerable extent, with the knowledge and consent of the then applicant proved thereto; and it also appeared that during the same interval the inventor had made certain assignments of interests in the invention. Certain letters of the patentee and other evidence were introduced, tending to show that the inventor had not relinquished his design of obtaining a patent at any time between the date of the original application and the final allowance of the patents. It was urged by the defence that the Dental Vulcanite Company was not a corporation under the laws of Massachusetts, as claimed in the bill; that being an association of persons, they had not conformed to the state statute regulating such associations, either in their proceedings for organization or in their subsequent acts and doings; that the alleged inventor was not the original and first inventor of the improvement; that he had after application abandoned his invention, because the same had gone into public use before the patent was finally obtained. It was also objected that the plaintiff company did not carry on the manufacturing business within the meaning of chapter sixty-one of the General Statutes of Massachusetts. A person by the name of Bevin was employed by the inventor to experiment upon the invention, and through him it was conducted to a successful issue. Previous to his employment, Bevin had made an imperfect experiment, and a caveat had been filed by the alleged inventor in his own name. It was urged in defence that Bevin was the real inventor.

B. R. Curtis, Causten Browne, and J. E. Maynadier, for complainants.

Whatever force there may be in the alleged misfeasance or nonfeasance of the complainant corporation, and whatever its effect in other proceedings, it cannot avail in this suit where the complainant is a legal corporation, holding the legal title to this patent, and in a suit against a third party a mere wrongdoer. As to validity of the first reissue, see Gayler v. Wilder, 10 How. [51 U. S.] 477; Woodworth v. Stone [Case No. 18,021]. The second reissue was to correct a date erroneously given in the first one, and was granted directly to the Dental Vulcanite Company as Cummings's assignee; but the petition making the surrender and asking for the second reissue was irregular in two particulars: it in terms surrendered the original patent instead of the first reissue; and it was signed by Cummings, who had assigned his whole interest, instead of by the company his assignees. The surrender in terms of the original patent instead of the first reissue was a clerical error which the commissioner rightly corrected of his own motion. The first reissue was that which was surrendered in fact, and was the only grant in existence to be surrendered. Or the error in question may be regarded as simply a misdescription of the thing surrendered, the identity of the thing itself being incapable of being mistaken. There is no requirement of law that a patent should be surrendered by writing. This is provided for by rule for convenience and for certainty. But a mere manual delivery of the old patent by the person entitled to surrender it, or by his agent, with intention to surrender, and an acceptance and cancellation by the commissioner and the issuing of new letters-patent for the same invention on an amended specification, would clearly be a substantial execution of the law providing for reissues. Upon the question of abandonment, Godfrey v. Eames, 1 Wall. [68 U. S.] 317, and Adams v. Jones [Case No. 57], were cited.

A. F. Badger, G. S. Boutwell, and Joel Giles, for respondent.

The Dental Vulcanite Company is not a legally organized corporation. Gen. St. c. 61, §§ 1, 6; St. 1851, c. 133, §§ 1, 6; St. 1852, c. 9, §§ 1, 2; Gen. St. c. 61, § 5; and Gen. St. c. 60, § 14. The original patent, dated June 7, 1864, was not lawfully issued and delivered to Cummings. Cummings made an application for a patent for substantially the same thing, April 12, 1855, which was rejected finally, February 6, 1856, in which decision Cummings acquiesced without appeal, and made no new application till March 25, 1864. If the rejection was an error, the neglect of Cummings to appeal to a judge of the circuit court for the district of Columbia for a period of more than eight years was a bar to further proceedings either by appeal or by renewal of his application. St. 1836, c. 357, § 7 [5 Stat. 119]; St. 1839, c. 88, § 11 [Id. 354]; St. 1852, c. 107, § 1 [10 Stat. 75]; Law, Dig. p. 148, § 55; and Judge Merrick's opinion (MS.) Ex parte Raymond [Case No. 11,592a]. An application for a patent in the sense of the patent law is an entirety, embracing all that should be done by the applicant until his application terminates in a final rejection or in the grant of a patent; and neglect to prosecute his application for more than two years is an abandonment of his invention to the public. St. 1861, § 12 [12 Stat. 248]; Godfrey v. Eames, 1 Wall. [68 U. S.] 317; rules of patent office in force in 1855, §§ 37-39, 105. The applicant may make as many applications as he pleases at any time not more than two years subsequent to the time of the public use of the invention. Cummings acquiesced in the final decision of the commissioner, February 6, 1856, and the subsequent and general use of the article claimed by Cummings having been by his consent and allowance, he must be held in law to have abandoned his invention, even if his claim to be the original and first inventor were not disputed. R. 11, § 10; Kendall v. Winsor, 21 How. [62 U. S.] 329, and Law, Dig. p. 95, § 31; Pennock v.

Dialogue, 2 Pet. [27 U. S.] 1; Shaw v. Cooper, 7 Pet. [32 U. S.] 292. Sales of the invention justify the inference of abandonment. The application of March 25, 1864, was a new application, and was so treated by the applicant, and by the patent office, while in fact the art of forming the plate, in which artificial teeth are inserted, of hard rubber, had been generally practised for more than two years. St. March 2, 1861, c. 88, § 10. The reissues of the patent to Cummings, dated January 10, 1865, and March 21, 1865, were not made according to law. Because the original patent of June 7, 1864, was surrendered by Cummings who did not own it; and the reissue of January 10, 1865, was granted to Cummings, and not to the Dental Vulcanite Company, and has never been surrendered; and the reissue of March 21, 1865, was granted upon the surrender by Cummings, of said original patent of June 7, 1864, which he did not own, and which did not then exist. A void act cannot be made good by a subsequent approval; the material act in a reissue is the surrender of the existing patent by the owner. If that be void the proceedings of the government in the grant of a reissue are null.

CLIFFORD, Circuit Justice. Certain preliminary objections have been made by the respondent to the right of the complainants to maintain the suit, which will first be considered. Respondent contends that the complainants are not a corporation as alleged in the bill of complaint. They claim to be a corporation legally organized under the law of the state. Gen. St. c. 61, p. 341. Section one of that chapter provides, among other things, that "three or more persons, who shall have associated themselves together by articles of agreement in writing for the purpose of . . . . carrying on any mechanical, mining, quarrying, or manufacturing business . . . . and shall have complied with the provisions of this chapter, shall be and remain a corporation under any name indicating their corporate character assumed in their articles of agreement which is not previously in use by any other corporation or company." Under that provision, the persons claiming to constitute the corporation complainants associated themselves together, prior to the filing of the original bill of complaint, by articles of agreement in writing, and formed the corporation by the name assumed in the bill of complaint, to manufacture and sell "artificial gums and palates of vulcanite or hard rubber, under letters-patent granted John A. Cummings, dated June 7, 1864, and assigned to said corporation." No such defence was set up in the original answer of the respondent, but he gave notice on the 2d of January, 1865, that he should insist in bar of the suit that the complainants were not a corporation legally organized under the laws of the state, and he repeated that allegation in his supplemental answer. Some of the objections taken to the proceedings were overruled at the hearing, and therefore will not be made the subject of remark. The principal objections which remain open are: (1) That the business of the company, as declared in the articles of association, is not a manufacturing business within the true intent and meaning of the provision to which reference has been made; and (2) that the company does not in point of fact manufacture the alleged improvement, nor carry on any manufacturing business. Strong doubts are entertained whether there is any merit in the objections, even if it be admitted that such a defence if valid may be pleaded in bar as well as in abatement. Doubtless the nature of the improvement is such that it is necessarily made to order; but it is difficult to see how that circumstance can divest the patented article of the character of a manufacture. Manufacturers often work to order, and it is not perceived that it can make any difference in respect to the question under consideration whether the article was made for sale, or was made to order, as in either case it is manufactured before it is actually sold. Licenses are granted by the complainants, as appears by the allegations in the bill of complaint; but there is also evidence in the case which shows that they have agents who manufacture the patented article. They complied in form with the requirements of the statute, and inasmuch as the authorities of the state have not called the validity of their organization in question, it cannot be admitted that a mere wrongdoer can set up such a defect, if it be one, as a justification of his wrongful acts. But it is not necessary to place the decision of the court upon either of those grounds, as it is clearly settled by the supreme court that such a defence must be pleaded in abatement, and that it cannot be pleaded in bar, nor be given in evidence under the general issue. Corporations may have the same remedies at law or in equity as natural persons, and the rule established by the supreme court is, that if the defendant plead the general issue in a suit brought by a corporation, it is an admission of the corporate existence of the plaintiffs, and dispenses with the necessity of any proof on their part to sustain that allegation. By pleading to the merits, said Judge Story, in the case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 450, the defendant necessarily admitted the capacity of the plaintiffs to sue. If he intended to take that exception, it should have been done by a plea in abatement, and his omission to do so was a waiver of the objection. Kane v. Paul, 14 Pet. [39 U. S.] 41; Childress v. Emory, 8 Wheat. [21 U. S.] 642. Reference was made in the argument to the fact that the respondent, on the 2d of January, 1865, in the paper filed at that time, giving notice of additional matters of defence not specified in the original answers, states that he will insist in bar of the suit that the plaintiffs are not a corporation legally organized under the laws of the state; but the

paper having been filed without leave to amend cannot be regarded as an amendment to the original answer. Looking at the objection in any point of view, we are of the opinion that it cannot be sustained.

Objection is also made by the respondent to the proceedings of the patent office on granting both the first and the second reissued patents, and he insists that the errors were of such a character that the last reissued patent is void. Recurring to the dates, it will be seen that the assignment to the complainants was prior to the surrender of the original patent; and the record shows that the instrument of assignment was on file in the patent office when the application for the reissue was presented. Fraud is not imputed, and there is no pretence of intentional error or concealment. The errors suggested are: 1. That the application for the first reissue was signed by the original patentee; and, 2. That the patent office in the first instance actually granted the reissue to the applicant. Whether the mistake was first discovered by the patent office or by the party named as patentee does not appear, but it does appear that the letters-patent were immediately returned to the commissioner, and that the mistake was corrected as a clerical error. Unless it could be corrected as a clerical error, it could not be corrected at all, as it was clearly not a case falling within the provision authorizing a surrender and reissue. Rules of the patent office furnish a form of an application for the surrender of a patent; but the act of congress does not in terms require that it shall be in writing. Patents may doubtless be surrendered on petition or by delivery as the rules of the patent office may prescribe, and in the cases specified in the act of congress a new patent may be issued to the original inventor, or, in case of an assignment, to his assignees. Where the assignment covers the whole interest of the inventor, present and prospective, it is undoubtedly more regular that the application for the surrender should be made by the assignee; but, even in that case, it cannot be admitted that the reissue is void, if the assignment was duly recorded in the patent office, and the application for the surrender and reissue was made with the knowledge and consent of the assignee. Letters-patent must in all cases conform to the requirements in the act of congress; but where the reissued patent is correct in form, and there is no proof of fraud, intentional error, or concealment, a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings which led to the reissue were irregular, unless it be shown that the proceedings were contrary to law, or that the patent was granted to the wrong party. Correction of the error in this case was made by the commissioner at the request of the assignor of the patent; and he stated in the same communication that the assignment to the complainants was on record in the patent office.

The second surrender was asked merely to correct an error of date in the first reissue; and it is obvious that the suggestion of error was well founded, and that the correction requested was one proper to be made. Two errors also are suggested in the proceedings which led to the second reissue: (1) That the application for the surrender of the patent was signed by the original inventor; and, (2) that the patent described in the application for the surrender was the original patent, instead of the first reissue, as it should have been. Evidently the first objection is without merit, as the application to surrender the patent referred to the assignment, and contained the request that the new patent might be issued to the complainants. Pursuant to that request, the reissue was granted; and the complainants, having adopted the surrender and accepted the new patent, are estopped to deny either the authority of the applicant or that of the commissioner. See "Surrender," 1 Com. Dig. 1; 10 Coke, 67b; Shep. Touch. 301–303. Complaint certainly cannot be made by the applicant, because it was his own act; and it is equally clear that the government cannot be heard to complain, because there is but one patent in existence for the invention, and the commissioner had full knowledge of all the circumstances.

The remaining preliminary objection is, that the description of the patent in the application for the surrender was erroneous. Suppose that is so, still it is apparent that all the papers were before the commissioner, and that he had full knowledge of all the circumstances and of what the patentees desired to accomplish. The averment of the answer is merely that the reissues were not made according to law; but it is not alleged or proved that there is any error in the records of the patent office, except what appears in the application for the surrender. The statement in the patent is, that the first reissue was surrendered and cancelled; and, in the absence of any proof to the contrary, the presumption of law is, that the statement as there made is correct, and that the surrender was made according to law and the rules of the patent office.

Coming to the merits of the case, it becomes necessary to ascertain the character of the invention, and the true construction of the patent. Present suit is founded upon the second reissued patent. Claim of the patent is, "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The invention is designated in the patent as a new and useful improvement in artificial gums and palates; but it is described in the beginning of the specification as a new and useful improvement in plates for artificial teeth, which, perhaps, is the better general description. Adopting the usual order, the inventor, in the first place,

points out the objections to and inconvenlences in the old mode of attaching artificial teeth to a metallic plate, and of fitting the same to the roof of the mouth. They are, as stated, that the metal was expensive, and that the plate, being hard and unyielding, was apt to injure the mouth, and that its tendency was to impede mastication and obstruct articulation. He then proceeds to say that his invention consists in forming the plate, to which the teeth or teeth and gums are attached, of hard rubber or vulcanite, so called; and describes the hard rubber or vulcanite as an elastic material, possessing and retaining, when used in that way, sufficient rigidity for the purpose of mastication, and being pliable enough at the same time to yield a little to the motions of the mouth. Description is then given of the manner of making the hard-rubber plates, from which it appears that impressions are taken of the mouth, or that part of it the plate is to fit, of wax or plaster, in the same manner as is usually practised in the construction of gold plates for artificial teeth. Superadded to that is also a description of the means employed in setting and securing the teeth, or also of the kinds of teeth which may be employed. They are set in place and adjusted to the proper distance and fullness in the same manner as practised in setting teeth in gold plates. But they are provided with pins projecting in such a manner that the rubber will close around them and hold them secure in position. When completed, the plaster mould, with the teeth set as described, is carefully filled with soft rubber, and the same is made secure in its position by placing another plaster mould over it, and while in that condition it is heated or baked in an oven or in some other suitable way. The statement of the patentee is, that the soft rubber or gum is to be compounded with sulphur, &c., in the manner prescribed in the hard-rubber patent, and is to be subjected to sufficient heat to vulcanize or harden it, as directed in that patent. Unless the soft rubber is colored when purchased from the owner of the hard-rubber patent, it is also to be colored in imitation of the natural gums by mixing it with vermilion or other suitable coloring matter while in the soft state. After the plate has been heated or baked sufficiently to convert it into hard rubber, the mould is removed and the plate is then polished for use. The claim of the patent conforms to the description of the invention as given in the specification; and it is not perceived that any form of words can render it more definite.

Several defences are set up by the respondent upon the merits; but the one most pressed at the argument was, that the assignor if the complainants is not the original and first inventor of the improvement described in the patent. The assignees hold the patent, and they have introduced it in evidence; and having done so, the presumption on that issue is in favor of the complainants. Letters-patent are granted by public authority, and when issued, and regular in form, the presumption is that the power was rightly exercised; and he who alleges the contrary must prove it. Considering the mass of testimony and documentary proofs upon this issue, it is deemed inexpedient to do much more than to state our conclusions. Neither party would be benefited by an attempt to remark upon all the proofs in the case, and it would necessarily extend the opinion to an unreasonable length. Suffice it to say, we have carefully examined the evidence, and, in view of all the facts and circumstances, are fully satisfied that the original patentee, in the contemplation of the patent law, was the original and first inventor of the improvement described in that patent. The respondent contends that the improvement was made by F. A. Bevin, or that the latter was at least a joint inventor with the original patentee. But it is not possible to sustain the first branch of the proposition, because the evidence introduced for that purpose is not sufficient to change the burden of proof, as it fails to show that the person named ever did anything before he was employed by the original patentee, more than try a single imperfect experiment. On the other hand it clearly appears that the original patentee had filed his caveat in the patent office before he had even made the acquaintance of the person supposed by the respondent to be the inventor of the improvement. Such a theory finds no satisfactory support in the proofs, and it is dismissed without further remark. Undoubtedly Bevin went into the employment of the original patentee in the fall of 1853, or early in 1854; but he went abroad in the spring of 1954, and did not return till the fall of that year. When he returned, he commenced, under the directions of the original patentee, the manufacture of hard-rubber plates. They entered into a written contract on the 2d of April, 1855; and the terms of that instrument show that both parties regarded the invention as belonging to the original patentee. By the terms of the instrument it appears that the original patentee had filed a caveat, preparatory to taking letters-patent, and that the other party had already rendered services in perfecting the invention. Substance of the agreement was, that Cummings should furnish all the pecuniary means, have the results, and that Bevin should make the experiments, and be entitled to one third of the interest. But the whole instrument treats Cummings as the inventor and Bevin as the employee. The same conclusion is drawn from the correspondence in the case, which is quite too voluminous to be reproduced. All the conduct of Bevin speaks the same language, and that remark is especially true of his conduct when Cummings was about to apply for a patent. His certificates given at that time are quite decisive, not only that he

did not regard himself as a prior inventor to the original patentee, but that he did not even claim or pretend to be a joint inventor as is supposed by the respondent. He never made any such claim in his lifetime, and no such claim has been made by his legal representatives since his decease. Our conclusion is that the defence on this point is not made out.

The next objection to be noticed is, that the inventor abandoned his invention because his application for a patent, which was made April 12, 1855, was rejected February 6, 1856, and because he did not appeal at all or make any new application until the 25th of March, 1864. Strong doubts are entertained whether any new application was necessary; but if it was, it is believed to be well settled that the second application must be regarded as having been filed in aid of the first, on which the rejection took place. Godfrey v. Eames, 1 Wall. [68 U. S.] 317.

Actual abandonment is not satisfactorily proved; and it is not possible to hold that any use of the invention without the consent of the inventor, while his application for a patent was pending in the patent office, can defeat the operation of the letters-patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor if his patent is allowed to have full operation after it is granted, but it would be very great injustice to hold that any delay which the inventor could not prevent, should under any circumstances affect the validity of his patent.

Another objection is, that the second reissued patent is not for the same invention as that described in the original specification. Comparing the two instruments, it is not perceived that there is any substantial difference between them in respect to anything embraced in the invention. The directions are more specific in the reissued patent, but there does not appear to be any such change in the description of the invention as will support the objection taken by the respondent.

Passing over certain minor objections, it only remains to ascertain whether the charge of infringement is maintained. Charge of the bill of complaint is, that the respondent has manufactured, used, and sold, and still continues to manufacture, use, and sell, many artificial gums and palates embracing the improvement and invention described in the letters-patent of the complainants. The reference in the supplemental answer is to the original answer, and it is the conclusion of the court that the latter, in legal contemplation, admits the charge of infringement. Complainants are entitled to a decree for an account and for an injunction.

[NOTE. The original patent No. 43,009, granted to J. A. Cummings, June 17, 1864, was involved in the case of Goodyear v. Hills, Case No. 5,571a. The reissue No. 1,904, dated March 21, 1865, was involved in the following cases: Goodyear Dental Vulcanite Co. v. Smith, Case No. 5,598, 93 U. S. 486; Same v. Davis, Case No. 5,589, 102 U. S. 222; Same v. Preterre, Case No. 5,596; Same v. Root, Id. 5,597; Same v. Willis, Id. 5,603; Same v. Flagg, Id. 5,590; Same v. Gardiner, Id. 5,591; Same v. Brightwell, McArthur & M. 74; Same v. Van Antwerp, Case No. 5,600; Same v Osgood, Id. 5,594.]

DENTON (MAGEE v.). See Case No. 8,943.

DENTON (PEABODY v.). See Case No. 10,-867.

Case No. 3,811.

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

[See Case No. 2,387.]

DENVER & R. G. RY. CO. (CANON CITY & S. J. RY. CO. v.). See Case No. 2,387.

DEPEW (HOLYOKE v.). See Case No. 6,-652.

Case No. 3,812.

DEPOSIT SAV. ASS'N v. MARKS et al.

[3 Woods, 553;[1] 23 Int. Rev. Rec. 241; 25 Pittsb. Leg. J. 3.]

Circuit Court, S. D. Georgia. June Term, 1877.

TAX ON STATE BANK NOTES.

Where a state bank, or state banking association, uses for circulation and pays out its own notes, such notes are liable to the tax of ten per cent. imposed by section 3412 of the Revised Statutes.

By section 3412 of the Revised Statutes of the United States, being a re-enactment of the sixth section of the act of March 3, 1865 [13 Stat. 484], as amended by act of July 13, 1866 [14 Stat. 146], it is provided that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, or of any state bank or state banking association, used for circulation and paid out by them. By the agreed state of facts in this case, it appeared that the plaintiff was an incorporated body, organized under a charter granted by the general assembly of Alabama; that the plaintiff was engaged in the business of receiving deposits and dealing in exchanges, and in the general business of banking, as authorized by said act, and that it was a bank or banker in the sense and meaning of section 3407 of the Revised Statutes of the United States, and that while engaged in such business, and between the 11th day of October and 13th November, 1873, the plaintiff issued a large amount of its own paper, in this form:

Deposit Savings Association of Mobile, Alabama.
2 2
Mobile, January 1st, 1873.
Will pay to bearer
Two Dollars
B On return of this voucher. B
L. C. Fry, Cashier. M. S. Foote, President.

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

That these notes were of the denominations of one, two, three, five, ten, twenty and fifty dollars, and that it paid them out to depositors and others who offered other currency or valuable consideration in exchange, and that during that time such papers circulated as money. Also, that the plaintiff was assessed by the internal revenue commissioner $40,000 on the assessment list for November, 1873, this amount being ten per cent. of the amount paid out by the plaintiff between October 11, 1873, and November 30, 1873. The collector of internal revenue at Mobile, by virtue of said assessment, issued his warrant of distraint against the plaintiff, and seized the sum of $6,725.50 in money, and certain real estate of the plaintiff, which was sold according to the revenue laws in such cases, and bid off by the United States, to whom a deed for said land was made according to the provisions of said laws. The plaintiff duly appealed, and the decision on the appeal sustained the tax and sale.

Thos. H. Herndon and John Little Smith, for plaintiff.

Geo. M. Duskin, U. S. Atty., for defendants.

BRADLEY, Circuit Justice. This action is brought to recover back the said real estate, on the ground that the assessment, being upon the plaintiff's own issues of paper, was illegal, and that the seizure and sale of the lands were also illegal.

It is contended by the plaintiff that there was another tax of one per cent. per annum on its own issues, and that the tax of ten per cent. imposed by section 3412 was intended to be imposed only upon the amount of the issues and paper of other banks paid out by it, and used as circulation.

We think that this interpretation is untenable. The words of the law are plain and obvious, and we think the intent was equally so. That intent evidently was to discourage the issue and use of a paper currency other than that which was provided by the government, by the legal tender currency issued by it, and by the notes and bills of national banks. If a state bank were only taxed on its issues, as such, it would be on an entire equality with the national banks. But the words of the section are plain and unmistakable. The tax of ten per cent. is imposed "on the amount of notes of any person, or of any state bank or state banking association used for circulation and paid out" by any bank, or banking association. To construe this as meaning notes other than its own issue would be to interpolate an exception in the law, which is not found in it, and which would tend to defeat its object if it were found in it. The entire argument to the contrary is inferential, and, in our judgment, insufficient to change the plain meaning of the words. We do not think it necessary to discuss the argument of the plaintiff in detail. We have examined it fully, and have no doubt of the conclusion to which we have come.

Judgment must be for the defendants, with costs.

Case No. 3,813.

DEPOSIT SAV. ASS'N v. MAYER.

[23 Int. Rev. Rec. 241.]

Circuit Court, S. D. Alabama. Feb., 1876.

NATIONAL BANKING ACT—TAX ON CIRCULATION OF STATE BANKS—CONSTRUCTION OF STATUTE.

[1. The tax of 10 per cent., which all banks and banking associations, state and national, are required to pay "on the amount of notes of any person, or of any state bank or state banking association, used for circulation and paid out by them" (Rev. St. § 3412), applies to amounts paid out by a state bank in its own previously issued notes as well as to payments in notes of persons or other state banks.]

[2. The fact that congress, at a subsequent session, passed an act (approved February 18, 1875) imposing, in terms, upon banks, this tax upon their own notes, is not conclusive against the construction above given to the original act.]

[3. The word "issued," as used in the act placing a tax of one-twelfth of one per cent. a month on the "average amount of circulation issued by any bank," etc. (Rev. St. § 3408), means not only the making of the notes, but includes also the idea of putting them out into circulation.]

[This was an action by the Deposit Savings Association, of Mobile, against Lou. H. Mayer, collector of internal revenue, to recover taxes alleged to have been illegally collected.]

It is agreed that the following are the facts in this case, viz.: The plaintiff is an incorporated body chartered and organized under the charter granted by the general assembly of Alabama, and which may be read as a part of the facts agreed, from the acts of the legislature of Alabama (Pamph. Laws 1865-66, p. 337, No. 221), or from the original charter; that the plaintiff was engaged in the business of receiving deposits and dealing in exchange, and in the general business of banking, as authorized by said act, and that it was a bank or banker, in the sense and meaning of section 3407 of the Revised Statutes of the United States; and that while engaged in such business, and between the eleventh day of October, 1873, and the thirtieth day of November, 1873, the plaintiff issued a large amount of its papers like the following, and of the denomination of 1, 2, 3, 5, 10, 20, and 50 dollars, and that it paid them out to depositors and to others who offered other currency or valuable consideration in exchange, and that during that time such papers did circulate as money. Also that the plaintiff was assessed by J. W. Douglass, commissioner of internal revenue, $40,000 on the assessment list for the month of November, 1873, this amount being ten per centum of the amount paid out by the plaintiff between

October 11, 1873, and November 30, 1873, as alleged by said J. W. Douglass, commissioner, as aforesaid. The defendant was collector of internal revenue at Mobile, and as such, and in the discharge of his supposed duties as such collector, and under and by virtue of the assessment made by the commissioner of internal revenue, did issue his warrant of distraint against the plaintiff, and did seize the sum of $6,725.50, and certain real and personal property which is not covered by the suit, and the defendant did deposit the said $6,725.50 into the treasury of the United States. This distraint and seizure was made under section 3187 of the Revised Statutes of the United States. It is further agreed that the plaintiff duly made his appeal to the commissioner of the internal revenue, according to the provisions of law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, to remit, refund and pay back said sum as erroneously or illegally assessed or as wrongfully collected, and that the decision of commissioner has been had therein as provided in section 3226 of the Revised Statutes of the United States, and that the decision of said commissioner was adverse to the plaintiff. Upon these facts the plaintiff insists that as a matter of law it was not subject to said tax of ten per cent. on its own issues as aforesaid thus claimed, and that such demand, seizure, and conversion of its money was unauthorized by law, and was erroneous and wrong. The defendant asserts the contrary proposition, and it is this question of law which is submitted for consideration and adjudication.

Henderson & Smith, for plaintiff.
Geo. M. Duskin, U. S. Atty.

OPINION OF THE COURT. The facts of the case appear in the agreed statement of the fact on file with the papers. The question here is the proper construction of the 6th section of the act of March 3, 1865 [13 Stat. 484], as amended by the act of July 31, 1866, and embodied in section 3412 of the Revised Statutes of the United States. This section of the act is in the following words: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, or of any state bank or state banking association used for circulation, and paid out by them." It is claimed that under this section of the law, the plaintiff, a state banking association, is not liable to pay this tax per centum on the amount of its own notes issued by it, but only upon the notes of persons or of banking associations other than its own, used for circulation and paid out by it. Thus, a tax upon notes used for circulation, and by the terms of the statute, is placed upon the amount of the notes of any person, or state bank, or state banking association, used for circulation and paid out by it. But it is claimed this does not apply to the bank's own notes or its own issue, and the issue of a bank—that is, its own notes—is a different thing from the notes of other banks which it may use and pay over its counter for circulation.

It will be observed that the word "issue" or "issued" is not used in section 3412 of the Revised Statutes under consideration. It is used, however, in a previous section of the same chapter 8, on banks and bankers, and in section 3408, Rev. St., it is provided. "There shall be levied, collected and paid among other taxes," third, "a tax of one-twelfth of one per centum each month upon the average amount of circulation issued by any bank association, corporation," etc. This, then, is a tax upon the circulation issued by a bank, and the next inquiry is, what is meant by the use of the word "issue"? It means that the bank has given origin and existence to the paper or notes, but it means more than the mere making, printing and signing of the notes, for this may all be done, and still the notes remain in the vaults of the bank, and never be put out. "Issued," then, means not only the making of the notes, but includes also the idea of putting them out into circulation, and this is to what the tax of one-twelfth of one per centum provided for in 3d subdivision of section 3408 applies. Nor does the subsequent section, the one under consideration, apply to the same thing, that it, is the ten per cent. tax to be cumulative upon the tax which we have seen is placed upon the issue of a bank. It would require very clear words to force me to the conclusion that such was the intention of congress, and I think these two provisions can be harmonized upon another view of the subject. We have seen that the word "issue" or "issued" is not used in section 3412, which imposes the ten per centum tax; that tax is, by the terms of the section, imposed upon the amount of the notes used for circulation. It does not deal with the question of issue at all; it presupposes the issue and existence of the notes, and imposes the tax of ten per centum on any bank that uses them for circulation.

The question is not who issued these notes and put them into circulation, nor is it as to the conditions of their issue, but the notes being in circulation, no matter from what source, every bank that uses them for circulation and pays them out is liable to the tax of ten per cent. on the amount so used and paid out. But it is said that subsequent passing out by a bank of its own notes is a re-issue, and not a passing out within the meaning of the statute; but will any one say, that a re-issue is the same thing as an original issue, which gives life and existence to the notes, or is there any pretence that the tax imposed by the statute, upon the issue by any bank, is also imposed upon the

re-issue or upon the paying out of its own notes? Certainly not, and I therefore conclude that a re-issue of notes already in circulation is simply another name for paying them out. The statute evidently intended to restrain the use of such notes, and because a bank originally issued the notes, which at subsequent times it repeatedly pays over its counter, does it not as fully come within the spirit and meaning of the statute as if it paid out notes other than its own? Its notes belong to the classes which the statute places under the ban, as well as the notes of other similar associations, and if relieved from the tax because it pays out its own notes, all that would be required to avoid the statute would be for each bank to swap currency every night, and pay out its own next day.

The congress of the United States, in the organization of our present system of banking and currency, has undertaken to provide a currency for the whole country. Its constitutional right to do this scarcely admits of question at this day. It follows that it has a right to protect that currency, and by so doing, protect the people from a vicious and unsound currency. The law was intended to remedy a supposed evil, and promote the public good; it is to be construed to effectuate the purpose and object of its enactment. It is said because that this plaintiff derived its right to issue these notes from the state of Alabama, and that if this construction of the law is correct, it would render the right or franchise so derived worthless, and the suggestion is made that the construction of the statute, contended for by the plaintiff, leaves a field and scope for its operation, and does not trench upon what is alleged to be dangerous ground, to wit, the reserved rights of the states. I trust that I am able to appreciate the force of that argument, but will not enter upon it, for I think that whole question, at least so far as the points involved in this case are concerned, has been fully settled in the case of Veazie Bank v. Fenlo (by the supreme court of the United States) 8 Wall. [75 U. S.] 533. In reply to that, it is said, that the constitutional question only was before the court, and that the question on the construction of the statute, as now made, was not before the court.

This question upon the construction of the statute does not seem to have been specifically presented, but the court assumed a construction as wide if not wider than that which I have given it. In the Case of Cliquot's Champagne, 3 Wall. [70 U. S.] 144, a tacit recognition is equivalent to an express declaration. The fact that congress at subsequent sessions sought to pass and did ultimately pass an act approved February 8, 1875, which imposed in terms upon the banks this tax of ten per cent. upon their own notes used for circulation, is not conclusive against the construction given. This might seem to be regarded as going to show the intention of congress in the first instance. Certainly the question admitted of doubt, and it was proper to free it from that doubt. The jury is instructed that under this agreed state of facts in this case defendant is entitled to a verdict.

DEPUTY MARSHAL (MEADE v.). See Case No. 9,372.

Case No. 3,814.

In re DE PUY.

[3 Ben. 307; 2 Am. Law T. Rep. U. S. Cts. 130; 10 Int. Rev. Rec. 34; 4 Am. Law Rev. 188; 16 Pittsb. Leg. J. 121.][1]

District Court, S. D. New York. June Term, 1869.

CONSTITUTIONAL LAW—POWER OF THE PRESIDENT—REVOCATION OF PARDON—DELIVERY—IMPRISONMENT FOR A YEAR OR LESS.

1. Under the constitution and laws of the United States, a pardon must be regarded as a deed, to the validity of which delivery is essential. A pardon differs in that respect from a commission.

2. Until a pardon is delivered, it may be revoked.

3. Under the 3d section of the act of March 3, 1863 (13 Stat. 500), a court of the United States has no right to order a person who is sentenced to imprisonment for a period of one year or less, to be confined in any particular state prison or penitentiary.

[Cited in Ex parte Brooks, 29 Fed. 85; Ex parte Waterman, 33 Fed. 31.]

4. A prisoner was sentenced to imprisonment for a year at Blackwell's Island, in pursuance of which the marshal delivered him into the custody of the keeper of the Blackwell's Island penitentiary: *Held*, that the sentence did not direct him to be imprisoned in any particular state prison or penitentiary, and that he was properly delivered to the custody of the keeper of the Blackwell's Island penitentiary, whether he was imprisoned by virtue of the direct sentence of the court, or by virtue of the rule of the circuit court on the subject. 4 Blatchf. 541.

5. Such prisoner was, under the act of congress of June 30, 1834 (4 Stat. 739), exclusively under the control of the officers having charge of such penitentiary.

6. A pardon for a prisoner so imprisoned was made out and signed by the outgoing president of the United States, on the 3d of March, 1869, and was transmitted on that day by the department of state to the marshal of the southern district of New York, and received by the marshal on the 5th of March, and, on the 6th of March, the incoming president directed the secretary of state to order the marshal, if the prisoner had not been released, to consider the pardon as cancelled, and to return the same, which the marshal did, and, on the 8th of March, the president signed an order, reciting that the pardon had not been delivered, and ordering that the pardon be revoked and withdrawn; and thereafter, on habeas corpus, directed to the warden of the penitentiary, the prisoner was brought before this court: *Held*, that the writ of habeas corpus was properly directed to the warden.

7. As the pardon had never been delivered to the warden, it had not been delivered to the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 4 Am. Law Rev. 188, contains only a partial report.]

prisoner, and the incoming president had the power to cancel it, as the president who signed the pardon would have had.

Habeas corpus.

Edwards Pierrepont, Dist. Atty., for the United States.

Edwin W. Stoughton and Clarence A. Seward, for petitioner.

BLATCHFORD, District Judge. The petitioner, Moses De Puy, represents that he is restrained of his liberty by John Fitch, warden of the penitentiary at Blackwell's Island, within the southern district of New York; that the said John Fitch, warden, as aforesaid, claims to restrain the petitioner of his liberty, and to detain him at the penitentiary aforesaid, on the following grounds, namely, that, at the January term, 1869, of the circuit court of the United States for the southern district of New York, one Jacob De Puy and the petitioner were convicted of having rescued spirits from the custody of a revenue officer of the United States, in violation of the provisions of the internal revenue laws, and were sentenced as follows, namely, the said Jacob De Puy to imprisonment for two years, and to pay a fine of six hundred dollars, and the petitioner to one year's imprisonment, and to pay a fine of two dollars; that, in pursuance of said conviction and sentence, the petitioner was, on the 18th of February, 1869, taken to the penitentiary at Blackwell's Island, aforesaid, and has ever since that day been, and now still is, there confined, under the charge of John Fitch, the warden, as aforesaid; and that, on the 3d of March, 1869, the president of the United States, in pursuance of the authority vested in him by the constitution of the United States, granted to the said Jacob De Puy and the petitioner a pardon for the offences of which they respectively stood convicted, conditioned upon the payment by them of their respective fines so imposed on them by the sentence aforesaid. A copy of the pardon is annexed to the petition. It is stated, in the petition, that the pardon was duly signed by the president, was sealed with the great seal of the United States, and was countersigned by the secretary of state, and was duly forwarded by mail to the marshal of the southern district of New York, for and on behalf of the petitioner; and the petition refers, in that connection, to an affidavit which is annexed to it. That affidavit is made by one James M. Nelson, and states, that, on behalf of Jacob and Moses De Puy, he presented a petition for their pardon to the president of the United States; that, after considering the same, the president endorsed on the petition a direction that a pardon issue, and requested him, Nelson, to take the petition and endorsement to the attorney general; and that he took the petition to the attorney general's office, and left it with the attorney general, and received from the attorney general a letter to the secretary of state. That letter, also, is annexed to the petition. It is dated the 3d of March, 1869, and is signed by the attorney general, and is addressed to the secretary of state, and states, that the attorney general is directed by the president to request the secretary of state to issue a warrant for the pardon of Jacob De Puy and Moses De Puy, with certain recitals. Nelson further states, that he took that letter to the office of the secretary of state, and obtained from that office a pardon, ready for signature, and took the pardon to the president, and obtained his signature thereto, and then took it to the office of the secretary of state; that the secretary of state signed it, and directed his chief clerk to have the seal of the United States attached, and to have the pardon, and a letter in relation to it, sent to the marshal; that he, Nelson, asked the chief clerk of the department of state, whether he, Nelson, would not be permitted to take the pardon; that the chief clerk said, no, that it must be sent to the marshal, that that was the usual course of business in such cases, and that it would be forwarded immediately on its being finished; and that the pardon was subsequently forwarded by the state department to the marshal. The petition further states, that the marshal received the pardon, by due course of mail, on the 6th of March, but did not deliver it to the petitioner, and, on the contrary, detained it; that it has been the invariable custom of the executive of the United States, on granting a pardon, to cause it to be forwarded by mail to the marshal of the district in which the prisoner is confined; that such deposit in the mail is the only delivery recognized by the executive for the delivery of the pardon to the prisoner; that the marshal receives the same as agent for, and on behalf of, the prisoner, and in no other capacity; and that the marshal, in this case, received this pardon in compliance with said custom, and as the agent of the petitioner. The petition then alleges, that the petitioner, by virtue of the pardon so issued, was entitled to be set at liberty forthwith, and to be no longer restrained of his liberty, upon his paying the fine imposed on him by said sentence of conviction, and which fine, he states, has been duly paid by him to the clerk of the court before which he was convicted. He, therefore, prays for a writ of habeas corpus, directed to the warden of the penitentiary, commanding him to produce before this court the body of the petitioner.

The writ was issued, and the petitioner was brought before the court. At the same time the return was made by the warden to the writ. In the return the warden states, that he produces the body of the petitioner, and that the cause of his imprisonment appears by copies of two commitments annexed to the return. The first one of those commitments is an order made by the circuit court of the United States for this district, on

the 15th of February, 1869, entitled in the case of The United States v. Moses De Puy, and reading as follows: "On motion of the United States district attorney, ordered sentence. Thereupon, the court proceed to pass judgment, and sentence the prisoner, Moses De Puy, on the first count, to be imprisoned at Blackwell's Island for the term of six months, and to pay a fine of one dollar, and stand committed until paid; and, on the second count, to be imprisoned at Blackwell's Island for the term of six months and pay a fine of one dollar, and stand committed until paid—this sentence to commence on the termination of the first." The other commitment is a paper signed by the marshal of the United States for the southern district of New York, and dated February 18th, 1869, and entitled in the case of The United States v. Jacob De Puy and Moses De Puy, "charged with removing distilled spirits to other than a bonded warehouse." It reads as follows: "Jacob De Puy and Moses De Puy, defendants in the above-entitled cause, are delivered by me into the custody of the keeper of the Blackwell's Island penitentiary, in pursuance of the statutes in such cases made and provided." The return further states, that there is annexed thereto a true copy of the record of the proceedings and judgment in the circuit court of the United States for this district, upon which the said Moses De Puy was sentenced and is now imprisoned, being the same judgment that is contained in the order before referred to, of the 15th of February, 1869. By that record it appears, that Jacob De Puy and Moses De Puy were indicted in the said circuit court. The indictment contained four counts, upon the first and second of which the petitioner, Moses De Puy, appears to have been convicted and sentenced. Those two counts are identical, except that the first one alleges an offence committed on the 15th of May, 1868, and the second one an offence committed on the 16th of May, 1868, the offence set forth in each being the same, and being set forth in each in the same language—rescuing, and attempting to rescue, and aiding and assisting in rescuing, distilled spirits, in one case fifty barrels, and in the other case thirty-two barrels, from the custody of a revenue officer. The record shows, that both of the prisoners, Jacob De Puy and Moses De Puy, were arraigned on this indictment on the 26th of December, 1868, and pleaded to it not guilty, the indictment having been found on the 15th of December, 1868. On the 7th of January, 1869, as appears by the record, a trial was ordered on the indictment. On the 13th of January the jury found both of the prisoners guilty. On the 10th of February a motion for a new trial, which had been previously made, was denied, and judgment was ordered on the verdict, and, as before stated, the judgment and sentence were passed on Moses De Puy on the 15th of February. The return further states, that the judgment and sentence have never been reversed, vacated or set aside, but still stand in full force and effect. The return also states, that no pardon for the said offence whereof Moses De Puy stands convicted and sentenced, according to the said record, has ever been issued or delivered to or for Moses De Puy, or to any one on his behalf.

The pardon, of which a copy is annexed to the petition, bears date on the 3d of March, 1869. It is in the form of letters patent, and commences with these words: "Andrew Johnson, President of the United States of America, to All to Whom These Presents shall Come, Greeting." It then recites, that, at the January term, 1869, of the United States circuit court for the southern district of New York, Jacob De Puy and Moses De Puy were convicted of having rescued spirits from the custody of a revenue officer of the Unites States, in violation of the provisions of the internal revenue laws, and sentenced as follows: Jacob De Puy to imprisonment for two years, and to pay a fine of six hundred dollars, and Moses De Puy to one year's imprisonment, and to pay a fine of two dollars. It then recites the considerations which moved the president to grant the pardon, and states that, in consideration of the premises, divers other good and sufficient reasons moving him thereunto, he grants to the said Jacob De Puy and Moses De Puy a pardon for the offences of which they stand convicted, conditioned upon the payment of their said fines. The pardon is signed by the president and the secretary of state, and bears the seal of the United States.

The return to the writ is traversed by the petitioner. The traverse states, that he denies that the judgment and sentence stand in full force and effect; that he denies the allegation, in the return, that no pardon of the offence whereof he was convicted and sentenced, according to the record annexed to the return, was issued or delivered to or for him, or to any one on his behalf; and that he avers and insists that a pardon for the offence of which he was convicted has been issued and delivered to him in the manner and form more fully and at large set forth in the petition.

Upon the issue of fact thus joined evidence was put in, consisting, mainly, of statements admitted by both parties to be correct. Among such evidence is a certified copy, from the records of the department of state, of what appears to be a record of the pardon, in the same words with the copy of the pardon that is annexed to the petition. It was also admitted by the district attorney, representing the United States, that the only conviction against Moses De Puy, and the only sentence passed upon him, were the conviction and sentence contained in the record attached to the return. It was also admitted by both parties, that the original of the par-

don was sent through the mail by the department of state, to the marshal of the United States for this district, enclosed in a letter, of which the following is a copy: "Department of State, Washington, 3d of March, 1869. Robert Murray, Esq., Marshal of the U. S. for the Southern District of New York. Sir: I transmit herewith the president's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge. I am, sir, your obt. servant, F. W. Seward." It was also admitted, that the original pardon enclosed in that letter was received at the office of the marshal, in this city, on the 5th of March, 1869, with the letter; that numbers of pardons for persons convicted in the courts of the United States in this district had been previously received by the marshal at his office, from the department of state, with similar letters; that he usually gave or transmitted such pardons to the keepers of the prisons where the persons pardoned were confined; and that such pardons were usually received by the marshal by mail. It was also admitted, that, on the 6th of March, 1869, the president, by a verbal order, directed the secretary of state to send to the marshal of the southern district of New York a communication in relation to this pardon; that the secretary of state obeyed this verbal order, and transmitted to the marshal a telegraphic despatch, in the following words: "Washington, March 6th, 1869. To Robert Murray, U. S. Marshal: If Jacob and Moses De Puy have not been released, you will regard their pardon as cancelled, and will return the same to this department. E. B. Washburne, Secretary of State;" that the telegraphic despatch was received at the office of the marshal, in this city, on the same day, the 6th of March; that, on the same day, the original pardon, which still remained in the hands of the marshal, was put by him on the way of its return to the state department; and that it reached the state department thereafter. It was also admitted, on the hearing, that the president thereafter verbally directed the secretary of state to cancel the pardon, and never gave any other or further direction in regard to it. It was also understood, on the hearing, that communication was to be had with the department of state, for the purpose of learning what there was, if anything, on record there on the subject, that had transpired after the return of the pardon. In pursuance of such understanding, I have been furnished with a despatch from the second assistant secretary of state to the district attorney, in which he says, that there is on file in the department of state, an order signed by the president, dated the 8th of March, 1869, stating that, whereas the pardons in question have not been delivered to, and accepted by, the said Jacob and Moses De Puy, or either of them, it is ordered that the said pardons be, and the same are, revoked and withdrawn; and that nothing further has taken place in regard to the matter. The fact was also put in evidence, that Moses De Puy, on the 12th of May, 1869, paid to the clerk of the circuit court the fine of two dollars imposed upon him by the sentence, and which he was required to pay as a condition of the pardon.

Various questions were discussed on the hearing, especially the question as to the correspondence of the terms of the pardon with the actual offences of which the petitioner was convicted and for which he was sentenced. I do not consider it important to consider that point. I assume that the pardon recites the offences properly.

The main ground upon which the discharge of the petitioner is claimed is, that the pardon was delivered to the marshal, and, being delivered to the marshal, was delivered to the petitioner; that the proceedings which took place were of such a character that the pardon was irrevocable; that the president had no authority or power to control the disposition to be made of the original paper in the hands of the marshal; and that the petitioner was entitled to the benefit of it, as a complete and full pardon.

I have given careful consideration to the questions raised in regard to this branch of the case, and have examined the authorities cited, and the statutes bearing on the subject, and have come to a conclusion satisfactory to my own mind. The question is an important one—a question of constitutional law, as to the proper construction of the powers of the president, under the constitution, in regard to pardons, and a question involving personal liberty; and for these reasons, and because I think it desirable that the true character of a pardon should be defined, I shall proceed to state, at considerable length, my views on the question, and the only question, which, it appears to me, is to be determined in this case, namely, whether this pardon was, or was not, actually delivered to the petitioner, in judgment of law.

It is contended, on the part of the petitioner, that, when this pardon received the signature of the president, and the seal of the department of state, it was a completed act, and passed beyond the control of the president. I think that is an entire mistake. The law undoubtedly is, that when a pardon is complete, there is no power to revoke it, any more than there is power to revoke any other completed act. And yet the question still remains—when is a pardon complete? It is argued, that a pardon stands on the same footing as a commission; and the doctrine of the case of Marbury v. Madison, 1 Cranch [5 U. S.] 137, is invoked in support of this view. The opinion of the court, in the case of Marbury v. Madison, was delivered in 1803, by Chief Justice Marshall, the same judge who, afterwards, in 1833, delivered the opinion of the same court, in the case of U. S. v. Wilson, 7 Pet. [32 U. S.] 150. In the case of Marbury v. Madison,

the president of the United States had nominated Marbury to the senate, for its advice and consent, to be appointed to the office of a justice of the peace of the District of Columbia. The senate advised and consented to the appointment. The president signed the commission appointing Marbury to be such officer, and the seal of the United States was, in due form, affixed to it by the secretary of state. Application was made to the secretary of state to deliver the commission to Marbury. It was not delivered, but was withheld. On that state of facts, the question came before the supreme court, as to whether Marbury was entitled to have his commission delivered to him, on the view that the delivery was a purely ministerial act, or whether there was any power on the part of the president, or of the secretary of state, to control the commission. The chief justice, in his opinion in the case, uses this language: "In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For, if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property." He then shows, that the constitution and laws contemplate, in regard to offices, three distinct operations: 1st. The nomination, which "is the sole act of the president, and is completely voluntary;" 2d. The appointment, which "is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate;" 3d. The commission. He then states, that, in the case before the court at that time, the appointment was made by the president, by and with the advice and consent of the senate, and was evidenced by no act but the commission itself; that the appointment, being the sole act of the president, was completely evidenced, when it was shown that the president had done everything to be performed by him; and that, even if the commission, instead of being evidence of an appointment, should be considered as constituting the appointment itself, still, the appointment would be made when the last act to be done by the president was performed, or, at farthest, when the commission was complete; that the last act to be done by the president was the signature of the commission; that he had then acted on the advice and consent of the senate to his own nomination; that the time for deliberation had then passed, and the president had decided; that his judgment on the advice and consent of the senate, concurring with his nomination, had been made, and the officer was appointed; that the appointment was evidenced by an open and unequivocal act; that this act, being the last act required from the person making it, necessarily excluded the idea of its being, so far as respected the appointment, an inchoate and incomplete transaction; that the power of appointment was exercised when the last act required from the person possessing the power had been performed; and that the last act was the signature of the commission. He then goes on to say, that, when the seal was affixed, if the affixing of the seal was to be considered as necessary to the validity of the commission, the appointment was made, no farther act remaining to be performed on the part of the government. He then proceeds to consider the argument that was urged in reference to a commission —that it was like a deed, to the validity of which delivery was essential—and says: "It has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential." On this subject, he comes to the conclusion, that, if the act of delivery was necessary to give validity to the commission, it was delivered when it was executed and given to the secretary of state for the purpose of being sealed, recorded, and transmitted to the party. But he holds that, in the case of a commission, a formal delivery to the person is not among the solemnities required as evidences of the validity of the instrument, and that only the sign manual of the president, and the seal of the United States, are those solemnities. He thus expressly puts a commission, as evidence of an appointment having been made to an office by the president and senate, on a totally different ground from an instrument which requires delivery, and holds that, when the appointment is made by the president, by and with the advice and consent of the senate, and the president has signed the commission, and the seal of the United States has been affixed to it, the president has done everything that he has any right to do in the premises; that his power then ceases; and that a delivery of the commission is not essential to the validity of the appointment. He then says: "If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance." He illustrates this view by the fact, that when a person appointed to any office refuses to accept it, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

I have gone thus, at some length, into the views of the chief justice, in the case of Marbury v. Madison [supra], for the purpose of showing, in contrast with these views on the subject of an appointment and a commission, that the same judge, in the same court, in delivering the judgment of the court, in the case of U. S. v. Wilson [supra], placed a pardon by the president on a totally different footing from that on which a commission was placed, in the case of Marbury v. Madison. In U. S. v. Wilson, the chief justice

says: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended. * * * A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance." In the case of Marbury v. Madison, it was held, that a commission was not a deed, or assimilated to a deed, and that delivery was not essential to its validity. The two instruments are thus placed in as direct antagonism, on the question of the necessity of a delivery, as it is possible for the same court, speaking through the same distinguished jurist, to place two matters. It is manifest, therefore, that, under the constitution and laws of the United States, a pardon must be regarded as a deed, to the validity of which delivery is essential. It is, also, apparent, that the decision in the case of Marbury v. Madison furnishes no support to the views urged on the part of the petitioner.

The only question in this case is, whether this pardon was delivered, in the sense of the law, to the petitioner, or to any person for him. All that was done in regard to the pardon was, that the secretary of state transmitted it to the marshal, with a letter, stating: "I transmit herewith the president's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge." In the case of Com. v. Halloway, 44 Pa. St. 210, a habeas corpus was issued to bring up the body of a prisoner who claimed to have been pardoned. The case was one before the full bench of the supreme court of Pennsylvania, the opinion of the court being delivered by Chief Justice Lowrie. In the opinion, the chief justice says: "There are charters or patents for new inventions, for lands, for grants of corporate privileges, and as commissioners of public affairs, as well as those of pardons; and, though all these have a strong likeness as to their form, and to the source whence they immediately proceed, yet they have also some marked points of unlikeness that warn us to be cautious about confounding the rules that belong to any one kind with those of another. We notice here only the distinction that is important for this case. With us, those that relate to new inventions, to lands, to corporate privileges, and to offices, are usually only the last step in the process by which certain rights become completely vested; and, when all preliminary steps are regular and complete, this last step becomes a mere ministerial duty, definitely prescribed by law, and the claimant has a right to demand that it shall be taken, because he has performed all the conditions upon which the law has made his title to it to depend." That was the case in Marbury v. Madison, where the last step—the delivery of the commission—was a mere ministerial duty, the right to the office having previously become a vested right. He then goes on to say: "But charters of pardon are entirely different from these, in the conditions on which they depend; for, (not to speak of those which are issued in pursuance of promises, by proclamation or otherwise, of executive clemency,) they are forwarded on mere grace, and not at all on preliminary steps that furnish legal merits or a legal title to them. The intention of the executive to grant a pardon can have no legal force until carried into completed act. And his instructions to his proper officers, and their work in pursuance of his instructions, are only the means by which he embodies his intentions into the completed act, and have no force out of the executive sphere until thus completed, though the courts may, when the intention is satisfactorily shown, suspend further proceedings, in expectation of the actual pardon, as has been sometimes done in England. The completed act is the charter of pardon and delivered. This is the only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor, and may be cancelled, to accord with a change of intention." He then discusses the question—"Was this pardon delivered?" It appeared that it had come to the hands of the warden of the prison; and the court says, that, "by usage, its delivery to the warden is prima facie equivalent to delivery, or is a constructive delivery, to the prisoner; but it is open to be proved no delivery, by showing circumstances that are inconsistent with the intention to deliver it."

In the present case, the petitioner was in the penitentiary on Blackwell's Island, under a sentence which directed him to be imprisoned at Blackwell's Island, in pursuance of which the marshal, by a written paper, delivered him into the custody of the keeper of such penitentiary. By the 3d section of the act of March 3, 1863 (13 Stat. 500), it is provided, "that, in every case where any person convicted of any offence against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, the use of which prison or penitentiary is allowed by the legislature of such state for such purposes; and the expenses attendant upon the execution of such sentence shall be paid by the United States." Under that provision of law, a court of the United States has no right to order a person who is sentenced to imprisonment for a period of one year, or less, to be confined in any particular state prison or penitentiary. The sentence in the case of the petitioner being, taking together the two terms of six

months each, not longer than one year, the court had no right to order the petitioner to be imprisoned in any particular state prison or penitentiary. Nor does the sentence, in terms, order him to be imprisoned in any particular state prison or penitentiary. It merely orders him to be imprisoned at Blackwell's Island. In pursuance of that order, the marshal delivered him into the custody of the keeper of the Blackwell's Island penitentiary. By a rule made by the circuit court for this district, on the 4th of March, 1840 (4 Blatchf. 541), it is provided, that, in all cases in which persons convicted of offences against the statutes of the United States, shall be sentenced to imprisonment, and the sentence shall not also specify that the party shall be kept at hard labor, it shall be the duty of the marshal to cause such party to be imprisoned in any one of the prisons within the city and county of New York, which he may select for the purpose. Now, in this case, whether the sentence which orders the petitioner to be imprisoned at Blackwell's Island, be considered as a sentence that he be imprisoned in the penitentiary at Blackwell's Island, or whether the portion of the sentence which refers to Blackwell's Island be considered as surplusage, or as void, so that the case would fall under the rule of court, of March, 1840, the sentence not specifying that the petitioner shall be kept at hard labor, and the marshal having had a right to cause the petitioner to be imprisoned in any one of the prisons within the city and county of New York, which he should choose to select for the purpose, and the penitentiary at Blackwell's Island being within the city and county of New York—in either view, the petitioner was properly imprisoned in the penitentiary at Blackwell's Island. Whether he was to be imprisoned there by virtue of the direct sentence of the court, or whether he was to be imprisoned there under the rule of court, of March, 1840, the marshal acted properly in delivering him into the custody of the keeper of the Blackwell's Island penitentiary.

There is also an act of congress, passed on the 30th of June, 1834 (4 Stat. 739), which provides, "that, whenever any criminal, convicted of any offence against the United States, shall be imprisoned, in pursuance of such conviction, and of the sentence thereupon, in the prison or penitentiary of any state or territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated; and, while so confined therein, shall also be exclusively under the control of the officers having charge of the same, under the laws of the said state or territory." The petitioner being lawfully in the penitentiary at Blackwell's Island, in any view, in pursuance of his conviction and sentence, he was, by virtue of the act of 1834, exclusively under the control of the officers having charge of such penitentiary, under the laws of the state. So long as this delivery into the custody of the warden of the penitentiary remained in force, the marshal had no control over the petitioner, and no power to remove him from the penitentiary. The writ of habeas corpus, in this case, was, therefore, properly directed to the warden of the penitentiary, because the petitioner was, by virtue of the act of 1834, exclusively under the control of such warden. Under that state of facts, the question arises, whether, when a prisoner is exclusively under the control of the warden of a prison—even though it may not be necessary to deliver a pardon to the prisoner himself, and even though the delivery of a pardon to the warden of the prison, who has the exclusive custody and control of the prisoner, may be equivalent to a delivery to the prisoner—whether a delivery of a pardon to any other person, before it reaches the warden of the prison, is equivalent to a delivery to the warden of the prison. This question must be answered in the negative, not only on general principles, but on the evidence in this case. It appears, that the marshal usually gave or transmitted the pardons which he received from the department of the state, to the keepers of the prisons where the prisoners pardoned were confined. Why were the pardons sent to the keepers of the prisons? Undoubtedly, because, under the act of 1834, the prisoners were and are in the custody of the keepers of the prisons, and not in the custody of the marshal. The marshal, having no power to take a prisoner out of prison, cannot go to the prison with a pardon and take the prisoner out, retaining the pardon himself; and the fact, that the marshal has always been in the habit of giving or sending pardons to the keepers of prisons, serves to show conclusively that the delivery of a pardon, in order to be effective, must be, at least, a delivery to the keeper of the prison.

The marshal was, in this case, no more than the messenger of the president. If the president had sent the pardon by a special messenger, and had directed him to go to the warden of the Blackwell's Island penitentiary, and to deliver the pardon to him, and had despatched the messenger on his way, it cannot be questioned that the president could, by a telegraphic despatch, or any other communication, to the messenger, while on his way, have lawfully directed the messenger not to deliver the pardon to the warden. If the president can arrest the mission of the messenger when the messenger has departed but ten feet from the door of the presidential mansion, he can arrest such mission at any time before the messenger delivers the pardon to the warden of the prison.

No question arises, in this case, concerning any right or power, on the part of the presi-

dent, to revoke or recall a completed pardon. In the language of Chief Justice Lowrie, before cited, "the completed act is the charter of pardon and delivered. This is the one and only step that gives title to a pardon. Until delivery, all that may have been done is mere matter of intended favor, and may be cancelled, to accord with a change of intention."

The point urged, on behalf of the petitioner, that the pardon was signed by President Johnson, and was sealed during his administration of the executive office, and that the order to the marshal to return the pardon to the department of state was made by his successor, President Grant, is of no force. The office of president did not die when President Johnson gave place to President Grant. The power of pardon is conferred by the constitution upon the office of president. The president who signed the pardon in this case would have had precisely the same right which I think his successor had, to arrest the pardon before it was delivered to the warden of the prison; and the successor had the same right in that respect as his predecessor would have had. I place my decision, in this case, solely on the ground that there never was any delivery of the pardon to the petitioner, or to any one for him. There never was any completed pardon. It has not been contended, on the part of the United States, that the president has power to annul, or withdraw, or cancel a completed pardon.

In connection with the fact that the pardon was never delivered to the petitioner, or to any one for him, there is one circumstance that is worthy of observation, and that is, that Nelson, the person who went to Washington to procure this pardon, asked to have it delivered to him, and was refused, it being stated to him by the chief clerk of the department of state, that the pardon must be sent to the marshal. That was equivalent to a declaration by the executive authority of the United States, that the benefit of a locus penitentiae was claimed. If the pardon had been delivered to Nelson, for the petitioner, the case might, perhaps, have been different. I do not say that it would; but the circumstance that a request to deliver the pardon to a person claiming to be the agent of the petitioner was refused, is worthy of consideration. The executive authority plainly said to Nelson, that it would not transmit this pardon by him, as the messenger of the petitioner, but would transmit it by its own messenger.

Upon the ground that there was no delivery of the pardon in this case to the petitioner, or to any one for him, or to the warden of the prison, who, by act of congress, had the exclusive control and custody of the petitioner, I hold that the petitioner is not entitled to be discharged, and that he must be remanded to the custody of the warden of the penitentiary at Blackwell's Island.

Case No. 3,815.

In re DERBY.

[6 Ben. 232; 8 N. B. R. 106; 6 Alb. Law J. 422.][1]

District Court, S. D. New York. Nov. Term, 1872.

BANKRUPTCY—JURISDICTION — INFANT—RATIFICATION.

1. Infants, in respect to their general contracts, are not embraced within the provisions of the bankruptcy act [of 1867 (14 Stat. 517)], as subjects of either voluntary or involuntary bankruptcy.

2. On the 7th of December, 1871, a petition in involuntary bankruptcy against D. was filed by S., who alleged, as the act of bankruptcy, the making by D. of a chattel mortgage to B. A. & W., on November 14th, 1871, he being then insolvent. D. was adjudged a bankrupt, and an assignee was appointed. On the 1st of December, 1871, an action was commenced in a state court by P., as guardian ad litem of D., as an infant, against B. A. & W., to recover for an alleged conversion by them of the goods covered by the chattel mortgage. The assignee in bankruptcy, after his appointment, filed a bill in equity against B. A. & W. to recover for the alleged conversion of the same goods. Thereupon B. A. & W., in April, 1872, filed a petition in the bankruptcy court, praying that the adjudication of bankruptcy against D. might be set aside, alleging, among other things, that D. was an infant when the petition was filed against him, which fact was, on a reference, established to be true. On the hearing, D., who had now become of age, presented a petition praying, among other things, for the confirmation of the bankruptcy proceedings against him: *Held*, that B. A. & W. were in a position to entitle them to ask the interposition of this court to vacate the adjudication.

[Cited in Re Hatje, Case No. 6,215; Re Austin, Id. 662; Re Jonas, Id. 7,442; Re Donnelly, 5 Fed. 786.]

3. As D. was an infant at the time of the filing of the petition, the court had no jurisdiction to make the adjudication.

[Cited in Re Bergeron, Case No. 1,342.]

4. The petition filed by D., after he came of age, for a confirmation of the bankruptcy proceedings, could not give the court jurisdiction.

5. As D. was an infant, the giving of the mortgage to B. A. & W. was not an act of bankruptcy, because it was not an absolute transfer, but was subject to his election to affirm or disaffirm it when he came of age.

6. The adjudication, and all the proceedings had thereupon, must be vacated.

[In bankruptcy. In the matter of Walter S. Derby.]

Samuel Brown, for Barton, Alexander & Waller.

Levi Gray, for Stevens and assignee.

BLATCHFORD, District Judge. On the 7th of December, 1871, Frederick Stevens filed in this court a petition in involuntary bankruptcy against Walter S. Derby. The debt set forth in the petition was alleged to be for goods sold to Derby in October and November, 1871. The act of bankruptcy alleged was the execution by Derby, while in-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Alb. Law J. 422, contains only a partial report.]

solvent, on the 14th of November, 1871, to the firm of Barton, Alexander & Waller, of a chattel mortgage, to secure a claim of $2,100, payable on demand, of his entire stock of goods and the fixtures in his store, with intent to give a preference to them, of which mortgaged property, it was alleged, they took possession three days afterwards. On the petition, an order to show cause was issued, returnable December 16th, 1871. On proof of the service of the order and of a copy of the petition on Derby on the 9th of December, 1871, an adjudication of bankruptcy was made against him on the 18th of December, 1871, to which day the matter had been adjourned. The proof of service was to the effect that the person making it went to the dwelling-house which was the last and usual place of abode of Derby in this district, and rang the door bell; that a woman of mature age came to the door, who appeared to be, and acted as if she was, mistress of the house; that the person inquired for Derby by his full name; that she answered that he was not in, and declined to give any further information concerning him; and that the person then delivered to and left with her a copy of the petition and of the order, and stated to her that they were for Derby. Neither on the return day, nor on the adjourned day, did Derby appear, although called in open court, and the court was not advised that he was not of full age. The case was referred to a register, and a warrant was issued, and Frederick Dodsworth was elected assignee.

On the 5th of April, 1872, the said Barton, Alexander & Waller filed in this court a petition setting forth the execution of the mortgage to them by Derby, on a part of his stock, to secure $2,199.40, due for the purchase money of the greater portion of the mortgaged goods; that the mortgage was not taken in violation of the bankruptcy act, or to obtain a preference; that, on the 27th of November, 1871, Derby carried away and converted to his own use all his stock and goods, except some show cases and rubbish, which rubbish the petitioners afterwards sold under their mortgage, but realized nothing above expenses of sale; that, on the 1st of December, 1871, one Purdy, as guardian ad litem of Derby, as an infant, appointed by a state court on the 29th of November, 1871, brought a suit in that court against the petitioners, to recover $4,000, as damages for the alleged conversion by them of the goods covered by the mortgage, claiming that the mortgage was void by reason of the infancy of Derby; and that said cause proceeded to an issue on the 12th of March, 1872, by complaint, answer, and reply, and was still pending. The petition then sets forth the filing of the petition in bankruptcy, and the issuing of the order to show cause, and alleges that said order was not left at the last or usual place of residence of Derby; that Derby did not reside, at the time, at the house where it was left; that the party serving it was so informed; that it did not come into the possession of Derby; that he did not appear in the bankruptcy proceedings, either in person or by attorney or guardian; that the claim of the petitioners against him amounts to more than two thirds of his entire indebtedness; that, at the meeting of creditors to elect an assignee, the petitioners were not allowed to vote; that the petitioners then and there filed with the register, and gave to the creditors, notice of the alleged infancy of Derby; that they afterwards served on the assignee notice of such alleged infancy, and of the pendency of such suit in the state court; that thereafter, the said assignee filed in this court a bill in equity against the petitioners, claiming to recover from them $5,000, as damages for the alleged conversion of the same goods involved in the suit in the state court; that the petitioners have made every effort to find Derby, but have been unable to communicate with him or to discover the property; that, during the dealings of the petitioners with Derby, he was held out to them as, and they believed him to be, a person of full age; that in fact, he was, and still now continues to be, an infant, under the age of twenty-one years, and incapable of contracting a debt or legal obligation; that Stevens never had a demand against him capable of being enforced at law, and the alleged debt to Stevens, on which the adjudication rested, was not a legal debt; that, by reason of such infancy, the said adjudication is void, as against the petitioners; and that the rights of the petitioners are prejudiced by the said adjudication, as they are subjected to two separate suits for one cause of action. They pray that the adjudication and the proceedings thereon be vacated, and the assignee be enjoined from prosecuting his suit.

On such petition and affidavits annexed to it, and on the proceedings herein, an order was made requiring Stevens and the assignee to show cause why the adjudication and proceedings had thereupon should not be vacated, on the ground that, at the time of the adjudication, Derby was an infant, and staying, in the meantime, all proceedings in the suit by the assignee. In answer, Stevens and the assignee set forth, by affidavit, that the sale of goods by Stevens to Derby, on credit, was made on the recommendation of the petitioners as to Derby's financial condition; that, a few days after such sale, the petitioners, by threats of legal proceedings, procured the mortgage which covered the goods so sold by Stevens to Derby; that Derby is a married man, and has been in business for himself for several years, and is over twenty-one years of age; that the petitioners have never proved any claim in bankruptcy, as creditors of Derby; that the house where the petition and order were left was the last and usual and known place of residence of Derby in New York; that Derby knew of the pendency of

the bankruptcy proceedings from their commencement; and that, on the 5th of March, 1872, a final order was entered in the suit in the state court, enjoining Derby from further prosecuting it, and authorizing the assignee, as such, to be substituted as plaintiff in it, and to prosecute it for the benefit of the creditors of Derby, but the assignee has no intention of so doing, and intends to rely on his suit in this court.

The question of the actual infancy of Derby at the time of the adjudication being in doubt, the court made an order for the taking of proof before a referee, as to the age of Derby at the date of the adjudication. Such proof is now before the court, and the motion to vacate the adjudication has been heard. It clearly appears that Derby did not reach the age of twenty-one years until the 14th of May, 1872.

On the hearing, Derby presented to the court a petition, verified by him on the 1st of June, 1872, and of which a copy was served on the attorneys for the petitioners on the 10th of June, 1872, setting forth that he resided, for six months immediately preceding the filing of the petition to Stevens, in this district, and had continued to reside there, and now resides there; that he was owing debts at the time of filing said petition, and is now owing debts, which he is unable to pay, to an amount exceeding $300; that he was indebted, at the time of filing said petition, to Stevens, in the sum mentioned in said petition, and to three other creditors, whom he names, in sums which he names, the aggregate of the four being $895.01; that at the time of contracting such debts he was a minor, but was engaged in business on his own account; that said debts were just, and were contracted in good faith, and would have been paid long since had not Barton, Alexander & Waller, on the 17th of November, 1871, wrongfully seized his entire stock of goods, of the value of about $5,000, and converted the same to their own use, and thereby broken up his business, and deprived him of the means of paying his just debts; that he arrived at the age of twenty-one years on the 14th of May, 1872; that he now ratifies and confirms the said four debts (naming them, but not including that to Barton, Alexander & Waller), and also ratifies and confirms the proceedings in bankruptcy herein, and the adjudication and proceedings thereunder; that he has been and is willing to surrender his estate and effects for the benefit of his said creditors, and desires to obtain the benefit of the bankruptcy act; that the said four creditors are all the creditors who have proved claims against him in the bankruptcy proceedings; and that he has no property except that which was taken possession of by Barton, Alexander & Waller, and had no other property at the time the petition of Stevens was filed. He therefore prays that the proceedings in bankruptcy, commenced on the petition of Stevens, may be continued, perfected and carried through, and that he may be decreed to have a discharge from his debts.

In answer to this petition of Derby, it is stated, on the part of Barton, Alexander & Waller, by affidavit, that they did not take possession of the goods of Derby, but that Derby, on the 17th of November, 1871, before daybreak, carted away from his store his entire movable stock, leaving only the fixtures and some rubbish, and has ever since retained said goods and concealed himself from said firm; and that the removal of the goods took place in the presence of three policemen, who knew Derby, and did not interfere because they knew him to be the proprietor of the store.

On the part of Barton, Alexander & Waller, it is contended, that, as Derby was an infant when he contracted the debt to Stevens, there was no provable debt due to Stevens at the time of the adjudication, and the proceedings in bankruptcy were unauthorized; that the mortgage to Barton, Alexander & Waller was void because of the infancy of Derby at the time it was given, and, therefore, Derby committed no act of bankruptcy by giving it; that Derby, by the suit in the state court, which is still pending, repudiated the mortgage; that he still repudiates it and the debt secured by it, by disowning it in his petition, and not therein ratifying and confirming it; that, as no title passed to Barton, Alexander & Waller by the mortgage, they obtained thereby no preference; that the petition merely ratifies the four claims proven during the infancy of Derby, for the purpose of a discharge therefrom, and such ratification does not amount to a promise, since he became of age, to pay such debts, so as to create a liability therefor, on which suits could be brought; that the claim of Barton, Alexander & Waller is as just and fair a claim as any one of the other four; that the adjudication was void on the grounds, (1) that there was no debt due to Stevens at the time of the adjudication; (2) that the act of bankruptcy alleged in the petition of Stevens was not committed; (3) and that the court obtained no jurisdiction of the person of Derby; that the void adjudication cannot be rendered valid by any subsequent consent or ratification by Derby; and that Derby, if he wishes to become a bankrupt, must now petition in the usual way.

On the part of the assignee and of Stevens, it is urged, that, if these proceedings are dismissed, all remedy against Barton, Alexander & Waller, under proceedings in bankruptcy, is, by lapse of time, gone; that, if necessary, the proceedings should be allowed to be amended, by having a guardian ad litem appointed for Derby nunc pro tunc; and that there is nothing in the language of the bankruptcy act of 1867 that forbids its application to an infant, and its language is broad enough to cover the case of an infant.

I entertain no doubt that Barton, Alexander & Waller are in a position to entitle

them to ask the interposition of this court to vacate the adjudication. The fact of the pendency of the suit in this court brought by the assignee against them, and the fact that they are as fully creditors of Derby as are those who have proved their debts against him, except in the particular that they have not formally proved their debt, give them an interest to protect, which brings them within the principles laid down in Re Boston, H. & E. R. Co. [Case No. 1,677], and demands that the court should, at their instance, inquire whether the adjudication in this case can be sustained.

The word "infant" or "minor" is not found in the bankruptcy act. The language of the 39th section, "any person residing and owing debts as aforesaid," which refers to the 11th section, and the language of the 11th section, "any person residing within the jurisdiction of the United States," is broad enough to include an infant. So, the language of the 103d section of the insolvency law of Massachusetts (Gen. St. Mass. 1860, c. 118), authorizes involuntary proceedings against "any person," not mentioning infants by words of inclusion or exclusion. In the case of Farris v. Richardson, 6 Allen, 118, a minor had been put into insolvency by some of his creditors, by default, on a notice left at his last and usual place of abode, it not being made known to the judge of insolvency that he was a minor. He had obtained credit from the petitioning creditors on the strength of representations that he was of full age. A creditor of his, who held promissory notes of his, and had attached his property thereon, before the insolvency proceedings were commenced, brought a bill of equity, to restrain such proceedings against the judge, the messenger and the petitioning creditors. The court held the proceedings to be void, on the ground that they had been prosecuted without the appointment of any guardian ad litem for the infant. It says: "In the absence of any express legislative enactment, or some clear implication arising from an existing provision of law, we cannot sanction proceedings in their nature judicial, which involve so wide a departure from the principles and practice on which civil suits against infants are uniformly conducted in courts of law." But it abstains from deciding whether the provisions of the insolvent laws of Massachusetts were at all applicable to infants, even when duly represented by a prochein ami or a guardian ad litem. It suggests, however, that there is fair reason to doubt whether the legislature intended to include infants among those entitled to the benefit of, or subject to the duties and limitations created by, the insolvent laws.

It cannot be doubtful that an adjudication against an infant who does not appear by a guardian ad litem, cannot be upheld. It is an adjudication against a person who has no legal existence, so as to be proceeded against in a court as if he were of full age. He is called upon to show cause, when he cannot. by himself, be heard to do so.

It is supposed, however, that this is a matter personal to the infant, and that the defect is cured, if the infant, after he becomes of age, comes into court and waives the irregularity by ratifying the proceeding; or, that the defect may be cured by the action of the court now, under such ratification, in appointing a guardian ad litem for the infant, for the time of his infancy, nunc pro tunc, as of the return day of the order to show cause. It will not be necessary, in the view I take of this case, to discuss the question thus suggested, for I am of opinion that infants, as subjects of either voluntary or involuntary bankruptcy, are not embraced within the provisions of the act of 1867, at least, in respect to their general contracts.

I have not been referred to any decision on the subject under the present act. Under the act of 1841 [5 Stat. 440], it was said by Judge McLean, in Re Book [Case No. 1,637], that that act extended to infants. The report of that case is very meagre, and throws little light on the question.

The general contracts of an infant having no force, if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for, the whole proceedings must be in vain, if the debts are disaffirmed by him after he attains his majority. And it does not comport with the proprieties of a court of justice, that it should solemnly entertain proceedings brought by an infant bankrupt voluntarily, with the surrender of his property to the court, and its granting of protection thereon, and its injunctions against pending suits, and then permit him afterwards to demand the restoration of his property and the virtual dismissal of the proceedings, against the will of the creditors set forth in his schedule, and who have suffered, perhaps, from the effect of the injunctions of the bankruptcy court, on the ground that, having arrived at full age, he disaffirms the debts so set forth.

So, in an involuntary case, the property of the infant bankrupt would be taken by the court, injunctions would, after adjudication, be granted against pending suits, a schedule of his creditors would be furnished by the bankrupt, and their debts would be proved, to no purpose, for, his disaffirmance of the debts, after becoming of age, would necessitate the restoration to him of his property, without any relief to the creditors.

But there are other difficulties attendant on an involuntary case. The debt of a petitioning creditor must be a debt provable at the time the petition is filed. A debt arising out of a general contract by an infant cannot be said to be a provable debt, or a debt at all, within the 19th section of the act, or to be a contingent debt, within that section.

In the case of a contingent debt, the party is absolutely bound by the obligation into which he has entered, but, by its terms, the debt is not to be paid except in a certain contingency. An infant is not absolutely bound by the obligation into which he has entered. So, also, in an involuntary case, the act of bankruptcy must be one which the party was capable at the time of committing absolutely, and did commit absolutely. An infant cannot make an absolute valid transfer of his property, within section 39, and, although he may be capable of committing some of the other acts of bankruptcy specified in that section, it is not to be intended that congress designed to make any of the specified acts of bankruptcy applicable to a person who could never absolutely commit the one involving a transfer of property. All the acts are specified in the same general language, which is broad enough to include all persons, including infants, and persons non compos mentis, and those under other legal disabilities; but it ought not to be construed as including, in respect to any of the specified acts, any person who is not in a personal status to be capable of committing absolutely all the specified acts. The law should be construed as uniform in its scope, as to the persons it applies to.

Another difficulty would arise in respect to infants. By the 43d section, at the first meeting of creditors, three-fourths in value may resolve to have the estate wound up by a trustee. If the court approves, the bankrupt is to transfer all his property to the trustee, who is then to hold it "in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had and held the same if no proceedings in bankruptcy had been taken." What could a trustee do under such a transfer from an infant? He could do no more, in regard to disposing of the property, during the minority of the infant, than the infant himself could have done. Every proceeding would have to be suspended, to await the action of the infant, on his becoming of age, and the creditors would be prevented from going on with any proceedings in any tribunal.

It cannot be supposed that congress intended that the jurisdiction of the bankruptcy court, or its effective procedure, should thus depend on the future personal action of the subjects of its process. It is not perceived why an infant could not rightfully ask, at least, in an involuntary case, if not in all cases, that the court should suspend all allowances of proofs of debt, and all distribution of his property, until he should become of age, and be allowed the privilege of disaffirming the debts sought to be proved. If he should disaffirm all of them, he could receive his discharge, and have all his estate returned to him. The only action of the court in such a case would have been to preserve his property for him, and give him a discharge from debts in respect to which, if sued, a plea and proof of infancy would have been fully available to free him from liability. It is not supposable, in the absence of express directions to that effect, that congress intended that the bankruptcy courts should exercise such a jurisdiction in respect to the estates of infants.

For these reasons, I am of opinion, that Derby, having been, in fact, an infant, when adjudicated a bankrupt, was not a proper subject for the action of the court, for want of authority in the court to take cognizance of his case. The question is one of jurisdiction. Therefore, the fact that Derby now comes into court, and states that he ratifies and confirms the proceedings, can have no effect to give to the court authority and jurisdiction as of the time of the adjudication. In re Lady Bryan Min. Co. [Case No. 7,978].

But, even giving full effect to Derby's present petition would not help the case. The giving of the mortgage to Barton, Alexander & Waller was no act of bankruptcy, because it was not an absolute transfer. It was subject to his election to affirm or disaffirm it when he became of age. His present petition contains no affirmance of the mortgage, and cannot be otherwise regarded than as a disaffirmance of it. A general confirmation and ratification of the adjudication cannot, in view of the whole petition, be construed as an affirmance of the mortgage which was the basis of the adjudication. It was not so designed.

It is not intended to express any opinion as to whether an infant may or may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessaries.

The present petition of Derby cannot be received as a proper voluntary petition, as its prayer merely is, that the former proceedings may be continued and carried through. As it can have no retroactive effect, an order must be entered vacating the adjudication herein, and all the proceedings had thereupon.

Case No. 3,816.

In re DERBY.

[8 Ben. 118;[1] 12 N. B. R. 241; 4 Am. Law Rec. 23.]

District Court, S. D. New York. June Term, 1875.

VOLUNTARY BANKRUPTCY—ASSENT OF CREDITORS TO DISCHARGE—ACT JUNE 22, 1874, § 9.

1. The words of the 9th section of the act of June 22, 1874 (18 Stat. 178), providing that in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not equal thirty per cent. of the debts proved against his estate, upon which he shall be liable as principal debtor, "without the assent of at least one-fourth of his creditors in number and one-third in value," are to be understood as

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

meaning creditors to whom he is liable as principal debtor and who have proved their debts against his estate.

[Cited in Re Read, 5 Fed. 722.]

2. Such assent must be in writing, and it is sufficient if it is filed before the hearing of the application for discharge.

[In bankruptcy. In the matter of James C. Derby.]

S. V. R. Cooper, for bankrupt.

BLATCHFORD, District Judge. This is a case of voluntary bankruptcy, the petition in which was filed on the 7th of August, 1874. Proceedings with a view to a discharge have been taken and conducted to the point of the certifying of the proceedings to the court by the register. The register certifies that the bankrupt has in all things conformed to his duty under the Revised Statutes, and has conformed to all the requirements of the Revised Statutes, unless the court should be of opinion that the 9th section of the act of June 22, 1874, requires the assent of one-fourth in number and one-third in value of all the creditors of the bankrupt, including alike those who have and those who have not proved their claims. Five creditors only have proved claims. The claims so proved amount to $2,145.80. Of those five creditors, three, whose claims, as proved, amount to $1,660, have assented to the discharge. The number of creditors whose claims are set forth in the schedules annexed to the voluntary petition is 44, and the amount of their claims is $17,873. Of these 44, only the three creditors above referred to, with proved claims amounting to $1,660, have signed the assent. One-fourth in number and one-third in value of the creditors of the bankrupt have not signed the assent.

When the act of June 22, 1874 (18 Stat. 178), was passed, the provision of law in force as to discharges was section 5112 of the Revised Statutes, in these words: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent. of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, eighteen hundred and sixty-nine." The 9th section of the act of June 22, 1874, provides as follows: "That, in cases of compulsory or involuntary bankruptcy, the provisions of said act,"—Act March 2, 1867 [14 Stat. 517],—"and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of a discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And, in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed." Section 21 of the act of June 22, 1874, repeals all acts and parts of acts inconsistent with its provisions.

The former statute, when it spoke of an assent of creditors as being necessary, spoke of it as an assent in writing of a majority in number and value of the creditors of the debtor to whom he should have become liable as principal debtor, and who should have proved their claims, and prescribed that such assent should be filed in the case at or before the time of the hearing of the application for discharge. The new statute, when it speaks of an assent of creditors as being necessary, (and which is only in cases of voluntary bankruptcy) merely says, that the discharge shall not be granted to the debtor "without the assent of at least one-fourth of his creditors in number and one-third in value." It does not, in terms, as before, require the assent to be in writing. It does not, in terms, as before, require the prescribed proportion in number and in value to be computed only upon creditors to whom the debtor shall have become liable as principal debtor. It does not, in terms, as before, require the prescribed proportion in number and value to be computed only upon such of the creditors, to whom the debtor shall have become liable as principal debtor, as shall have proved their claims. It does not, in terms, as before, require the assent to be filed in the case at or before the time of the hearing of the application for discharge. Yet all these are matters as to which inquiry at once arises, under the new statute. Must the assent be in writing? Are the creditors referred to in the new statute only the creditors to whom the debtor shall have become liable as principal debtor, or are other creditors to be included? When it is determined what creditors are thus to be recognized, is the prescribed proportion to be computed only upon such of those creditors as have proved their claims, or upon all of those creditors? Is it sufficient to file the assent at or before the time of the hearing of the application for discharge; or must it

be filed at or before the time of the application for discharge, as was required by section 33 of the act of March 2, 1867 (14 Stat. 533)? No aid is derived from the language of the new statute, in answering any of these inquiries, except what may be derived from the naked language, that the assent is to be "the assent of at least one-fourth of his creditors in number and one-third in value." I do not think, in view of the course of legislation on the subject, and of the structure of the 9th section of the act of June 22, 1874, that the expression "his creditors," in the clause therein in regard to discharges in cases of voluntary bankruptcy, is necessarily to be interpreted to mean all the creditors of the debtor, whether they have proved their debts or not.

In the former statute, the provision as to assent is introduced by the word "unless." No discharge shall be granted to a debtor whose assets shall not be equal to a specified percentage of certain specified claims, "unless" the assent in writing of a majority in number and value of certain specified creditors is filed in the case by a certain specified time. The sentence is a complete one in itself. It provides that a discharge shall not be granted to a debtor who answers a specified description, "unless" the court finds affirmatively certain prescribed things to exist, which are (1) that an assent in writing be filed; (2) that it be the assent of a majority in number and value of the creditors of the debtor to whom he shall have become liable as principal debtor, and who shall have proved their claims; (3) that it be filed at or before the time of the hearing of the application for discharge. The new statute merely says, that, in cases of voluntary bankruptcy, a discharge shall not be granted to a debtor who answers a specified description, "without" the assent of at least one-fourth of his creditors in number and one-third in value. The sentence is an incomplete one. It does not require the assent to be in writing, or to be filed, or to be filed by any specified time; and it leaves open the question as to what is meant by the expression "his creditors."

Section 33 of the original bankruptcy act of March 2, 1867, required the assent, when necessary, to be the assent in writing of a majority in number and value of the creditors who had proved their claims, and required it to be filed at or before the time of the application for discharge; but required it only where the assets of the debtor did not pay fifty per centum of the claims against his estate. The act of July 27, 1868 (15 Stat. 227), required the assent, when necessary, to be the assent in writing of a majority in number and value of the creditors to whom the debtor should have become liable as principal debtor, and who should have proved their claims, and required it to be filed at or before the time of the hearing of the application for discharge; but required it only where the assets of the debtor should not be equal to fifty per centum of the claims proved against his estate, upon which he should be liable as the principal debtor. These provisions continued in force until the 9th section of the act of June 22, 1874, was enacted. Thus, from the year 1868, an assent to a discharge was required only where the assets of the debtor did not equal fifty per cent. of the claims proved against his estate, upon which he had become liable as the principal debtor. The 9th section of the act of June 22, 1874, provides that no assent shall be necessary in involuntary cases; and it requires an assent in voluntary cases, only where the assets of the debtor do not equal thirty per cent. of the claims proved against his estate, upon which he has become liable as the principal debtor. It then repeals the provision requiring fifty per cent. of such assets. It thus, in respect to voluntary cases, in specifying the cases where an assent is required, requires it, as before, in cases where the assets of the debtor do not equal a certain percentage of the claims proved against his estate, upon which he has become liable as the principal debtor, and only in such cases, and merely changes the percentage from fifty to thirty. Then, as to what the assent is to be. The former statute required it to be the assent in writing of a specified proportion in number and value of the creditors to whom the debtor had become liable as principal debtor, and who had proved their claims, and required it to be filed at or before the time of the hearing of the application for discharge. The new statute prescribes the assent merely as an assent of at least one-fourth of the creditors of the debtor in number and one-third in value. Bnt, the change the new statute was aiming to make in respect to voluntary cases, was, clearly, a change beneficial to the debtor, by prescribing terms less onerous than were before required. Before, if the debtor's assets did not equal fifty per cent. of the claims proved against his estate, upon which he had become liable as the principal debtor, he was required to obtain an assent of creditors. Now, he was not to be required to obtain any assent of creditors unless his assets did not equal thirty per cent. of such claims. So, before, when the debtor was obliged to obtain an assent, it was required to be the assent in writing of a majority in number and value of the same creditors who were to be reckoned in computing the percentage in assets—that is, creditors to whom he had become liable as principal debtor, and who had proved their claims, and the assent was to be filed, and it was sufficient to file it, at or before the time of the hearing of the application for discharge. Now the change to be made was one beneficial to the debtor, by imposing upon him less rigorous terms, and the change was to annul the requirement of the assent of a majority in number and value of the credit-

ors who were to be reckoned in computing the percentage in assets (that percentage being changed from fifty to thirty), and to prescribe, instead, the assent of at least one-fourth in number and one-third in value of the same creditors, that is, creditors to whom the debtor should have become liable as principal debtor, and who should have proved their claims, leaving the assent still to be required to be in writing, and to be filed, and to be sufficient if filed at or before the time of the hearing of the application for discharge. The words "his creditors." in the clause of the 9th section of the act of June 22, 1874, in regard to cases of voluntary bankruptcy, may very properly be referred to the class just previously defined in the section as the creditors of whom the section is speaking, and of whom alone it speaks as creditors concerned, when requirements to a discharge are being prescribed, namely, creditors to whom the debtor is liable as principal debtor and who have proved their claims. They alone are treated as creditors and as "his creditors." They alone are treated as creditors in computing the thirty per cent. in assets, and they alone could have been intended to be treated as creditors in computing the assent of one-fourth in number and one-third in value. If this be not so, the provision as to assent would, in numerous cases, be more onerous than it was before, for it would, in numerous cases, require the assent of more creditors to make up one-fourth in number and one-third in value of all the creditors of the debtor, than it did previously to make up a majority in number and value of creditors to whom the debtor had become liable as principal debtor and who had proved their claims.

I remarked in Francke's Case [Case No. 5,046], that, in regard to involuntary cases commenced after the passage of the act of 1874, the bringing of the petition, which was required to be brought by one-fourth in number and one-third in value of the creditors of the debtor, seemed to be regarded, under the 9th section of that act, as the assent of such one-fourth in number and one-third in value, to the discharge of the debtor; but that, in regard to the case of a voluntary petitioner, commenced after the passage of the act of 1874, the assent required thereby seemed to be prescribed with a view of placing the bankrupt on the same footing, as to the action of creditors, with the bankrupt in involuntary cases. This suggestion does not require that one-fourth in number and one-third in value of all the creditors should sign the assent, in like manner as one-fourth in number and one-third in value of all the creditors must unite in an involuntary petition. For, as has been seen, the policy of the statute has been, in respect to a percentage in assets, and an assent of creditors, always to deal only with creditors who have proved their debts. At the time a petition in involuntary bankruptcy is filed, nothing less than the whole body of creditors who may thereafter choose to prove their debts can be regarded as constituting the creditors of the bankrupt. But, at the succeeding stages of the case, those only who have proved their debts are, for very many essential purposes, taken notice of as being the creditors of the bankrupt. Thus, those alone who have proved their debts can vote in the choice of assignee or trustee, or share in the distribution of the estate. Those who do not prove their debts are regarded as having elected not to be considered as creditors, so far as the proceedings in bankruptcy are concerned. In analogy to this, only those who have proved their debts are taken note of in computing the percentage in assets or the proportion required to assent to a discharge.

I have met with no decision on the point above considered. In Re Griffiths [Case No. 5,825], Judge Lowell alludes to the question, whether the assent referred to in the new statute "is that of the given number and value of all creditors who have proved their debts, or only of those to whom the bankrupt is liable as principal debtor," and speaks of it as a question which may arise in voluntary cases, and as a difficult question. The point was not before him for decision, as the case he was considering was a compulsory case. He seems to regard the expression "his creditors," as including only creditors who have proved their debts, and indicates that the question may be as to whether all creditors who have proved their debts are intended, or only those, of such creditors as have proved their debts, to whom the bankrupt is liable as principal debtor. I see no evidence that congress intended to vary the principle adopted in 1868. By the original act of 1867, the assent was to be the assent of a majority in number and value of the creditors who had proved their claims. In 1868, this was changed to the assent of a majority in number and value of the creditors to whom the debtor had became liable as principal debtor, and who had proved their claims. This continued to be the rule when the act of 1874 was passed. I see nothing in that act but a change of the proportion from a majority in number and value to one-fourth in number and one-third in value, leaving the proportion still to be calculated upon the creditors to whom the debtor has become liable as principal debtor and who have proved their claims.

These conclusions are in harmony with those at which I arrived in Sheldon's Case [Id. 12,747], when considering the question as to whether the provisions of section 9 of the act of 1874, as to discharges in voluntary bankruptcy, apply to debts contracted prior to January 1st, 1869.

It results, that the bankrupt is entitled to a discharge.

DERBY (EVERETT v.). See Case No. 4,-576.

Case No. 3,817.

DERBY v. JACQUES et al.

[1 Cliff. 425.][1]

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

RES JUDICATA — PLEA IN BAR — NONSUIT AS BAR —JUDGMENT ON AGREED STATEMENT—WRIT OF RIGHT—STATE LAWS.

1. A plea which sets forth proceedings in a former suit and a judgment in favor of the tenants, with profert of the record, and also states that the demandant, subsequent to the rendition of the judgment, made application to the court to amend the record by entering judgment for the tenants as upon a nonsuit, which application the court heard and refused, is not double; and that part of the plea which states the application being entirely immaterial, and not in any possible view affecting the question whether the judgment was or was not a bar (the record being wholly unaffected by the application), may be rejected as surplusage.

2. A judgment of nonsuit even upon an agreed statement of facts cannot be pleaded in bar to a new suit, although rendered by a court of competent jurisdiction, between the same parties, and for the same subject-matter, as in the second suit.

3. An agreed statement may be the proper foundation of such a judgment as will constitute a bar to a new suit between the same parties for the same cause of action. Judgments upon agreed statements of facts were unknown to the common law, but the general usage of the courts of Massachusetts has sanctioned this mode of trial, and it has become part of the common law of the state.

4. Where a cause was submitted to the court under an agreed statement which among other things provided that "the court may make any other order or judgment in the case which they shall think it may require," *held*, that the whole controversy was submitted to the court without limitation; and that, the court having jurisdiction of the cause and of the parties, its judgment, until reversed, must be binding in every other court.

5. By the 34th section of the judiciary act [1 Stat. 92] it is provided that the laws of the several states, except in certain cases, shall be regarded as rules of decision in the courts of the United States in cases where they apply.

6. While a writ of right may still be maintained in the circuit court for the district of Massachusetts, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit is no longer in force in this district. Certainly not if such judgment was recovered in the state court since the writ of right was abolished by the statute of the state.

[Cited in Kelly v. Town of Milan, 21 Fed. 862.]

This was a writ of right, claiming to recover an undivided fifth part of a certain parcel of land in Somerville, in this district. Two pleas were filed by the tenants [Samuel Jacques, and others]: First, they pleaded the general issue, or rather tendered an issue on a joinder of the mise, on the mere right of the demandant [Eleanor Derby] and her seizin, with the usual prayer that recognition be made whether they or the demandant have the greater right to hold the premises, and also praying for an inquiry as to the seizin of the demandant. By their second plea, the tenants set up as a bar to the action a judgment of the supreme court of Massachusetts, rendered in a suit brought by the demandant and certain other parties against Henry Hall and Samuel Jacques, the father of the tenants, who had subsequently deceased. In that case, the record showed that the parties made an agreed statement of facts, setting out the evidences of their respective titles, and submitted the cause to the court upon that agreed statement, which, as the plea alleges, concludes as follows: "If the court shall be of opinion, on the facts stated, that the demandants have no right to any part of the demanded premises, they are to become nonsuit, and judgment is to be entered for the tenants. If the court shall be of opinion that the title to the whole of the demanded premises is in the demandants, the tenants are to be defaulted, and judgment is to be entered accordingly. If the court shall be of opinion that the papers show a legal title in the demandants, but under the circumstances the tenants might, in law, have acquired an exclusive adverse possession of any part of the demanded premises, under a claim of title for more than twenty years, so as to gain a title thereto, then the court may refer it to three commissioners, with such instructions as the court may see fit, to determine to what, if any, part of the demanded premises the tenants have acquired a title by an adverse possession of more than twenty years, and the return of such commissioners shall be conclusive between the parties, and judgment be entered accordingly, or the court may make any other order or judgment in the case which they may think it shall require." After reciting the agreement of the parties, the tenants by their plea allege in substance and effect that the court afterwards, at a regular term thereof, filed a rescript in the case as follows: "Judgment for the tenants." Whereupon it was considered by the court that the tenants recover against the demandant their costs, taxed at a given sum, as by the record and proceedings thereof in the court more fully and at large appears. Subsequently the demandants, as the plea stated, made application to the court to alter the record by having an entry of nonsuit made therein, and a judgment for the tenants as upon nonsuit, which application was heard by the court, and, after due consideration, was refused. Hall, the first-named tenant in the suit described in the plea, conveyed all his right and estate in the demanded premises to the father of the tenants in this suit, who subsequently deceased, leaving a will, and eight children, and the tenants claimed title to the premises in question as his heirs and devisees, according to the terms and conditions of the will. To that plea the demandant demurred, and

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

showed the following causes of demurrer: First, that the judgment set up in the plea was a judgment for costs only, and did not fix or determine the right or title to the land demanded. Second, that the judgment was rendered on an agreed statement of facts signed by the parties, by which it was stipulated that, if the court should be of opinion that the demandants had no right to any part of the demanded premises, they were to become nonsuit, and judgment was to be entered for the tenants. Third, that the judgment for the tenants was in fact rendered upon a nonsuit. Fourth, that it is apparent from the judgment pleaded that there was no verdict of a jury, no issue joined either of law or fact, no retraxit of the demandants, and no other legal ground upon which the judgment could rest, except the agreement of the demandant, to become nonsuit. Fifth, that the plea was double, by alleging the proceedings of the court subsequent to the judgment, of which there is no record.

E. H. Derby and J. P. Robinson, for demandant.

The agreed statement of facts sets forth three propositions:—First, a judgment of nonsuit, if demandants showed no title. Second, a judgment for demandants on default, in case they showed a title. Third, a reference to commissioners in case the title was found in both parties, and thereupon such further order or judgment as the court shall deem the case to require; and our point is, that the demandants, having failed to show a title to the satisfaction of the court, have been nonsuited, and a judgment for costs has been entered on such nonsuit pursuant to the agreed statement of facts. The judgment in Derby et al. v. Hall et al. does not touch the title or allude thereto, but is a judgment for costs only. There was no issue in law or in fact between the parties, upon which a judgment to affect the title could be founded. In pursuance of the agreement of the parties, no judgment could be entered, except upon nonsuit or default. No judgment at all could be rendered in such case, except in pursuance of such agreement. The demandants never agreed to anything, except for a nonsuit, in case the legal title should be decided against them. There is no judgment whatever against them, except for costs, viz. "that defendants recover of the demandants their taxed costs." This court will not go behind the record, and that record must be presumed to show the intent of the parties. The words in the rescript or message of the court to the clerk in vacation, "Judgment for tenants," are merely preliminary to the judgment, and not the judgment or any part of the same. The rescript merely follows the agreed statement of facts, that, on failure to show title, "demandants are to become nonsuit, and judgment to be entered for tenants." And the judgment of nonsuit in the usual form has been entered for the tenants accordingly. The established form of a judgment on a verdict in bar of the title of the demandants is one finding the title, viz. "that it is considered that demandants take nothing by their suit, and that the tenants go thereof without day," while in a writ of right, the judgment for tenants is that "the tenants shall hold the demanded premises quit of the said demandants and their heirs forever, and shall recover their costs." The plea is double and defective in form, and introduces matter which, if recorded, would not affect the decision, but, on the contrary, would aid the demurrer. That a full judgment in a state court upon a writ of entry is no bar to a writ of right in the United States courts, which is a higher remedy. Counsel further contended, that as there were but four kinds of judgments known to the law, viz. on demurrer, verdict, retraxit, and nonsuit, and as this judgment was not either of the first three, it must be the last.

S. E. Sewall, for tenants.

It is too well settled to be disputed, that a judgment between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive. Le Guen v. Gouverneur, 1 Johns. Cas. 436; 1 Greenl. Ev. §§ 528, 531. The question, then, is, What was the judgment of the supreme court of Massachusetts? The rescript sent to the clerk was in these words, "Judgment for tenants," and so it was recorded by the clerk. Demandant contends that this was not a judgment, but a mere order to the clerk to enter judgment. But this is an entirely false view of the case. The clerk is merely a ministerial officer, who records the doings of the court. The judgment is itself the act of the court, not of the clerk. The rescript is the judgment, the ipsissima verba of the rescript. The clerk did not venture to alter them. The record is the mere evidence of the judgment, not the judgment itself. When the clerk recorded the rescript he recorded the judgment. The judgment of the court is often verbal, as in sentencing prisoners to death, fine, or imprisonment. The words addressed by the court to the prisoner are the judgment; what the clerk writes is the mere record of the judgment. Demandant asserts that only four judgments are known to the law; now, besides his list, there is, in the practice of Massachusetts, a very familiar one, viz. on an agreed statement, which is this very case. Now it does not matter whether the judgment follows the terms of the agreed statement or not. If it be in direct violation of them, it will yet be valid until reversed.

CLIFFORD, Circuit Justice. Three questions are raised by the demurrer for the con-

sideration of the court. But for the sake of convenience, the order in which they are presented in the pleadings will be reversed. They are as follows: (1) Whether the plea is sufficient in point of form; and if so, then, (2) whether the record of the former suit and judgment set forth in the plea is of a character to operate as a final and conclusive determination of the title of the parties in the court of the state where it was made; and if both of these questions are found in favor of the tenants, then, (3) whether a judgment upon the merits rendered in this state, by a court having jurisdiction of the parties and the cause, in a plea of land, commenced and prosecuted by a writ of entry, is a bar to a writ of right subsequently prosecuted between the same parties, and for the same premises, in the federal courts.

It is insisted by the demandant that the plea is double, and therefore bad in point of form, because it sets forth the proceedings in the court on the application of the demandant to amend the record, which proceedings took place subsequent to the rendition of the judgment, and are no part of the same. That suggestion would certainly have weight, if those allegations of the plea were necessary to maintain the defence set up by the tenants; and it would clearly be well founded, under the circumstances of this case, if the other matters set forth in the plea did not remain in full force, and wholly unaffected by those allegations. But it is obvious, if the judgment without those proceedings is of a character to operate as a final and conclusive determination of the title of the parties, then those proceedings are entirely immaterial to the issue of law raised by the demurrer; and if the judgment was not of such a character at the time the record of the judgment was made, still those proceedings are equally immaterial, because the record yet remains without any alteration whatever; so that the question whether the payment is or is not a bar to this suit, in any view that can be taken of the question, is wholly unaffected by those proceedings. According to the well-settled rules of pleading, therefore, the allegations of the plea setting forth those proceedings, which in themselves are entirely immaterial, may be rejected as surplusage; and if the other matters set forth in the plea are well pleaded, and constitute a sufficient answer to the declaration, the allegations setting forth those proceedings do not vitiate the plea. Examples may be found where the immaterial averment is descriptive of the matter in controversy, or where the immaterial matter is so interwoven with the substance of the plea that the whole allegation becomes material and is subject to a traverse; but the present case falls within the well-known rule, that if the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation on the subject whatever was necessary, it may be rejected as surplusage, and need not be proved; nor will it vitiate even on a special demurrer. 1 Chit. Pl. (12th Am. Ed.) 229; Steph. Pl. 423; Co. Litt. 303b.

In the second place, it is insisted by the demandant that a judgment of nonsuit is never a bar to a new suit, and that the judgment set forth in the plea is a judgment of nonsuit. That proposition, being twofold, presents two questions which will be separately considered. While the tenants do not controvert the first branch of the proposition, they expressly deny that the judgment in question is one of nonsuit, or that it was so intended or understood by the court before whom it was rendered. Nonsuit at common law was a mere default or neglect of the plaintiff to pursue his remedy, and therefore he was allowed to begin his suit again upon payment of costs. 3 Shars. Bl. 296. Courts of justice could determine nothing at common law, unless both parties were present in person or by their attorneys, except in cases of default. In the course of the pleading, therefore, if either party neglected to put in his declaration, plea, replication, or the like, within the times allotted by the rules of the court, the plaintiff, if the omission was his, was said to be nonsuit; or if the negligence was on the side of the defendant, judgment was rendered against him for his default. Such a judgment, when rendered against the plaintiff, was only for the costs of the suit, and upon the payment of the same he might bring a new action. Those rules of practice substantially obtain at the present time, and accordingly it has been determined by the highest authority that a judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter. Homer v. Brown, 16 How. [57 U. S.] 354; Morgan v. Bliss, 2 Mass. 113; Knox v. Waldoborough, 5 Me. 185; Bridge v. Sumner, 1 Pick. 371; Wade v. Howard, 8 Pick. 353. These cases fully justify the first branch of the proposition assumed by the demandant; but it by no means follows, as will presently appear, that all of the deductions attempted to be made from the admission can be sustained. Assuming that a judgment of nonsuit is not a bar to a new action, the more important inquiry arises in the case, what is the true nature of the judgment set up in the plea. To show that it is a judgment of nonsuit, and nothing more, the attention of the court is drawn by the counsel of the demandant to the various kinds of judgment as known and understood at common law. He assumes, in the language of a learned commentator, that the judgment of the court is the sentence of the law, and that there can be but four kinds of judgment in cases of this

description. (1) Upon demurrer, where the facts are agreed by the parties, and the law is determined by the court. (2) Where the law is admitted by the parties, and the facts are disputed, as in case of judgments on verdicts. (3) Where the facts and law arising thereon are admitted by the defendant, as in judgments by confession or default. (4) Where the plaintiff is convinced that the facts, or the law, or both, are not sufficient to support his action, as in judgments on nonsuit, retraxit, and discontinuance. 3 Shars. Bl. 395. That course of remark, however, is based upon the assumption that the practice in the courts of Massachusetts is the same in all respects as the practice was at common law; and inasmuch as a final judgment on an agreed statement of facts was unknown in the early jurisprudence of the parent country, so it is insisted that such an agreed statement cannot now be regarded as the proper foundation of such a judgment as will conclusively determine the rights of the parties and constitute a bar to a new suit. Much reason exists to suppose that such was the theory of the common law. General verdicts, however, were often taken subject to the opinion of the court on a special case stated by the counsel; but as nothing appeared on the record except the general verdict, the parties were precluded from the benefit of a writ of error. Id. 377. At one time strong doubts were entertained whether a writ of error would lie in the supreme court on a judgment rendered in the circuit court upon an agreed case. Keene v. Whittaker, 13 Pet. [38 U. S.] 459. Those doubts, however, were soon removed when, upon an examination of the question, it was found that the practice of the court had been to sustain writs of error in such cases almost from the time of its organization. Faw v. Roberdeau's Ex'r, 3 Cranch [7 U. S.] 173; Tucker v. Oxley, 5 Cranch [9 U. S.] 34; Kennedy v. Brent, 6 Cranch [10 U. S.] 187; Brent v. Chapman, 5 Cranch [9 U. S.] 358; Shankland v. Washington Corp., 5 Pet. [30 U. S.] 390; Inglee v. Coolidge, 2 Wheat. [15 U. S.] 363; Miller v. Nicholls, 4 Wheat. [17 U. S.] 311. Three cases have since been reported, in which the point has been directly adjudicated, so that the question may now be considered as closed. U. S. v. Eliason, 16 Pet. [41 U. S.] 301; Stimpson v. Baltimore & S. R. Co., 10 How. [51 U. S.] 329; Graham v. Bayne, 18 How. [59 U. S.] 60; Suydam v. Williamson, 20 How. [61 U. S.] 427. General usage in the courts of Massachusetts, "whereof the memory of man runneth not to the contrary," has sanctioned this mode of trial until it has become a part of the common law of the state. Cases are often submitted to the court in that mode, without any other pleading than the declaration. Issues are seldom or never framed in such submissions, except so far as they arise out of the statement of the case. When the practice was commenced is not known, and in all probability it would be as vain as it would be useless to attempt to trace its origin. Four cases at least where the trial was in that mode, are reported in the first volume of the Massachusetts Reports. They were all conducted by eminent counsel, and were severally heard and decided by a learned court. Livermore v. Newburyport Ins. Co., 1 Mass. 264; Payson v. Payson, Id. 284; Gordon v. Pearson, Id. 324; Porter v. Bussey, Id. 436. No one can read any one of those cases and fail to see that the practice as now known and universally understood was at that early period equally familiar to the bar and the court. From the year 1804 to the present time, the practice of trying causes in that mode has constantly increased, and it was never doubted, so far as appears, that a judgment rendered on such a foundation, if purporting in its terms to be a final judgment, was a conclusive determination of the matter in controversy, and as such that it might be pleaded in a bar to a new suit between the same parties for the same cause of action. Maine at that period was a part of Massachusetts, but since the act of separation, her courts have adopted and sanctioned the same practice, which has been continued to the present time. Hubbard v. Cummings, 1 Me. 11; Fosdick v. Gooding, Id. 30; Lincoln & K. Bank v. Richardson, Id. 79; Hallowell v. Gardiner, Id. 93; Jewett v. Somerset Co., Id. 125. To admit that there can be a doubt upon this question, would be to prejudice vast interests long since supposed to rest upon the irrepealable determinations of the courts. There is no ground for doubt upon the subject, any more than in respect to a judgment on the verdict of a jury. Having come to this conclusion, it now becomes necessary to examine the agreement under which the cause was submitted to the determination of the court. Such agreements are usually appended to the statement in the case, and in fact form a necessary part of it. Livermore v. Newburyport Ins. Co., 1 Mass. 269. In the first place, the plea states that the parties appeared at regular term of the court, and agreed to submit the action to the decision of the court, on the following statement of facts: That agreement recites the nature of the action, describes in general terms the land in controversy, and contains a full statement of the evidence of title on which each party relied. By the terms of the agreement it was stipulated: (1) That if the court came to the conclusion, on the facts stated, that the demandants had no right to any part of the demanded premises, then the demandants were to become nonsuit, and judgment was to be entered for the tenants. (2) On the other hand, if the court, in view of the facts, came to the conclusion that the title to the whole of the premises in question was in the demandants, then the tenants were to be defaulted, and judgment was to be entered accordingly. (3) But if the circumstances were such, in

the opinion of the court, that the tenants might have acquired title to any portion of the demanded premises by adverse possession, then, although the paper evidence showed the title to be in the demandants, still the court was authorized to refer the matter to three commissioners, with such instructions as the court might see fit to give in order that the commissioners might determine to what, if any, part of the same premises the tenants had acquired a title by such adverse possession; but it was expressly stipulated that the return of the commissioners should be conclusive between the parties, and that judgment should be entered accordingly. Under each of the three clauses of the agreement already recited, the parties themselves prescribed the judgment which the court should enter in the case. No discretion whatever was vested in the court as to the judgment to be rendered under any one of those three clauses of the agreement. Demandants were to be nonsuited under the first clause, and the tenants were to be defaulted under the second, and judgment was to be rendered on the return of the commissioners under the third clause. Nothing, therefore, can be plainer than the fact that the court, in giving the judgment in question, did not act under any one of those three clauses. It is not pretended that the demandants were ever nonsuited, or that the tenants were defaulted, or that the cause was ever referred to commissioners. Were there no other clause in the agreement, it would then be clear that the judgment was erroneous. Such, however, is not the fact, as appears from the fourth clause of the agreement, which provides as follows: "Or the court may make any other order or judgment in the case which they shall think it may require." Under this last clause, the whole controversy was submitted to the court on the facts stated, without restriction or limitation. To suppose otherwise would be to do violence to the language employed, and to make a new agreement for the parties instead of expounding the one they have made for themselves. It is suggested, however, that the fourth clause was intended to apply only to the special proceeding contemplated under the third, and that it should be so limited and qualified. But that suggestion cannot be sustained, for the reason that the third clause is as independent, full, and complete as the first and second; and also, for the better reason, that it expressly provides that "the return of the commissioners shall be conclusive between the parties, and judgment be entered accordingly." Admitting this construction of the agreement to be correct, it then follows that it was entirely competent for the court to render judgment for the tenants, or judgment for the demandants, accordingly as they found for the one or the other party; and such a judgment, undoubtedly, if properly entered, would be a conclusive determination of the matter in controversy in the courts of this state. Assuming that the court had power to render a final judgment for the tenants, the next inquiry is, Was the judgment which they rendered one of that character? It is contended by the demandant that it is a judgment for costs only. No question is made as to the facts stated in the plea, but the argument on this point is addressed to the construction of the language employed by the court in giving the judgment, and the argument is, that the language so employed, when taken in connection with the agreement under which the court acted, shows that the judgment is one for costs only, which impliedly admits that the language is correctly recited in the plea. Had there been any doubt as to the correctness of that part of the plea which recites the judgment, it should have been controverted by a proper replication. Under the admissions of the demurrer, it must be assumed that the judgment as recorded is a judgment for the tenants, in the manner and form as stated in the plea. Taking that for granted, I am of the opinion that the judgment is in legal effect precisely what it purports to be,—a final judgment for the tenants. Clearly it is not a judgment of nonsuit, and therefore was not rendered under the first clause of the agreement; and it is equally clear that it could not have been rendered under the second clause, because it is a judgment for the tenants, and not for the demandants. All agree that the third clause was inapplicable to the case, and that no such judgment as is therein contemplated could have been entered by the court, because the case was never referred to commissioners. It comes to this, then, either that the court acted under the fourth clause or they acted without authority. For the argument's sake, however, let it be admitted that the construction here given to the fourth clause is not correct, and that the judgment is erroneous. Still, it is a final judgment of a court having jurisdiction of the cause and of the parties, and in the opinion of this court its validity cannot here be questioned. Where a court has such jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, the judgment, until reversed, must be regarded as binding in every other court. Errors and irregularities, if any, must be corrected by some direct proceeding to set the judgment aside, either before the same court or in an appellate court. Elliot v. Peirsol, 1 Pet. [26 U. S.] 340; Thompson v. Tolmie, 2 Pet. [27 U. S.] 168; Cook v. Darling, 18 Pick. 393; Granger v. Clark, 22 Me. 128; Smith v. Keen, 26 Me. 423; Banister v. Higginson, 15 Me. 73; Simms v. Slacum, 3 Cranch [7 U. S.] 306; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 478. Lastly, it is insisted by the demandant that the judgment set up in the plea is not a bar to this suit, because it was rendered in a plea of land commenced and pros-

ecuted by a writ of entry. Beyond question the writ of right is in its nature the highest writ in the law. It lies only for the recovery of an estate in fee simple, and is the last resort of a party who has been ousted of real property. This writ, says Judge Blackstone, lies concurrently with all other real actions in which an estate of fee simple may be recovered, and it also lies after them, being as it were an appeal to the mere right when judgment hath been had as to the possession in an inferior possessory action. 3 Shars. Bl. 193; Jack. Real Act. 276; Stearns, Real Act. 350. Such a remedy still exists at common law, and it existed in the courts of Massachusetts until 1840, when it was abolished by statute. Rev. St. Mass. c. 101, § 51. A writ of right was a proper remedy in the courts of Massachusetts, as at common law, prior to that period; and it was held by the supreme court, in the case of Homer v. Brown, 16 How. [57 U. S.] 363, that the repeal of the statute conferring the remedy did not repeal it as process in the circuit court for this district. But the same court held, in the same case, that it was as process alone that it continued in the circuit court for this district, and that the action was subject to the limitation prescribed by the state law as to the time within which such a remedy may be prosecuted. Writs of right were abolished in Massachusetts before the rendition of the judgment set up in the plea of the tenants. When that judgment was rendered, therefore, the writ of entry was the highest writ known to the law of the state, and the judgment in question conclusively settled the title of the parties under the law of the state, so that the question here presented is not one respecting the form of the remedy, but presents the inquiry whether there can be one rule of property in the courts of the state, and another and a different rule touching the same subject-matter in the circuit court for the district. By the thirty-fourth section of the judiciary act, it is provided that the laws of the several states, except in certain cases not material to the present inquiry, shall be regarded as rules of decision in the courts of the United States in cases where they apply. Repeated decisions of the supreme court have established the doctrine that the federal courts adopt the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which has become a fixed rule of property. Jackson v. Chew, 12 Wheat. [25 U. S.] 153; Henderson v. Griffin, 5 Pet. [30 U. S.] 151; Daly v. James, 8 Wheat. [21 U. S.] 495; Lane v. Vick, 3 How. [44 U. S.] 464. While, therefore, a writ of right may still be maintained in the circuit court for this district, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit is no longer here in force; certainly not, if such judgment was recovered in the state court since the writ of right was abolished by the statute of the state. To regard the writ of right in the circuit court of the district as still overriding a final judgment recovered on a writ of entry in the state court, would present the anomaly of one rule of property in the state courts, and another and a different rule in the circuit court in respect to the same subject-matter. Infinite mischief would ensue from such a contrariety in the rules of property in the respective jurisdictions; and it was to prevent such a state of things that the thirty-fourth section of the judiciary act was passed. That section does not apply to process, it merely furnishes a rule of decision, and was not intended to regulate the remedy. M'Keen v. Delancy, 5 Cranch [9 U. S.] 22; Wayman v. Southard, 10 Wheat. [23 U. S.] 1; Polk's Lessee v. Wendall, 9 Cranch [13 U. S.] 87; Mutual Assur. Soc. v. Watts, 1 Wheat. [14 U. S.] 279; Shipp v. Miller, 2 Wheat. [15 U. S.] 316; Thatcher v. Powell, 6 Wheat. [19 U. S.] 119; M'Cluny v. Silliman, 3 Pet. [28 U. S.] 270; Green v. Neal, 6 Pet. [31 U. S.] 291. In view of the whole case, I am of the opinion that the plea of the tenants is sufficient, and constitutes a bar to the present suit. Demurrer overruled. Plea adjudged sufficient.

DERBY (PULTE v.). See Case No. 11,465.

DERBY (STORY v.). See Case No. 13,496.

DERBY (WALKER v.). See Case No. 17,068.

DERMOTT (FIDELIO v.). See Case No. 4,754.

DERMOTT (MONCURE v.). See Case No. 9,707.

Case No. 3,818.

DERMOTT v. TUCKER.

[3 Cranch, C. C. 92.][1]

Circuit Court, District of Columbia. May Term, 1827.

LANDLORD AND TENANT—PAROL LEASE—ASSUMPSIT FOR RENT.

Upon a parol lease for one year at $600 per annum and an occupation for two or more years, the plaintiff may recover for the whole time of occupation at that rate, upon a count upon indebitatus assumpsit for $1000, although the use and occupation were not worth so much.

Indebitatus assumpsit for $1000 for use and occupation, and quantum meruit for use and occupation.

The plaintiff offered evidence of a parol agreement for a year at $600 per annum, and an occupation of two years, and prayed the court to instruct the jury that if they should be satisfied by the evidence that there was such agreement and occupation, the plaintiff was entitled to recover upon the count of indebitatus assumpsit for $1000,

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

damages at the rate agreed upon for the actual time of occupation, although they should be satisfied by the evidence that the use and occupation were not worth so much.

Which instruction THE COURT gave, (nem. con.)

Verdict for the plaintiff $200.

DE RODRIGUEZ (UNITED STATES v.). See Case No. 14,950.

DERRINGER (PETTIBONE v.). See Case No. 11,043.

DERRY v. HERSEY. See Case No. 2,388.

DERRY MILLS, Ex parte. See Case No. 7,-015.

Case No. 3,819.

DESHON v. FOSDICK et al.

[1 Woods, 286.][1]

Circuit Court, D. Louisiana. Nov. Term, 1872.

CONTRACT BY CORRESPONDENCE—AGREEMENT FOR CHARTER OF SHIP—WARRANTY.

1. Where parties are in treaty by letter and telegraph to make a contract, there must be a distinct offer on one hand and an acceptance of it on the other, showing a concurrence of the minds of the parties upon all the terms of the contract before either party is bound.

2. A., in Boston, was in correspondence with B., in New Orleans, in reference to the chartering of a ship to B. to carry freights from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a day certain. *Held*, that the representation amounted to a warranty that the ship should sail on that day. The ship did not sail for two days after the time fixed; therefore, B. was not bound.

[Cited in Goulding v. Hammond, 49 Fed. 445.]

Jury waived and cause submitted to court on facts and law.

Thomas Hunton, for plaintiff.

L. Madison Day and J. R. Beckwith, for defendant.

WOODS, Circuit Judge. The petition alleges, that on March 10, 1871, the ship E. Sherman, then lying in the port of Boston, was chartered by plaintiffs, who were the owners, to defendants for the purpose of transporting cotton from the port of New Orleans to some European port, at a rate of freight agreed upon. That in pursuance of the contract, the ship sailed for New Orleans, and arrived on the 12th day of April. That on her arrival she was accepted by the defendants, but on April 19, they repudiated the contract and declared they would not accept, and would not receive the ship. The plaintiffs aver, that by reason of the premises, they have been damaged in the sum of $6,793.73, with interest, from judicial demand, for which they ask judgment.

The defendants plead: 1. A general denial. 2. That they did by letter and telegrams agree to charter said ship on the understanding and representation that she would sail from Boston on Wednesday the 8th day of March, 1871, but that she did not sail for several days after that time and that as soon as defendants were advised of that fact they gave notice to plaintiff, Wm. Deshon, who was master of said ship before she was tendered to them under said charter party, that they were not bound to take her under said charter party, and no tender was thereafter made to defendants.

The evidence in the case establishes these facts: On the 9th of March, 1871, the defendants telegraphed from New Orleans to Howes, Ryder & Co., in Boston, the agents of plaintiffs, as follows: "Shall we close Sherman; Liverpool; three farthings; Havre, 1 1-2, Continent, 13-16." On the 10th of March the foregoing dispatch was answered by Howes, Ryder & Co., as follows: "Close Sherman, three farthings Liverpool; 13-16, Continent; full cargo." On March 10th, after the receipt by defendants of this dispatch and before it was answered by them, defendants received a letter written by Howes, Ryder & Co., on the 6th of March, in which they say "Our ship E. Sherman will sale on Wednesday for your port. We have given our captain letters of introduction to your house, and if he is not chartered before he arrives, hope you will look after him immediately and offer him some good business. He has given me authority to close him at three quarters Liverpool. At any time you can offer her that before he arrives, please let us hear from you and we hold the opportunity to accept the first offer made at those rates from any house," etc. After the receipt of this letter and of the telegram of Howes, Ryder & Co., of the 10th of March above given, and on the evening of that day the defendants sent the following telegram to Howes, Ryder & Co.: "Sherman closed. Liverpool, three farthings; Havre, one and a half, or Continent, thirteen sixteenths."

It is further shown by the testimony of the defendant Fosdick that had he not received on the 10th the letter of Howes, Ryder & Co., advising him that the Sherman would sail for Boston on the 8th of March he would not have sent his telegram of that date closing the contract chartering the ship.

The pleadings and evidence present two questions for decision.

The first is, Did the telegram of defendants of the 9th of March and the reply thereto of Howes, Ryder & Co., of the 10th, complete and conclude the contract of the parties? A negative answer must be given to this question. The telegram of the 9th was an inquiry to which the telegram of the 10th was an answer. It meant simply, "Will you charter your vessel on the terms named?" The answer is in effect an affirmative reply. This does not make a contract until the defendants have sent another dis-

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

patch accepting that ship on the terms specified. But it is to be observed that the terms in the answer of Howes, Ryder & Co., do not correspond with the inquiry propounded in the telegram of defendants. They inquire, "Shall we close Sherman, Liverpool, three farthings; Havre, one and a half; Continent, thirteen-sixteenths?" In the answer of Howes, Ryder & Co., nothing is said about the rates to Havre, and the words "full cargo" are added. So that by the passage of these two telegrams the minds of the parties had not concurred upon the terms of the contract. A second dispatch from defendants was necessary to complete the contract, and this was sent on the night of March 10, after the reception by defendants of the letter of Howes, Ryder & Co., dated March 6.

Other questions to be determined are, did the statement, made in the letter of the 6th, that the Sherman would sail on the 8th, form a part of the contract? and, if it did, was it a mere representation, or was it a condition precedent?

I can see no reason why the element by which the date of the sailing of the ship was fixed should be excluded from the contract any more than the rates of freight. Howes, Ryder & Co. were corresponding with defendants, both by letter and telegram, in reference to the chartering of the ship. Before defendants finally closed the contract, they had before them the telegram of Howes, Ryder & Co., fixing the rates of freight, and their letter naming the day when the ship would sail from Boston. It is fair to presume that both operated on the mind of defendants in inducing them to charter the ship, and the express testimony is, that such was the fact. We may then conclude that the sailing of the ship on the 8th of March was a part of the contract.

But was it a condition precedent? Did it amount to a warranty that the ship should sail on the day named? This question appears to be settled by the case of Lowber v. Bangs, 2 Wall. [69 U. S.] 728, and the cases cited in the opinion of the court. In that case it was held, "that a stipulation in a charter party that the chartered vessel, then in distant seas, should proceed from one port named to another port named with all possible despatch, is a warranty that she will so proceed, and goes to the root of the contract; it is not a representation simply that she will so proceed, but a condition precedent to the right of recovery." In Glaholm v. Hays, 2 Man. & G. 257, cited by counsel, and referred to by the court in Lowber v. Bangs [supra], the language of the charter party was, "the vessel to sail from England on or before the 4th of February next," and this was held to be a condition precedent. In Ollive v. Booker, 1 Exch. 416, the vessel was described as "now at sea, having sailed three weeks ago," and it was held that the time at which the vessel sailed was material, and the statement in the charter party amounted to a warranty. See, also, Oliver v. Fielden, 4 Exch. 135; Croockewit v. Fletcher, 1 Hurl. & N. 912; Behn v. Burness, 8 Law T. [N. S.] 207, April, 1863.

Holding, therefore, that the statement made by Howes, Ryder & Co., the agents of the owners, in their letter of March 6, that the Sherman would sail on the 8th, entered into the contract of the parties and amounted to a warranty, and there being no dispute of the fact that she did not sail until the 10th, I am of opinion that plaintiff has shown no case for a recovery, and that there must be a finding and judgment for costs in favor of defendants.

Case No. 3,820.

DESHON v. The MEDORA.

[2 Woodb. & M. 118.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

ADMIRALTY JURISDICTION—ENFORCEMENT OF MORTGAGE.

Where one advances money to the owners of a vessel, which was partly used in fitting her for the coming voyage, it is doubtful whether the mortgage to secure it on the vessel can be enforced in admiralty by a libel against her. If before the case is decided, the sale of the vessel has been ordered on prior libels for voyages and a bottomry bond, and the claim of this libellant on the balance of the proceeds been put in and allowed, this libel will be dismissed without costs.

[Cited in Adams v. Blodgett, Case No. 46; Folger v. The Robert G. Shaw, Id. 4,899.]

This was an appeal from a decree of the district court [of the United States for the district of Massachusetts] made on the libel against the ship Medora, which was referred to in the preceding case. It averred, that Fisk & Bradford, the owners, on the 25th of March, 1845, at Boston, where the Medora was then lying, executed a bottomry bond to the libellant, such as is described in his answer to the libel by Leland & Co. That two previous libels, named in the opinion of the court in said case, had been filed and sustained against the vessel, and her sale ordered, and the libellant prayed, that he might receive payment out of the balance of the proceeds thereof still remaining in the district court. The libel requested notice to be given to the assignee of the owners and to Leland & Co., and to other claimants to appear and object if they have cause. On the 30th of April, 1846, Winsor, the assignee, appeared and admitted, that Fisk & Bradford executed the bond to [James] Deshon at the time named, and were the owners of the ship. That the amount loaned he is not informed of, and begs it may be proved, but believes a note for $1000, payable in six months, constituted a part, and that $3200 of

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

it was money previously advanced. That a part of it was notes of the owners then falling due, and checks and commissions, and notes given by the libellant not then due, and notes of the owners given to third persons, which the libellant had taken up. That said bond was not a maritime contract, nor its enforcement within the admiralty jurisdiction of the district court, because the loan was not on the risk of the vessel's being lost, but was to be repaid with interest at all events. That the above bond was not duly recorded as a mortgage under the laws of Massachusetts till July 19, 1845, after the title of Winsor as assignee had accrued. That on the arrival of the Medora from Manilla, March 17, 1846, he took possession of her as assignee of the owners for the benefit of all concerned, and has expended about her for her preservation $209.14. That in support of these facts, beside the papers and evidence offered, he prays that the libellant be required to answer certain interrogatories on oath. And that this libel be dismissed, and the proceeds of the Medora be paid over to him. He set out, also, the failure of the former owners, April 29, 1846; the proceedings then commenced under the insolvent system of Massachusetts, and prosecuted till he was appointed assignee, and the property of the owners duly assigned to him on the 22d of May, 1846. The replication of Deshon denied all the material parts of the answer, and called for proof. The evidence, besides what was put into the previous case, which might be pertinent, consisted of the expenditures made since the arrival of the vessel, and which it was agreed should be allowed out of the proceeds, and taxed in the cases before decided. A note for $750 from A. C. to the owners was put in, and an admission that the libellant, before the ship sailed to Manilla, inquired of the master if she was free from all previous incumbrances, and was answered in the affirmative. The libellant in answer to the interrogatories testified, that he advanced the $6000 while the Medora was in port and preparing to sail, and it was in cash except a note of $1000 given by him to the owners, payable in six months. That he has received no commissions, though 5 per cent. was agreed to be paid, and he has had former dealings with the owners, which were kept entirely distinct from this, and all now claimed is due. That he discounted a note of $752 by Leland & Co. which if not paid, as it has not been, was to be covered by the bond. That all the advances were made within twenty-five days, and by previous agreement were to be secured by the bottomry bond, and he has received from no quarter any thing in payment. The decree in the district court was, that the libellant recover against the proceeds of the vessel $5860 without costs.

Mr. Choate, for Deshon.

Mr. Goodrich, for assignee.

WOODBURY, Circuit Justice. It will be seen, by the opinion in Leland v. The Medora [Case No. 8,237], delivered at this term, that the propriety of instituting libels in the district court to compel the sale of vessels on mere mortgages, may be questioned, and will, therefore, not be decided till necessary. It is, perhaps, more questionable in cases where a portion of the debt did not arise from a mere maritime contract, but a discount of a note like a portion of the present claim. But without giving an opinion on that point, the debt here claimed has been allowed in that case on the balance of the proceeds of this vessel, ordered to be sold on another libel, clearly appropriate. The reasons for this distinction are there given. Let this case then be dismissed without costs.

There having been some color, if not justification, for filing the libel, the plaintiff should not pay cost, and as his claim has since been otherwise satisfied, it is not equitable for him to receive cost. See Hunter v. Marlboro' [Case No. 6,908]. Costs in admiralty are entirely under the control and discretion of the court. Dunl. Adm. Pr. 102. Thus, if plausible ground existed for a libel, costs may be given for the libellant, though it be dismissed. 3 W. Rob. Adm. 167; Edw. Adm. 70; 2 Wheat. [15 U. S.] 57, Append. And against seamen, as libellants, if failing, costs are seldom allowed. Dunl. Adm. Pr. 102.

DESIRE, The (DECATUR v.). See Case No. 4,111.

Case No. 3,821.

DESMAZES v. MUTUAL BEN. LIFE INS. CO.

[7 Ins. Law J. 926; 7 Reporter, 136; 19 Alb. Law J. 220.][1]

Circuit Court, D. Massachusetts. Oct. 7, 1878.

LIFE INSURANCE — NON-FORFEITURE STATUTES — WAIVER — FOREIGN COMPANIES AND CONTRACTS — CONFLICT OF LAWS.

[1. The original non-forfeiture act of Massachusetts, being expressly limited to insurance companies "chartered by authority of this commonwealth" (Gen. St., 2d Ed., c. 186, § 1), does not apply to a New Jersey corporation doing business in Massachusetts; nor was it extended by Supp. Gen. St. 1872, c. 325, § 7, any further than to include contracts of foreign companies made within the state.]

[Followed in Smith v. Mutual Life Ins. Co., 5 Fed. 583.]

[2. A party may waive statutory provisions in his favor when no principle of public policy is violated thereby; and this is done in the case of a life insurance non-forfeiture act, when, after failure to pay premiums, the assured takes

[1] [7 Reporter, 136, and 19 Alb. Law J. 220, contain only partial reports.]

advantage of an alternative provision in his policy, by receiving dividends thereunder.]

[Applied in Caffery v. John Hancock Mut. Life Ins. Co., 27 Fed. 28.]

[3. A policy issued to a citizen of Massachusetts by a New Jersey corporation at its principal office in New Jersey, where the premiums and loss are made payable, upon an application received and transmitted by its Massachusetts agent, who has no authority to contract, the policy being then transmitted to the agent and delivered by him, is a New Jersey contract, and is not governed by the Massachusetts law.]

[Followed in Whitcomb v. Phoenix Mut. Life Ins. Co., Case No. 17,530.]

[This was an action on a policy of life insurance issued by a New Jersey corporation to plaintiff on the life of her husband.]

Dwight Foster and Alfred D. Foster, of Boston, for defendants.

The policy was non-forfeitable, never became void through non-payment of premium, therefore the act did not apply. The insured had a right to waive the provisions of the law in favor of another stipulation, and did so waive by accepting a paid-up policy. Chase v. Phoenix Life Ins. Co., 67 Me. 85; Maxw. Interp. St. § 348; East India Co. v. Paul, 7 Moore. P. C. 86; Markham v. Stanford, 14 C. B. (N. S.) 376; Rumsey v. North-Eastern Ry. Co., Id. 641; Morrison v. Underwood, 5 Cush. 52; Tombs v. Rochester & S. R. Co., 18 Barb. 583; Buel v. Trustees of the Village of Lockport, 3 N. Y. 197; Sedg. St. & Const. Law, 109; Farmers' & Drovers' Ins. Co. v. Curry (Ky. Ct. App., 1877) 13 Bush. 312. The act of 1861 applied originally only to Massachusetts corporations. Nor were the provisions of the statute of 1861 made applicable to the present contract by St. 1872, c. 325, § 7. Obviously these statutes can have no influence upon any policy which is not a Massachusetts contract and governed by its laws, even though made with a resident or citizen of Massachusetts. No such extra-territorial power is possible. Baldwin v. Hale, 1 Wall. [68 U. S.] 223; Green v. Collins [Case No. 5.755]; D'Arcy v. Ketchum, 11 How. [52 U. S.] 173; Pennoyer v. Neff [95 U. S. 715].

The present policy is a New Jersey contract. The premiums and loss are payable there; the policy recites that it is signed and delivered there, and it is not countersigned by a Massachusetts agent, who had no authority to bind his principal or complete the contract. Insurance Co. v. Davis, 95 U. S. 428; Sav. (Guth. Ed.) 175; Ex parte Heidelback [Case No. 6,322]; Whart. Confl. Laws, §§ 406, 426. No premium was ever paid in Massachusetts. The inception of the contract was in New Jersey. Tayloe v. Merchants' Ins. Co., 9 How. [50 U. S.] 398.

The rule as to contracts of insurance is well established. "The general rule seems to be that a contract of insurance is subject to the law of the place where the policy is issued —where the corporation issuing it has its seat—where the loss, if it be incurred, is to be paid. When the policy is procured by correspondence, this rule continues to obtain; and this, whether the policy is sent by mail or delivered by agent to the party insured." Whart. Confl. Laws, § 465; Sav. (Guth. Ed.) p. 196, and note A, p. 215 (quoting Bar); Westl. Priv. Int. Law, § 221; Ruse v. Mutual Ben. Life Ins. Co., 23 N. Y. 521; Spratley v. Mutual Ben. Life Ins. Co. (Ky. Ct. App.) 4 Bigelow, Cas. 84; Parker v. Royal Exchange Assur. Co., 8 Ct. Sess. Cas. (2d Series) 365; Huth v. New York Mut. Ins. Co., 8 Bosw. 551; Hyde v. Goodnow, 3 N. Y. 267; Western v. Genesee Mut. Ins. Co., 12 N. Y. 259; Wright v. Sun Mut. Ins. Co. [Case No. 18,-095]. The general principles applicable to all classes of contracts lead to the same conclusion. Green v. Collins [Case No. 5,755]; Hill v. Spear, 50 N. H. 263; Story, Confl. Laws, §§ 242, 280; Andrews v. Pond, 13 Pet. [38 U. S.] 65; Don v. Lippmann, 5 Clark & F. 13; Fergusson v. Fyffe, 8 Clark & F. 121; Penobscot & K. Ry. Co. v. Bartlett, 12 Gray, 246; Ex parte Holthausen (1874) 9 Ch. App. 722. The authority of the agent to bind the company distinguishes. Pattison v. Mills, 1 Dow & C. 342; Daniels v. Hudson River Ins. Co., 12 Cush. 416; Kennebec Co. v. Augusta Ins. Co., 6 Gray, 208; Heebner v. Eagle Ins. Co., 10 Gray, 131; Bailey v. Hope Ins. Co., 56 Me. 474; Meagher v. Aetna Ins. Co., 20 U. C. Q. B. 607. Morris v. Penn Ins. Co., 120 Mass. 503, decides nothing whatever except that "St. 1861, c. 186, applies by force of St. 1872, c. 325, to foreign as well as domestic insurance companies." Maine has one non-forfeiture law; Massachusetts another; California and Missouri have still different statutes. If a life insurance company is disabled from entering into any contract which does not tacitly incorporate into itself the statute law of the state where the first premium is paid and the policy delivered, the business of such institution will be circumscribed, if not crippled, and constant confusion will result.

CLIFFORD, Circuit Justice. Contracts are to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the law of the place where they reside and transact their business, unless a different intention is manifest from the terms which they employ. Green v. Collins [supra]. Sufficient appears in the agreed facts to show that the corporation defendants, on the 26th of June, 1874, in consideration of the matters alleged, issued a policy of life insurance to the plaintiff, then the wife of George G. Desmazes, since deceased, insuring the life of her husband, who was at the time a citizen of Chelsea, county of Suffolk, and commonwealth of Massachusetts, in the sum of one thousand dollars, for the term of his life; that the defendants are a corporation organized under the laws of New

Jersey, and are engaged in the business of issuing policies of insurance upon the lives of persons residing in various parts of the United States; that they have agents appointed for certain special purposes, but such agents are not authorized to make, alter or discharge contracts, or to waive forfeitures, or grant permits. Instead of that, it appears on the face of the policy in this case that policies are issued by the company in consideration, among other things, of the payment by the assured of the first and each succeeding premium, at their office in the city of Newark, and that the policy is executed at said office, and that the loss is payable at the same place. Agents are appointed by the company who are authorized to receive premiums, but only on the production of the company's receipt, duly signed by the president or treasurer thereof, and the agreed facts show that the corporation has complied with the laws of Massachusetts in the appointment of an agent in that state for the purpose which those laws contemplate. Those agents are only authorized to receive applications from persons desiring insurance, and to forward such applications to the office of the corporation, where, if the application is accepted, a policy is issued and sent by mail to the agent in the state from which the application came, to be there delivered by said agent to the insured upon payment of the first premium.

On June 26th, 1874, the corporation, at their office in Newark, issued to the plaintiff a policy upon the life of the decedent in the sum of one thousand dollars, which was sent by mail to the corporation's agent in Massachusetts, and was by him delivered to the plaintiff, she being then, and now, a citizen of that state. Prior to that there had been some dealings between the parties; and it appears she gave up a former policy upon the life of her husband, and received in exchange the present policy with a receipt for the first premium of $54.81, and also a receipt for $35.98, applicable in part payment for the second premium, which would become due in one year. Due surrender was made, and the old policy with the surrender was transmitted by the agent to the office of the company in Newark, with the application for the second policy. Desmazes, the husband of the plaintiff, died July 28, 1876, and due notice and proof of his death was given by the plaintiff to the defendants. No further payment of premiums was made by the plaintiff. Two dividends became due on the policy, both of which were paid. Of these, one became due for $10.05, June 26, 1875, and was paid to the plaintiff in cash. By the terms of the policy, in case the premiums shall not be paid on or before the several days mentioned for the payment thereof, at the office of the company in the city of Newark, or to agents when they produce receipts signed by the president or treasurer, then, and in every such case, the company will, on the above terms and conditions, pay the sum of fifty dollars for every annual premium paid. Conforming to these terms and conditions the company, June 26, 1876, made a second dividend to the plaintiff of sixty-five cents, as upon a paid-up policy for fifty dollars, which was also paid to the plaintiff in cash, as appears by the receipt appended to the agreed facts. Except paying the premiums, all the conditions of the policy were fulfilled by the plaintiff, and the parties agree that if the court shall hold that Mass. St. 1861, c. 186, applies to the contract made between the plaintiff and defendants, then judgment shall be rendered for the plaintiff in the sum of nine hundred and twenty-five dollars, with interest from October 27, 1876; otherwise the judgment shall be for the plaintiff in the sum of eighty-five dollars and ninety-eight cents, with interest from the same date. Where the facts are agreed they cannot be controverted, and the agreed statement in this case expressly declares that the policy at the death of the person whose life was insured was in force for fifty dollars only, unless the provisions of Mass. St. 1861, c. 186, apply to the contract. By the express terms of the contract the insured was at liberty to omit paying the premiums at the times and place mentioned in the policy, and in that event the policy did not become forfeited or void, but became a paid-up policy for an amount proportioned to the premiums previously paid. Fifty dollars, it is stipulated, shall be paid in that event for every annual premium previously paid in fulfillment of the contract between the parties, which, as the plaintiff contends, tends strongly to show that the policy did not become forfeited, and that the case does not fall within the said Massachusetts statute. Failure to pay the stipulated premiums, it may well be urged, does not forfeit the policy, as the stipulation in that event is that the company will, on the prescribed terms and conditions, pay the sum of fifty dollars for every annual premium paid. Chase v. Phoenix Mut. Life Ins. Co., 67 Me. 91; Dorr v. Same, Id. 441. Nor does the present case come within the spirit of the Massachusetts statute, the object of which was, where by the terms of such a policy an absolute forfeiture had been incurred by the non-payment of premiums, to grant an equitable extension of the contract for a term proportionate to the net value of the policy. Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had outside of the statute, to waive the non-forfeiture provision if the other party consented, and to accept a different stipulation of a more favorable character in lieu of the same. Everyone, says Maxwell, has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, and which may be dis-

pensed with without infringing any public right or public policy. Maxw. Interp. St. 348; Buel v. Trustees of the Village of Lockport, 3 N. Y. 197; Tombs v. Rochester & S. R. Co., 18 Barb. 485; Morrison v. Underwood, 5 Cush. 55; Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush, 312; Markham v. Stanford, 14 C. B. (N. S.) 376; Rumsey v. North-Eastern Ry. Co., Id. 641.

Contracts in general will not usually have the effect to modify a statute, but to this rule there is a large class of exceptions. Cases often arise where a party is held at liberty to waive statutory provisions in his favor, and Mr. Sedgwick lays it down as a general rule that where no principle of public policy is violated, parties may waive the provisions of a statute which, if fulfilled, would operate in their favor, and that proposition is fully sustained by many other authorities. Sedg. St. & Const. Law, 109. Even if doubt could be entertained whether the statute in question could be waived when the policy was originally taken, there can be none that such waiver and election could be made when the premiums became payable and the insured ceased to make the stipulated payments, and if so, then the matter is placed beyond doubt, as the agreed facts show that the insured, subsequent to her failure to pay premiums, accepted a dividend declared in her favor as upon a paid-up policy for fifty dollars. When the parties undertake in the policy itself to declare the meaning and effect to be given to its stipulations, they have a right to do so except in cases where there is some provision in the statute to indicate an intention on the part of the legislature to control the action of the parties in that respect. There is nothing of the kind contained in the original act referred to, as it is plain that its terms do not apply to any other than Massachusetts corporations. Supp. Gen. St. Mass. (2d Ed.) c. 186, § 1, p. 73. By the express terms of the act its provisions are limited to life insurance companies, "chartered by the authority of this commonwealth." Created as the defendant corporation was by the laws of New Jersey, it is clear that it is not within the words of that statute. Considered in that light, it is clear that in Massachusetts it is a foreign insurance company, and that as such it is liable to be excluded altogether from the state, or may be admitted to do business there upon such conditions as the state may impose and the company may accept. Paul v. Virginia, 8 Wall. [75 U. S.] 181; Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445; Doyle v. Insurance Co., 94 U. S. 535. No sound construction can treat the language, "chartered by the authority of this commonwealth," as equivalent to "doing business in this commonwealth," and if not, then it follows to a demonstration that the provisions of that statute did not originally apply to such a corporation. All corporations, associations, partnerships or individuals, doing business in Massachusetts, under any charter, compact, agreement or statute of that state or of any other state involving an insurance, guaranty, contract or pledge for the payment of annuities or endowment, or for the payment of moneys to families, as representatives of policy or certificate holders, are considered and deemed by the statute law of the commonwealth to be life insurance companies within the meaning of the statute of the state relating to life insurance, and the same section of the statute provides that they shall not make any such insurance, guaranty, contract or pledge therein, or to or with any citizen or resident of the state, which shall not distinctly state therein the amount of such life benefit, the manner of payment, the period of the continuance thereof, and the amount of the annual, semi-annual or quarterly premiums, or by which the payment of the life benefit to assured shall be contingent upon the payment of assessments made upon surviving members, nor except in accordance with and under the conditions and restrictions of the statute now or hereafter regulating the business of life insurance. Gen. St. Mass. p. 1029, c. 325, § 7. Suppose the original act did not apply to a case like the present before the passage of the latter act, still it is insisted by the plaintiff that the closing paragraph of the seventh section in the latter act gives it that effect, and the plaintiff relies with confidence upon the case of Morris v. Penn Ins. Co., 120 Mass. 504, decided by the supreme court of that commonwealth, for supporting that proposition.

In examining that question it must be assumed that the true construction of the two statutes is that which is given to them in that case by that court. Much difficulty arises, however, in ascertaining how far that decision goes, inasmuch as the report of the case fails to give a definite statement of the facts. Enough appears to show that the policy lapsed by the neglect of the assured to pay the annual premium; that the assured afterward, at his request, underwent a new examination by the medical examiner of the company, at his expense; that the policy was subsequently reinstated, and that the assured paid at Boston a premium on the reinstated policy, and failed to make any other payment. Appended to that is the statemnt that the agreed facts showed that the defendants were liable to the plaintiff according to the provisions of the non-forfeiture act of the state, from which the clear inference is that the contract, by the settled rules of law, was a Massachusetts contract. Unless the contract was a Massachusetts contract it is clear that those statutes could not have had any controlling influence in the case, it being settled that the laws of a state cannot have any extraterritorial operation in that regard. Baldwin v. Hale [supra]; Green v. Collins [supra]; D'Arcy v. Ketchum [supra]; Pennoyer v. Neff, 95 U. S. 720.

Argument to show that the contract in this case was a New Jersey contract is hardly necessary, as that proposition is fully sustained by the agreed facts. Viewed in the light of the agreed facts, everything indicates that the parties contracted with reference to the law of New Jersey, and without any reference to the law of Massachusetts. Both parties concede the following propositions: (1) That the company was chartered by the legislature of New Jersey. (2) That Newark is its established place of business. (3) That the annual premiums were payable at Newark. (4) That the Massachusetts agent was not authorized to make, alter, or discharge contracts, waive forfeitures, or grant permits. (5) That policies are issued by the company at Newark, their place of business, and that the losses, if any, are payable there. (6) That agents can only receive premiums when furnished with receipts duly signed by the president or treasurer of the company. (7) That they are only authorized to receive applications for insurance, and to transmit the same to the office of the company at Newark. (8) That the policy of the applicant, if accepted, is signed at Newark, and sent by mail to the agent. (9) That all the agent does at that time is to deliver the policy as directed. (10) That the agent does not countersign the instrument, nor does he do any act to give it validity. (11) That the new application, with the one surrendered, was sent by the agent to Newark, for the action of the company. (12) That the application was accepted at Newark, where the policy was executed, and forwarded by mail. (13) That all the agent did was to deliver the policy with the two receipts, which were executed at Newark, and sent with the executed policy to the agent for delivery. (14) That the only act done within the commonwealth of Massachusetts was the delivery, by the agent, of the policy with the two receipts, in pursuance of the company's directions. Tested by these facts, which cannot be successfully contested, the court is of the opinion that the case falls within the controlling rule following: That the seat of the continuous business of the corporation was at Newark, and that the contract was made and was to be performed there, and must be interpreted by the law of the place where it was made. Sav. (Guth. Ed.) 175; Ex parte Heidelback [Case No. 6,322]; Whart. Confl. Laws, § 426.

Decided support to that proposition is also found in another section from the last-named author, in the words following: "Where an agent having no power to complete a contract, obtains orders in a foreign state, which orders he forwards to his home principal, who accepts and fills them, the seat of the contract is in the state in which the principal resides," which is the exact case before the court. Whart. Confl. Laws, § 406; Hyde v. Goodnow, 3 N. Y. 267; Backman v. Jenks, 55 Barb. 439. Insurance contracts are in general subject to the laws of the place where the policy is issued, and where the corporation issuing it has its seat, and where the loss, if it be incurred, is to be paid. When the policy is procured by correspondence, still the same rule obtains; nor does it make any difference whether the policy is sent by mail or delivered by an agent to the party insured, as courts will presume that the contract is governed by the law of the place where the policy was completed and issued. Whart. Confl. Laws, § 465; Ruse v. Mutual Ben. Life Ins. Co., 23 N. Y. 516; Parker v. Royal Exch. Assur. Co., 8 Ct. Sess. Cas. (2d Ser.) 372. It appeared in the case last cited, that a citizen of Scotland made proposals for an insurance upon the life of a Scotchman to an English insurance company, and thereafter received a policy, which was prepared at the head office in London, and then transmitted to the Edinburgh agents, by whom it was delivered to the insured, and to whom he made payment of premium. Held by the whole court, the judges delivering opinions seriatim, that the contract was English, because the Edinburgh agents were not authorized to conclude contracts binding the company. The Lord Justice-Clerk said that the insured received a policy in English form, and that his proposal for the same was transmitted to the London company, the Scotch agents not undertaking, and not being entitled to bind the company. "Although the life may be in Scotland, or the party insuring it, yet it is an undertaking in England. The company do the business of insurance there; there they undertake the risks; there they insure, so far as the business has locality. * * * The delivery of the policy is only the delivery of the document of debt, by which each becomes mutually bound, and by which the assured holds the proof of the obligation, but the thing done is to insure in England, and that the company does." Three or more questions were involved, but the one most discussed was whether interest should be allowed, and Lord Moncrieff said: "If we must follow our own law we must find interest due, but if we are satisfied that the law of England ought to rule the question, no interest can be awarded." "If the locus contractus and also the locus solutionis are ascertained to be in one country, the law of that country must rule all questions touching the effect of the contract." Taking those questions to be settled, it follows that if the policy was made in England the result would be that the contract is English, and that all must be ruled by the law of England. Much stress was laid in that case upon the fact that the policy was by the agent delivered in Scotland; but the answer of Lord Cockburn to that argument is decisive. Speaking of the agent, the learned justice said the agent was the mere hand that transmitted, probably with his opinion, the proposals, and was to receive

and deliver the policy; that he did nothing that might not have been done by mail, as the policy which he delivered was an English policy, executed according to English law, and bearing no reference to any foreign locus solutionis, either of the premium or of the sum insured. Western v. Genesee Mut. Ins. Co., 12 N. Y. 263; Westl. Confl. Laws, § 221; Sav. (Guth. Ed.) 215. Authorities to show that the validity of a contract is to be decided by the law of the place where it is made are numerous, and it is clear that the proposition is correct, unless it was agreed, either expressly or tacitly, that it should be performed in some place, and then the general rule is that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. Green v. Collins [Case No. 5,755]; Hill v. Spear, 50 N. H. 262; Story, Confl. Laws (6th Ed.) § 242; Andrews v. Pond, 13 Pet. [38 U. S.] 65; Don v. Lippmann, 5 Clark &F. 13; Penobscot & K. Ry. Co. v. Bartlett, 12 Gray, 246; Meagher v. Aetna Ins. Co., 20 U. C. Q. B. 607. When the agents have authority to bind the company by entering into contracts without reference to the head office, the contract is held in many cases to be made at the place where the agent is established, which makes it necessary to keep in mind that the agent in this case had no such authority, and that the contract was made, and was to be performed at the office in the state where the charter was granted. Daniels v. Hudson River Ins. Co., 12 Pick. 422; Kennebec Co. v. Augusta Ins. Co., 6 Gray, 205; Heebner v. Eagle Ins. Co., 10 Gray, 134. Pursuant to the rule adopted, the plaintiff is entitled to judgment in the sum of eighty-five dollars and ninety-eight cents, according to the agreed facts, but nothing is said about costs in the agreed statement. Costs, therefore, would in general be awarded in favor of the plaintiff, but the defendants state in their brief that on May 26, 1877, they filed in the case an offer in writing to be defaulted, and that judgment might be rendered in favor of the plaintiff for ninety-five dollars and interest, and the plaintiff did not, within ten days after receiving notice of the offer, accept the same, and that the amount recoverable is less than the sum so offered. Gen. St. Mass. c. 129, §§ 62, 63; Rev. St. §§ 914-916. Under the agreed facts the plaintiff recovers less than the amount so offered, and of course the defendants are entitled to costs from the date of the offer to be defaulted.

Judgment for plaintiff in the sum of $85.98, with costs to the time of the offer; costs for the defendants from the date of the offer.

DES MOINES COUNTY (RUSCH v.). See Case No. 12,142.

DESMOND (UNITED STATES v.). See Case No. 14,951.

Case No. 3,822.

DESPAN v. OLNEY.

[1 Curt. 306;[1] 2 Liv. Law Mag. 354.]

Circuit Court, D. Rhode Island. Nov. Term, 1852.

MILITARY OFFICER—ORDERS OF SUPERIOR—CIVIL LIABILITY.

1. A military officer, acting under the law martial, is justified by an order from a superior officer, apparently within the scope of his authority.

2. If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable.

This was an action of trespass. It appeared, that in June, 1842, the plaintiff [John S. Despan] was a citizen of Rhode Island, residing at Pawtucket; and that the defendant [James N. Olney] came to his shop, in that village, accompanied by several files of soldiers, arrested the plaintiff. and after holding him in confinement for a few hours in a neighboring tavern, had him conveyed to the city of Providence, where he was confined for several days, and then permitted to return home. The defendant pleaded a statute of limitations of Rhode Island, which barred all actions, for acts done while the state was under martial law, provided such acts were intended to preserve the peace of the state, and to aid the people and government thereof against the open or suspected hostility of the person complaining; and issue was taken and joined upon the averment of the plea, that the act in question was done with that intent. It was shown that the defendant was a native born citizen of Rhode Island, but resided at Brooklyn, in the state of New York; that in June, 1842, he came to Providence, and volunteered his services, and received a commission as captain from the governor, and was ordered to Pawtucket, in consequence of some alarm excited by disturbances there and in the neighborhood; that very soon after his arrival there, an order was given to him by Major-General Anthony, who was the highest in military command at that time and place, to arrest the plaintiff; that he executed this order without any unnecessary violence, and it was admitted that he bore no personal malice against the plaintiff, with whom, it did not appear, he had any acquaintance. The act of the legislature of Rhode Island, placing the state under martial law, was then in force. It was shown that the plaintiff, some weeks before the time in question, had commanded a military company, raised to support what was called the people's constitution, and was present, with his company, when an attack was made on the arsenal at Providence. But it also appeared, that, after the president of the United States had recognized the government organized under the original charter of Rhode

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

Island to be the lawful government of the state, the plaintiff had not taken any active part against that government, and had, on some occasions, used his influence to prevent others from doing so. But it did not appear that this was known, either to the plaintiff, or to General Anthony.

The district judge did not sit on the trial.

Mr. Weeden, for plaintiff.
Mr. Blake, for defendant.

CURTIS, Circuit Justice, directed the jury as follows:

The question for you to try is, whether the act of the defendant, in arresting the plaintiff, was intended by the defendant to preserve the peace of the state, and to aid the people and government thereof against the open or suspected hostility of the plaintiff. You perceive, it is a question of the defendant's intent; and the only mode of determining it is, to consider what he did, and under what circumstances the act was done; from these facts, which are shown by the evidence, you are to infer what the purpose or intent of the defendant was; a fact, not susceptible of being directly proved by evidence, because it is a state of mind. It appears by the act of assembly which has been read, that martial law then existed in Rhode Island. It has been determined by the supreme court of the United States, in a case which went up to that court from this district, that the legislature of a state has power to proclaim martial law, whenever in its discretion, the public safety demands this extreme measure. And also, that, as the executive department of the government of the United States had recognized the government of Rhode Island, organized under its charter, as the only lawfully existing government of the state, all other departments of the government of the Union were bound thereby. You will, therefore, take it to be the law in this case, that martial law had been rightfully proclaimed, and did exist, at the time when the acts complained of were done. But the existence of martial law does not authorize general military license, or place the lives, liberty, or property of the citizens of the state under the unlimited control of every holder of a military commission.

It is not needful, in this case, to point out the limits of the authority which it confers. It is enough to say, that under the issue you are trying, the existence of martial law is not, of itself, a justification of the defendant. He must also satisfy you that the act done by him, under that law, was intended by him to preserve the peace of the state, and to aid the existing government, and not from recklessness, or a love of power, or to gratify any bad passion. Still, the fact that martial law existed, has a most important bearing on the question of the intent of the defendant. He held a commission as captain. He received an order from his commander. He was bound to obey all lawful orders. And if this order was one which, upon its face, was lawful, and he did no more than execute it, you will consider whether it would not be proper to conclude, that he acted simply with an intent to do his duty, unless some other intent appears. Now, as martial law existed, and as Major-General Anthony had authority under that law, for sufficient cause known to him, to cause the arrest of the plaintiff, the order to do so was, upon its face, a lawful order. And I do not think the defendant was bound to go behind an order, thus apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this, would be destructive of military discipline, and of the necessary promptness and efficiency of the service.

It is a general principle, that an executive officer is justified by his precept. If the court from which it issues has jurisdiction, and the precept is regular on its face, it is neither the right nor the duty of the civil officer to inquire further. Something like this is true of a military officer. If he receive an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, and not the inferior, who reasonably supposed he was doing only his duty. And therefore, if in this case, you find, as matter of fact, that the defendant did receive from his commander, an order to arrest the plaintiff, and that there was no fact known to the defendant, which would have made the arrest an abuse of power by General Anthony, you will then take it that the defendant was bound to obey that order, and you will consider whether he did not act from this motive. If he did act simply from a desire to do his military duty, you will then consider whether his intent was to preserve the peace of the state, and aid the people and government thereof, against the open or suspected hostility of the plaintiff.

The defendant had volunteered his services as a soldier. No evidence has been given, tending to show that he had any motive in doing so, except the ostensible one, to aid the existing government in their unhappy troubles. And if his object, in entering the service, was to preserve the peace of the state, and aid its government against open or suspected hostility, you will inquire whether this general purpose did or did not actuate him, in doing the act complained of; whether there is any ground to impute to him any other motive; if you find none, and

I must say I know of no evidence of any other, or any thing tending to show that he did act with any other intent, then you ought to find this issue in his favor. The contest, which so deeply agitated this state, though long terminated, may have left deep impressions upon your minds; and, out of the jury-box, you might differ very widely, in opinion, respecting its merits. But, fortunately, its merits are not here to be tried. You may all have a fixed opinion, that the government, under the charter, was in the right, or that it was in the wrong; or you may be quite unable to agree on that point; and yet, you may be able to agree, and be bound, as conscientious men, to agree upon a verdict in this case. If you find the defendant's intent was not what he has stated in his plea, you should convict him, though you are of opinion that the charter government, whose soldier he was, was entirely to be approved. And if, on the other hand, you believe he did the act complained of with the intent alleged, then you are bound to acquit him, though you should all be convinced that that government was wrongfully sustained.

The jury found for the defendant.

Case No. 3,823.

The DESPATCH.

[2 Gall. 1.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

PRIZE—JOINT CAPTURE—DISTRIBUTION.

In cases of joint capture by privateers, they share in proportion to the number of men composing their respective crews.

Mr. Williams, for the Castigator.

Cummings and Sprague, for joint captors.

STORY, Circuit Justice. The brig Despatch and cargo were captured by the privateer Castigator in company with the privateer Fame, and, upon the whole evidence in the cause, it appears to be a clear case of joint capture. By consent of the parties, a decree pro forma in favor of the captors has been rendered against the claimants, upon which an appeal is to be interposed, and the only question, remaining for the consideration of the court, is the relative proportion, in which the privateers shall respectively share. The Castigator had one gun of 6 lbs. and 19 men, and the Fame two guns of 4 lbs. and 18 men. As between public ships of the United States this point is settled by the 7th article of the rules for the distribution of prizes, in the act of April 23d, 1800 (5 Laws U.S. 108 [2 stat. 53]), which provides, that in cases of joint capture, the capturing ships shall share "according to the number of men and guns on board each ship in sight." But as to private armed ships, no regulation has been adopted, and of course the distribution must be governed by the general rules of the prize jurisdiction.

Upon general principles, it would seem reasonable, in cases of joint capture, that the distribution should be made according to the relative strength of the capturing ships. In that proportion the intimidation of the enemy, which would lead to a surrender, would ordinarily be supposed to exist, where no battle should be actually fought; and in cases of actual battle, the degree of injury done to the enemy would be estimated in the same manner. And, in a middle class of cases, where one ship was actually engaged, and the other only in general co-operation, the ultimate surrender might be well attributed, as much to the despair of escape from the combined force, as the immediate injury from the engaging force. And, indeed, to attempt a discrimination founded upon different degrees of exertion, would be very difficult, if not wholly impossible, in practice. Bynkershoek, therefore, and he alone is a great authority, lays down the rule, that the parties shall, in joint captures, share in proportion to their respective strength. Bynk. c. 18, Per Dup. 164. And this I apprehend to be the rule adopted in the prize courts of England and France; and perhaps it forms the basis of the distribution among the other maritime powers of Europe. Vide Duckworth v. Tucker, 2 Taunt. 7. In the manner of estimating the relative strength a great diversity of regulation exists. Valin in his treatise of prizes (Des Prises, c. 18), states that in France the mode varies in three classes of cases of joint capture. 1. Between a public ship and a privateer, the distribution is in proportion to the number of cannon. 2. Between privateers, in proportion to the force and equipments, the number and the caliber of the cannon of the respective ships; and the estimate in this case, depending upon such heterogeneous and complex combinations, is reduced to an unity of denomination by an arbitrary valuation of the component parts. 3. Between public ships, in proportion to the number and caliber of their respective batteries of cannon.

In England, as between public ships, cases of joint capture do not present any difficulty in the distribution. By the king's proclamation, the whole property is shared by all the officers and crews of the capturing ships according to certain fixed proportions in which all the officers of equal rank obtain an equal share. For instance, the captain of the capturing ship is entitled to three eighths of the prize, and in joint captures, the same three eighths are distributed equally among all the officers of that rank. 2 C. Rob. Append. No. 9. As to privateers, no statute regulation exists, and therefore their claims are settled by the general law of relative strength. This relative strength is to be measured, as has been settled by solemn ad-

[1] [Reported by John Gallison, Esq.]

judications at the cockpit and in the king's bench, by the number of men on board each ship. Roberts v. Hartley, 1 Doug. 311. This rule has the advantage of great practical simplicity and general equity. It seems bottomed on the soundest sense, and places the relative force in the power and activity of animated beings, in which it must always ultimately reside, rather than in the mere instruments, which without such power and activity would be useless and unavailing. I consider this rule of the admiralty, as decisive of the present claims, and I accordingly adjudge and decree, that the privateer Castigator shall be entitled to 19-37th parts, and the privateer Fame to 18-37th parts of the property subject to condemnation, to be distributed among the officers, crews and owners, of said privateers, respectively, according to law.

Case No. 3,824.

Ex parte DES ROCHERS.

[1 McAll. 68.][1]

Circuit Court, California.[2] July Term, 1856.

HABEAS CORPUS—FEDERAL COURTS.

The circuit courts and federal judges have the power to apply the writ of habeas corpus to all cases which it would reach at common law, provided it is not issued to any person in jail, unless confined under or by color of the authority of the United States.

This is an application for a writ of habeas corpus. The applicant states himself to be an alien, and a subject of Napoleon III., emperor of the French. That he has an action at law pending in the supreme court of this state, in which he is plaintiff, and the county of San Francisco is defendant, for the sum of sixteen thousand dollars; and delay in the decision thereof is a great injury to him. That said suit was argued and submitted to the supreme court of this state, and taken under advisement at the January term, 1856. That the court is composed of three judges, the Hon. Hugh C. Murray, the Hon. David S. Terry, and the Hon. Solomon Heydenfeldt. That by the law organizing said court, the presence of two of the said judges is made necessary to transact business, and their concurrence to pronounce a judgment. That according to law a term of the said supreme court should have been held at the city of Sacramento in this state, in the present month of July, commencing on the first Monday of the month. That one of the judges of said court, the Hon. Solomon Heydenfeldt, has been and still is absent from the state; that the Hon. David S. Terry, another of the judges of said court, is unlawfully restrained of his liberty, against his consent, by certain persons (whose names are given in the petition) in the city of San Francisco, and in the northern district of the state of California, and held by them in unlawful custody, and is not confined in any jail, nor by the color of authority of any state or of any magistrate thereof; that the said David S. Terry has been so unlawfully restrained of his liberty against his consent since the 21st day of June, 1856, and has been thereby prevented from discharging his duty as one of the judges of the said supreme court in examining and considering the causes which had been submitted in said court, and among others, the said cause of the applicant, and prevented from taking his seat upon the bench of the said court, at the said July term thereof, in consequence of which the said term has not been holden; all which is greatly to the injury of the applicant, by hindering and delaying the consideration and determination of his said suit. He further states that he has been informed, and he believes, that the persons who hold the said David S. Terry in illegal confinement, are about to transfer and convey him beyond the limits of this state and of the United States, illegally and against his will. The application concludes with a prayer for a writ of habeas corpus to the persons named as having the said Terry in illegal restraint.

A. P. Crittenden and D. W. Perley, for petitioner.

McALLISTER, Circuit Judge. The principle which it is the object of this writ to vindicate, has existed from and been consecrated by a remote antiquity. It was embodied in the celebrated edict "De Homine Exhibendo," of the Roman law, existed in the unwritten usages of the Saxon, and found utterance in the great charter of our Anglo-Saxon forefathers. "No freeman shall be taken, or imprisoned, or disseized of his franchises or liberties, &c., unless by the judgment of his peers, or the laws of the land." From the earliest times, says Lord Campbell, "before the habeas corpus act, this writ issued, calling upon the party detaining to show if any just cause existed for the detention." 2 Q. B. 342. At common law, it issued in numerous instances. In one, it was granted on the application of the secretary of a humane society, to bring up the body of a helpless and ignorant female who was being exhibited for money against her consent. In another, for the body of a bastard, under fourteen years of age, to restore it to the mother. Again, it has been issued to bring up an infant who had absconded from its father, and was detained by a third person against his consent; to relieve a wife from the illegal restraint of her husband; to relieve, at the instance of her husband, a wife from illegal restraint; and, upon the application of his friends, to inquire into the legality of an impressment of a party. "It is an immediate remedy for every illegal imprisonment." 1 Watts, 67. In a word, whenever a person has been de-

[1] [Reported by Cutler McAllister, Esq.]

[2] [District not given.]

prived of going when and where he pleases, and restrained of his liberty, he has a right to inquire if that restraint be legal, whether it be by a jailor, constable, or private individual. 2 Ashm. 247, cited in 4 Bac. Abr. 571.

In this country, in the case of U. S. v. Green [Case No. 15,256], the common-law habeas corpus was issued to try the right of custody to an infant. No one will lightly impute usurpation of jurisdiction to the great judge who presided in that case. The question before him, when he ordered the writ to issue, was one of jurisdiction. This could not have been waived even by consent of parties, as such consent could give no jurisdiction to a court of the United States, which is not conferred by the constitution and laws. If the proceeding shows a want of jurisdiction, it is the duty of the court to take notice of it, without waiting for an objection from either party. Cutler v. Rae, 7 How. [48 U. S.] 729. It is difficult even to imagine that Judge Story, through ignorance or willfulness, proved derelict to his duty. The conclusion is, that he entertained no reasonable doubt of jurisdiction, and therefore exercised it. This great writ existed for all remedial purposes, not only anterior to the enactment of the habeas corpus act in England, but prior to the time of magna charta. In the reign of the second Charles, the habeas corpus act was passed to repel the aggressions of the crown and its minions. Those aggressions clothed themselves in the form of legal proceedings in the name of the crown, and hence the terms of the act were limited to persons confined on criminal process. But the habeas corpus brought by our ancestors as their birthright to this country, was the common-law habeas corpus; that great embodiment of a free principle, which, born with the sturdy Roman, preserved by the free Saxon, was so cherished by our immediate sires that they engrafted into our organic law the declaration, "that the privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion," &c. Const. U. S. art. 1, § 9. In the constitution of our own state, and in that of every state of the Union, a similar provision has been with jealous vigilance incorporated. Nor have the representatives of the people of this state been unmindful of the beneficial influences of this great writ. "Every person unlawfully committed, detained, confined, or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint." Comp. Laws Cal. 167.

In commenting upon the habeas corpus, the supreme court of Pennsylvania, in the Case of Williamson [26 Pa. St. 9] say, "The common law on this subject was brought to America by the colonists. Congress has conferred upon the federal judges the power to issue such writs according to the principles regulating them in other courts." In Ex parte Swartwout, 4 Cranch [8 U. S.] 94, it is said that "for the meaning of the term (habeas corpus), resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." The proposition, then, is established, both by federal and state authority, that in determining upon the nature and character of the habeas corpus mentioned in the constitution and judiciary act of the United States, regard is to be had, not to the limits prescribed by the British statutes, but to the more liberal principles in this particular of the common law by which it is regulated. By those principles it was issued in England to relieve any person from illegal restraint. Its operation in this country should not be less beneficent. It remains to consider to what extent the act of congress giving to the federal judiciary the power to issue this great writ has limited and controlled the cases to which, at common law, it confessedly applies. In doing so, we must bear in mind that we are fixing a construction which is to decide whether the federal courts are to extend to or withhold from persons, a great constitutional right, in many cases to which the common law applies.

No law, say the supreme court of the United States, prescribes the cases in which this great writ shall be issued, nor the power of the court over the party when brought up by it. The term used in the constitution is one well understood; and the judiciary act authorizes all the courts of the United States and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment. Ex parte Watkins, 3 Pet. [28 U. S.] 201. To the fourteenth section of the judiciary act of 1789 (1 Stat. 73), we must look for the written source of the power of the courts of the United States to issue this writ: "All the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." A doubt once existed whether the restrictive words, "which may be necessary for the exercise of their respective jurisdictions," did not limit the power to the award of such writs of habeas corpus only as were necessary to enable the federal courts to exercise their respective jurisdictions in some case they were capable of deciding,—or, whether these restrictive words related exclusively to the last and immediately preceding words, "all writs not specially provided for by statute." That doubt has been dissipated by the masterly decision of Chief Justice Marshall, in Ex parte Swartwout, 4 Cranch [8 U. S.] 75, in which it was settled that the words, "which may be necessary for the exercise of their respective jurisdictions," apply only to the writs refer-

red to in the last antecedent clause, thus leaving the writs enumerated, scire facias and habeas corpus, unrestricted, save as limited by the proviso to this section. In allusion to this case of Ex parte Bollman, Id., Conkling, in his treatise, says (page 77, Ed. 1856), "The propriety of the latter construction, indicated by strict grammatical construction, was demonstrated by a masterly reductio ad absurdum; and it was held also to be strongly corroborated by the thirty-third section of the judiciary act, which gave the power to bring up a prisoner not committed by the court itself to be bailed." It followed from this enactment, as the appropriate process to bring up the party was habeas corpus, that such power was supposed to have been previously given, and that the thirty-third section was therefore explanatory of the fourteenth.

After having given to the courts of the United States the power to issue writs of habeas corpus, the fourteenth section of the act declares that "either the justices of the supreme court or judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of inquiring into the cause of commitment;" and the second section of the act of congress organizing this court, gives the same power to its presiding officer. 9 Stat. 521. Thus far the unrestricted power is given to issue the writ. By the decision of the supreme court of the United States this is a writ well understood; and in the exercise of the power of issuing it, the courts of the United States must necessarily inquire into its use according to the common law. [Ex parte Watkins] 3 Pet. [28 U. S.] 200. A restriction is interposed, by the proviso to the fourteenth section of the act which gave the general power. It is in these words: "Provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." That this proviso extends to the whole section, and limits the powers of both the courts and judges, there can be no doubt. Its evident object, and a most salutary one, was to prevent any possible conflict between the federal and state tribunals, which would result from leaving in the former the power to relieve persons confined in jail by state courts and state magistrates. Such view seems to have been taken by Judge Kane, in the case of U. S. v. Williamson [Case No. 16,726], and in the same case by the supreme court of Pennsylvania [26 Pa. St. 9]. In that case a writ of habeas corpus had been issued by the district judge of the United States for the eastern district of the state of Pennsylvania. The respondent having made an evasive return, was committed for the contempt. He was subsequently brought before the supreme court of the state of Pennsylvania. Among others, his discharge was moved for on the ground that the district judge had no jurisdiction or power to issue the writ. To this objection the court say: "The act of congress of September 24, 1789, gives the court power to issue writs of habeas corpus, &c., and the same act expressly authorizes the judge of that court to grant writs of habeas corpus for the purpose of inquiring into the cause of commitment, provided that such shall in no case extend to persons in jail, unless where they are in custody under the authority of the United States," &c. "And it does not appear that the writ of habeas corpus issued for persons in jail, or in disregard of state process or authority." It was on this ground that the Pennsylvania court very justly sustained the jurisdiction of the district judge. While it is evident that the proviso to the fourteenth section, limits equally the powers of the courts and judges (admitted to do so by the court in the Williamson Case), it by no means follows that equalizing and restricting their powers as to persons in jail, has denuded them of all powers, where they have jurisdiction of the parties, to relieve from illegal restraint, save in cases where the suffering parties are in jail under authority of the United States. The proviso simply inhibits them from sending the writ to any persons in legal custody in jail, unless there under the authority of the United States. The alien, or citizen of another state, who is restrained of his liberty by lawless men, who is under no legal restraint, has a right to appeal to the laws of the country for relief. If in jail, or legal custody not under color of authority of the United States, he is remitted to those laws which placed him there. This is, in my opinion, the true construction of the proviso, in which I am confirmed by the action of Judge Story, and by the opinions of the district judge of the district court of the United States for the Eastern district of Pennsylvania, and the supreme court of that state. It was in the exercise of this jurisdiction that Judge Kane issued the writ in the Williamson Case. Speaking of the common-law habeas corpus, he says, "The writ issues here, as it did in Rome, whenever it is shown by affidavit that its beneficial agency is needed. It would lose its efficiency if it could not issue without a petition from the party himself, or some one whom the party had delegated to represent him. His very presence in court to demand the writ, would in some sort negative the restraint which his petition must allege. In the most urgent cases, those in which delay would be disastrous, forcible abduction, secret imprisonment, and the like, the very grievance under which he is suffering precludes the possibility of his applying in person. The American books are full of cases—they are within the experience of every practitioner at the bar—in which the writ has issued at the instance of third parties, who had no other interest or right in the matter than what man concedes to sym-

pathy with the oppressed." U. S. v. Williamson [Case No. 16,726]. These views are as sound law as they are eloquently expressed. In the case at bar, the applicant is an alien resident in this place; is not only interested in the matter to the extent that man concedes to sympathy with the oppressed, but is pecuniarily interested to a large amount. The party illegally deprived of his liberty is not in jail, nor in any custody known to the law, but held in restraint against his will, and in direct violation of those laws. It is, therefore, ordered that the writ of habeas corpus do issue as prayed for.

The writ was not served, the party in confinement having been released the night before the writ was to have been served.

Case No. 3,825.

DESSAU v. BOURS et al.

[1 McAll. 20.][1]

Circuit Court, California.[2] July Term, 1855.

PAROL EVIDENCE—PARTIES TO NEGOTIABLE PAPER.

1. Parol testimony is inadmissible to charge a party on negotiable paper, where neither his name, nor any other circumstance, appears on its face to connect him with it.

2. The rule applicable in cases of sales, as to undisclosed principals, does not apply to this case.

3. Where there is sufficient on the face of negotiable paper to create a doubt to whom credit was given, parol evidence is admissible to remove that doubt.

An action was brought, by payee v. drawer, on following draft: "Banking House, T. Robinson, Bours & Co., Stockton, January 22d, 1855. At sight pay to the order of A. Dessau, for value received, twelve hundred dollars. T. Robinson, Bours & Co., Agents. To William Hagan & Co., New York." An answer to the complaint was filed, which sets forth specially certain facts by way of defense, which will be found in the opinion of the court. To that answer a demurrer was filed by the plaintiff.

Sloan & Love, for plaintiff.

D. W. Perley, for defendants.

McALLISTER, District Judge. On the face of this instrument, there can be no doubt of the responsibility of defendants. No mention is made of any principal; nor is any fact patent on the face of the paper which discloses the existence of any persons save the drawers who are to be charged. Thus viewed, by the well-settled rule of law, the word "Agents" appended to the drawers' names is to be regarded merely as descriptio personarum, and the instrument fixes upon the signers an unqualified responsibility. The defense to the action rests upon an answer which avers that the bill was drawn by defendants as agents of certain persons named Burgoyne & Co.; that at the time it was drawn, such fact was communicated to the plaintiff, and he was informed, that the defendants were in no way liable for the due acceptance or payment of the bill; that, after being so informed, the plaintiff took the bill, and then and there agreed with defendants, that in case of non-acceptance or non-payment of same, defendants were not to be liable; but that he (the plaintiff) would look solely to the said Burgoyne & Co. for indemnity. To the answer, a demurrer has been filed by the plaintiff, and the question raised by the pleading is, whether parol testimony is admissible to discharge a party from the liability fixed upon him by law, by the terms of the bill under consideration. The names of Burgoyne & Co. do not appear on the bill, and if made liable, they are to be made so under the authority of that class of cases, relied on in this case, which authorizes the admission of parol testimony to fix the liability of an unknown principal. The rule which admits such testimony to charge an unknown principal, while it rejects such when its object is to discharge the signer of a written contract, is advanced by Mr. Smith, in his Leading Cases, and has been subsequently adopted in Westminster Hall. But the cases collated by that writer, and those which in England and this country affirm the principle, will be found to be cases of sales. The court considers none of these strictly applicable to the case at bar. There is a distinction between the admission of parol testimony to charge an unknown principal in a transaction of sale, and to fix the liability of a party upon a bill on which his name does not even inferentially appear. In a recent case in England, Lord Abinger, Ch. B., and Parke, Gurney, and Rolfe, BB., decided that a partner might be held upon a written contract signed by his co-partners, but on which his name did not appear; considering the case one of agency. While they state that all written contracts not under seal stand upon the same footing as contracts not written, they expressly admit, that in the case of a bill of exchange, or promissory note, none but the parties named in the instrument can be sued upon it. Beckham v. Drake, 9 Mees. & W. 79, 92; 1 Pars. Cont. 48, note a. In accordance with this doctrine is the case of Pentz v. Stanton, 10 Wend. 271, relied on by counsel for the demurrer. The force of this authority is assailed upon the ground, that in the marginal note of the reporter, as well as in the argument of counsel, it appears in that case, no disclosure of the name of the principal was made. Such is the fact; but it is equally true, that the court did not place its decision upon that ground; but on the broad principles of commercial law. It says, "The plaintiff cannot on the bill of exchange recover against the present defendant. His name

[1] [Reported by Cutler McAllister, Esq.]

[2] [District not given.]

nowhere appears upon it. It was drawn and subscribed by West, in his own name, with the simple addition of 'Agent;' but without any specification whatever of the name of the principal." Again, "It is not sufficient to charge the principal, or protect the agent from personal liability, merely to describe himself as agent, if the language of the instrument imports a personal contract upon his part." It is urged that if Burgoyne & Co. are not liable, that fact fixes the liability of defendants. It does not follow from the circumstance that the former are not responsible on paper on which their names do not appear, that the liability of defendants must on that account be conclusively fixed. Their responsibility depends upon the admissibility of certain evidence, which question is raised by the demurrer in this case; and if it be overruled, then upon the clear and satisfactory character of the evidence the defendants may give of the facts pleaded depends their liability. To sustain it, the counsel for the plaintiff has cited several cases from Massachusetts. In the first of these, the party signed the note sued on as "guardian of an insane person;" and in the second, as "guardian of an infant." In both, the principals disclosed were incapable of contracting, and the inference therefore was, that the only party who could contract was the one intended to be charged, and the addition to his signature was regarded merely as a designatio personae, or intended to serve him in making up his accounts. The third case, was one where a party sued on a note made payable to him as agent; and it was held, he might sue in his own name. 5 Mass. 299; 6 Mass. 58; 8 Mass. 103. Neither of these cases touches the point whether the parol testimony offered in this case can be received. The true rule deducible from the recent cases is, that where there is sufficient on the face of the instrument to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. In the application of this rule, the embarrassing question may arise, whether the form of an instrument in a given case is such as will admit parol evidence to remove the doubt suggested by its terms. In the case of Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. [18 U. S.] 326, the check sued on was signed by William Patton, individually. The question was, is this a private check, or drawn as cashier? The court say (page 335), "Had the draft signed by Patton borne no marks of an official character on the face of it, the case would have presented more difficulty." They then advert to the fact that the check, which was in the usual form, had prefixed to it the words "Mechanics' Bank of Alexandria," as sufficient to authorize the admission of parol testimony, to show the true nature of the transaction. It is to be observed, that such testimony was admitted to charge a party whose name did not appear upon the check. A further step in the relaxation of the rule was taken in the case of Susquehanna Bridge Co. v. Evans [Case No. 13,635], where testimony was admitted in an action between indorser and indorsee, to establish a parol agreement between the parties entered into at the time of indorsement. The point under consideration came before the supreme court of New York in Mott v. Hicks, 1 Cow. 513. A note was given in the name of the president and directors of the Woodstock Company, signed by W. Hicks, president, and made payable to Isaac Horsfield, who indorsed as agent. On trial of an action on the note, the endorser, Horsfield, was offered as a witness and objected to. The question of his liability, as endorser, came up directly. It was held, first, that the maker of the note was not individually liable there being sufficient on the face of the instrument to indicate the principal; second, that parol evidence was admissible to discharge the endorser, inasmuch as he had endorsed as "agent," which, it was considered, had opened the door to the admissibility of testimony. But the question has been met more directly in the case of Hicks v. Hinde, 9 Barb. 528. The action was upon a draft, signed by John Hinde, "Agent," and the court, after adverting to the case of Pentz v. Stanton, 10 Wend. 271, and other cases, decided that the drawing of the draft was restrictive, and that the word "Agent," annexed to the signature of the maker was equivalent to a declaration that he would not be held responsible personally on the draft. In such case, parol evidence was admissible. These two last cases have been cited approvingly in New York, in Babcock v. Beman, 1 Ker. [11 N. Y.] 200, and may be taken as the law of the most commercial state in the Union. The rule is not only adopted, but carried to a greater extent in Pennsylvania. In Miles v. O'Hara, 1 Serg. & R. 32, the drawer of a bill of exchange was permitted to rebut the presumption of liability arising out of his unqualified and unrestricted signature; by introducing parol testimony to establish his agency, and the knowledge of it by the opposite party. A decision to the same effect will be found in Hill v. Ely, 5 Serg. & R. 363. But this court cannot go to the extent to which the courts of Pennsylvania have gone in the admission of parol testimony, to discharge parties who have put their signatures to commercial paper without any restriction. Those courts have done so by reason of their peculiar structure. Mr. Justice Duncan, in the last-cited case, predicates the right to receive parol testimony in such cases on the ground that the courts of law of Pennsylvania will administer any relief which could be obtained in a court of equity, there being no court of chancery in that state. But as

the case at bar comes within the decisions of the courts of law in New York, heretofore cited, and no case has yet been brought to the attention of this court, in which an adverse ruling directly on the point has been made, this court is arrived at the conclusion, that under the circumstances of this case the parol testimony is admissible. The demurrer must, therefore, be overruled.

D'ESTE (ZANE v.). See Case No. 18,199.

Case No. 3,826.

DESSOR v. DAVIS.

[Nowhere reported; opinion not now accessible.]

Case No. 3,827.

DE TASLET et al. v. CROUSELLAT.

[1 Wash. C. C. 504.] [1]

Circuit Court, D. Pennsylvania. Oct., 1806.

SET-OFF—ACTION ON BILL OF EXCHANGE.

1. The defendant, in an action on a bill of exchange, may set off a claim he has upon the plaintiff, for not having insured a particular sum on a vessel and which he was ordered and bound to do, the vessel having been lost, and no insurance having been made by the plaintiff.

2. Damages on bills of exchange, paid by the defendant, upon bills drawn by him on the plaintiff, and which the plaintiff was bound to pay, may be set off.

The questions in this cause were, whether the defendant could set off against the plaintiff's demand, which was on a protested bill of exchange for the sum of £7,000 sterling, which the defendant had ordered the plaintiff to insure on a vessel, the plaintiff being under a legal obligation to make the insurance as directed; but which he had failed to do, and the vessel was lost. Secondly. If he could set off about £1,800, which the defendant had paid for the damages on bills of exchange, drawn upon the plaintiff, and which he had protested, though he was bound to accept and pay them.

Mr. Levy, for defendant, contended, that under the law of this state, passed in 1705, which declares, that on the plea of payment, the defendant may give in evidence any bond, bill, account, bargain, or agreement; greater latitude was allowed to offsets than in England. That in the case of a merchant who has funds of another in his hands; or who has been in the habit of insuring for him; or who accepts a bill of lading from him, and yet refuses or neglects to make insurance when ordered; that he stands himself the insurer, is liable to pay exactly what the insurers would have been bound to pay, and is entitled to make the same defence. He cited 1 Marsh. Ins. 205-209; 6 Term R. 488; Parker, 303, 304.

Mr. Rawle, for plaintiff, insisted, that the action against the merchant thus neglecting to insure, is founded in maleficio: that the damages are unliquidated, and cannot be set off.

BY THE COURT. The foundation of this offset is a breach of contract, which makes the merchant who thus neglects to insure, the insurer, and he is liable as the insurer, and is entitled to make the defence which the insurer could make. This, therefore, is not a case of unliquidated damages. As to the second point, that was settled in the case of Armstrong v. Brown [Case No. 542]. The parties then agreed to withdraw a juror, the plaintiff not being prepared to meet the first offset.

[NOTE. The case was tried at the October term, 1807, and verdict rendered for plaintiff. See Case No. 3,828.]

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

Case No. 3,828.

DE TASTETT et al. v. CROUSILLAT.

[2 Wash. C. C. 132.] [1]

Circuit Court, D. Pennsylvania. Oct., 1807.

PRINCIPAL AND AGENT — NEGLECT OF AGENT TO EFFECT INSURANCE — DAMAGES — BILLS OF EXCHANGE—AGREEMENT TO ACCEPT — PAROL EVIDENCE—SET-OFF.

1. A merchant who is in the habit of insuring for his correspondent, and is ordered to make insurance, which he neglects, or imperfectly executes, is answerable as if he was himself the assurer, and is entitled to the premium.

[Cited in Le Roy v. Beard, 8 How. (49 U. S.) 468; Very v. Levy, 13 How. (54 U. S.) 359. Approved in Manny v. Dunlap, Case No. 9,047.]

2. When the insurance has been imperfectly made, and not altogether neglected, it may be questioned, whether the agent is liable for more than the damages, equal to the chance of the indemnity which would have been afforded by the exact execution of the order.

3. A claim of damages against an agent, upon the orders of the principal, which he is charged with neglecting, is not entitled to favour, if the order has been couched in doubtful terms.

4. If a reasonable diligence was used by the agent to effect the insurance, he is not liable.

5. The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance, will make him liable in damages.

6. Unliquidated damages cannot be set off.

7. An agreement to accept bills, renders it unnecessary that the drawee shall have funds in his hands belonging to the drawer.

8. Parol evidence to show facts stated in certain letters received by the witness, will not be admitted; as the letters are higher testimony, and should be produced.

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

The jury were empannelled to try issues in two actions, the one brought to recover the amount of a bill of exchange, drawn by the defendant on a house at Rochelle, in favour of the plaintiffs, for two thousand pounds sterling, and damages, the same having been protested; and the other for the balance of a commercial account. The plaintiffs are merchants residing at London, between whom and the defendant very considerable transactions had taken place, principally in the drawing of bills on each other, and insurances effected in England, on vessels and cargoes, sent by the defendant to England, and to different parts of the continent. Many of the defendant's bills, drawn in the summer and autumn of 1805, on the plaintiffs, were protested; and the defendant having been obliged to pay the damages, to the amount of about two thousand pounds, this is claimed by the defendant as an offset, the plaintiff consenting that the claim may be made in this action. He also claimed the sum of seven thousand pounds of the plaintiff, for not having effected an insurance on the Betsey, as he had been directed to do, and as he had been in the habit of doing on former occasions. This cause was partly tried at a former term, when it was objected by the plaintiffs' counsel, that this claim, if well founded, could not be made an offset. But the court deciding otherwise, a juror was withdrawn, that the plaintiff might have an opportunity of taking testimony, to meet this point. [See Case No. 3,827.] Depositions having been taken, the question relative to this point appeared to be as follows. In consequence of a decision in the case of Kellner v. Le Mesurier (1803) 4 East, 396, declaring that policies made in England upon foreign vessels, seized as prize by any of his majesty's privateers, and condemned, were absolutely void; it had become a practice, in many instances, for the underwriters in London to execute a policy in common form, and to give a separate engagement, which they considered binding on their honour, to pay the losses in cases of captures and condemnations, whether by English cruisers or others. In the summer of 1805, the plaintiffs having been ordered by the defendant to obtain an insurance on a vessel named the Tryphenia, had it effected with this separate engagement, of which he informed the defendant on the 16th of October. In the summer of the same year, the defendant wrote to the plaintiffs, informing them of his intended shipment of a cargo of colonial produce to Antwerp, by the ship Betsey; and desiring him to insure six thousand pounds on the cargo, which he desires may be done "by the most solid assurance." He shortly after directed him to insure one thousand pounds more on the same cargo. The plaintiffs had the insurance effected in the common manner, but no separate engagement to insure against capture was obtained; and it appears, by a deposition in the cause, that the broker who was applied to, to get the insurance effected, was instructed by the plaintiff to obtain, if he could, such a separate engagement. The attempt was made at Lloyd's Coffee-House, but none of the underwriters could be prevailed upon to enter into such an engagement. On the 16th of October, the plaintiffs enclosed to the defendants three separate accounts for the insurances effected upon the Tryphenia, the six thousand, and the one thousand pounds on the Betsey's cargo. In the first, they stated, specially, the separate agreement which had been obtained; but made no mention of it, as to the other insurances. No other notice was given to the defendants, that in the latter case such an agreement had not been obtained. The Betsey was captured about the middle of November, by a British cruiser, and condemned as good prize. On the 3d of July, 1805, the plaintiffs wrote to the defendants, referring to a former letter from the defendants, in which he stated the details of his concern with Anthony De Tastett & Co., of St. Sebastians, which, they say, "we are to support with all our credit. We have written them on this subject, and said that we would honour all your drafts on us, for your account." On the 27th of August, the plaintiffs wrote to the defendant, that they would accept no more of his bills. In many letters from the defendant to the plaintiffs, previous to the letter of the 27th of August, when he mentioned the bills drawn on the plaintiffs, he distinguished between those drawn on account of his connexions with the house at St. Sebastians, which he directed to be charged to them; and those drawn on his own account, which he ordered to be placed to his particular debit. The defendant's counsel offered a witness to prove, that, by the letters of his, the witness's, correspondents in England, they had, in the summer and fall of 1805, effected insurances on his property, with a separate engagement to pay, though the property should be seized by the British cruisers, and condemned. This was objected to, and the court sustained the objection; observing that the evidence was of no higher dignity than hearsay.

Duponceau and Levy, for defendants, contended: First; that the plaintiffs were bound to have the insurance effected upon the cargo of the Betsey, with a separate engagement, as had been done on the Tryphenia; or should have shown, satisfactorily, that they could not get this done. Proof that one broker had made an unsuccessful attempt, is no evidence that others might not have succeeded, if they had been applied to. Second; that even if every proper attempt had been made by the plaintiffs, and had failed, still the plaintiffs should immediately have given the defendant notice thereof, to ena-

ble him to cover his property fully in this country. Third; that the plaintiffs, having engaged to honour the defendant's bills, they were bound to do so; and are liable to pay all the damages arising from their failure.

Mr. Rawle, for plaintiff, on the first point, answered, that no order to insure in the way now contended for, was given; and the plaintiffs endeavoured, as far as they were bound, to obtain such an insurance, but could not do it; consequently they are not liable. Second; the accounts enclosed in the letter of the 16th of October, in one of which mention is made of this separate and special underwriting, and in the other cases no notice is taken of such an agreement, were sufficient to apprize the defendant of the real situation of the cargo of the Betsey, as to the indemnity secured on it. Third; that the undertaking, as to the plaintiffs, to accept the defendant's bills, went only to such as were drawn in relation to his concern with the house at St. Sebastians; that, at any rate, the demand cannot be supported, unless the defendant had shown that he had sufficient funds in his hands, of that house, to authorize him to draw; and at all events, the plaintiffs were not bound to accept any bills drawn after the 27th of August, when they informed him that they would accept no more of his bills.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The first question arises upon the defendant's claim of seven thousand pounds. The law is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium. In this case an insurance was effected, valid so far as it went, and had it gone as far as the defendant contends it ought, it would, by the legal decisions in England, have been inoperative and void. But the defendant says, that this ought not to have entered into the consideration of the plaintiffs; that, having ordered such an insurance to be made, it was the duty of the plaintiffs to make it, and to secure to the defendant the chance of an indemnity, though founded only on the honour of the underwriters. To this charge of misconduct, the plaintiff has given two answers: First, that he received no orders to effect the insurance, in the manner now contended for; and, secondly, that he made the attempt to do it, and could not get it effected. The words "solid assurance," contained in the defendant's letters, are certainly equivocal. They might mean such an insurance, as would completely protect the property against captures by British cruisers, the imminent dangers of which were foreseen by the defendant, and acknowledged and dreaded by the plaintiffs, as their letters evince; or they might mean, that the underwriters should be men of solidity, and able to pay in case of loss. It may be proper here to observe, that a claim for damages against an agent, comes with a bad grace from a principal, who complains of a disobedience of orders, couched in ambiguous terms. If, with a reasonable attention to the language, the words would bear the construction which has been placed upon them, it would be too much to condemn him in damages, because, upon a refined and critical examination of them, a different construction should be deemed the correct one. The second excuse depends upon the fact, whether a reasonable diligence was used by the plaintiffs to effect an insurance, as ordered. If it was, they would not be answerable for the want of success which attended those endeavours, even if it were perfectly clear, that the general principle contended for, applies to a case of this kind; as to which we give no opinion.

The next question respects the claim for damages on the protested bills of exchange, which, it is contended, the plaintiffs, by their letter of the 3d of July, undertook to accept. To the court, it appears that that promise was confined to bills drawn on account of transactions which were to take place between the defendant, and De Tastett of St. Sebastians; and this is strongly confirmed by the subsequent letters of the defendant to the plaintiffs; in which he discriminates between those bills which are to be charged to the house at St. Sebastians, and those drawn on his particular account. If so, the defendant is entitled to damages upon those bills only, which are of the former description. But the court do not acquiesce in two of the positions laid down by Mr. Rawle under this head. For, clearly, the plaintiffs were bound to accept all bills drawn on the faith of the letter of the 3d of July, between the date of the plaintiff's letter to the defendant, forbidding any further drafts, and the receipt of that letter by the defendant; until which time, it could not be considered as changing the relative situation of the parties. And secondly; it is of no consequence whether the defendant had or had not funds in the hands of the house at St. Sebastians, unless this had been made a condition of the plaintiffs' engagement to accept; for a man may validly bind himself to accept bills without funds, and if the promise be general, and the transactions fair, he continues bound until a countermand is received.

Verdict for the plaintiff.

Case No. 3,829.

In re DETERT.

[11 N. B. R. 293;[1] 7 Chi. Leg. News, 130; 14 Am. Law Reg. (N. S.) 166.]

District Court, W. D. Missouri. 1875.

BANKRUPTCY — HOMESTEAD RIGHTS — PROPERTY FRAUDULENTLY CONVEYED — SURRENDER BY CREDITOR.

1. The bankrupt files his petition, praying to have fifteen hundred dollars set apart to him out of the assets of the estate in lieu of a homestead. It appears from the evidence that he conveyed his property in trust, for himself and creditors named in the deed, to delay the collection of a judgment recovered against him. *Held*, that when a party makes a conveyance which is afterwards set aside on account of an illegal preference under the bankrupt law [of 1867 (14 Stat. 517)], both the right to a homestead and dower revive.

2. That a creditor who surrenders his rights under a fraudulent conveyance, must be held to have made a surrender under the 23d section of the act, and not a mere assent on his part for the unsecured creditors to participate in the proceeds of his preference, and the same effect is to be given to the relinquishment of the creditor, as the setting aside of the deed would have had, had it taken place.

Johnson & Botsford, for the homestead.
H. B. Hamilton, contra.

KREKEL, District Judge. The bankrupt files his petition, praying to have fifteen hundred dollars set apart to him out of the assets of the estate in lieu of a homestead. It appears from the evidence, that the bankrupt was indebted to Comstock & Co., who sued him, and recovered judgment; to delay the collection whereof, he conveyed and assigned his property, including his homestead, to Charles F. Meyer, in trust for himself and certain other creditors named in the deed; that within four months after the making of this conveyance he was declared bankrupt, on creditors' petition; that said Meyer and H. B. Hamilton were elected assignees; that Meyer presented his own as well as the creditors' claims named in the trust deed for allowance as secured; that thereupon Hamilton, his co-assignee, objected, alleging that an illegal preference was attempted thereby to be secured, and that the trust deed was, on that account, void; that said Meyer, to avoid the objections, executed an instrument in writing, agreeing that if the objections were withdrawn, and the claim allowed to be proven up as secured, the proceeds derived from the disposition of the property should be equally distributed among all the creditors of the estate; that the objections were withdrawn and the claims allowed as secured; that a sale was ordered by the court under the deed of trust in conformity to its requirements, in which the assignees joined; and that the proceeds of sale were paid into the estate, and treated as part of the general fund now in court. The deed of trust made by the bankrupt to Meyer has never been set aside, but the bankrupt contends that the surrender of the preference by Meyer, as stated under the 23d section of the bankrupt law, has the same effect as the setting aside of the deed would have; and that, consequently, he is entitled to an allowance to the extent, at least, of what the homestead sold for. That a preference was intended to be secured by the trust deed to Meyer is not seriously questioned, but the assignee contends that as the claim was allowed as secured, and the deed of trust held valid, as shown by the sale under it, the proceeds must be treated, so far as the bankrupt is concerned, as discharged from all claims on his part.

It has often been decided, and may be said to be settled law, that where a party makes a conveyance, which is afterward set aside on account of an illegal preference under the bankrupt law, both the right to a homestead and dower revive. Cox v. Wilder [Case No. 3,308]; Vogler v. Montgomery, 54 Mo. 577; McFarland v. Goodman [Case No. 8,789]. The reasons given are that the relinquishment of homestead or dower are for the benefit of the grantee alone, and he having been unable to avail himself of it, the same cannot go to the assignee who claims adversely to the deed. Were it not for the deed being in force, as it is claimed, the case, under the rulings cited, would present no difficulty. The 23d section of the bankrupt law provides that any person having received a preference, shall not prove the claim on account of which the preference was given; nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, or benefit. The manner in which this surrender shall be made, the law has not determined. In the case before the court, Meyer was not permitted to prove his claim, or have any benefit therefrom, until by an instrument in writing he had agreed that the proceeds of his preference should become a part of the general estate of the bankrupt. This may be treated in effect as a surrender under the 23d section, and is not a mere consent on the part of Meyer for the unsecured creditors to participate in the proceeds of his preference. But the question remains, "What effect had this surrender on the rights of the bankrupt?" If the reasons given by the authorities cited, that the conveyance was for the benefit of the grantee and could not operate in favor of the assignee or general creditors, both of whom claimed adversely to the deed, then it must follow that the same effect must be given to this relinquishment of Meyer as the setting aside of the deed, had it taken place, would have had. I am the more inclined to give this effect to the relinquishment under consideration, from the persuasive force of the Missouri case cited, and because of the harmony thus established between the federal and state decisions, furnishing a perma-

[1] [Reprinted from 11 N. B. R. 293, by permission.]

nent rule of property. The homestead having been sold at the trustee's and assignee's sale for seven hundred and twenty-five dollars, this amount will be set apart to the bankrupt in lieu of his homestead.

DETLOR v. The COMET. See Case No. 3,050.
DETMOLD v. FISHER. See Case No. 3,830.

Case No. 3,830.

DETMOLD et al. v. GATE VEIN COAL CO.
SAME v. FISHER.

[3 Wkly. Notes Cas. 567.]

Circuit Court, E. D. Pennsylvania. Nov. 10, 1876.

AFFIDAVIT OF DEFENCE LAW — AVERMENT FILED WITH COPY OF INSTRUMENT — FUNCTION AND SCOPE OF AVERMENT IN SUCH CASE—PRACTICE.

Semble, that the two-term rule, based upon the old Pennsylvania practice, may be acted upon in a case not within the affidavit of defence law.

Note: Origin and development of affidavit of defence law.

Motion to set aside judgment. Judgment in this case had been entered by default, for want of an affidavit of defence, upon copy filed of an agreement in writing, whereby the company defendant agreed to ship and consign to plaintiffs [Detmold and Cox], within a specified time, a certain quantity of coal to be sold by them at a certain commission. The plaintiffs were to make advances on such shipments, a bond of indemnity being given to secure them against loss, of which a copy was also filed. With these copies plaintiffs filed an averment that the agreement had not been performed, whereby the plaintiffs were entitled to judgment for the amount of commissions upon the sales of the coal which should have been shipped; and also for a balance due on account of advances, as shown by a copy of book entries filed therewith. An affidavit was filed by defendant denying breach of the agreement, and averring that the copies filed, with the averments, were not such as to entitle plaintiffs to judgment under the affidavit of defence law.

Mr. Dallas, for plaintiffs.

Judgment is asked upon the copies of the agreement and the bond of suretyship, and not upon the copy of book account, which latter is filed with the above instruments merely as an averment to liquidate the plaintiff's claim, and to assist the clerk in assessing the damages. Frank v. Maguire, 6 Wright [42 Pa. St.] 81.

F. W. Hughes, for defendants.

Breach of the agreement is alleged in general terms. The instruments of writing upon which suit is brought are for the payment of money at a future time, the consideration being executory, and the demand is for damages for the breach of agreement, dependent upon facts dehors the record. They are not within the affidavit of defence law. Montgomery v. Johnston, 1 Miles, 324; Miners' Bank v. Blackiston, 2 Miles, 358; Com. v. Hoffman, 24 P. F. Smith [74 Pa. St.] 105.

THE COURT. Judgment would be granted upon the copies as filed, if it were not for the fact that the copies of the book entries, filed to assist the assessment of damages, tend to extend and not to limit the claim, as shown by the copies of the instruments of writing. Such a purpose is not within the rule allowing averments to be filed with copies of instruments. Judgment in each case vacated without prejudice to the right of the plaintiff to move for judgment, in accordance with the practice under the old second term rule, for default of affidavits alleging defence, and the amount thereof; but defendants have leave to file such affidavit in each case.

CADWALADER, District Judge (orally). The following order was entered of record: "And now, to wit, this 15th day of November, A. D. 1876, the court orders the judgments to be vacated as having been unadvisedly entered, but without prejudice to any right of the plaintiffs to move for judgment for want of an affidavit of defence under the rule and practice which is in that behalf independent of the statute law of the state."

NOTE. The practice [in Pennsylvania] of taking judgment by default for want of an affidavit of defence originated in the supreme court [of the state] in 1795, under an agreement signed by all the attorneys except two, and entered among the records of said court. As it is believed that this document is not to be found in print, it is here inserted, viz.:

"It is agreed by the attorneys practising in the supreme court of Pennsylvania, that, in all actions now depending or which shall hereafter be instituted in the same court, either by original process or by removal from any inferior courts, the defendant's attorney shall confess judgment to the plaintiff at the third court (here follow certain provisions as to stay of execution) unless the defendant, or some person for him or her, shall make affidavit, at or before the second term, that, to the best of his knowledge and belief, there is a just defence, in whole or in part in the same cause, and if the defence is to part only, then the defendant's attorney shall confess judgment to the plaintiff (if the plaintiff's attorney will accept the same in full satisfaction of his demand), for so much as shall be acknowledged to be due to the plaintiff in the said cause.

"Witness our hands this eleventh day of September, 1795.

"Cha. Heatly.	Jac. Bankson.
"Benj. R. Morgan.	Benj. Chew, Jr.
"Jas. Thomas.	Wm. Moore Smith.
"Robt. Porter.	Charles Swift.
"Samson Levy.	John F. Mifflin.
"John Caldwell.	Wm. Tilghman.
"Jno. Wells.	William H. Tod.
"Robert Henry Dunkin.	W. Brinton.
"Jno. Hallowell.	John Read, Jr.
"Jared Ingersoll.	Rich'd Lake.
"Alex'r Wilcocks.	James Gibson.
"Edw. Tilghman.	Adam Gordon.
"Moses Levy.	Walter Franklin.
"Jos. B. McKean.	Joseph Hopkinson.
"A. J. Dallas.	Thos. W. Tallman.
"Peter S. Du Ponceau.	Thos. Armstrong.
"Jasper Moylan.	J. W. Condy.
"John D. Coxe.	M. Keppele.
"W. Rawle.	Jno. R. Smith."

Entered in appearance docket, supreme court, September term, 1795, pp. 628, 629.

This agreement was also entered as a rule of the supreme court, under date of Sept. 11, 1795 (MS. Book of Rules of Supreme Court, rule 50, p. 39), but it was not enforced against the two attorneys who refused to sign it, and who neither gave nor took judgments under it. A modification of the rule (permitting the plaintiff to direct that judgment by default for want of an affidavit of defence should be entered as of course) was afterwards adopted by the supreme and circuit courts in 1799; and a further modification was adopted by the court of common pleas in 1809. See Vanatta v. Anderson, 3 Bin. 417. The latter rule provided that, in all actions of debt or contract where special bail was not required, the plaintiff might direct judgment to be taken by default, at any time after the fifth Monday of the next succeeding term to which the process was returnable, unless the defendant had made an affidavit, and previously filed the same in the prothonotary's office, stating that, to the best of his knowledge and belief, there was a just defence, in whole or in part, in the said cause; and, if the defence was to part only, the defendant should specify the sum which he admitted was due; provided always that no judgment should be entered by virtue of this rule unless the plaintiff had filed a declaration during the term to which the process was returnable. In actions where special bail was required, if the plaintiff filed his declaration within the first three days of the next term after special bail was entered, and the defendant did not make an affidavit before the fifth Monday of that term, the plaintiff could enter judgment. The district court of Philadelphia county also, after its establishment in 1811, adopted a similar rule, which provided that judgment could be taken at the third Monday of the next succeeding term, if the plaintiff had filed his declaration before the third day of that term. Walker's Court Rules (Ed. E. W. Davis, 1847).

The remark of Read, J., in Sellers v. Burk, 11 Wright [47 Pa. St.] 350 (decided in 1864), that the provisions of the act of 1835, and its supplements, "giving power to the courts in this county to enter judgment by default for want of an affidavit of defence in certain specified causes, have, in a great measure, superseded all former rules on the subject;" and the intimation of Cadwalader, J., in the above-reported case, would seem to imply that the old practice which obtained before the act of 1835, and its supplements, may still be invoked in cases which, though not within the act, would be within the old rule of the court. It is believed that in the U. S. court for the eastern district of Pennsylvania, such judgments have been occasionally granted, probably in conformity to the practice in some of the counties comprising that district. It would seem, however, as stated in 1 Troub. & H. Pr. 368, that in Philadelphia county "the rules of court which preceded these statutes have now been repealed;" and that the practice is now entirely regulated by the provisions of the act of March 28, 1835, § 2 [Pa. Laws, p. 89], relating to the district court for the city and county of Philadelphia, and its supplement, act of April 14, 1846 [Pa. Laws, p. 328], relating to the court of common pleas. The latter court, in November, 1848, repealed its rule, "being of opinion that it was sufficiently supplied by the acts of assembly," Walker's Court Rules (Ed. F. C. Philpot, 1850), p. 14; and the district court, in 1857, by omitting its former rule on the subject from among those adopted and published in that year, thereby repealed it under an order of January 3, 1857, repealing all rules not then re-announced, Walker's Court Rules (Ed. E. T. Chase, 1857).

The court of nisi prius, which was established under act of July 26, 1842 [Pa. Laws, p. 431], was empowered under the provision of that act to enter judgment by default for want of an affidavit of defence, as under the act of March 28, 1835, and its supplements; and it would appear that it did not establish a practice by rule of court similar to that under the second-term rule, or like that which had been in force in any of the other courts prior to the act of March 28, 1835. See rules adopted January 15, 1849; Walker's Court Rules (Ed. 1857), p. 99; New Court Rules (Davis & Simpson, 1870), p. 248. The United States circuit court made its practice conformable to that of the nisi prius by a rule adopted January 10, 1861 (New Court Rules, p. 353). By act of congress of June 1, 1872 (Rev. St. § 914 [17 Stat. 196]), it is provided that the practice of the United States courts, in civil causes, shall conform to that existing in the courts of the state in which such United States courts are held. It may be added that the act of March 21, 1806 (4 Smith's Laws 326, P. L. 561), to regulate arbitration and proceedings in courts of justice, provided that, in all suits for the recovery of any debt founded on a verbal promise or a book account, the plaintiff should file a statement of his demand on the third day of the term to which the process was returnable; and the defendant at least twenty days before the next succeeding term should file a statement of account, if any, against the demand, and particularly stating what was justly due. It was the practice under this act to take judgment by default for want of a counter-statement as of a plea; and if instead of a specific statement a formal plea was entered, as payment, the cause was at issue. An "affidavit of defence," however, was not required. 3 Pa. Bl. p. 205. Numerous special acts of assembly have been passed extending the Philadelphia affidavit of defence law to other counties of the state (Purd. Dig. 1165, note g); and in others it has been adopted, with or without modification, by rule of court. Chief Justice Black remarked, in Lord v. Ocean Bank, 8 Harris [20 Pa. St.] 387, that "the only regret of those who are well informed on the subject is, that it is not universally adopted in all the courts of the state." The power of a court, in the absence of a statutory provision, to make and enforce such a rule, has not been seriously doubted since Vanatta v. Anderson, 3 Bin. 417. Several subsequent cases, in which the power of county courts to make similar rules has been sustained, are referred to in Linn's Analytical Index, and Landis' Supplement, under the case of Vanatta v. Anderson. W. W. C.

Case No. 3,831.

DETMOLD v. REEVES et al.

[1 Fish. Pat. Cas. 127; 5 Pa. Law J. Rep. 99; 4 Am. Law J. (N. S.) 186; Merw. Pat. Inv. 571; 52 Jour. Fr. Inst. 270; 8 Leg. Int. 146.] [1]

Circuit Court, E. D. Pennsylvania. Sept., 1851.

PATENTABLE DISCOVERY—REDUCTION TO PRACTICE—SCOPE OF PATENT.

1. He who has discovered some new element, or property of matter, may secure to himself the ownership of his discovery, as soon as he has been able to illustrate it practically and to demonstrate its value. His patent in such a case will be commensurate with the principle which it announces to the world, and may be as broad as the mental conception itself.

2. But the mental conception must have been susceptible of embodiment, and must have been, in fact, embodied in some mechanical device, or

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 571, contains only a partial report.]

some process of art. The patent must be for a thing—not for an idea merely.

3. The contract of the public is not with him who has discovered, but with him who also makes his discovery usefully known. If he has discovered much and discloses little, communicates to the world only one or more of the derivative and secondary truths of the principle he has discovered, he patents no more than he has proclaimed. He will not be allowed, afterward, when the extent of his right shall be the subject of controversy, to expand into a general expression what was before limited to a particular form, and argue that he had described the whole, by implication, from the first.

This was an application for a provisional injunction to restrain the defendants [David Reeves, R. S. Buck, S. J. Reeves, and others] from the infringement of letters patent [No. 2,558] for "a method of generating and supplying heat," granted to Christian E. Detmold as the assignee of M. Faber Du Faur, April 16, 1842, and reissued January 23, 1845 [No. 67].

[The plaintiff claims to have invented a new process of drawing off from blast furnaces the waste combustible gases, and using them as a fuel in reverberatory or other furnaces. The defendants denied the claim, asserting that, beyond his particular apparatus for burning the gases, the assignee of the plaintiff had no right whatever, and that they (the defendants) really only used the gases in a way known and practiced long ago, even as far back as 1811.

[As the greatest number of the furnaces in the United States, numbering in all between five and six hundred, used some modification of this plan, either to heat their boilers or to heat the blast, it will be seen that at the plaintiff's price for a license, $2,000 for a furnace, the case involved much more than half a million of dollars.] [2]

Harding, Campbell, Hazlehurst & Cadwallader, for complainant.

Sheppard, Gerhard, Meredith, Williams & Mallory, for defendants.

KANE, District Judge. The complainant, Mr. Detmold, is the assignee, and as such, the patentee in this country, of an invention made by M. Faber Du Faur, and patented by him in 1840 and 1841, in Bavaria and Wurtemburg. The American patent was issued in 1842, but it was amended and reissued in 1845. It was for "a new and useful invention for generating and applying heat," and its immediate subject is a new mode of collecting, conducting and using the combustible gases that ordinarily escape from the tunnel-head of the blast furnace. The defendants are extensively engaged in the manufacture of iron, and, it is charged, that they are availing themselves of a part of the patented invention.

The interests which are involved in the controversy are very great, and may be seriously affected by the action of the court on the present motion. The argument, therefore, has had the widest range—embracing the originality of the patented invention, its practically useful character, its identity in principle with the apparatus employed by the defendants, the right of the inventor, by his assignee, to protection under the patent laws, the regularity of the proceedings of reissue, and their legal effect, as well as the policy of postponing the summary relief, which it is the province of equity to administer, until after an adjudication of the merits by a court of law. But, of these questions, which were argued by learned counsel on both sides with characteristic ability, there is only one, after all, which, on a careful review of the whole ground, I deem it necessary to decide.

The claim of the complainant, as it has been expounded by his counsel in the present case, is for "a new method of economizing fuel, by using the waste combustible gases of the upper portion of the blast furnace, by drawing them off below the upper level of the charge, and conducting them through convenient passages to other fireplaces or structures, there to be burned as fuel." It does not assert an exclusive right to the use of gases from the tunnel-head, nor to the employment of pipes or tubes for conducting gases; and very properly, for both of these were long ago familiar to the arts; its essential characteristic is, that the gases are to be withdrawn "below the upper level of the charge."

Can such a claim be legitimately deduced from the terms of the patent before me? This is the controlling question of the cause.

The descriptive language of the specification does not designate, as the place for taking off the gases, a point "below the level of the charges"—an expression that would apply equally well to any and every such point—but one "at or near that point of the furnace where the limestone employed as a flux is completely calcined, and the reduction, or deoxydation, has not yet commenced;" and this point, it adds, "will generally be at about one-third the hight of the whole furnace below the tunnel-head, or two-thirds above the bottom stone."

It is true, that the formal claim, at the close of the instrument, speaks of drawing off the gases at one or more points below the top of the fuel; and if the expressions "fuel" and "charges" can be regarded as convertible, this would certainly countenance the exposition of the complainant's counsel. But it does not stand alone; and it can not be interpreted fairly, without giving effect to the words that follow it, "substantially as set forth in the above specification." There is here an important qualification of the broad language of the claim—one that limits and defines it by a reference to the description that has gone before—and when the two parts are taken together, as they must be, they do not impart the withdrawal of the

[2] [From 5 Pa. Law J. Rep. 99.]

gases from below the top of the charges generally, at any and all points whatsoever, but specially—from, at, or near that point below the top of them, at which the flux has been calcined, and the deoxydation is about to begin.

The explanatory, or practical reference which is added in the specification, to a point one-third below the top of the furnace, makes this even more plain. For, the indication of a point, ascertainable by simple measurement, as the one that will in most cases conform the structural arrangement to the rule deduced from scientific principle, is almost a declaration in terms, that the patentee had in view a particular point, and did not mean to apply his claim to all points below the charges alike.

So far, then, as the motion for an injunction asserts, as its basis, that the defendants are using a device which has been specifically described and claimed in the patent, it can not be sustained, since it is conceded that the defendants do not take out the gases "at or near the point at which the calcination is perfected, while the deoxydation has not yet begun," nor at or "about one-third of the hight of the tunnel," measured from the top. But the question still remains, whether the defendants are not violating the patent substantially; deriving from it information essentially connected with its subject-matter; and only so far varying their structure in form and proportion as to elude its terms.

There is no doubt, that he who has discovered some new element or property of matter, may secure to himself the ownership of his discovery, so soon as he has been able to illustrate it practically, and to demonstrate its value. His patent, in such a case, will be commensurate with the principles, which it announces to the world, and may be as broad as the mental conception itself. But, then, the mental conception must have been susceptible of embodiment, and must have been, in fact, embodied in some mechanical device, or some process of art. The abstract must have been resolved into the concrete. The patent must be for a thing—not for an idea merely.

This limitation, it may be said, denies to some of the more important products of mind what it concedes to others of lower grade. But it is not the less true on that account. Men may be enriched, or made happy, by physical, as well as by moral or political truths, which, nevertheless, go without reward for their authors. He who devised the art of multiplication could not restrain others from using it after him, without paying him for a license. The miner who first found out that the deeper veins were the richer in metal, could not compel his neighbor to continue digging near the surface.

The more comprehensive truths of all philosophy, whatever specific name we give to them, can not be specially appropriated by any one. They are almost elements of our being. We have not reasoned them out, perhaps, and may be even unconscious of their action; yet they are about us, and within us, entering into and influencing our habitual thoughts, and pursuits, and modes of life—contributing to our safety and happiness. And they belong to us as effectively as any of the gifts of Heaven. If we could search the laws of nature, they would be, like water and the air, the common property of mankind; and those theories of the learned which we dignify with this title, partake, just so far as they are true, of the same universally diffused ownership. It is their application to practical use which brings them within the domain of individuals; and it is the novelty of such an application that constitutes it the proper subject of a patent.

But the contract of the public is not with him who has discovered, but with him who also makes his discovery usefully known. If he has discovered much and discloses little—if there has been revealed to him one of the arcana of nature, and he communicates to the world only one or more of its derivative and secondary truths, he patents no more than he has proclaimed. He will not be allowed afterward, when the extent of his right shall be the subject of controversy, either by expanding into a general expression what was limited before in a particular form, or, by tracing out for us the line that leads back from consequences to remote causes, to initiate us, inferentially, into the radical mystery of his invention, and then argue that he had described it by implication from the first, and so claimed ownership of it in his patent.

If, as it has been contended with great apparent force, M. Faber Du Faur was really the discoverer of the true theory of the blast furnace, so as to determine from it the point at which the carbonic oxyd, having performed its chemical function, might be withdrawn without sensible injury; if he knew that the gases, when taken from openings near the boshes, were capable of more intense combustion, but that their withdrawal so low down impoverished the action of the furnace, and that when used at the tunnel-head, after they had performed successively the offices of deoxydating the mineral, calcining the flux, and vaporizing the water of the charges, they were less available as fuel, in consequence of the increased impurity—and, if knowing this, he had taught the iron-master how to choose the best place for withdrawing the gases, having reference to the dimensions of his furnace, and the different sorts of fuel and mineral and fluid employed in it, and with reference, also, perhaps, to the purpose to which the flame of the gases was to be applied, after they had been withdrawn—no one can doubt that he would have conferred a signal benefit upon the arts of the world. And if he had, besides this, devised some form of structure, some material arrangement by which his discovery might

be applied to use, I would be most reluctant to say that his patent, properly drawn out, should be limited to the mere mechanical illustration, and could not cover effectually the whole ground of his discovery.

But M. Du Faur, and his assignee, Mr. Detmold, have not done this. They have announced no principle of science, no natural law. They indicate to us the place at which the gases should be taken out, first by a reference to a scientific problem, which they leave unsolved, and next, by a proximate reference to a mechanical measurement. There is not, so far as my inquiries have gone, anything less definitely settled among the skillful in these matters, than the point at which the calcination of the flux is completed, and the deoxydation of the material begins. Some deny altogether that any one point can ever satisfy both of the conditions; for they assert that the reduction always begins before the calcination is perfected; and all concur that the point, if there be one, must vary with the form and proportions of the furnace, the chemical elements of the ore, the flux, and the fuel, and that it is, moreover, affected sensibly by atmospheric changes.

The indication is too vague, therefore, and, under the varying circumstances to which it must be applied in practice, too erroneous also, to vindicate for the patented discovery the broader or general character.

The other indication, which refers to a proportionate distance from the tunnel-head, one-third, or thereabouts, is merely specific.

The interpretation, therefore, which I am constrained to give to that part of Mr. Detmold's patent, which is involved in the present discussion, limits his claim to the formal arrangement, without any assertion of right to any dominant principle. The defendants have, perhaps, derived instruction from his descriptions, and may even, to some extent, have modeled their furnace, with its appendages, upon a theory which he suggested. But it does not appear to me that they are infringing or have infringed his patent.

The motion for injunction must be dismissed.

Case No. 3,832.

The DETROIT.

[1 Brown, Adm. 141.][1]

Circuit Court, E. D. Michigan. June, 1874.

PRACTICE—AMENDMENT OF LIBEL — STATE CLAIM —RIGHTS OF BONA FIDE PURCHASER.

1. A court of admiralty has no power to permit a libel to be amended by striking out the name of a sole libellant and substituting another in its place. Such amendment is virtually the institution of a new suit, and discharges the sureties upon the stipulation.

[Cited in The Maggie Jones, Case No. 8,947. Disapproved in The William F. M'Rae, 23 Fed. 559.]

2. It is the duty of the claimant, however, to put his objections upon the record, and unless he does so, he will be deemed to have waived them by appearing, examining witnesses, and contesting the case upon the merits.

3. A claim for towage accrued against a vessel in May and June, 1865, while she was in the hands of a person who had contracted to purchase her. Having failed to fulfil his contract; she was returned to the owner who took her to Canada within a month or two after the services were rendered, where she remained until June 27th, of the following year. She was there resold to a bona fide purchaser, without notice, who brought her within the jurisdiction of the court, and kept her during the remainder of the summer. On October 6th, the libel was filed and the vessel attached. *Held*, that the lien was waived and the action could not be maintained.

[Approved in The Hercules, Case No. 6,400. Followed in The Theodore Perry, Id. 13,879. Cited in The Bristol, 11 Fed. 164; The Rapid Transit, Id. 335; The J. W. Tucker, 20 Fed. 134.]

4. A bona fide purchaser under a bill of sale does not lose the protection of the law by taking the collateral guaranty of a third party indemnifying him against liens.

[Approved in The Hercules, Case No. 6,400.]

On appeal from the decree of the district court dismissing the libel. The action was brought to recover for the services of the tug Young America, in towing the barge Detroit to and from Bear Creek, in Canada. The libel was originally filed in the name of John K. Harrow, who was supposed to be the owner of the tug. After answer filed and the testimony of one witness had been taken, it was discovered that James P. Harrow was the owner of the tug at the time the services were performed. Upon an affidavit that the proctor had been misinformed at the time the suit was commenced, an amendment was permitted, substituting James P. for John K. Harrow as libellant. A motion to vacate the order permitting the amendment was afterwards made and denied. Claimant thereupon appeared, took testimony, cross-examined witnesses, and contested the case upon the merits, without further objection to the amendment. The towage services in question were performed in May and June, 1865, the barge being then in the hands of one McDonald, who held her under an agreement to purchase of one Kean, the owner. On July 14th, 1865, McDonald having failed to perform his contract, Kean took possession of her and had her towed to Canada, opposite Detroit, where she underwent some repairs. It appeared that about August 30th, she was towed back to Detroit, where she remained a very short time, and was then taken back to Canada and laid up for the remainder of the season. In the autumn of 1865, the bill was sent by Harrow, who lived at Algonac, forty miles from Detroit, to one Kanter, at Detroit, with instructions to collect. Some time before the return of the barge, Kanter made a demand on Kean who returned an evasive answer. On June 27th, 1866, the claimant, Alger, went to Canada with Kean, bought the barge there and brought her over to Detroit, where she

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

was thoroughly repaired. A negotiable note at four months was given for the purchase money. The bill of sale which was not given until August, contained a special warranty by Patrick E. Kean against all liens, and a collateral guaranty to the same effect was given by his agent, Michael B. Kean. The libel was filed and the barge attached October 6th, 1866.

H. B. Brown, for libellant.

But sixteen months elapsed from the time the claim accrued until the barge was attached; of these, eleven months were spent in Canada. If the barge had not changed owners there could be no pretense of a stale claim. The Nestor [Case No. 10,126]; Jay v. Allen [Id. 7,235]; Brown v. Jones [Id. 2,017]; The Sarah Ann [Id. 12,342]; Stillman v. The Buckeye State [Id. 13,445]; The Merrimac, 14 Wall. [81 U. S.] 653.

Where the vessel has changed hands, the questions to be considered are:

First. Whether the libellant has used due diligence. Was the claim enforced within a reasonable time, considering all the circumstances of the case? The Chusan [Case No. 2,717]; The Rebecca [Id. 11,619]; The Lillie Mills [Id. 8,352]; The Eliza Jane [Id. 4,363]; The Dubuque [Id. 4,110]; The Atalanta [Id. 597]. The facts of this case, with regard to the diligence used, are not unlike those in the case of The Bolivar [Id. 1,610]. So far as the claimant Alger is concerned, the case stands precisely as if the libel had been filed on the day she was brought over from Canada, because he purchased her there, and no change of circumstances took place from that time to the day of filing the libel. She was brought over as his property, sold to him on four months' credit, which did not expire until after the libel was filed. Deducting her absence in Canada, but five months elapsed from the time the claim accrued until the libel was filed. Reckoning the time she remained here after her return, less than four months elapsed, either of these being sufficient to take the case out of rule in Stillman v. The Buckeye State [supra], where it was held that as against bona fide purchasers, the libel must be filed within a year. The time of her absence should of course be deducted. The Sarah Ann [supra]; The General Jackson [Case No. 5,314].

Second. Whether the allowance of the claim will work an injury to innocent purchasers. I submit the question is not simply whether the vessel has passed into the hands of a bona fide purchaser without notice, but whether such purchaser will have to pay the claim out of his own pocket. The court will look at all the circumstances of the case, and if it finds the purchaser amply protected, will hold the vessel responsible. This distinction is noticed in the case of Packard v. The Louisa [Id. 10,652]. In the case of The Utility [Id. 16,806] the court indicates an opinion that if the purchaser protects himself, the libellant will also be protected. In the case of Cole v. The Atlantic [Id. 2,976] the court enforced a claim against a bona fide purchaser, after the lapse of two years, because the libellant had used due diligence, and the purchaser was indemnified. Injury to third parties seems also to be made the test in the case of The Canton [Id. 2,388], and also in that of Stillman v. The Buckeye State [supra]. In this case two special guaranties against these liens were taken from responsible parties, one of whom signed the stipulation to answer judgment, and it is not claimed that a decree for payment would work any actual injury to Alger. The amendment substituting one libellant for another was within the discretion of the court. Jennings v. Springs, 1 Bailey, Eq. 181. Even if it were not so, the claimant has waived the objection by appearing, taking testimony, noticing the case for trial, and litigating on the merits for eight years without objection.

F. H. Canfield, for claimant.

1. No attempt is made to contradict claimant's testimony, that he is a bona fide purchaser without notice. The fact that the bill of sale contains full covenants of warranty, does not deprive the purchaser of the protection which the law affords him. Indeed a quitclaim deed is considered strong evidence that the vendee is not a bona fide purchaser. Oliver v. Piatt, 3 How. [44 U. S.] 333; Lowry v. Brown, 1 Cold. 456. To sustain libellant's position is to subject the purchaser under covenants of warranty to the expense of two suits: 1st, to defend the claim; 2d, to recover from his warrantor.

2. Libellant's claim is stale. The services were rendered not to Alger nor to Kean, but to McDonald, who held the barge under an agreement to purchase. The general rule with regard to laches, is stated in the following case. The Dubuque [supra]. It is only a statement of a general principle of law, that, as between two parties, a loss must be borne by him who might have acted and neglected to do so. Claimant has been guilty of no laches. If he pays, he suffers a loss which libellant might have prevented by acting promptly. Had proceedings been instituted before August 16th, when the bill of sale was given, claimant might have protected himself by refusing to accept it until the claim was paid. Blaine v. The Carter, 4 Cranch [8 U. S.] 328; Stillman v. The Buckeye State [supra]; The Eliza Jane [supra]; The Paul Boggs [Case No. 10,846]; The General Jackson [supra]; The Dubuque [Case No. 4,110]; The John Lowe [Id. 7,356]; The Favorite [Id. 4,696].

SWAYNE, Circuit Justice (orally). The libel in this case was originally filed by John K. Harrow, but, by an amendment allowed under an order of the district court, the name of James P. Harrow was substituted. It was not a mere mistake in the name of

the libellant, but an actual change of one person for another. I think there was no authority to make this order. It was decided by the supreme court in The Commander in Chief, 1 Wall. [68 U. S.] 43, that new parties may be added, and parties improperly joined may, on motion, be stricken out, but I do not think this authorizes the substitution of one sole libellant for another. It is, substantially, the institution of a new suit. Clearly, this could not be done at common law, and I know of no authority for this practice in equity, except the one cited from Bailey's Reports, which rests upon different principles. If the claimant, after having objected, and asked to have the order vacated, had stood by his objection and refused to proceed further in the case, or if he had put his exceptions on record, showing that he had done everything in his power to insist upon them, I should have held it fatal in this court. But I think, by appearing, taking testimony and cross-examining witnesses, arguing the case upon the merits, and conducting the litigation for nearly eight years without observing any of the forms to which I have adverted, the objection must be deemed to have been waived. By appearing and contesting this new suit upon the merits, the claimant is now precluded from insisting it was not properly commenced. The effect of these proceedings upon the sureties, it is not necessary here to discuss. There is a controversy between the parties, whether the barge was taken to Canada on the 14th of July or on the 31st of August, but I do not regard it as material to the disposition of this case. The services having been rendered in May and June, the libellant cannot be considered in default for failing to prosecute his claim before the 31st of August, assuming her to have been removed upon that day. She remained at Windsor, opposite and in sight of Detroit, until the 27th of June, 1866, when the claimant Alger went to Canada, purchased her, and brought her to Detroit, where she was put into a dry dock and largely repaired. This libel was filed and the barge attached on the 13th of October, 1866.

The question to be considered is whether this delay is to be deemed a waiver of libellant's lien as against Alger. It is said he is not a bona fide purchaser, by reason of the warranty contained in the bill of sale and the collateral guaranty given by M. B. Kean. It seems to me, however, that the answer of Mr. Canfield is entirely conclusive upon that point. It is held in the authorities upon that subject, that the very fact that a vendee accepts a quitclaim deed, is strong evidence that he is not a bona fide purchaser, and such I conceive to be the law. I do not understand that a person, by taking the warranty of his vendor, or of a third party, loses the protection of the law applicable to bona fide purchases. The services were rendered while the vessel was in possession of McDonald, under a claim of ownership. So far as it appears from the testimony, the barge was his, and he was its agent for all purposes. After he had failed to complete his purchase, and the vessel was surrendered to Kean, he was entitled to be advised that such a claim was owing by McDonald when he might possibly protect himself against it, and it is proven in this case that a demand was made upon him for payment some time during the following autumn. Had libellant failed to give this notice before the close of navigation, I should have held the barge discharged of the lien while in Kean's hands. But it seems to me this was not libellant's only duty in the premises. The season of navigation closed and winter passed. On the 27th of June, 1866, the claimant Alger went to Windsor, where the barge was lying, purchased her, brought her to Detroit, and placed her in Jones' shipyard, where extensive repairs were commenced. Libellant was bound to know all this. He certainly could have learned it by observation or inquiry. Yet he allowed the months of July, August and September to elapse without taking a step to enforce his claim. Not until the 6th of October, was his libel filed and the vessel attached. During all this time the title was vested in Alger. Now, as a question of law, was this reasonable diligence? The main authorities upon the subject have been read and I fully concur in their reasoning.

In the cases of Stillman v. The Buckeye State [supra], and The Dubuque [supra], a rule applicable to the lakes is laid down, that where the vessel has passed into the hands of a bona fide purchaser, claims of this character should be prosecuted within the current season of navigation, or, at least, within a year. I think this rule is founded upon the most solid considerations of good sense. Granting there were no laches in this case before the close of navigation, as the vessel was all this time beyond the jurisdiction of the court, I think it was incumbent upon libellant to keep a careful watch upon her movements, to notify the purchaser of his claim as soon as she was sold, and to proceed to enforce his lien as soon as she was brought within the jurisdiction of the court. He was bound to know that this vessel was as likely to change hands as any other, and should have used diligence to ascertain when she was transferred to Alger, and have given him speedy notice of his claim in order that he might lose no opportunity of protecting himself against it. Instead of this, he allows the three busiest months of the season to elapse without making known its existence. I think these facts warrant the presumption that the lien was waived.

Upon the best consideration I have been able to give to the case, I feel constrained to affirm the decree of the district court. Libel dismissed.

DETROIT (FARRINGTON v.). See Case No. 4,687.

DETROIT (HOLLINGSWORTH v.). See Case No. 6,613.

DETROIT (PHILLIPS v.). See Cases Nos. 11,100 and 11,101.

DETROIT & C. STEAM NAV. CO. (NEW ENGLAND INS. CO. v.). See Case No. 10,154.

Case No. 3,833.

In re DETROIT CAR WORKS.

[14 N. B. R. 243; 3 N. Y. Wkly. Dig. 140.][1]

District Court, E. D. Michigan. April 12, 1876.

INVOLUNTARY BANKRUPTCY—CORPORATIONS.

Since the amended act of June 22, 1874 [18 Stat. 178], a corporation can no longer be subjected to compulsory bankruptcy upon the petition of a single creditor.

This was a reference to a register to inquire and report whether one-fourth in number and one-third in amount of the creditors of the Detroit Car Works, a corporation, had petitioned for the adjudication of the corporation as bankrupt. On the hearing before the register, counsel for petitioning creditors insisted that a corporation, having committed an act of bankruptcy, could be adjudged bankrupt on the petition of a single creditor. Proofs were taken, and the case argued on all the points involved in the questions referred. But the consideration of the proofs submitted was arrested, and the case certified back into court for determination of the question above stated, as to the right of a single creditor, in a petition for compulsory bankruptcy against a corporation. The reasons for this appear in the following extract from the opinion of the register (Hovey K. Clarke):

Pending the consideration of these questions, the report of the case of New Lamp Chimney Co. v. Ansonia Brass & Copper Co. [91 U. S. 656], decided by the supreme court at the present term, came to my attention. The opinion was delivered by Clifford, J., in the course of which he holds that "the whole administrative proceedings, in respect to bankrupt corporations, are specifically regulated by section 37 [Act 1867; 14 Stat. 535]—Rev. St. § 5122—as a separate feature of the bankruptcy system;" and "that the petition for involuntary bankruptcy may be made and presented by any creditor or creditors, in the manner provided in respect to debtors, without any specification as to the number of creditors or the amount of debts." I do not overlook the fact that the section of the act which the court thus construes was section 37 before the amendment of June, 1874; but section 5122, in the revision, must have the same effect, exclusive of section 5021 (for it remains substantially unaltered), as section 37 of the original act had of section 39. But this effect is not left to inference. The court expressly says that section 37 enacts "special regulations," when the insolvent is a corporation or joint-stock company, different from those prescribed in cases where the insolvent party is a natural person or a partnership; and one of those differences has already been pointed out to be that a petition for the involuntary adjudication of a corporation as bankrupt, may be filed "without any specification as to the number of creditors or the amount of their debts."

As I understand this opinion, it fully affirms the position taken by counsel for the petitioning creditors, that an insolvent corporation, having committed an act of bankruptcy, may be adjudged bankrupt on the petition of a single creditor; and, if so, the determination of the other questions is unnecessary to establish the right of the petitioning creditors to an order adjudging the said corporation bankrupt. Under these circumstances, this decision of the supreme court having transpired since the reference in this case was ordered, I may properly regard myself as discharged from proceeding further with the inquiry I am directed to make, as the principal question, one that includes all the others (so far as the object of this inquiry is concerned), has been settled by the court of last resort.

BROWN, District Judge. Reference of this case was made to the register upon the theory, adopted at the time by both counsel, that the same proportion of creditors was requisite to subject a corporation to involuntary bankruptcy as in the case of natural persons. Pending the reference, however, the attention of the register was called to the recent case of New Lamp Chimney Co. v. Ansonia Brass & Copper Co. [91 U. S. 656], in which it was suggested that the proceedings against corporations are specifically regulated by section 37 as a separate feature of the bankrupt system, and that a petition might be presented by any creditor, without specification as to the number and amount. Section 37 of the original act enacted "that the provisions of this act shall apply to all moneyed, business or commercial corporations and joint-stock companies; and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors." A further clause of the same section subjects corporations to the ordinary provisions of the bankrupt act, with the single exception that "no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof." This section appears in the Revised Statutes as section 5122, with a single alteration, made

[1] [Reprinted from 14 N. B. R. 243, by permission. 3 N. Y. Wkly. Dig. 140, contains only a partial report.]

by erasing the words "or creditors," in speaking of proceedings in compulsory bankruptcy. I do not regard this change as material, as the word "creditor" would include a single or any number of creditors, nothing appearing to the contrary. Indeed, it is not easy to see why the entire clause, first above quoted from section 37, is not surplusage, except so far as it requires a vote of stockholders to authorize a voluntary proceeding. By section 48 of the original act (Rev. St. § 5013), the word "person" shall also include "corporation." This definition would of itself subject corporations as persons to the involuntary proceedings contemplated in section 39; so that when section 37 declares that the provisions of the act shall apply to all corporations, it only declares a little more definitely what would be inferred from sections 39 and 48. The subsequent words, "upon the petition of any officer duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose," merely prescribe the manner in which corporations may voluntarily become bankrupt; and the remaining words are substantially a re-enactment of like clauses in section 39. I regard the entire clause as meaning little more than that corporations may become voluntarily bankrupt upon the petition of a majority of the stockholders, and may be subjected to proceedings in compulsory bankruptcy like any other debtor. By section 12 of the amended act, a debtor could only be adjudged a bankrupt upon the petition of a certain proportion of his creditors, and the provisions of this section were applied "to all cases of compulsory or involuntary bankruptcy commenced since December 1, 1873, as well as those commenced" thereafter; and in all cases commenced since that date, the court shall, if the allegation as to number and amount be denied, proceed to ascertain the same. There can be no doubt that were it not for the first clause of section 37 (Rev. St. 5122) this would be held to include corporations as well as natural persons. It is insisted, however, that as section 12 of the amended act refers by name only to section 39 of the original act, it cannot be extended by construction to section 37; that this remains unaltered, and that corporations may still be adjudicated upon the petition of a single creditor. It seems to me, however, that corporations fall within the scope of the amended act. It was passed during a period of great financial depression, and its object was to aid debtors somewhat in their struggles to maintain their credit and prevent their being thrown into bankruptcy, unless, in the opinion of a fair proportion of their creditors, such action seemed desirable. Under the act, as it formerly stood, the suspension of payment of a single piece of commercial paper, for more than fourteen days, enabled any ill-willed creditor to seize the entire property of his debtor, and put it into the hands of an assignee. Such proceedings might be very proper in the ordinary financial state of the country, but, in periods of business depression, are capable of being used as an engine of gross injustice. No distinction is perceived in this regard between corporations and natural persons. Indeed, the fact that corporations can obtain no discharge, and that proceedings in bankruptcy amount to a practical extinction, would seem to entitle them to even greater indulgence than natural persons. Counsel rely upon a recent decision of the supreme court, in the case above cited, of New Lamp Chimney Co. v. Ansonia Brass & Copper Co. [supra]. This was an action, by a creditor of a corporation, who had proved his claim and received a dividend, to recover the residue. Defendant insisted that the case was controlled by the 21st section, providing that no creditor, proving his debt, should be allowed to maintain a suit against the bankrupt therefor, but should be deemed to have waived all right of action. The court held, however, that inasmuch as, by the 37th section, no discharge can be granted to a corporation, such suit might be maintained. The court observed, incidentally, that the whole administrative proceedings, in respect to bankrupt corporations, are specifically regulated, by section 37, as a separate feature of the bankrupt system; and, in illustration of this, enumerated as one of its distinct features, the fact that the petition may be made by any creditor or creditors, without any specification as to the number of creditors or the amount of their debts. The point, however, was not raised or argued in the case, and the remark seems to have been thrown out merely by way of suggestion or illustration. I do not regard it as an adjudication of the question binding upon this court. The effect of the amendment, however, was directly considered by the district court of Oregon, in the Case of the Oregon Bulletin Printing & Publishing Company [Case No. 10,558], where it was held that section 12 of the amended act, in relation to the number and amount of creditors, did not apply to corporations. The learned judge seems to lay stress upon the fact that the amended act of 1874 was passed upon the same day as section 5122 of the Revised Statutes; that they should be considered as cotemporaneous acts; that effect should be given to them as such; and that as section 5122 contemplates proceedings by a single creditor of a corporation, it should not be considered as modified by section 12 of the amended act. I do not regard this, however, as material, but, under section 5601, should regard the amended act as having the force of a later act, even if enacted a month before the Revised Statutes. This section provides that all acts passed after December 1st, 1873, are to have full effect, as if passed after the enactment of the Revised Statutes, and, so far as they may conflict with the Revision, are to have effect as subsequent acts, and as repealing any portion of the revision inconsistent therewith. The view taken of the law by Judge Dillon, in the

Case of the Leavenworth Savings Bank [Case No. 8,165], seems to me the sounder and more correct one. More extended discussion would result in a mere reiteration of the arguments there used. The question certified must be answered in the negative.

Case No. 3,834.

DETROIT STOVE WORKS v. MICHIGAN STOVE CO.

[12 O. G. 189.]

Circuit Court, E. D. Michigan. 1877.

PATENTS—INFRINGEMENT—BASE-BURNING STOVES.

In equity.

BROWN, District Judge. This cause having heretofore been brought on to be heard upon the pleadings filed, and the proof taken thereon, and the said pleadings and proofs having been read, and Mr. Thomas S. Sprague, of counsel for complainant, and Mr. John Miner, of counsel for defendant, having been heard, and the court having fully considered the said pleadings, proofs, and arguments, it is hereby ordered, adjudged, and decreed that the reissued letters patent granted unto John V. B. Carter and James Duyer, dated March 7, 1876, No. 6,979, are valid; and that the complainant is the owner of said letters patent; and that the defendant has infringed the said letters patent in making, using, and vending to others the improvement in base-burning stoves for heating and cooking, as charged in said complainant's bill of complaint, and that the said complainant is entitled to have a perpetual injunction to restrain said defendants, its agents, servants, and all holding or claiming under or through it from making, using, or vending, or in any manner disposing of heating and cooking-stoves, embracing the invention or improvements described in said letters patent, namely: "In combination with a heating-stove, having revertible and base flues, a culinary attachment placed directly against the rear flues of said stove so that the inner wall or front of said culinary attachment is adapted to be heated by direct radiation from the fire-pot, while the other walls of said atachment are heated by the products of combustion in their passage from the base to the exit, substantially as and for the purposes set forth." And, also: "In a heating-stove, and in combination therewith, a culinary attachment provided with suitable openings, to allow the products of combustion to be directed from the flues of a revertible-flue heating-stove into the inclosed flue-space surrounding the oven, placed between the ring which forms the base of the combustion-chamber proper, and the base of the stove, all being effected substantially in the manner and for the purposes described in said letters patent." And it is further adjudged and decreed, that the cause be referred to D. J. Davison, a master of this court, to ascertain and report the number of base-burning stoves for heating and cooking containing the said improvements, or either of them, made, and also the number sold by the said defendant since the 7th day of March, 1876, and the damages complainant has sustained, or use and profits defendant has received, by reason of such infringement since the time last aforesaid. And upon the coming in and confirmation of the said report, that said complainant have a decree and execution for the amount due thereon, and also for the costs in this suit, to be taxed.

[NOTE. Patent No. 131,936 was granted to Carter & Dwyer October 8, 1872; reissued March 7, 1876 (No. 6,979).]

Case No. 3,835.

DETROIT STOVE WORKS v. PERRY.

[20 Alb. Law J. 10; 8 Reporter, 327.] [1]

Circuit Court, E. D. Michigan. 1879.

CONSTRUCTION OF ORAL CONTRACTS—PROVINCE OF COURT AND JURY.

[1. The correct rule to be extracted from the cases in relation to the construction of oral contracts is this: If there be any conflict as to the words used, or if the words themselves be ambiguous, the question of intent should be left for the jury. But if the words are clear and explicit, and the only difficulty is in the proper legal inference to be drawn from them, it belongs to the court to give them their proper construction.]

[2. Plaintiff and defendant, being adversely interested in a patent suit, agreed that each should furnish to the other six copies of his printed testimony. Afterwards, defendant asked plaintiff's attorney to oblige him by ordering 30 copies more for him, to which the attorney replied, "Certainly." Defendant had previously consulted the printer, who said that he would charge eight cents per page, and five cents per copy for stitching, for extra copies. Defendant, having concluded that he wanted 40 copies, obtained the following order from plaintiff's attorney to the printer: "Mr. P. (defendant) says he gave you an order for 30 copies. We ordered 100. He now says he wishes 40; will be content with 90, so we have nothing to do with his order for 30, and have no objection to his having 40 on like terms." *Held*, that as plaintiff, in agreeing to give defendant the six copies, had already donated the original cost of the composition, it was clear, as matter of law, that the agreement was that defendant should have the extra copies merely for their extra cost, and he was not liable to pay a ratable proportion of the cost of the entire edition, including the composition.]

[3. Defendant was not obliged to accept a tender of the extra copies, when accompanied with a demand for the proportionate price of the whole edition, and, having refused to accept them, was not bound to pay anything to plaintiff.]

On motion for a new trial. This was an action of assumpsit to recover of the defendant the price of thirty printed copies of testimony taken on behalf of the plaintiff in a certain patent suit pending before the patent office at Washington. The plaintiff's

[1] [8 Reporter, 327, contains only a partial report.]

testimony tended to show that the plaintiff and defendant were interested adversely to each other in this suit; that defendant came to Detroit to attend the taking of this testimony of plaintiff's witnesses; that it was agreed between them that each should furnish to the other six printed copies of their testimony; that three or four days after they had commenced taking testimony here, and about the 24th of September, 1874, defendant, desiring some extra copies of the plaintiff's testimony for circulation, went to the office of Col. Sprague, plaintiff's attorney, accompanied by his agent, one Liddell, and asked Col. Sprague how many copies of his testimony he was going to print; that Sprague replied that he thought they were going to print about one hundred, and that Mr. Perry, the defendant, then asked him to oblige him by ordering thirty copies for him, to which Col. Sprague replied, "Certainly." That was all the conversation in the case. It seems that Liddell, defendant's agent, had been to the office of the Free Press and asked the printer what he would furnish thirty copies for, to which he replied eight cents per page, and five cents per copy for stitching. Afterward defendant concluded that he wanted forty copies, and obtained a letter from Mr. Sprague to the printer, of which the following is a copy: "Detroit, October 21st, 1874. Friend Eby:—Mr. Perry says he gave you an order for thirty copies. We ordered one hundred. He now says he wishes forty; we will be content with ninety, so we have nothing to do with this order for thirty, and have no objection to his having forty upon like terms. Yours, Sprague." Further testimony was offered tending to show that subsequently an agent of the plaintiff's called upon the defendant at his hotel and presented him a bill for thirty copies of the testimony at $35 each, amounting to $1,050, being the proportion which the thirty copies bore to the entire edition, which defendant refused to pay. There was no evidence that he received the thirty copies or that they were ever tendered to him. Upon this testimony the court charged the jury that the plaintiff was not entitled to recover, and directed a verdict for the defendant. Plaintiff moved for a new trial.

G. V. N. Lothrop, for plaintiff.
Alfred Russell, for defendant.

BROWN, District Judge. This motion raises the following questions: 1. Whether under the order, as stated by the plaintiff's witnesses, the plaintiff was entitled to recover the proportionate price which the thirty copies bore to the entire edition of 130 copies, or simply the extra cost of thirty copies. 2. Whether the intent of the parties to be gathered from this conversation and the other circumstances should have been submitted to the jury as a question of fact.

I have no doubt that if articles are manufactured separately, and without the use of a factor or instrument common to all, the cost of one being equal to every other, the instruction asked for would have been correct, and the plaintiff would have been entitled to recover the proportion which the thirty copies bore to the entire edition. So, too, if an edition of a certain work were published for sale, an agreement to sell at cost a part of such edition would imply an obligation to pay the proportionate amount of the cost of the composition as well as the press-work and paper; but where, as in this case, the composition had already been ordered by the plaintiff for its own use, and by a previous understanding the defendant was to have the benefit of such composition gratuitously in the six copies which each should furnish the other, I think it quite clear the same rule should not apply. In other words, the plaintiff having already incurred the expense of composition, and having agreed to let the defendant have the benefit of that expense (for he could not carry out his contract to give the six copies without incurring it), it can make no further claim for the same by reason of the thirty copies, and could therefore only recover for the extra expense of those copies, namely, the press-work and paper. Suppose, for instance, that A. and B. had agreed to exchange photographs with each other, the cost of the first picture being five dollars, and that of each subsequent one one dollar. A. then requests B. to give him a dozen extra copies for his own use. It seems to me entirely clear that B. would not be entitled to charge him any portion of the price paid for the negative or first copy since he had already agreed to give him that and could only charge for the extra price of the twelve copies. The case differs from this only in the fact that the composition of a book bears a much larger proportion to the cost of the press-work and copy.

2. Should the import of this contract have been left to the jury as a question of fact or disposed of by the court as a legal proposition? In discussing this the following propositions may be considered as settled beyond dispute: 1. That before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge; not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Commissioners v. Clark, 94 U. S. 278, 284. 2. That the construction of written contracts is for the court, except where the same is rendered ambiguous by the facts and circumstances surrounding the transaction. How far the intent of the parties to be gathered from the terms of an oral contract is a question for the jury is not definitely settled. In principle it would seem that if there be no dispute as to the words used, and no facts surrounding the transaction calculated to throw doubt upon the intent of the parties, or the meaning in which

they use the words, there is no more reason for submitting the case to the jury than if the contract was in writing. Short v. Woodward, 13 Gray, 86. It certainly cannot be true that oral contracts must always be left to the jury, for example, if, upon the sale of a horse, the vendor should say, "I know this horse to be sound, and warrant him to be so," and nothing else was said, it would not be error to instruct the jury that these words constituted a warranty. But if upon the other hand he should say, "I believe this horse to be sound, but will not warrant him to be so," it would certainly not be contended that the court would be at liberty to leave this to the jury as evidence from which they might properly find a warranty. Of course, if there is a dispute as to the actual conversation, or the words used are ambiguous in themselves, or the contract is to be gathered from a series of conversations and circumstances, the jury must determine the intent of the parties. Thus, where the vendor of a cow assured the purchaser "she was all right," it was held that it was properly left to the jury to decide whether the words were intended as a warranty of soundness. Tuttle v. Brown, 4 Gray, 457.

The counsel for the plaintiff in this case insists that, where the words used do not extend to the whole contract, it must be left to the jury to determine what was the intention of the parties, and that, as nothing was said in this conversation as to the price or payment, it should be left to the jury to ascertain what, under all the circumstances of the case, should have been paid. There are cases which seem to support this theory, or which at least go to the extent of holding that the construction of all oral contracts should be left to the jury. But the authorities are by no means in harmony. In Copeland v. Hall, 29 Me. 93, the jury were left free to find what the language of the contract was, but they were restrained from the exercise of their own judgment, by a construction of the language by the court, which precluded them from finding the meaning of that language under all the evidence in the case. This was held to be error; it was said the whole contract should have been left to the jury to determine for themselves the proper construction to be given to it. This case seems to be in conflict with that of Curtis v. Martz, 14 Mich. 507–513, where it was said the jury should have been told in substance what would be the proper construction of the mortgages upon the different state of facts which might be found by them. So, in Herbert v. Ford, 33 Me. 90, it was said, "The jury had the right to determine the existence of the parol contract, its extent and limitations; they are to find not only what language is used, but its purport and meaning. In cases of written contracts, it is the duty of the court to define the meaning of the language used in them. But in verbal contracts such duty is confined to the jury. They are not barely to ascertain the words and forms of expression, but to interpret their sense and meaning." A like rule was made by the same court in Guptill v. Damon, 42 Me. 271. Although in this case there was a strong dissenting opinion, in Kuns' Ex'r v. Young, 34 Pa. St. 60, it was said that the evidence of a promise to pay the debt of another must be clear, explicit, and certain; that whether it be so or not is a question of fact for the jury. In Tobin v. Gregg, Id. 446, the promise rested in parol proof, and that of the most unsatisfactory sort,—the confessions and casual declarations of the defendant, made to third parties, who had no interest that entitled them to full explanation, or stimulated them to understand and remember exactly what was meant. It was held, and there can be no doubt of the propriety of the ruling, that the testimony should be referred, in connection with the proofs upon the other side, to the jury, to find whether the promise declared on had indeed been made. So, in Judge v. Leclaire, 31 Mo. 127, the law was assumed to be well settled that, where the terms of a contract are to be ascertained from the oral evidence of witnesses, it is the province of the jury to determine from the evidence what is the contract; Citing Islay v. Stewart, 4 Dev. & B. 160, in which it was said that, where the controversy in a cause turns upon the meaning of the parties to a verbal agreement in relation to a matter upon which there is room for dispute, it is proper for the judge to leave it to the jury, as a question of fact, to ascertain what was the agreement of the parties in relation to such matter. Opposed to this current of authority, however, are the decisions in Massachusetts and several other states. In Rice v. Dwight Manuf'g Co., 2 Cush. 80, it is said that the same rule of construction is applicable to parol as to written contracts. "The language used by parties while contracting may be proved, and, when proved, is to be taken in its usual and ordinary acceptation, and however difficult it may be, and frequently is, to put a just construction upon it, still that duty devolves upon the court. The jury are to find whether or not the language was used, the court are to instruct the jury as to its legal effect, if used." A like ruling was made in Pratt v. Langdon, 12 Allen, 544, and in Globe Works v. Wright, 106 Mass. 207–216. So, in Folsom v. Plummer, 43 N. H. 469–472, it was said to be competent for the court in its discretion, where a contract is merely verbal, and there is doubt as to the precise language used, or as to the understanding of the parties, to leave it to the jury to judge what is proved, and what language was used, and how it was to be understood, subject to proper instructions as to the legal effect of such contract as they may find to

have been made; and in Smalley v. Hendrickson, 29 N. J. Law, 371, it was said that where the existence and terms of a parol contract were established the construction is a matter of law for the court. See, also, Kingsbury v. Buchanan, 11 Iowa, 387–395; Dudgeon v. Haggart, 17 Mich. 279.

I think the correct rule to be extracted from the cases is this: If there be any conflict as to the words used, or if the words themselves be ambiguous, the question of intent should be left to the jury. But if the words are clear and explicit, and the only difficulty is in the proper legal inference to be drawn from them, it belongs to the court to give them their proper construction. The fact that in this case one of the terms of the contract, namely, the price to be paid, was omitted, does not render it necessary that the construction of the contract should be left to the jury, if the circumstances surrounding the transaction leave no doubt as to the legal inference to be drawn from the conversation. It is true, as suggested by plaintiff's counsel, that the order in this case, standing alone, was consistent either with a gift to the defendant with an intent to charge him a proportionate price on the cost of the whole edition, or with an intent to charge him only with the cost of the extra copies. It is not suggested by either party that a gift was intended. I have already stated the reasons which lead me to hold that, as the plaintiff had already agreed to furnish the defendant the cost of composition in the six copies, it could not charge him the proportionate price of the whole edition. The evidence upon this point is to my mind so decisive, that if the jury should find such to be the intent of the parties, I should feel compelled to set aside the verdict. Under the view I take of the plaintiff's case, it could only be entitled to recover for the extra cost of the thirty copies, and as these copies were never received by the defendant, or tendered by the plaintiff, or, if such tender were ever made, it was accompanied by a demand for the proportionate price of the whole edition, I think the plaintiff is not entitled to recover. Of course, if the defendant received the thirty copies, he would be bound to pay the cost of them. But if they were tendered to him with a demand for the proportionate price of the whole edition, he would not be bound to receive them, and could not be held liable to pay anything. The motion for a new trial must therefore be denied.

DEUSTER (BROAD v.). See Case No. 1,908.
DEVAL (TYLER v.). See Case No. 14,307.
DE VALLE (CROSS v.). See Cases Nos. 3,430 and 3,431.

Case No. 3,835a.

DE VARAIGNE v. FOX.

[See Case No. 3,836.]

Case No. 3,836.

DE VARAIGNE v. FOX.

[2 Blatchf. 95.][1]

Circuit Court, S. D. New York. Sept. 30, 1848.

EMINENT DOMAIN—LEGISLATIVE POWER—CHARACTER OF ESTATE ACQUIRED—REVERTER.

1. The right of eminent domain empowers the legislature to devote private property to public use.

2. An act of the legislature of New York, reciting that certain lands were needed by the corporation of the city of New York for the purpose of extending the alms-house establishment of the city, and providing that, on the ascertainment and payment to the owner of the lands, of the loss and damage for taking them, the corporation should be seised of the lands in fee-simple absolute, does not exceed the rightful authority of the legislature.

3. In the exercise of its power to devote private property to public use, the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken, as well as of the necessity of taking it.

[Cited in Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 243.]

4. Where the legislature has conferred an estate in fee simple absolute in the premises taken, it must be assumed that they judged it necessary to do so, to answer the public use contemplated.

5. Such a grant of a fee simple absolute will not be construed as a conditional fee or usufruct, leaving the possibility of a reverter to the original owner on the lapse of the particular use, but will be held to have vested the entire property forever in the grantee.

6. If a change in the destination of the property granted, after a continuance for twenty-six years of the use of it first contemplated, raises any interest or right on the part of the original owner, it is of an equitable character, cognizable only in chancery, and not at law.

[This was an action of ejectment by Maria De Varaigne against Edward Fox.]

In February, 1818, the mayor, aldermen and commonalty of the city of New-York were possessed of certain premises in that city, occupied by them as an alms-house establishment, and presented to the legislature of New-York a memorial praying that a law might be passed authorizing them to enter upon and take possession of certain lands contiguous to the said premises, and hold the same for the use of the said alms-house establishment. On the 21st of April, 1818, an act was passed, entitled "An act authorizing the mayor, aldermen, and commonalty of the city of New-York to take possession of certain lands." The act recited that the corporation was desirous of taking possession of certain lands, the bounds of which were specified, for the purpose of extending the alms-house establishment of the city, and provided that it should be lawful for the corporation, whenever they should judge proper, to take possession of all or any part of the said lands, in the manner prescribed by a prior act in relation to taking lands, passed March 29, 1816 [4 Laws N. Y. p. 52]. Laws

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

1818, c. 244 [p. 255]. This act of 1816 provided for the estimate, by commissioners, of the sums to be paid to the owners of the lands to be taken, for their loss and damage, and for a report thereon to the supreme court, and its confirmation of the same; all according to certain prescribed forms. The act of 1818 provided that, on the final confirmation of the report of the commissioners, and the payment of the sums which might be awarded by them, the corporation should become and be seised in fee-simple absolute of the said lands, or of so much thereof as might be described in the report. The requisite steps were taken in due form for estimating the amount to be paid to Mrs. Ann Rogers, then the owner in fee-simple of a portion of the said lands, and the amount was reported at $13,090. On the 14th of May, 1819, the report was confirmed by the court, and that amount was paid to Mrs. Rogers on the 1st of July, 1819. The corporation then took possession of the said lands of Mrs. Rogers, and occupied them for the use of the alms-house establishment until April, 1845, when they ceased to use them for that or any other public purpose, but caused them to be divided into lots and sold at auction. The defendant purchased on such sale, and received from the corporation a warranty deed for a part of the said lands of Mrs. Rogers, being the premises of which an undivided share was claimed by the plaintiff, and held the same under that title and no other. On the 15th of June, 1833, Mrs. Rogers devised to the plaintiff, and to her heirs and assigns, in fee-simple, one undivided eighth part of all her real estate, and died soon afterwards. The will was duly proved, and the plaintiff brought this suit to recover one undivided eighth part of the premises so purchased by the defendant. At the trial, a special verdict was taken, finding the foregoing facts.

William W. Van Wagenen, for plaintiff.

1. The act of 1818 purported to take from Mrs. Rogers the fee of her land. But, if it be construed according to the intent of all the parties, the estate to be taken was limited to the quality and quantity of estate necessary to the public use that was designed. Only a limited estate was necessary for that public use. The circumstances attending the passage of the act must be regarded in its construction. Livingston v. Harris, 11 Wend. 329, 338; Dwar. St. 701; Jerome v. Ross, 7 Johns. Ch. 315, 344. 2. The legislature, by virtue of the right of eminent domain, could take away so much of Mrs. Rogers' estate as the public necessity required, and no more. Vattel, p. 111; Gardner v. Village of Newburgh, 2 Johns. Ch. 162; Beekman v. Saratoga & S. R. Co., 3 Paige, 45, 72; Boston Water Power Co. v. Boston & W. R. Co., 23 Pick. 360, 394. Nor can private property be taken by the legislature for other use than that of the public. Beekman v. Saratoga & S. R. Co., 3 Paige, 45, 72; Varick v. Smith, 5 Paige, 137. 159; People v. Morris, 13 Wend. 325, 328; Charles River Bridge v. Warren Bridge, 11 Pet. [36 U. S.] 420, 641; Bonaparte v. Camden & A. R. Co. [Case No. 1,617]; Sharp v. Johnson, 4 Hill, 92, 99; Taylor v. Porter, Id. 140. 3. The act of 1818 purported to divide the estate that was taken from Mrs. Rogers into two distinct parts—the one devoted to the public use, and the other given over in perpetuity to the corporation. So far as it is constitutional and regards the public use, the act will be sustained, though it is void for all beyond that. Jackson v. Mancius, 2 Wend. 357, 363; Jackson v. Cory, 8 Johns. 301; Jackson v. Catlin, 2 Johns. 248; In re Street, 11 Wend. 152; In re John and Cherry Streets, 19 Wend. 659; Taylor v. Porter, 4 Hill, 140, 147; Varick v. Smith, 5 Paige, 137, 159; Bloodgood v. Mohawk & H. R. R. Co. 18 Wend. 9. 4. The plaintiff is not estopped by the fact that Mrs. Rogers received the compensation awarded. The grant made in virtue of the act was only of the use of Mrs. Rogers' estate for an unlimited time, and her acceptance of the money can be held to imply no more than an assent to such a grant and use of the estate. 5. The title being valid in the corporation until the public use ceased, in 1845, the statute of limitations has no application.

Charles O'Conor, for defendant.

THE COURT held: 1. The right of eminent domain empowers the legislature to devote private property to public use, and the acts in question in this case did not exceed the rightful authority of the legislature.

2. In the exercise of that power, the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken from an individual and dedicated to the public use, as well as of the necessity of taking it.

3. It must be assumed that the legislature judged it necessary, in the present case, to confer on the mayor, aldermen and commonalty of the city of New York an estate in fee-simple absolute in the premises in question, to answer the public use contemplated.

4. The grant cannot, under the terms of the act of 1818, be construed as a conditional fee or usufruct, leaving the possibility of a reverter to the original owner on the lapse of the particular use, but must be held to have vested the entire property forever in the corporation.

5. If a change in the destination of the property, after a continuance for twenty-six years of the use of it first contemplated, raises any interest or right on the part of the original owner, her heirs or devisees, it is of an equitable character, cognizable only in chancery, and not at law.

6. We do not pass upon the effect of the acceptance by Mrs. Rogers of the full consideration of the fee value, as an estoppel or

otherwise, nor upon the question as to the power of devising a possible reverter.

Judgment for defendant.

DEVAUGHAN (UNITED STATES v.). See Case No. 14,952.

Case No. 3,837.

DEVAUGHN'S CASE.

[2 Cranch, C. C. 501.][1]

Circuit Court, District of Columbia. Nov., 1824.

WITNESS BEFORE GRAND JURY—CRIMINATING QUESTIONS.

A witness before the grand jury, is bound to answer a question, although he makes oath that he cannot answer it without criminating himself.

William Devaughn was sworn as a witness to the grand jury, who asked him whether he saw John Ball gaming at Mrs. Garner's. He refused to answer, saying that he could not answer the question without criminating himself. This was stated to the court, by the grand jury, in writing.

THE COURT (THRUSTON, Circuit Judge, absent) decided, under the authority of this court, in the case of U. S. v. Miller, at October term, 1821 [Case No. 15,772], that he was bound to answer the question, and informed him that if he persisted in his refusal he must be committed. He then submitted to answer.

NOTE. Cranch, C. J., did not concur in the opinion of the court, in the case of the U. S. v. Miller [supra], but considered himself now bound by that decision.

DEVEAUX (BANK OF THE UNITED STATES v.). See Case No. 916.

DEVENS (KNOX v.). See Case No. 7,905.

Case No. 3,838.

DEVIGNY v. MOORE.

[1 Cranch, C. C. 174.][1]

Circuit Court, District of Columbia. July, 1804.

FEES—RULE FOR SECURITY.

After the term at which a rule was laid upon the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a non-resident.

The rule on the plaintiff to give security for fees, was laid at the last term. The clerk, at this term, moved for non pros. on the rule.

Mr. Peacock, for plaintiff, contended that the clerk must show that the plaintiff lives out of the county.

But THE COURT (nem. con.) ordered the non pros. to be entered, unless the plaintiff should prove his residence within the county.

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

Case No. 3,839.

DE VILLEMONT et al. v. UNITED STATES et al.

[Hempst. 389.][1]

District Court, D. Arkansas. Oct., 1848.

SPANISH LAND GRANTS—VALIDITY—CONDITIONS—SURVEYS.

1. Where precise locality is not given to a concession, a survey is necessary to sever the land from the royal domain.

2. Surveys were necessary under the Spanish government. Case of Winter v. U. S. [Case No. 17,895] cited and approved.

[Followed in Glenn v. U. S., Case No. 5,481.]

3. In 1795, Baron de Carondelet, the governor-general of Louisiana, made a grant of land on the Mississippi river, upon condition that a road and clearing should be made within one year, and an establishment made on the land within three years; neither of which was complied with, nor was possession taken under the grant until after the cession of the country to the United States. The excuses for these omissions, namely, that the grantee was commandant at the post of Arkansas, and that the Indians were hostile, are insufficient; as he must have known these conditions when he obtained the grant. According to the principles established in Glenn v. U. S., 13 How. [54 U. S.] 250, the Spanish authorities would not have confirmed this grant; neither can this court do it. The grant is void, because the land cannot be located by a survey.

[Followed in Glenn v. U. S., Case No. 5,481.]

Petition for the confirmation of a Spanish land claim [filed by Catharine De Villemont, Carlos De Villemont, Ursine De Villemont, Pedro De Villemont, James Blaine and Yoe, his wife, Don Carlos Gibson, Cecilia Gibson, Adelia Gibson, Louis De Villemont, Pierre Soule and Armantine, his wife, Louis T. Caine and Adele, his wife, Armand Mercier, Alfred Mercier, Dider Preux and Leontine, his wife, Auguste Mercier and Charles Jessier, heirs and legal representatives of Don Carlos De Villemont, deceased, against the United States, Horace F. Walworth, Mary B. Miles, and James B. Miles.]

Before JOHNSON, District Judge, under the act of congress of June 17, 1844 (5 Stat. 676), reviving act of May 26, 1824 (4 Stat. 52).

A. Fowler, for petitioners.

S. H. Hempstead, Dist. Atty., for the United States.

Albert Pike and D. J. Baldwin, for Horace F. Walworth.

Daniel Ringo and F. W. Trapnall, for Mary B. Miles and James B. Miles.

OPINION OF THE COURT. The claim of the petitioners, as heirs and legal representatives of Don Carlos De Villemont, civil and military commandant of the post of Arkansas and its districts, is based on the request or petition of De Villemont, dated the 10th May, 1795, addressed to the Baron De Carondelet, governor-general of Louisiana, to grant to him a tract of land having a front of two leagues by a depth of one league, with paral-

[1] [Reported by Samuel H. Hempstead, Esq.]

lel boundaries, situated in the place called the "Island del Chicot," distant twenty-five leagues below the mouth of the Arkansas river; the Cypress swamp of the Island del Chicot to be the upper boundary of the tract of land solicited. Upon which request, the Baron De Carondelet made a concession or order of survey, of which the following is a substantial translation, namely: "The surveyor-general of this province, or the private person appointed for that purpose, will locate and establish this tract of land which is petitioned for, upon the two leagues of land in front by one in depth in the place indicated in the preceding memorial; the said land being vacant, and the said location not operating to any one's prejudice; under the express conditions that a road and regular clearing be made in the peremptory space of one year; and this concession to become null at the precise expiration of three years' time, if the said land shall not be settled upon, and during which time it cannot be alienated; under which conditions a complete survey of the land must be made, which must be remitted to me, in order that a corresponding formal title may be supplied to the party interested. El Baron De Carondelet." The tract of land is to be situated twenty-five leagues below the mouth of the Arkansas river, and the Cypress swamp of the Island of Chicot is to be its upper boundary. There is no proof in the case as to the existence of the "Island del Chicot;" but there is evidence proving the existence of a place on the Mississippi river known and called by the name of "Point Chicot," and it may be admitted that this is the place called for in the request and order or warrant of survey. But the petitioners have wholly failed to show by testimony that there existed a Cypress swamp above the place called Island of, or Point, Chicot, which was to constitute the upper boundary of the tract of land intended to be granted. In the absence of this proof, it is manifest that no precise locality is given to the tract of land claimed by the petitioners. To give identity and locality to the tract of land intended to be granted, it is evident that an actual official survey, made by the surveyor-general of the province, one of his deputies, or a private person appointed for that purpose, was essential. This, however, was never done. The tract of land claimed by the petitioners has never been identified and severed from the royal domain, and upon this ground alone the claim is null and void. For the reasons upon which this opinion is founded, I refer to the decision at the present term in the case of Winter v. U. S. [Case No. 17,895], and the authorities there cited. The petition must be dismissed, and the petitioners pay all costs. Decreed accordingly.

NOTE. From this decree the petitioners appealed to the supreme court, where, at the December term, 1851, the case was argued by Mr. Taylor for the appellants, and Mr. Lawrence and Mr. Crittenden, attorney-general, for the United States, and Mr. Pike for Horace F. Walworth. It is reported in 13 How. [54 U. S.] 261; and there was delivered the following opinion of the supreme court:

CATRON, J. The heirs of Don Carlos De Villemont filed their petition in the district court of Arkansas to have a confirmation of a grant for two leagues of land front by one league in depth, lying on the right descending bank of the Mississippi at a place called the Island del Chicot, distant twenty-five leagues below the mouth of the Arkansas river; the Cypress swamp of the island being called for as the upper boundary of said tract. The governor-general granted the land on the express conditions "that a road and regular clearing be made in the peremptory space of one year; and this concession to be null, if, at the expiration of three years' time, the said land shall not be established, and during which time it cannot be alienated; under which conditions the plot and certificate of survey shall be made out and remitted to me, in order to provide the interested party with the corresponding title in form." The concession was made June 17, 1795. No possession was taken of the land by De Villemont, nor any survey made or demanded, during the existence of the Spanish government. The petition alleges that possession was first taken in 1807, and as an excuse for the delay, it is stated that the grantee was commandant at the post of Arkansas up to the end of the year 1802, and confined by his official duties there; and second, that so hostile were the Indians in the neighborhood of the land that no settlement could be made on it. The proof shows that De Villemont first took possession in 1822 or 1823. The second regulation of O'Reilly of 1770 required that roads should be made and kept in repair in case of grants fronting on the Mississippi river, and that grantees should be bound within the term of three years to clear the whole front of their lands, to the depth of two arpens; and in default of fulfilling these conditions, the land claimed should revert to the king's domain; nor should proprietors alienate until after three years' possession was held, and until the conditions were entirely fulfilled. In this instance, the time was restricted to one year for making the improvements required by the regulations, and three years were allowed for making an establishment on the premises. In this case, where a front of six miles was granted, a clearing to the whole extent was of course not contemplated, yet to a reasonable extent it certainly was; but it was undoubtedly necessary that an establishment should be made within three years; such being the requirement of the concession, in concurrence with the regulations. The act of March 26, 1804 [2 Stat. 287], prohibited any subsequent entry on the land, and declared void all future acts done to the end of obtaining a perfect title, even by an actual settler, if the settlement was not made before the 20th of December, 1803. De Villemont's title must, therefore, abide by its condition when the act of 1804 was passed. For further views on this subject, we refer to our opinion expressed on Clamorgan's title, at the present term, in the case of Glenn v. U. S., 13 How. [54 U. S.] 250.

We are asked to decree a title and award a patent on the same grounds that the governor-general of Louisiana, or the intendant, would have been bound to do, had application for a perfect title been made during the existence of the Spanish colonial government. The only consideration on which such title could have been founded, was inhabitation and cultivation either by De Villemont himself, or his tenants; and having done nothing of the kind, he had no right to a title. Nor can an excuse be heard that hostility from Indians prevented a compliance with the conditions imposed, as De Villemont took his concession subject to this risk. The alleged excuse that he was commandant

of the post of Arkansas, and bound to be constantly there in the performance of his official duties, is still more idle, as he held this office when the concession was made, and knew what its duties were. The petition was dismissed by the district court because the land claimed could not be located by survey. The concession is for two leagues front by one in depth, with parallel boundaries, situated at Chicot island, the Cypress swamp on the island being the upper boundary. Chicot island is represented in the concession as being twenty-five leagues below the mouth of the Arkansas river. The land now claimed by the petition is represented to lie five leagues below the mouth of that river, at a place known as "Chicot Point," being a peninsula included in a sudden bend, and surrounded on three sides by the Mississippi river. It is difficult to conceive that Chicot point lying in fact nearly twenty-five leagues below the mouth of the Arkansas, is the Chicot island to which the concession refers. But admitting that the point was meant (which we believe to be the fact), still no Cypress swamp is found there to locate the upper boundary; nor is it possible to make a decree fixing any one side line, or any place of beginning for a specific tract of land. Our opinion is, that on either of the grounds stated, the petition should be dismissed, and the decree below affirmed. Ordered accordingly.

Case No. 3,840.

DE VISSER v. BLACKSTONE et al.

[6 Blatchf. 235.] [1]

Circuit Court, S. D. New York. Nov. 9, 1868.

RECEIVER'S POSSESSION AND TITLE TO LANDS — INTERFERENCE BY STATE COURT — CONTEMPT — RECEIVER'S SALE—RELEASE OF LIENS.

1. When a receiver, appointed by this court, is vested with the title to, and possession of, real estate, as such receiver, his possession is the possession of this court, and any attempt to disturb such possession by proceedings subsequently instituted in a state court, or otherwise, without first obtaining the leave of this court, is a contempt of this court.

2. Where a receiver appointed by this court brought a suit in equity, in this court, against persons who claimed to have pre-existing liens on real estate, of which such receiver was in possession by virtue of his trust, to have the rights of such defendants, in respect of such liens, determined by this court, and, if adjudicated in their favor, paid out of the proceeds of the sale of such real estate by the receiver, this court made an interlocutory order requiring the defendants to release their liens, and setting apart, to be paid into this court, out of the proceeds of the sale to be made of such real estate by the receiver, a sufficient sum to discharge such liens, with the costs of the suit, and ten per cent. in addition, to be held as a fund applicable to the payment of such liens, if they should be established by the decree of this court to be prior in right to the claims of the plaintiff.

In equity. The plaintiff [Simon De Visser] was appointed, by a decree made by this court on the 19th of June, 1868, in a suit in equity, brought by James Drake and others against Francis Goodridge, as survivor, &c., and others, receiver of certain real estate, the title to which was conveyed to him, under said decree, on the 26th of June, 1868. The defendants [Wyllys Blackstone and others] in this suit were four several parties who claimed to have separate mechanics' liens on said real estate, which attached prior to the accruing of the plaintiff's title as receiver. Subsequently to the accruing of the receiver's title, one of those four parties instituted legal proceedings in the court of common pleas for the city and county of New York, to enforce and foreclose his lien. The bill prayed that the plaintiff's title might be decreed to be prior in point of time, and superior in right and equity to the liens claimed by the defendants; that the defendants might release their liens to the plaintiff; and that an interlocutory order might be made directing the execution of such releases within some short day, to the end that the plaintiff might proceed, as receiver, to sell the real estate, and bring the proceeds into this court, and have leave to withdraw all of the same for the purposes of his trust, except so much thereof as should be necessary to protect the defendants until the final decision in this cause. The plaintiff now moved for the granting of such interlocutory order.

Edwin W. Stoughton, for plaintiff.

Cornelius J. De Witt, Moses B. Maclay, and William T. Graff, for defendants.

BLATCHFORD, District Judge. The plaintiff, having been appointed receiver by this court, and having become fully vested with the title to, and possession of, the real estate in question, on the 26th of June, 1868, his possession is the possession of this court, and any attempt to disturb such possession by proceedings, on the part of the defendants in this suit, in the court of common pleas of the city and county of New York or otherwise, without first obtaining the leave of this court, is a contempt of this court. By the final decree made in the cause in which the receiver was appointed, he is directed to sell the real estate and bring the proceeds into this court. The defendants commenced the proceedings to enforce their mechanics' liens in September, 1868. They claim that their liens attached in November and December, 1867, and are superior to the rights of the plaintiffs in the suit in which the receiver was appointed. Those plaintiffs and the receiver dispute this claim. Still, whatever rights the defendants have, as against the rights and possession of the receiver, their claims are, at most, pre-existing liens on the real estate. They are now brought into this court by this suit, which is instituted in behalf of the plaintiffs in the suit in which the receiver was appointed, and in aid of that suit. The object of this suit is, in substance, to have the rights of the defendants, in respect of the liens set up by them, determined by this court, and, if adjudicated in their favor, paid out of the proceeds of the sale of the real estate by the receiver, thus substituting, so far as those liens are concerned, the fund in court realized from the sale of the real estate, in place of the real estate itself. This court, sitting in equity, having the parties

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

before it and the fund in its hands, will administer the fund according to the rights of the parties, and will give to the defendants all the rights against the fund which they could, under any circumstances, have against the real estate. These doctrines are fully laid down in the opinion of the supreme court, delivered by Mr. Justice Nelson, in the case of Wiswall v. Sampson, 14 How. [55 U. S.] 52. The plaintiff is entitled to such relief as will enable him to sell the real estate free from the liens claimed by the defendants, and to have so much of the proceeds as shall be sufficient to pay the defendants' claims, if established, set apart to represent the real estate. An order will be entered, providing that the defendants bring into this court, and file with the clerk thereof prior to a day to be named, a sworn statement of the amount of their respective alleged liens upon the said real estate; that, at the time of filing such statement, they respectively deliver to such clerk releases executed by them, in the form to be annexed to such order, releasing all liens which they have or claim on said real estate; that the plaintiff then proceed to sell said real estate, according to the terms of his trust as receiver; that the purchasers thereof pay to the clerk of this court, out of the purchase money thereof, such sum as shall cover the amount of said alleged liens in the aggregate, with the costs of this suit, with the addition of ten per cent thereto, to abide the event of this suit, and to be held as a fund applicable to the payment of said alleged liens, and to be so applied in case this court shall decree that the same ought to be so applied; that the rights of the defendants to said fund shall be and remain the same as they now are or would be to said real estate if such sale were not made, and if proceedings to enforce and foreclose such alleged liens were taken and prosecuted according to the statutes of the state of New York; that, on receiving such amount of such purchase money, the said clerk complete the releases, by inserting therein, as the releasees, the names of the purchasers of the premises, and deliver the releases, so completed, to such purchasers; and that he then deposit the sum of money so received by him with the United States Trust Company, on interest, to abide the further order of this court.

Case No. 3,841.

In re DEVLIN et al.

[1 Ben. 335;[1] 1 N. B. R. 35; Bankr. Reg. Supp. 8; 6 Int. Rev. Rec. 61; 1 Am. Law T. Rep. Bankr. 32.]

District Court, S. D. New York. Aug., 1867.

BANKRUPTCY PRACTICE—TIME OF NOTICE OF FIRST MEETING—PUBLICATION.

1. Where a warrant in bankruptcy was issued July 10th, the first meeting of creditors being fixed for July 24th, and, on the 24th, the marshal made return of due publication of notice, the first publication being on July 15th, and of due mailing of notices on that day, and thereupon the register adjourned the meeting to August 8th, and directed a new notice to be given by the marshal, as required in the warrant, of such adjourned meeting, and, on August 8th, the marshal returned that he had, on July 29th, mailed notices to the creditors, but did not return that any further publication had been made, and the register thereupon certified to the court the questions (1) whether the publication for the first return day of the warrant was sufficient, and (2) whether it was necessary to publish again for the adjourned day: *Held*, that the publication for the first day was not sufficient, the meaning of the eleventh section of the bankrupt act [of 1867 (14 Stat. 521)] being, that the notices shall be served and the publication be completed before the commencement of the ten days immediately preceding the return day of the warrant.

[Cited in Re Pulver, Case No. 11,466.]

2. That, there having been no proper publication and service of notice, it was proper for the register to adjourn the meeting.

3. That the word "given," in the twelfth section of the act, means published as well as served.

4. That, as the notice had not been properly published at the time of the second meeting, it was proper for the register to again adjourn the meeting and direct notice to be published as above stated, the service on the creditors having been properly made and standing good.

5. That, if the publication had been good for the first return day, it would not have been necessary to publish again, but only to have required new service of the notices on the creditors.

[In bankruptcy. In the matter of Patrick C. Devlin and John Hagan.]

In this case, the warrant in bankruptcy was issued July 10th, 1867, the first meeting of creditors being fixed for July 24th. On that day, the marshal returned, that, by virtue of the warrant, he had caused the notice therein ordered to be published twice in each of the newspapers specified, the first publication having been on the 15th of July, and that, on July 15th, he mailed copies of the notice, as required by the warrant. The register, deeming that notice to the creditors had not been given ten days before the meeting, adjourned it to August 8th, and directed that a new notice should be given by the marshal, as required in the warrant, of the meeting to be held on August 8th. On that day, the marshal returned, that he had mailed notices to the creditors on the 29th of July. The return did not show that any further publication had been made of the notice. On these facts the register certified that the following questions arose: 1. Whether the publication of the notices in the newspapers named, within the period of ten days immediately preceding the return day of the warrant, was sufficient publication, within the meaning of the act. 2. If such publication was sufficient for the first return day, was it necessary again to publish for the adjourned day or second return day, in addition to the mailing or personal service of notices to creditors? [The regis-

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

ter also states that the parties requested that the said question, should be certified to the judge for his opinion thereon.] [2]

BLATCHFORD, District Judge. The publication of the notices in the newspapers named, within the period of ten days immediately preceding the return day of the warrant, was not sufficient publication, within the meaning of the act. The eleventh section of the act requires that the warrant to the marshal shall authorize him forthwith to publish notices in the newspapers specified and to serve notice, by mail or personally, on the creditors and the other persons specified, and that the notice shall state that a meeting of the creditors, to prove their debts and choose one or more assignees, will be held at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same. The warrant, form No. 6, directs that the first publication of the notice shall be made forthwith, and that the notice shall be served on the creditors forthwith and at least ten days before the appointed meeting. The good sense of all this is, that the publication must be commenced and the notices be served as soon as conveniently practicable after the issuing of the warrant; but that, at all events, to make the proceedings regular, the publications must be completed before the commencement of the period of ten days immediately preceding the return day of the warrant, and the notices must be served on the creditors before the commencement of such period of ten days.

In the present case, there had been, at the time of the meeting of July 24th, 1867, no proper publication of notice, and no proper service of notice. Under section 12 of the act, it was, therefore, proper for the register to adjourn the meeting to a day and hour to be then and there fixed by him, and to direct that a new notice should be given by the marshal, as required in the warrant, that the meeting of the creditors would be held on such adjourned day and hour. The twelfth section says, that if, at the meeting held in pursuance of the notice, it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. The expression, "notice to the creditors," in this twelfth section, means the notice required by the eleventh section to be published, as well as the notice required by that section to be served; and the word "given," wherever used in the twelfth section, means published as well as served.

On the adjourned day, the 8th of August, 1867, it appeared that the necessary notice to the creditors had been served as required, that is, ten days before the adjourned meeting, but it did not appear that the notice had been properly published. On such adjourned day, it was proper for the register to again adjourn the meeting, and direct the notice to be published, the publication to be completed at least ten days before the new adjourned day, the service on the creditors having been properly made and standing good. If the publication had been sufficient for the first return day, it would not have been necessary to publish again for the first adjourned day, or for the second return day; but it would only have been necessary, if the service on the creditors had not been properly made in time before the first return day, to require the service of new notice on the creditors.

[2] [From 1 N. B. R. 35.]

Case No. 3,842.

DEVLIN v. GIBBS et al.

[4 Cranch, C. C. 626.] [1]

Circuit Court, District of Columbia. Nov., 1835.

EXECUTION—IRREGULARITIES—FALSE IMPRISONMENT—PAROL EVIDENCE.

1. An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void.

2. An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void.

3. Parol evidence is admissible to show that there was in fact no judgment rendered by a justice of the peace, as stated in the execution.

Trespass, assault and battery, and false imprisonment. The plaintiff had been, some time since, arrested upon a writ of ca. sa., issued in favor of these defendants, against himself and one James Kennedy, only, upon a judgment against them jointly with one Hugh Tierney, as recited in the execution; and had been discharged from that arrest by this court (THRUSTON, Circuit Judge, absent) upon habeas corpus, upon the ground that an execution against two only upon a judgment against three was void; the same appearing upon the face of the execution. The plaintiff thereupon brought the present action, and the principal question was, whether the execution was absolutely void, or only voidable; or, in other words, whether it was irregular, or only erroneous; for, if irregular, it was void; but if erroneous, it was only voidable, and the defendants not liable in this action.

Mr. Bradley, for defendants, to show that the executions were erroneous only, and not irregular, cited Reynolds v. Corp, 3 Caines, 267; Herrick v. Manly, 1 Caines, 253-255; Butler v. Potter, 17 Johns. 145; 1 Chit. Pl. 183; Starkie, Ev. pt. 4, p. 1447; and 1 Archb. Pr. 257.

R. S. Coxe, for plaintiff, cited the cases referred to in 10 Petersdorff, tit. "Trespass," 279, 402.

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

THE COURT (MORSELL, Circuit Judge, dissenting) were of opinion that the execution was not irregular, but erroneous; not void, but voidable; and that, therefore, the defendants were not liable in this action.

In the course of the trial THE COURT permitted the plaintiff to produce parol evidence to show that, in fact, no judgment had ever been rendered by the magistrate. But the jury found a verdict for the defendants.

DEVLIN (UNITED STATES v.). See Cases Nos. 14,953-14,955.

Case No. 3,843.

In re DEVOE.

[2 N.B.R.27 (Quarto, 11); 1 Lowell, 251; 1 Am. Law T. Rep. Bankr. 90; 7 Am. Law Reg. (N. S.) 690.][1]

District Court, D. Massachusetts. June, 1868.

FEDERAL JURISDICTION—HABEAS CORPUS — BANKRUPT IMPRISONED ON STATE PROCESS — PLEADING AND EVIDENCE.

1. Where a bankrupt is held under arrest upon state process in an action of tort, in the nature of deceit, it being alleged in the declaration that he obtained possession of the plaintiff's goods under color of a contract, by means of false and fraudulent representations, the United States district court has no power to discharge the bankrupt upon a petition for a writ of habeas corpus.

[Approved in Re Kimball, Case No. 7,768. Followed in Re Whitehouse, Id. 17,564. Cited in Re Alsberg, Id. 261.]

2. Evidence cannot be received to contradict the declaration and to show that no such cause of action really exists as is therein set forth.

C. A. & G. M. Reed, for petitioner.

A. Russ, for respondent.

LOWELL, District Judge. The petitioner alleges that he was duly adjudged a bankrupt by the district court of the southern district of New York, on the 26th of May, last, and that pending the proceedings in bankruptcy, to wit, June 1st, 1868, he was arrested in this city, in a civil action at the suit of one John C. Nicholos, and is still imprisoned on the writ then issued, and that the action is founded on a debt or claim from which his discharge in bankruptcy would release him. A writ of habeas corpus was issued in accordance with rule 27 of the supreme court rules in bankruptcy [Rice, Manual, 115], and by the return it appears that the writ contains a declaration in tort in the nature of deceit, alleging certain false and fraudulent representations and inducements, whereby the present petitioner is said to have procured from the plaintiff an assignment of a complete stock in trade, including goods, choses in action, &c., in exchange for a note averred to be of much less value than was represented, if not wholly worthless. The jurisdiction of this court over the subject matter, and the pendency of the proceedings in bankruptcy in New York, are admitted, and the question agreed is whether this is such an arrest as is prohibited by section 26 of the bankrupt act. And this may be divided into two questions: First, whether the declaration shows a debt which would be discharged by the certificate; and second, if not, whether evidence can be received to contradict the declaration and to show that no such cause of action really exists as is there set out, but only a debt provable in bankruptcy and discharged by the certificate, if any cause of action there be. By section 19 [of the bankrupt act of 1867 (14 Stat. 525)], all demands against a bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest, and by a subsequent clause of the same section the court may cause such damages, if liquidated, to be assessed in such mode as it may deem best, and the sum so assessed may be proved. The declaration in this case is not very artificially drawn, but it seems clear that the gist of the action is the fraud and not the conversion. The facts alleged might be sufficient to show that a merely voidable title had been obtained to the property out of which the plaintiff declares himself to have been defrauded, and if he had elected so to do, he might, perhaps, have avoided the sale and have maintained trover for the goods and chattels; but he could not have done so for the book debts, and he naturally preferred to declare for his whole damages in one action, and accordingly he has not declared in trover. Another answer to this part of the case is that trover could not be maintained excepting upon the ground that the fraud would authorize the plaintiff to rescind the bargain and demand back the goods, and in that case the goods considered as a debt provable in bankruptcy would be one created by the fraud of the bankrupt, which, by section 33, would not be discharged by the certificate, though it would, perhaps, be provable. If proved, all actions must be stayed by section 21, but this debt has not been proved, and this brings us to the main point of dispute.

The petitioner contends that he has the right to aver and prove, in reply to this return, that the allegations of fraud contained in the plaintiff's declaration are false, and that the plaintiff has no just cause of action whatever against him on the footing of a fraud. This point is not open to the petitioner. The words of the statute are that no bankrupt shall be liable to arrest, during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him. Now, upon inspection of this writ, it appears to be founded on such a

[1] [Reprinted from 2 N. B. R. 27 (Quarto, 11), by permission. 1 Lowell, 251, contains only a condensed report.]

claim, namely, a claim of damages for deceit. Whether that claim is well or ill-founded is a question that must be left to the tribunal before which the case is brought. It is impossible that I should try it on habeas corpus. Suppose the declaration were for damages in trespass or case, slander or assault, it is very plain that I could not inquire, on habeas corpus, whether any assault or slander had been committed; even the court before whom the case is pending could not do that. And this is admitted in argument. But how does it vary the case that the action is founded on a fraud which the petitioner says never was committed? If no fraud was committed, the plaintiff has no just cause of action concerning the matters declared on, but that does not show that the action is founded on a debt or claim from which the discharge in bankruptcy would release him, but only that it has no foundation whatever.

It is said that Judge Blatchford has decided that the district court will, on habeas corpus, inquire into the fact of fraud, and uphold or discharge the arrest according to the result of the inquiry. In re Kimbal [Case No. 7,767]; In re Glaser [Id. 5,474]. But in both these cases the action was founded upon a simple contract debt, which, on its face, would be provable and discharged in bankruptcy, and the arrest only was founded on ex parte affidavits of fraud. And, if I am rightly informed of the New York practice, such an arrest might be discharged by the court that ordered it, and perhaps by some other courts upon just such a preliminary hearing as Judge Blatchford granted. If so, it was of no special consequence whether one court or the other should undertake that investigation; both having jurisdiction of assets of bankrupts. The course taken was certainly a liberal one for the creditor who had not in terms founded his action on the fraud; but it would seem to work equal and exact justice under the operation of the laws of arrest in New York. I am not sure that in the district the creditor must not stand or fall on the record on which he causes the arrest to be made. In this case the whole foundation of the action is the fraud, and the arrest is only an incident, not depending at all on the fraud, but on the fact that the defendant is a non-resident; and to try the question of fraud is to try not merely the validity of the arrest, but the whole case. This action is a civil action, but it is not founded on any debt, excepting in the very largest sense, certainly not on any provable and dischargeable debt; and if every allegation in the writ be wholly false and malicious, still it is a matter with which this court has not, under this part of the law, any more concern than if the petitioner were not a bankrupt. I have no authority, in this summary mode, to relieve from imprisonment, on state process, persons who, whether bankrupts or not, are unjustly charged concerning matters not coming within my cognizance. What remedies there may be in such an extreme case it is not necessary to inquire. It is strongly urged, by the provisions of the act of February 5, 1867 (14 Stat. 385, § 1), that the petitioner may aver and prove any facts which tend to show that he is unjustly detained under the forms of law and under state authority in contravention of the constitution or laws of the United States. That statute enlarges the jurisdiction of this court, and gives me power to hear and determine this case, and it certainly intends that the return to the writ should not be conclusive, but that the real facts of the detention may be shown by evidence. But I do not understand that it expects a judge to decide the merits of a case on habeas corpus. In deciding that the arrest of the petitioner is not prohibited by the bankrupt law, I have not decided that he is not imprisoned in contravention of the very law of the United States that has been relied on for his release.

Case No. 3,844.

DEVOE v. The FASHION.

[4 Am. Law J. (N. S.) 279; 25 Hunt, Mer. Mag. 718; 14 Law Rep. 450.]

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

CHARTER PARTY—CHARTERER—WHEN OWNER.

Held, that a charter of a ship for a voyage or term of time, the charterer to victual and man her, and have entire control of her, renders the charterer owner for the time, and the real owner is not responsible for the contracts of the master durante tempore, if the creditor have notice of such charter. *Held*, that a sloop and craft navigating the waters of the state, or its vicinity, and taken by the master on condition that he victual and man her, and divide the earnings of the vessel with the owner, if such arrangement is known to the hands or seamen, the vessel is exempt from liability to the seamen for their wages on such hiring. Libel dismissed, with costs.

Isaac Devoe against the sloop Fashion.

Before Betts, District Judge.

Case No. 3,845.

DEVOE et al. v. PENROSE FERRY BRIDGE CO.

[3 Am. Law Reg. (O. S.) 79; 5 Pa. Law J. Rep. 313.]

Circuit Court, E. D. Pennsylvania. 1854.

INTERSTATE COMMERCE—ENJOINING ERECTION OF BRIDGES—JURISDICTION OF FEDERAL COURTS—PROCEDURE.

1. A court of the United States has the power to prevent, by injunction, the present or future erection of any bridge under the authority of one of the states, that by its construction will interfere with the navigation of a public stream upon which there is a commerce to any considerable extent with other states, though such stream lies wholly within the limits of the state. The

question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public.

[Cited in Milnor v. New Jersey R. Co., Case No. 9,620; Silliman v. Hudson River Bridge Co., Id. 12,852.]

2. In such case, unless irreparable damage would be done to the defendants thereby, and though an answer be put in denying both the fact and the law, an interlocutory injunction may be granted upon affidavits, at once, until further order; and an issue may be then directed to determine whether the bridge under its present form, &c., is a nuisance to the navigation of the river, and, if so, whether any bridge can be constructed at the particular spot which will not be a nuisance.

[Cited in Gilman v. Philadelphia, 3 Wall. (70 U. S.) 741.]

This was an application to Mr. Justice GRIER, for interlocutory injunctions in three cases, involving the same state of facts.

GRIER, Circuit Justice. Three several bills have been filed against the Penrose Ferry Bridge Company, praying for injunctions to restrain them from erecting a bridge over the river Schuylkill. A motion for a special injunction has been made on the notice usual in each case. As they all involve the same questions with immaterial differences, we shall treat them as one case.

The complainants are citizens of other states, and owners, some of wharf property on the Schuylkill, others of coasting vessels, barges and canal boats trading from this port, on that river, to ports in other states. The bills set forth that the river Schuylkill, from its mouth to and beyond the port of Philadelphia, is, and for a long time hath been, an ancient, navigable, public river and common highway, free to be used and navigated by all citizens of the United States. That the river has a good tide-water navigation for over six miles above its mouth to the port of Philadelphia, for ships and vessels drawing 18 or 20 feet. That many of said ships, steamboats, barges, &c., navigating said river, are duly enrolled and licensed at the port of Philadelphia, a port of entry within the district of Philadelphia, under and by virtue of the act of congress in that behalf made and provided. That foreign vessels have been accustomed to navigate, and are entitled to navigate, the said Schuylkill with cargoes, bound to the port of Philadelphia, and to discharge the same, &c. That about a mile above the mouth of said river, the channel has been crossed heretofore by means of a ferry skiff or scow, which afforded ample convenience for the travel across the river without obstructing the navigation. That the Penrose Ferry Bridge Company, a corporation created and established by authority of the state of Pennsylvania, and the other defendants, citizens of Pennsylvania, have collected materials, and are engaged in constructing and erecting a truss toll bridge over and across the channel of said river at the site of the ferry. That it is their intention to erect the bridge at an elevation of only six feet above the level of ordinary high water, and not over one or two feet above the level of the usual freshets in the river. The complainants charge that the erection of such a bridge as that threatened by defendants will greatly obstruct the navigation of the river, and will tend greatly to destroy the trade, commerce and business of the citizens of the United States, to their great damage and common nuisance; that many millions of dollars have been expended by citizens of the United States in the construction of works of public improvement terminating at said port on the Schuylkill, which will be much injured by such obstruction to the navigation of the river; that the defendants claim a right to erect said bridge under color of certain acts of the legislature of Pennsylvania, passed on the 9th of April, 1853 [Pa. Laws, p. 713], and 15th of April, 1854 [Id. 367], and pretend that certain draws placed in said bridge will afford sufficient passage-way for vessels navigating the river; but the complainants charge that the river Schuylkill having a good tide-water navigation to a part of the port of Philadelphia, the citizens of the United States are lawfully entitled to its full and free navigation without hindrance or obstruction by virtue of any state authority; and they aver that the proposed draws are utterly inadequate to meet the requirements of the present commerce and navigation of the river; and that no draw in any bridge to be erected there of suitable height, affording less than one hundred feet clear channel, would afford a sufficient passage to vessels and barges in the manner they are now accustomed to use and navigate the river. The complainants also severally aver that they will each suffer special damage to their business or property, if the erection of said bridge be proceeded with in the plan proposed.

A very large number of witnesses have been examined in the support and denial of the charges of these bills. The usual practice of this court on motions for special injunctions has been, to grant them as a matter of course, where no opposition is made by the defendants, on affidavits supporting the charges of the bill. And in patent cases, if the defendant denies, under oath the equity of the bill, the court will usually inquire no further, and will not proceed, on a mere preliminary motion and affidavit to try the whole merits of the case. But in applications for an injunction, in case of alleged nuisance, the practice has been somewhat different. In such cases, it is not sufficient to deny the law, or the facts relied on in the bill, to have the injunction refused, and the inquiry will be, whether it is not best for all parties that the erection of the supposed nuisance should be arrested till these questions be finally and properly decided. And if no irreparable or very material injury will probably arise to

the defendant, the court will issue the injunction without attempts to adjudicate the merits by anticipation. It is usually better for all parties that an injunction issue even in a doubtful case, till the merits of the controversy are finally decided. It has been my desire to pursue this course in the present case, and to have silently granted the injunctions. without forming or expressing any opinion on the merits, or the great questions of law and fact involved in the case. But, as the counsel have argued the case very fully on its merits, and as I find that illegitimate inferences have been drawn, and unnecessary fears excited, as to the results and consequences of certain doctrines supposed to be held by the court on this subject, I have concluded to briefly express an opinion on the leading questions of law and fact in the case, notwithstanding it may appear to be an anticipation of the final hearing of the merits. As the defendants in this case claim to act under the authority of the state of Pennsylvania in the erection of this bridge, which it is charged will be a nuisance to the navigation of the river Schuylkill, the right or propriety of the interference of this court becomes a matter of grave and serious consideration. The river Schuylkill is wholly within the territory of the state. She has exercised jurisdiction over its waters both as a state and a colony. She has authorized the erection of a dam and three bridges below the ebb and flow of the tide. States have an undoubted right to regulate all matters of police, including internal commerce, roads, ferries, canals and bridges. But the power conferred on the general government by the constitution of the union, to regulate commerce between the several states and foreign countries, necessarily authorizes it to keep open and free all navigable streams connecting the ocean with ports of delivery or entry, and protect the intercourse between the several states on all our tide-waters. When the exercise of their several powers come into conflict, those of the state must necessarily yield to the superior or controlling power. The jurisdiction of this court in cases like the present has been fully considered and decided by the supreme court in the case of Pennsylvania v. Wheeling Bridge, 13 How. [54 U. S.] 519. This court is not at liberty, even if so disposed, to disregard the authority of that case, and the people of Pennsylvania, at whose instance the doctrines contained in it were established, are morally estopped from questioning their correctness. It is there decided that, although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a state, yet that as courts of chancery they may interfere at the instance of an individual or corporation, who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to ports of entry within a state. The commerce on the river Schuylkill below the port of Philadelphia, is as much entitled to this protection as that of Ohio, Mississippi, Delaware or Hudson; and the complainants in this case have shown the same right to the interference of this court in their behalf, as was shown by the state of Pennsylvania in that. In fact, every question of law which has been agitated in the argument, either in these cases, or the one which preceded them, has been fully considered and decided by the supreme court in that case, and it is unnecessary for this court to vindicate their decision by further argument.

Let us now proceed to examine the facts in evidence on the present motion, and how far they will justify the interference of this court by injunction. At common law, every obstruction, however small, to the free navigation of a public river, might, in strictness, be styled a nuisance. But the stringent application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd and highly injurious to public interests. Intercourse by means of turnpikes, canals, railroads and bridges, is a public necessity. A railroad constructed by the authority of a state, is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them, should be subjected to great delay or annoyance for the convenience of a few sloops or fishing smacks. Where bridges are constructed with draws, or openings for the passage of masted vessels, and high enough to permit others to pass under if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience, in comparison with the public benefit of the bridge. In every investigation of this kind the question is relative, not absolute. Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case,—when the trade of the channel is of great amount and importance and that across it trifling, the same rule cannot apply, as to a case where the conditions are contrary. If a steam ferry can amply accommodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than a steamboat or towboat, or better accommodate some small neighborhood or neck of land. The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge, compelling all the commerce of her port to pass through a draw; while it might be very reasonable that vessels passing from one part of the port or harbor to another, should be compelled to submit to some incon-

venience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city. It would be an abuse of the term to call the Schuylkill dam a nuisance, because it is below tidewater, and converts a few miles of useless sloop navigation into a canal which annually adds millions to the wealth of the city and state, and whose commerce constitutes the staple of this western portion of the port of Philadelphia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market street bridge. Ample space for those vessels still remains at the wharves below. The great staple of this western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steam tugs and canal boats engaged in transporting it. The city of Philadelphia now extends across the Schuylkill, and such a bridge is a public necessity. The same may possibly be said of the Gray's Ferry bridge, over which the railroad to Baltimore passes. Vessels with masts and steamboats with high chimneys are, no doubt, put to considerable inconvenience in passing the draw; but the bridge is built so high that the immense trade in coal can pass under it without interruption. Besides, when this bridge was first erected, the commerce of the river was of little importance compared to its present condition, and the mode of transporting the coal has accommodated itself to the state of the navigation and its impediments, as they then existed. If the erection of such a bridge at that place were now proposed for the first time, its propriety might have admitted of some doubt.

With a view to these principles, let us now examine the structure proposed to be erected by the defendant. 1st. The bridge is to be some five or six miles below the port of Philadelphia, although within the present city limits, and about one mile above the mouth of the Schuylkill river. 2nd. The defendants propose to erect it at a height of six or eight feet above high water level, and two feet above the usual freshets of the river. 3rd. It is to have a pivot draw on a pier in the centre of the river channel, which, when open, will leave a passage on each side of the pier of about 60 feet in the clear. 4th. Sailing vessels and single steamboats without tows, may pass with some delay and inconvenience, but sufficient to cause an increase on freight of from three to five cents a ton. 5th. A large portion of the great commerce of this river is coal, conveyed to the port by the Schuylkill canal, which coal boats are at present towed by small tugs below the Gray's Ferry bridge, under which they can pass without delay or inconvenience. The canal boats containing the coal are then received by steamboats of a larger class, which take them in tow, necessarily ranged four abreast. These would neither pass under the bridge nor through the draws of the proposed bridge, without great danger, difficulty and delay. 6th. The erection of this bridge will necessarily cause an entire change in the transportation of coal on the river below the port. Wharves will have to be constructed below it, and the larger steamboats remain there; thereby greatly increasing the expense of towage by the small boats above. 7th. It will operate as a tax upon coal, of five cents per ton, by increasing its freight to that amount. This item alone amounts to $20,000 per annum. 8th. The city of Philadelphia, through her select and common councils, has remonstrated firmly against any legislative license for the erection of a bridge at this place, and declares that, by "this dangerous obstruction, trade amounting to more than a million of tons annually, would be seriously impaired, and driven from that portion of the port; and that the large investments of the city in her gas-works, and other property on the Schuylkill, and a large proportion of all the wharf front, would be greatly injured by any farther bridge below Gray's Ferry." 9th. It is in evidence, also, that the city is now at a great expense in removing the gas-works below the bridges; and among the reasons for such a measure, was their expectation of having the bituminous coal imported from Liverpool in large vessels, delivered to them free from the obstruction of bridges; and that the erection of this bridge will cause an additional cost to the city in this matter, of fifty cents a ton on all the coal imported for her gas works. 10th. There is no public necessity for the erection of such a bridge over the mouth of the Schuylkill, nor any benefits which will at all counterbalance the evils to commerce which will be caused by it. 11th. The farmers of Tinicum and part of Kingsessing, to whom it might be a convenience (especially in winter) to have a bridge at this place, can cross with their market wagons with as much safety and as little delay by steamboat ferry as a bridge. If the quantity of travel is not sufficient to support a steam ferry, it is conclusive evidence that there is no public necessity for an erection of a bridge which will tax commerce to such an extent.

Upon the whole, I think it is abundantly in evidence, from the testimony before me, that the proposed bridge, if erected, will greatly injure the commerce passing from and to other states, along the river Schuylkill, to the port of Philadelphia; and also that there is no public necessity for a bridge at that place which can justify the sacrifice of other and superior interests to so great an extent. I concur with the city council "that any obstruction at or near the outlet of such a great public highway, must seriously interfere with the growth of that trade, and only tend to sacrifice great public interests to partial and individual benefit." See Journals of Councils, vol. 18, p. 157. Such an erection will, therefore, be a public nuisance to the navigation of the Schuylkill river and the commercial intercourse of other states with the port

of Philadelphia, and ought to be restrained. Let the injunction issue till further order.

If the defendants desire to pursue this matter any farther, the court will order an issue to try at next term the following questions: 1st. Whether a bridge, erected as now proposed at the place called "Penrose's Ferry," would be a nuisance to the navigation of Schuylkill river, or not. 2nd. Whether any bridge can be built at that place which will not materially affect the public interest and commerce of the river; and, if so, of what height, breadth of draw, &c.

NOTE. It may be proper to state that the preceding case, though it involves the same principles, is not that which gave rise to some remarks in a previous number of this journal; and that the bills upon which it is founded were not in fact known to be in contemplation at the time those remarks were printed. The present bills, indeed, are filed by different parties, and under somewhat different circumstances. We must beg also leave to disclaim, with regard to the article to which we refer, the least intention of applying its observations to the learned and able court in which these cases arose. For that court none can have greater respect, or can rest with more confidence on its decisions, than ourselves. Our object was only to deprecate, with earnestness, it is true, but still with great deference, conclusions towards which the federal courts, in general, appeared to be drifting. The particular case entered very little into the considerations which actuated us; it was only the occasion, not the subject of our remarks; and it may well be that the bridge whose erection has just been restrained, is both hurtful and useless. When the power now claimed is exercised by a judge whose strong good sense and thorough learning are so well known, we might be sure that it would be exerted only in the way most beneficial to the public. But we cannot hope that it will always and in all places be confided to such competent hands; and that prudence and moderation will invariably accompany its exercise. It involves, indeed, what is substantially an act of legislative discretion, and is enforced by the summary and abrupt process of an immediate injunction. And setting aside all constitutional considerations, there are few men to whose uncontrolled judgment we would like to trust such a power, especially in the important matters of commerce. This, however, like unfortunately too many other innovations, presented itself with its fairest and most promising side foremost; and some were perhaps inclined to forget, since the doctrine sought to be established would work conveniently in the present, that the precedent might not be looked upon with so much pleasure in the future. Willing, therefore, as we might otherwise be to acquiesce in the wisdom and propriety of this particular decision, it was only the more the duty of those who were convinced of the dangers which were hidden underneath these doctrines, to protest respectfully against their extension.

DEVOE MANUF'G CO. (MEISSNER v.). See Case No. 9,397.

Case No. 3,846.

DEVOLL v. BROWN.

[The case reported under above title in 3 West Law J. 151, and Merw. Pat. Inv. 414, is the same as Case No. 3,662.]

Case No. 3,847.

In re DEVORE.

[16 N. B. R. 56;[1] 24 Pittsb. Leg. J. 185, 187.]

District Court, W. D. Pennsylvania. June 28, 1877.

BANKRUPTCY — SALE OF LANDS FREE OF LIENS— INTEREST—COMMISSIONS AND COSTS — JURISDICTION OF STATE COURT.

1. Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution.

2. Attorney's commissions and costs stipulated to be paid on foreclosure are not allowable when the proceedings to foreclose are invalid.

3. When the bankrupt court has first taken jurisdiction by ordering a sale of mortgaged premises, discharged of liens, it thereby ousts a state court of jurisdiction to foreclose the mortgage.

[In bankruptcy. In the matter of Abraham A. Devore.]

A. H. Miller, for exceptions.

P. C. Knox, for report.

KETCHAM, District Judge. In the matter of the exceptions to the report of Register Harper, ascertaining liens and distributing the fund arising from the sale of real estate, filed February 16, 1877:

First. The register should have allowed interest on the demand in this case up to the date of making up his report. It is not practicable to allow it beyond that date, as his report, when confirmed, must furnish the schedule of distribution in pursuance of which payment is to be made. He allowed interest up to September 15, 1876. He made up his report on February 15, 1877. Therefore interest for five months longer should be added to the amount reported. The amount of principal debt is three thousand and seventy-two dollars and sixty-five cents. The interest thereon for five months, and which should be added to the amount reported, is seventy-five dollars and fifty-four cents.

Second. The register made no error in reporting against the costs of the scire facias and the commissions of five per cent. as part of the expense of foreclosure of the mortgage by scire facias. The mortgage was not foreclosed. No legal and valid proceeding to foreclose was either carried to conclusion or commenced. The mortgage debtor was adjudicated bankrupt in February, 1876. The mortgagee, in June, 1876, issued a scire facias, not against the assignee in bankruptcy, but against the bankrupt, and without notice to the assignee, and procured the bankrupt's acceptance of service of the scire facias, and proceeded no further. The proceeding, as far as it went, was utterly invalid, for it was a suit upon a scire facias with but one party—without a defendant—and never could have been carried to a judgment that would bind the property

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in the hands of the assignee. It was a nullity, and no consideration for the five per cent. commission and costs stipulated to be paid on foreclosure. Moreover, there was no necessity for issuing the scire facias against anybody. The assignee in bankruptcy was appointed, and his appointment approved March 28, 1876. On May 29, 1876, he applied to the court and obtained an order to sell the mortgaged premises, and sold them July 8, 1876, discharged of liens, and produced the money distributed. In June, 1876, after the order of sale was granted to the assignee, the plaintiff's attorney says he issued his scire facias against the bankrupt and got his acceptance of service. For what purpose, with an order of sale out? The cases in first and second Otto, cited by counsel for exceptant, have no application to the case. In the case in first Otto, the scire facias had been served upon the mortgagors, and the court had jurisdiction of the proper parties and had proceeded within a few days of a decree of foreclosure before the defendant went into bankruptcy. The decree was entered without noticing the assignee in bankruptcy, and was valid against the assignee as against any other alienee or transferee pendente lite. In the case in second Otto, there was no question of parties; it was altogether a question of jurisdiction of the circuit court. But the bill in chancery originally went against the defendant, a bankrupt, and, on ascertaining the bankruptcy, it was afterwards amended, and the assignee was substituted, showing the necessity of making the assignee the defendant. We do not deem it necessary or important in this case to discuss the jurisdiction of the common pleas of Fayette county in the proceedings to foreclose this mortgage, in case it had gone on to foreclosure, yet there is no doubt that when the bankrupt court, as in this case, had first taken jurisdiction by ordering a sale of the mortgaged premises, discharged of liens, it ousted the jurisdiction of the common pleas. Both jurisdictions cannot deal with the same case at the same time.

Therefore, to conclude: The first exception is sustained and the report amended by awarding to the mortgagee's claim the aforesaid additional amount. The second exception is overruled and the report confirmed as to that.

Case No. 3,848.

DEWEES' CASE.

[Chase, 531.][1]

Circuit Court, D. North Carolina. June, 1869

MEMBERS OF CONGRESS — UNLAWFUL FRANKING — INDICTMENT — TRANSMITTING CIRCULARS.

1. An indictment against a member of congress for unlawfully franking, need not charge that he franked any letter as a member of congress, nor that he was a member of congress when the offense was committed. If this were otherwise, the indictment charging that "J. T. D., member of congress," committed the offense, sufficiently charged that he did it whilst a member of congress.

2. In an indictment for a statutory offense, it is sufficient if the offense be substantially set forth, though not in the precise words of the act.

3. An allegation in an indictment that a member of congress franked letters, not written by himself, namely, envelopes which he consented should be used by one C., for the purpose of transmitting through the mail certain matter properly chargeable with postage, sufficiently excludes the possibility that the letters were written by the order of the defendant on the business of his office.

4. Though it is unlawful for a member of congress to frank envelopes to be used in transmitting printed circulars through the mail, it is not penal. Such do not come within the meaning of the word "letters" in the act of 1825.

[Cited in U. S. v. Huggett, 40 Fed. 642.]

John T. Dewees, the representative in the congress of the United States from the Raleigh district in the years 1868-9, made some arrangement with one Cunningham, by which the latter was enabled to transmit his business circulars through the mails without paying postage thereon. The circulars were printed, sealed up in envelopes, franked by Dewees as member of congress; or the franked envelopes were furnished by Dewees, and used by Cunningham, it did not appear which. For this he was indicted in this court, and found guilty by a jury. Whereupon he moved in arrest of judgment that the indictment described no offense for which punishment was denounced by the laws of the United States.

CHASE, Circuit Justice. An indictment was found against the defendant, charging that he, a member of congress, franked letters, not written by himself, namely, envelopes which he consented should be used by one Cunningham for the purpose of transmitting through the mail, free of postage, certain mailable matter properly chargeable with postage; which franked envelopes were used by Cunningham. Upon this indictment the jury found the defendant guilty.

A motion has been made in arrest of judgment. The ground of the motion is that the act described in the indictment did not constitute the offense of franking letters in violation of law within the meaning of section 28 of the act of March 3, 1825 [4 Stat. 110]. It is more particularly insisted, first, that the indictment does not allege that Dewees franked any letter as a member of congress; second, that it does not negative the conclusion that the letters were written by others under his direction, and on the business of his office; and, third, that a printed circular letter, contained in a sealed envelope, is not a letter within the meaning of the act of 1825.

That act provides that, "if any person shall

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frank any letter or letters other than those written by himself, or by his order, on the business of his office, he shall, on conviction thereof, pay a fine of ten dollars."

The first objection may, therefore, be easily disposed of. The penalty is pronounced against any person who commits the offense of unlawful franking. It was sufficient, therefore, to allege that Dewees committed the offense without alleging that he was a member of congress. If this were otherwise, we think that the indictment which charges that John T. Dewees, member of congress, committed the offense, is a sufficient allegation that he was a member of congress when the offense was committed.

Nor do we think that more weight should be given to the second objection. In an indictment for a statutory offense, it is sufficient that it is substantially set forth, though not in the precise words of the act. U. S. v. Bachelder [Case No. 14,490]; U. S. v. Pond [Id. 16,067].

In the present case the fact that the letters were not written by the order of the defendant on the business of his office, is sufficiently negatived by the affirmation that the envelopes which he franked were used, with his consent, by Cunningham, for the purpose of transmitting free through the mail matter chargeable with postage.

The only serious question is that presented by the third objection, that the franking of envelopes for the transmission of printed circulars through the mail is not the franking of letters within the meaning of the act. It is not denied that the franking of these envelopes, for the purpose intended, was a violation of the law.

The franking privileges of members of congress cover only correspondence to and from them, printed matter issued by authority of congress, speeches, proceedings and debates in congress, and printed matter sent to them. It is very clear that the circulars franked by the defendant did not come within either of these descriptions. The franking, therefore, was unlawful. But, is it made a penal offense by the act of congress? The answer to this question depends on the meaning of the word "letter" as used in the act.

It is strenuously insisted on behalf of the defendant, that the word means only a manuscript letter. In support of this view, it is urged, that the act itself in denouncing a penalty for franking letters other than those written by the franker, implies that the letters, of which the franking is made an offense, must be written letters, and this view seems not unreasonable.

It is further insisted that this construction is supported by the provisions of the act of 1863 (12 Stat. 705), describing mailable matter as consisting, first, of letters; second, of regularly issued printed matter; and third, of miscellaneous matter. In these classes of mailable matter, the first alone embraces correspondence, wholly or partly in writing. The other classes embrace printed matter, with an addition, in the third class, of book manuscripts, and proof sheets, corrected or uncorrected.

This definition of letters as correspondence, wholly or partly in writing, necessarily excludes from the definition printed circulars, whether in the form of letters or otherwise. It does not leave us at liberty to say that the word "letter" or "letters," other than those written by himself or by his order, in the above section of the act of 1825, includes any letters, not partly, at least, in writing. The indictment in this case, does not charge that the letters described in it were written, either wholly or in part, and the proof before the jury was that the circulars alleged to have been franked were printed.

It follows that the indictment does not describe an offense within the meaning of the penal provision of the act of 1825. It describes only an unlawful act to which congress has not seen fit to annex a penalty. No judgment, therefore, can be entered upon the verdict. The motion in arrest must be granted.

Case No. 3,849.

In re DEWEY.

[1 Lowell, 493;[1] 4 N. B. R. 412 (Quarto, 139).]

District Court, D. Massachusetts. Dec., 1870.

BANKRUPTCY—REMOVAL OF ASSIGNEE—DISCRETION OF COURT.

1. The bankrupt act [of 1867 (14 Stat. 525)], § 18, requires the court to exercise a judicial discretion in affirming or refusing to affirm the action of creditors in the removal of an assignee.

2. When it appeared that a majority of creditors in number and value had duly voted to remove the assignees, but that the creditors were few, and several of them voting for the removal were parties to mortgages and other transactions which the assignees were seeking to impeach, and that the whole movement was made by and on behalf of such parties, and no money remained in the hands of the assignees, and nothing remained to be done by them excepting to settle those disputes, the court refused to remove the assignees.

[In bankruptcy. In the matter of Edward Dewey.]

H. D. Hyde, for petitioners.

R. M. Morse, Jr., for respondents.

LOWELL, District Judge. A majority in number and value of the creditors in this cause petitioned the court to appoint a meeting, as required by section 18, that a vote might be taken upon the removal of the assignees. At the meeting the requisite majority voted to remove them, and this action is reported to me for my consent. The statute which makes that consent necessary, and the form prescribed by the supreme court, which contemplates that the reason for removal should be stated in the petition,

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

seem to require that I should exercise a judicial discretion in the matter, notwithstanding the action of the creditors.

The case shows that the bankrupt was a wholesale dealer in whiskey, and that at the time of his bankruptcy part of the goods which he had bought had been replevied by the sellers, the rest being in the hands of mortgagees or pledgees. The assignees have defended the replevin suit, and have brought suits in equity in this court against the mortgagees. In these last suits decrees were made by me, by the written consent of the parties, requiring the assignees to sell the whiskey at retail, for cash, and pay the money into court, and authorizing the mortgagees to have the money paid out to them, pending the litigation, on security for its repayment in case the final decree should be against them. All this has been done; and the payments to the mortgagees have absorbed all the proceeds. There are no assets in the estate, unless the assignees prevail either in the replevin suit or in one or both of the suits in this court.

The creditors allege that the assignees misconducted the sales of the whiskey, so that they failed to obtain as much as they might have got by about two thousand dollars. On the other hand, the assignees say that they are amply able to respond to any sum which they ought to pay, if any thing, in respect to the sales; and that the movement for their removal has been originated and conducted by and on behalf of the parties to the suits above mentioned. And there is nothing remaining in the hands or under the control of the assignees but the settlement of these suits. The evidence shows that these statements are true, and an examination of the vote of the eight creditors constituting the majority, taken in connection with the evidence, places the matter beyond doubt. I am always ready to hold assignees to a strict account, and shall do so in this case, but I hesitate to remove them in a case where such a course may operate the very opposite effect from what is intended by the law, and may be held as a precedent for punishing assignees for too great zeal in the conduct of their office. It is not alleged that the defendants are acting oppressively or in bad faith in the conduct of the suits, and I am unwilling to admit that the parties opposed in interest to the official action of assignees should have the power to dictate their conduct, even if they happen to be able to command a majority vote of the creditors themselves. It is not the intention of the law that the majority should have absolute control over the rights and interests of the minority. That the new assignee whom the creditors have chosen is a gentleman of high character does not meet this difficulty. The great danger is in the precedent of making the removal under the peculiar circumstances of this case. Consent refused.

DEWEY (ALDEN v.). See Case No. 153.

DEWEY (BANK OF NORTH CAROLINA v.). See Case No. 897.

DEWEY (HOLLEMAN v.). See Case No. 6,607.

Case No. 3,850.

DEWEY v. KELTON et al.

[18 N. B. R. 217.][1]

District Court, D. Vermont. Aug. 6, 1878.

BANKRUPTCY—EQUITABLE CLAIMS—PAYMENT.

In 1872 the bankrupt sold certain government bonds belonging to his sister, which were then in his hands, and out of the avails paid and took up a mortgage note which then fell due, secured on certain real estate, and kept the balance to his own use. At that time he also owed his sister for a balance of interest he had previously received, and had other government bonds of hers which he had or afterwards pledged for his debts. During the following six years he paid her money from time to time, which was charged against the interest received by him upon her bonds, and not otherwise applied by either. *Held*, that she was entitled to be treated as if she had held the mortgage from the time he took it up; that the payments should be applied upon the interest and not to the balance of avails of the sale; and that she was entitled to a lien for the payment of the sum found to be due to her after application of such payments.

[This was a suit by Jane E. Dewey against S. S. Kelton, assignee in bankruptcy, and John P. Dewey, the bankrupt.]

S. C. Shurtliff, for oratrix.

B. F. Fifield and Gleason & Field, for defendants.

WHEELER, District Judge. This cause has been heard on pleadings, proofs and arguments. It appears beyond question that the bankrupt defendant, John P. Dewey, on the 26th day of April, 1872, sold government bonds amounting to three thousand dollars then in his hands, most of which belonged to the oratrix, his sister, and the rest either to her or their mother, for three thousand four hundred dollars and fifty cents net, and out of the avails paid and took up a mortgage note of two thousand four hundred and thirty-six dollars, due that day with interest annually, on which two years interest amounting to three hundred and one dollars and eight cents had accrued, secured on the premises in question owned by him.

There is some confusion on the evidence as to which, she or her mother, owned the bonds sold; they were not clearly hers, but on the whole it satisfactorily appears that upon the understanding between her and her mother and the bankrupt they were hers. They were so sold and the avails so used without her knowledge or consent. They were left with him to be taken care of, exchanged for others if he should think best, and to have the coupons collected. It is claimed in behalf of the assignee that the transaction

[1] [Reprinted by permission.]

created a mere debt. But they were her bonds in his hands to be held for her, not his bonds in his hands for which he owed her. She had trusted to his care, not his responsibility. He held them in trust, not as his own. He converted them in violation of the trust.

In Story, Eq. Jur. § 1258, it is said: "Whenever the property of a party has been wrongfully misapplied, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or cestui que trust." And in section 1259: "It matters not in the slightest degree into whatever other form different from the original the change may be made, whether it be that of promissory notes, or of goods, or of stocks, for the product of the substitute for the original thing should follow the nature of the thing so long as it can be ascertained to be such: The right ceases only when the means of ascertainment fail, which of course is the case when the subject matter is turned into money and mixed and confused in a general mass of property of the same description." These doctrines are recognized in the laws of the state, which always govern as to such rights of property (Abell v. Howe, 43 Vt. 403); and by the highest judicial tribunal of the land (Cook v. Tullis, 18 Wall. [85 U. S.] 332). The money that these bonds brought went directly to take up this mortgage. It is distinctly traceable there. The mortgage constitutes a title to the property to that extent. He in effect bought it with her property. As against him, in a court of equity, she had the same right to the property that she would have had in it if she had bought the mortgage and taken it. She had the right to say that what was done with her property was done for her. By the transaction an equitable right to the mortgaged premises equal to the mortgage interest became vested in her if she should choose, as she has chosen, to take it. The bankrupt law cuts off no such rights. It merely takes the property of the bankrupt as it is, subject to all trusts, and distributes it among the creditors. This has always been the policy of bankrupt laws. Scott v. Surman, Willes, 400; Cook v. Tullis, 18 Wall. [85 U. S.] 332. The assignee takes no right other than the bankrupt has, except as to property conveyed in fraud of the rights of creditors, or of certain provisions of the bankrupt law, and this property was not conveyed by the bankrupt at all. It was rather kept by him by conveying hers in fraud of her rights. His creditors supposed, when they trusted him, that he had paid off the mortgage with his own means, and that he owned the property clear. He held himself out as such owner. It is claimed for the assignee in behalf of the creditors, that it is inequitable for her now to claim the benefit of the mortgage against them. But it is not shown that she has ever done anything to mislead them. They do not appear to have inquired of her about it, and if they had, she could not have told them, for she did not know more than they did that her bonds had paid off the mortgage. It is the common case of creditors deceived as to the property of their debtor. They cannot justly claim that others who have not deceived them shall give up their rights.

She seems entitled to stand and be treated here as if she had held the mortgage from the time he took it up. He owed her at that time one hundred and two dollars and seventy cents, for a balance of interest he had previously received. He had five hundred dollars of other goverment bonds that belonged to her, which he had, or has since, wrongfully pledged for his debt. He kept the balance of the avails of these bonds sold, six hundred and sixty-three dollars and forty-one cents, to his own use. He has through his firm paid her money from time to time since, which they mutually understood was to apply upon the interest received by him on her bonds, and it was charged against credits for such interest, and not otherwise applied by either. He became indebted to her for the balance of the avails of the sale. It is claimed that the payments should be applied upon that debt. He had the right to make the application of any payment made by him. If he made none, she had the right. They both applied them upon the interest generally. Although she did not know of the other debt, it does not seem that she has the right to change the application, now she has found it out, more than she would have had if she then had known of it. So it must be applied upon the interest. There has been no application on any particular interest. There are several sorts to which the law must make the application. By the law of the state, payments not otherwise applied are to go first to extinguish the oldest debts to which they are applicable. St. Albans v. Failey, 46 Vt. 448; Langdon v. Bowen, Id. 512. And where one is secured and the other not, to the one not secured. Briggs v. Williams, 2 Vt. 283. He received the avails of the coupons on the five hundred dollars of the bonds pledged, or the benefit of them on his debts. The oldest debt due her for interest was the balance of one hundred and two dollars and seventy cents. This was all the interest he owed her besides the three hundred and one dollars and eight cents accrued interest on the notes. He paid her during the first year after, applicable, according to their expectations, to what was due then, one hundred and seventy dollars; during the second year, one hundred and seventy-six dollars and sixty-five cents; during the third, one hundred and twenty-five dollars; during the fourth, one hundred and thirty dollars; during the fifth, one hundred and forty-five dollars and twenty cents; and during the sixth, before the proceedings in bankruptcy, fifty-one dollars.

Applying the first payment first to the balance of interest due, then to the interest on

interest due on the mortgage, and subsequent payments to, first, the gold interest on the five hundred dollars of bonds pledged, then to the interest on the six hundred and sixty-three dollars and forty-one cents, the balance of the avails of the sale, then to interest on interest due on the mortgage, then to interest on the mortgage, and there remains due at the commencement of the bankruptcy proceedings three thousand three hundred and ninety-one dollars and eight cents, and which leaves paid all sums due from the bankrupt to the oratrix, including sales of coupons to April 26, 1878. She is entitled to a lien equivalent to a mortgage lien for the payment of that sum. And as the mortgage was given for the purchase-money, and would have been valid against the homestead right of the bankrupt, so is her lien valid against it. As the whole matter is before the court, she is entitled to a decree as of a foreclosure with the usual time of redemption. Let a decree be entered for the oratrix that she is entitled to a lien equivalent to a mortgage lien upon said premises against the assignee and the bankrupt for the said sum of three thousand three hundred and ninety-one dollars and eight cents, which with interest to the present time amounts to the sum of three thousand four hundred and seventy-five dollars and ninety-five cents, and for a foreclosure, with one year from this sixth day of August, 1878, within which to redeem said premises by payment of the last-mentioned sum with interest to the time of payment and costs.

DEWEY (UNITED STATES v.). See Case No. 14,956.

DEWEY (WALLACE v.). See Case No. 17,099.

Case No. 3,851.

DE WITT v. BROOKS.

COPYRIGHT—WHO ENTITLED TO—WRITER EMPLOYED BY ANOTHER.

1. A person who hires another to write a book, and gives him the description and scope of the work, is not the author. The literary man who writes the book and prepares it for publication is the author, and the copyright is intended to protect him, and not the person who employed him.

2. Where the incidents and events of a person's life were furnished by such person to another, who prepared them for publication, and the copyright was taken out in the name of the person so furnishing such facts, *held*, that he was not the author, and that a party claiming as his assignee could not maintain an action for infringement.

[The points stated as above are taken from Law, Dig. 174, 642. Nowhere more fully reported; opinion not now accessible.]

DE WITT (BUNKLEY v.). See Case No. 2,134.

DE WOLF (BROWNELL v.). See Case No. 2,037.

DE WOLF (FEARING v.). See Case No. 4,711.

DE WOLF v. HARRIS. See Case No. 4,221.

Case No. 3,852.

DE WOLF v. HOWLAND et al.

[2 Paine, 356.][1]

Circuit Court, Second Circuit.

SHIPPING—PART OWNERS—PARTNERSHIP—FACTORS AND BROKERS—LIEN FOR ADVANCES.

1. Where A. and B. purchased the ship S. and her cargo, on account of themselves, and C. and D., in equal third parts, and it was agreed between the parties that C. should go as master and supercargo, the outward cargo to be consigned to C., and A. and B. made all the advances both for ship and cargo, and were constituted the agents and factors in New York for the several parties, and the return cargo was to be consigned to them for sale on account of the concern, *held*, that the parties interested in this adventure could not be considered partners, but must be deemed tenants in common, each one having a right over his separate share, according to the rules of law applicable to such an interest in chattels, and not to be governed by the law of partnership.

2. *Held*, further, that A. and B., so far as related to the interest or share of D., must be considered his agents or factors, and that they had a right to retain out of his share of the proceeds of the adventure, for their advances and disbursements in his behalf.

3. A. and B. drew a bill of exchange on D. for their advances, which was accepted by D. but not paid; and, subsequently to the acceptance of the bill, but before it fell due, D., having failed, transferred his interest in the ship and cargo then at sea, to E., for a pre-existing debt. *Held*, that the bill drawn on D., by A. and B., was not a waiver of their lien on the proceeds of the cargo, especially as E. had notice of their claim.

4. And E. having filed a bill for a discovery and account of the proceeds of the cargo, one-third of which he claimed under D., it was *held* that he had no superior equity upon which he could rest his claim to overreach the lien of A. and B.

5. *Held*, however, that as A. and B. were not acting in the character of general factors, but were constituted such under the particular arrangement in relation to this adventure, that their lien must be limited to their advancements for D. on account of the outward cargo, and not for the general balance of their account against him.

[This was a bill in equity by Charles De Wolf against Gardiner G. Howland and Samuel S. Howland.]

THOMPSON, Circuit Justice. The facts upon which this case must turn, are to be collected from the bill and answer, one witness only having been examined, barely to prove the execution of an assignment by George De Wolf to the complainant.

The object of the bill is for a discovery and account of the proceeds of the cargo of the ship Superior, one-third of which the complainant claims under George De Wolf.

[1] [Reported by Elijah Paine, Jr., in 2 Paine, which covers the period from 1827 to 1840. Date of this opinion not given.]

From the bill and answer it appears, that in September, 1825, the defendants purchased the ship Superior and her cargo, on account of themselves, and Jacob Smith and George De Wolf, in equal third parts; that it was agreed between the parties, that Smith should go as master and supercargo, the outward cargo to be consigned to Smith. The defendants made all the advances both for ship and cargo, and were constituted the agents and factors in New York for the several parties, and the return cargo was to be consigned to them for sale, on account of the concern. On the 3d of October, after the ship sailed on her voyage, George De Wolf wrote the defendants to send him a statement of the costs of the ship and cargo, and when due, that he might remit his proportion. On the 20th of October the defendants sent him the amount, and drew on him two bills of exchange—one for the one-third of the cost of the ship, and the other for one-third the amount of the cargo, payable at the average times when the payments for the ship and cargo would fall due. The only question now before the court relates to the cargo, the bill for which bears date on the 10th of October for $4,297.97, payable on the 8th of January then next. This bill was accepted by George De Wolf, and returned to the defendants, who still hold the same, it never having been negotiated by them or in any manner whatever paid or satisfied. George De Wolf failed some time in the month of December, and on the 22d of that month he transferred his interest in the ship and cargo, then at sea, to the complainant, the consideration for which was the payment, by the complainant, of a note which he had endorsed for George De Wolf, dated the 4th of October, 1825.

These are the leading facts in the case. There are others which have a strong bearing upon the result, which will be noticed hereafter; and the main question, under these circumstances, is, whether the defendants have a right to retain, out of the proceeds of the return cargo, enough to satisfy themselves for their advances for George De Wolf, on the purchase of the outward cargo; or whether the complainant is entitled to the same under his assignment from George De Wolf. The parties interested in this adventure cannot be considered partners,[2] but must be deemed tenants in common, each one having a right over his separate share, according to the rules of law applicable to such an interest in chattels, and not to be governed by the law of partnership. This would be the obvious conclusion, from the particular arrangement between the parties in this case, and is the light in which the law generally considers such adventures. Jackson v. Robinson [Case No. 7,144], and cases there cited; 4 Pick. 456, 457; Term R. 119, 783.

The defendants, so far as respects the interest or share of George De Wolf, must be considered his agents or factors. They were expressly so constituted by the original arrangement between the parties, and the re-

[2] A person who contracts for a share of the profits of a particular trade or business, as profits, is a partner as to third persons, and is liable for the debts of the partnership. Chase v. Barrett, 4 Paige, 148. Whether a partnership exist, as to creditors, between a merchant and a mere servant or agent of his, who contracts with the merchant for a share of the actual profits as a reward for his services, and who is not held out to the world as a partner? Quaere. Id. To constitute a partnership as between the parties thereto, there must be a joint ownership of funds, and an agreement, either express or implied, to participate in the profits or loss of the business. Id. By articles of agreement, the members of an insurance company covenanted together, that in case of losses, over the above sum subscribed originally for a capital, each member should bear such part of the loss as was proportioned to the sum by him originally subscribed. This is an ordinary partnership; the members are bound in solido, each for the whole; not only as to strangers, but as to members of the company who have procured insurance. Shubrick's Ex'rs v. Fisher, 2 Desaus. Eq. 148. A proposal by a partner here to another in England to renew a copartnership, just expiring, which was received by the partner in England, and acted upon, by shipping goods, without charging commissions, and other partnership acts, is binding on both. But it may be dissolved in the same informal manner, by mutual consent, implied from the acts of both parties. And one of them shall not afterward be allowed to set up a claim to share in the profits of a new business, such as the commission business, entered into by the other, to which the former contributed neither money, stock nor labor. Dickinson v. Bold's Survivors, 3 Desaus. Eq. 501. The private association of stockholders of the North River Steam Boat Company, is not a copartnership; but the parties are tenants in common of the property and franchises belonging to the company. And in such association, the majority cannot bind the minority, unless by special agreement. Livingston v. Lynch, 4 Johns. Ch. 573. Where a defendant denied in his answer that he was a partner in a company, and there was no proof of his being so, the partnership shall not be presumed from equivocal circumstances. State v. Penman, 2 Desaus. Eq. 1. Though the part owners of a ship, generally speaking, are tenants in common, and not partners or joint-tenants, yet it seems there may be a special partnership in the ship as well as the cargo, in regard to a particular adventure, and the proceeds arising from the sale of them, and the profits of the adventure. Mumford v. Nicoll, 20 Johns. 611. Owners of freight and cargo are partners. Id. The assignees of a bankrupt partner under a separate commission, are tenants in common with the solvent partner, and one cannot call the joint property out of the hands of the other. Murray v. Murray, 5 Johns. Ch. 70. The question considered whether owning a ship employed in trade by several indistinct shares constitutes a partnership. Ch. Desaussure's opinion that it is a partnership, and carries with it all its incidents. Seabrook v. Rose, 2 Hill, Eq. 555. No one partner is entitled to compensation for his services unless there is a special agreement. Nor is he to be allowed for the interest on money advanced to the firm until a general settlement or dissolution. Lee v. Lashbrook, 8 Dana, 214.

Where a special partnership was intended to be formed under the statute, but in one of the newspapers in which the terms were published, the sum contributed was, by mistake of the printer, stated at a different and larger sum

turn cargo came consigned to them, according to the express agreement between the parties. This would clearly give to the defendants a right to retain for their advances. Particular liens of factors are rather favored in the law, as being for the convenience and benefit of trade. They sometimes grow out of the express contract between the parties, and sometimes are implied, from the usage of trade, or the manner of dealing between the parties in the particular case. In Bradford v. Kimberly, 3 Johns. Ch. 431, it is said to be well settled, that a factor may retain the goods or the proceeds not only for the charges incident to that particular cargo, but for the balance of his general account; and this allowance is made not only whilst the goods remain in specie, but after they are converted into money; and that this is a very equitable doctrine, especially when the acceptances and responsibilities were assumed, or necessarily presumed to have been assumed, upon the credit of the property in his possession. The language here used applies with peculiar force to the case now before the court, and is sustained by the well-settled law applicable to the rights of factors; and, indeed, this general principle did not seem to have been questioned on the argument; but the main point pressed upon the court, and which indeed presents the only difficulty in the case, is, whether the bill drawn upon George De Wolf by the defendants, for their advances on his account, was

than the true sum mentioned in the certificate, the associates were all held liable as general partners. Argall v. Smith, 3 Denio, 435. And to maintain an action against the associates in such case as general partners, the plaintiff need not prove that he was actually misled by such mistake of the printer. Smith v. Argall, 6 Hill, 479. A man in business may employ another, and agree to compensate him by a share of the profits without conferring on him the rights or subjecting him to liability as a partner, even in respect to third persons. Burckle v. Eckart, 1 Denio, 337. Where one of the parties to a contract for manufacturing is to furnish the building, &c., the other to superintend the work, &c., the former to receive a share in the profits, they are partners as respects third persons. Everett v. Coe, 5 Denio, 180. Where two persons are jointly concerned in the building of a mill, the promise of one to pay for advances made will not bind the other. The community of interest does not create them partners; to constitute them such, there must be an agreement ultimately to share in the profits and loss. Porter v. McClure, 15 Wend. 187. There is no partnership in real estate; the parties are tenants in common. Baker v. Wheeler, 8 Wend. 505; Coles v. Coles, 15 Johns. 160. But tenants in common in timber land, who are also partners in the lumber business, are partners of the timber when converted into logs. Id. The plaintiff employed the defendant to procure consignments for him, and to act as his agent in certain mercantile business, to be carried on in the name of the plaintiff. The defendant, as a compensation for his service, was to receive one-half of the profits of the business; but he had no authority to contract in the name of the plaintiff, nor was he to be liable to third persons for any responsibilities created for the concern. No profits were ever realized, but on the contrary, losses ensued, and the plaintiff brought an action of assumpsit against the defendant for money had and received to his use, as appeared by the books which the defendant had kept; held, that the foregoing acts did not constitute such a partnership between the parties as would bar the action at law; and the plaintiff having recovered a verdict against the defendant for the balance of his account, the court refused to set it aside. Ross v. Drinker, 2 Hall, 415. Two persons agree to burn lime on shares, one to fill a kiln with stone and the other to burn the kiln and to furnish the necessary wood for that purpose, the lime to be equally divided between them; held, that a technical partnership existed between the parties. Musier v. Trumpbour, 5 Wend. 274. Notwithstanding the partnership, however, an action at law may be maintained by one partner against the other for a balance due him, growing out of the partnership transaction, if there be but a single item to liquidate. Id. The defendants being engaged in the transportation of freight, &c., between the city of New York and various places west, by way of the Hudson river and canals, made an arrangement with the Mohawk and Hudson Railroad Company by which it was mutually agreed that the defendants should deliver up their freight, &c., to the company at Albany, and their down freight at Schenectady—the termini of the railroad—the company to transport the freight and passengers over their road, &c., and the defendants to pay therefor in the proportion that thirty miles bore to the whole distance of canal transportations west of Albany, assuming the contract price fixed between the owner of the freight and the defendants as the basis of the calculation; held, in assumpsit by the company to recover for the transportation, that the arrangement did not constitute a partnership between the parties; and this though it was further agreed that the company should furnish "warehouse facilities," and pay a portion of the expense of offices at each end of their road. Mohawk & H. R. Co. v. Niles, 3 Hill, 162. An arrangement like the above will not constitute a partnership between those making it, even in respect to third persons. Id. Where two persons jointly became the owners of a quantity of salt, and one of them, with the assent of the other, took it to market, under an agreement that everything should be done to forward the business, and the salt turned into money; it was accordingly sold, and the proceeds applied to the payment of a joint debt; held, that these facts composed the necessary ingredients of a limited partnership. Cumpston v. McNair, 1 Wend. 457. Where there is no dispute as to the material facts relative to the existence of a partnership, it is a question of law to be decided by the judge not to be submitted to the jury; but where the question was submitted to them, and they found in accordance with the opinion of the court, a new trial was refused on this ground. Id. Where an agreement was entered into to form a joint stock company for the purchase of a steam brig, the terms of which were that the stock should consist of $25,000, to be divided into one hundred shares, one-fourth of the subscription to the stock to be paid on delivery of the bill of sale of the vessel, and the residue by instalments, and a payment was made to the owners of the vessel, by one of the subscribers, of ten per cent. upon the amount of his subscription, and the vessel was subsequently destroyed by fire previous to a delivery of her or the execution of a bill of sale, it was held, that the vessel was at the risk of the owners until the bill of sale was executed; that until then, or an actual delivery of the vessel, there was no partnership in the case; and it having become impossible for the owners of the vessel, in consequence of its destruction, to comply with the contract on their part, the consideration on which the ten per cent. was paid had failed, and the party was entitled to recover it back. Murray v. Richards, 1 Wend. 58.

not a waiver of their lien. If the complainant is chargeable with notice of the defendants' claim upon the proceeds of the cargo, he can stand in no better situation than George De Wolf himself would have stood in; and that he is chargeable with such notice would seem fairly inferable from his own statement in the bill. He states that the parties in interest were each owners of one-third part of the cargo, and that the bill of exchange was drawn by the defendants upon G. De Wolf for their advances and disbursements for his one-third part of the cargo, and made payable on the 8th day of January then next, which was some time after the assignment made by G. De Wolf to the complainant. He must, therefore, have known that the defendants made the advances for the purchase of the outward cargo, and that they had not been reimbursed for the same. The bill does not allege any want of notice; nor could the complainants have been misled by any apparent ownership in George De Wolf. He had, in no sense whatever, the possession of the goods; nor was it a purchase made by the complainants, but only an assignment for a pre-existing debt —a mere security from an insolvent debtor. He has, therefore, no superior equity upon which he can rest his claim to overreach the lien of the defendants. If George De Wolf was the party before the court, he would come with a very ill grace calling for these proceeds without reimbursing the defendants for their advances, as between them the drawing and accepting the bill was manifestly a mere mode of payment; it did not extinguish the original contract. The defendants might have brought their action against him for the advances, and surrendered up this bill. The bill was made payable at the time when payment for the purchase of the cargo fell due; and there are no circumstances tending in any measure to show that the bill was intended as a substitute for the lien which the defendants had upon the cargo and its proceeds. And if, as has been already observed, the complainant stands in no better situation than G. De Wolf would, he, as assignee, must take these proceeds, subject to the same equity to which they were subject in the hands of the assignor. 1 P. Wms. 496; 1 Vern. 691, 764; 1 Ves. Sr. 123; 4 Ves. 121; 2 Johns. Ch. 448; Ross v. The Active [Case No. 12,070]; U. S. v. Sturges [Id. 16,414].

It is not to be denied that some of the cases to be found in the books go very far in asserting, as a general proposition, that as to personal chattels an implied lien is waived by taking security for the debt. But no case has fallen under my observation to sustain such an unqualified rule; they are always attended by circumstances indicating that such was the intention of the parties. The case of Cowell v. Simpson, 16 Ves. 278, which has been much relied upon, turned upon the particular circumstances leading to the conclusion that the lien was intended to be waived. There was a credit of three years given in the note taken, and this was considered of great weight by the court to show the understanding of the parties. And this, together with the inconvenience it would occasion to hold the lien for such a length of time, were the controlling circumstances which governed the decision in that case; and that the rule was here carried to its full extent would seem inferable from what fell from the court in Stevenson v. Blakelock, 1 Maule & S. 541, where it is said it is unnecessary to canvass the doctrine in that case, for then the bills were running, and there was no reason to presume they would not be paid; but in this case the bills have been refused payment, which places the defendant in the original situation as to the lien. This latter remark applies directly to the case now before the court. The bill has not been paid by George De Wolf, and he became insolvent before it fell due, and the defendants ought, upon every principle of justice and equity, to be placed in their original situation as to the lien. So far as the mere circumstance of taking a note or bill may be considered as indicative of an intention to waive an implied lien, it is not perceived that any solid distinction can exist between the cases of an implied lien which the vendor of real estate has for the purchase-money, and an implied lien upon a chattel; and in the former description of cases it is laid down in Garson v. Green, 1 Johns. Ch. 308, that the taking a note for the purchase-money does not affect the vendor's lien. See, also, 1 Schoales & L. 132; 6 Ves. 752; 15 Ves. 329. Where a distinct and independent security is taken either of property or the responsibility of a third person, it might very fairly be construed a waiver of the implied lien. Every case must, therefore, depend, in a great measure, upon its own circumstances, with a view to ascertain the intention of the parties. And this case furnishes no circumstances warranting the conclusion that the defendants intended to waive their lien, and rely upon the personal security of George De Wolf.

This lien must, however, be limited to their advances and disbursements for George De Wolf, on account of the outward cargo, and not for the general balance of their account against him. They were not acting in the character of general factors, but constituted such under the particular arrangement in relation to this adventure. The defendants must, therefore, account to the complainant for the net proceeds of one-third part of the outward and return cargoes, after deducting all legal and customary charges thereon. A decree must, accordingly, be entered conformably to the principles here laid down. See Murray v. Lazarus [Case No. 9,962].

DE WOLF (MACY v.). See Case No. 8,933.

Case No. 3,853.

DE WOLF v. TWO HUNDRED AND SIXTY-SIX HOGSHEADS AND THIRTY-ONE TIERCES MOLASSES.

[N. Y. Times, July 20, 1858.]

District Court, S. D. New York. July 19, 1858.

CHARTER PARTY—LIEN—FREIGHT.

[This was a libel by Benjamin De Wolf and others, owners of the brig Europa, against two hundred and sixty-six hogsheads and thirty-one tierces of molasses (Thomas R. Gordon and others, claimants), to enforce a lien for money due under a charter party.]

HALL, District Judge. As against Herrira, Meyer & Co. the libelants in this case had no lien upon the cargo of the Europa beyond the amount of the freight mentioned in the bill of lading; but as against Gordon & Co., the charterers, they had a lien for the amount due under the charter party. If the draft of Herrira, Meyer & Co. had not been paid, they would have had a right (as against the libelants) to the possession of the molasses shipped, on paying the stipulated freight only; and the question in this case is therefore whether the claimants have succeeded to the rights of Herrira, Meyer & Co., or those of Gordon & Co., in the payment by the latter of the draft of Herrira, Meyer & Co.

It is insisted by the claimants that Gordon & Co. acted as their agents in paying the draft of Herrira, Meyer & Co.; that they in fact paid the amount paid through their agents; and that they have the same rights which Herrira, Meyer & Co. had, prior to such payment, or rather on Gordon & Co. failing to make payment of their draft. On the other hand, it is insisted that Gordon & Co. are still the sole parties interested in defeating the libelant's claim, and that the claimants had no interest in the cargo libeled.

It is clear from the evidence that the draft of Herrira, Meyer & Co. (deducting the discount allowed) was paid by Gordon & Co., by the check of the claimants, for an amount greater than the sum paid, without expressly declaring that such payment was paid by the claimants in order to make themselves purchasers for Herrira, Meyer & Co.; that the claimants paid Gordon & Co. more than was paid the agent of Herrira, Meyer & Co.; that there was no express or specific arrangement between the agent of Herrira, Meyer & Co. and any agent of the claimants; that the latter aim to succeed to the rights of Herrira, Meyer & Co.; and upon the whole evidence I am of the opinion that the claimants must stand in the place of Gordon & Co., and not stand as purchasers for Herrira, Meyer & Co. The libelants must, therefore, have a decree declaring that they had a lien on the property libeled for the amount due under the charter party, and it must be referred to a commissioner to ascertain and report the amount.

Case No. 3,854.

Ex parte DEXTER.

[1 Hayw. & H. 191.][1]

Circuit Court, District of Columbia. June 28, 1844.

IMPRISONMENT FOR DEBT—ABOLITION—ARREST ON CAPIAS FROM JUSTICE OF THE PEACE.

1. The act of congress of June 17, 1844 [5 Stat. 678], is supplemental to the act of August 1, 1842 [Id. 498], and does not prohibit the arrest, but authorizes it, for the purpose of compelling the appearance of the defendant in person, or by attorney, on the return day of the writ.

2. Congress, by the act of June 17, 1844, did not intend to deprive creditors of the means to recover judgment and to obtain satisfaction out of the property of their debtors. They meant to prohibit imprisonment for debt.

3. The only process a justice of the peace is authorized to issue is a capias, the service of which is an arrest.

At law. Writ of habeas corpus directed to John Waters, a constable.

The return is, that he holds him [John W. Dexter] by virtue of two warrants of arrest issued by John D. Clark, a justice of the peace; one in favor of John Hands, Jr., for a small debt, and the other in favor of the corporation of Washington, for ten dollars, a penalty of a by-law. These warrants command the constable "to take into custody the body of the said John W. Dexter, and him safe keep, so that he have him before the said justice on the 28th day of June, 1844, to answer, &c." The warrants were issued on the 27th day of June, and the officer returns that he holds the prisoner in custody for the purpose of taking him before the justice of the peace under the said warrants.

Mr. Carlisle, for the prisoner, moved his discharge under the act of congress of June 17, 1844, contending that an arrest is an imprisonment, and that a person arrested for debt is a person imprisoned for debt, which is expressly prohibited by the act.

Mr. Bradley contended that the new act is expressly supplementary to the act of August 1, 1842, and must be considered as in pari materia. The act of 1844 says no person shall be held to bail or imprisoned in any civil action. The words "held to bail" apply to mesne process; the word "imprisoned" applies to final process.

CRANCH, Chief Judge. The act of congress June 17, 1844, being "supplemental," must be considered as intended to remedy some defect in or to extend the provisions of

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

the act to which it is a supplement. The former act of August 1, 1842, only regulated arrest on mesne process, and was not applicable to small debts within the jurisdiction of a justice of the peace. It did not forbid imprisonment after judgment in any case. The supplementary act of June 17, 1844, enacts: "That no person shall hereafter be held to bail or imprisoned in any civil action in the District of Columbia where the debt or claim, exclusive of interest and costs, is less that fifty dollars." It was not usual for the officer to require bail upon a justice's warrant for debt; but it was at his option to require it or not; and if required, and it was not given, the officer might keep the defendant in custody in the common jail until the return of the writ, which might be any day named in the warrant, not exceeding forty days. But the new act provides that the defendant shall not be held to bail, and does not make any provision for the appearance of the defendant before the justice, to answer to the complaint. The new act does not prohibit the arrest, indeed it admits the power of arrest, when it forbids the holding of the defendant to bail, for there can be no holding to bail without an arrest; and if the arrest is to be considered as an imprisonment within the meaning of the act, the provision that the defendant should not be held to bail is useless, because, if the arrest is forbidden under the term imprisonment no bail can be required.

If then the arrest be not the imprisonment contemplated by the act, how long may that arrest be continued until it amounts to the imprisonment prohibited? Does it continue until the object of the arrest is accomplished, viz., an actual appearance of the defendant in person, or by attorney, or an authority to enter an appearance for him on the return day of the writ? I think it does. This is the provision of the act to which this is a supplement, and it is probable that the legislature considered the authority to arrest to obtain an appearance which already existed, and which they did not forbid, was sufficient to accomplish the purpose. It cannot be presumed that the legislature intended to deprive creditors of all means to recover judgment for their small debts, and to obtain satisfaction out of the property of their debtors. They only meant to prohibit imprisonment for debt. They did not intend to prevent judgment; yet such would be the consequence of prohibiting the arrest, because the only process which a justice of the peace is authorized to issue is a capias, and the only service of a capias is an arrest. The return of the officer to the writ of habeas corpus is that he has taken the prisoner by virtue of a warrant from a justice of the peace, and now holds him in custody for the purpose of taking him on the same day before the justice of the peace as he is by the warrant commanded. This I think he had a right to do: and the prisoner must be remanded.

Case No. 3,855.

DEXTER v. ARNOLD et al.

[3 Mason, 284.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1823.

ADMINISTRATORS — LIABILITY FOR INTEREST — MORTGAGES—NEW ASSETS — LIMITATION OF ACTIONS—PARTNERSHIP.

1. An administrator is not liable to pay interest upon assets in his hands, unless under special circumstances.

2. Neither is a partner on partnership accounts, before settlement and balance struck.

[Cited in Johnson v. Hartshorne, 52 N. Y. 178.]

3. An administrator, who is also mortgagee of the real estate of his intestate, in his own right, is not liable to account as administrator for the money which he receives upon the sale of such estate, as mortgagee, although he sells with general warranty.

4, Such sale does not bar the equity of redemption of the heirs.

5. Where an estate is insolvent, and distribution of the assets is decreed under the laws of Rhode Island, and afterwards new assets come into the hands of the administrator, more than sufficient to pay all the debts, a suit will lie against the administrator for payment, in behalf of the creditors, notwithstanding the statute of limitations precludes an original suit against the administrator; for the new assets are a trust fund for the creditors, and the heirs can claim distribution only after all the debts are paid.

Bill in equity [by Edward Dexter against Thomas Arnold and another]. The substance of the bill was as follows: Jonathan Arnold died in 1806, intestate, leaving his brother, the defendant, Thomas Arnold, and his sister, Marcy Dexter, and sundry other persons, his heirs at law. Afterwards, the defendant, Thomas Arnold, in March, 1807, took administration on the estate of Jonathan Arnold. Marcy Dexter died in 1817, having by her will constituted the plaintiff and one Stephen Dexter trustees of the residue of her estate in trust for the use and maintenance of her daughter, Susannah Dexter, during her life, and as to what remained at her death, one half to the children of the plaintiff, and the other half to the children of the said Stephen Dexter, who should be then living. The said Susannah died in 1820. The will was duly proved by the trustees, who were also executors. The bill charges, that the defendant, Thomas Arnold, as administrator of Jonathan's estate, received large sums of money; that he was in partnership with Jonathan, and owed his estate large sums on partnership account; and particularly charges the receipt of more than 20,000 dollars on Mississippi stock held by Jonathan, which was paid by the United States to the administrator. It further charges collusion between the co-trustee, Stephen Dexter, and the defendant, Thomas Arnold, prays an account and decree of distribution of the portion of the intestate's estate, which belonged to Mary Arnold, as one of the heirs, &c., &c.

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

Upon the coming in of the answers, it was agreed by the counsel on both sides, that there must be a reference to a master, to take the accounts of the defendant, Thomas Arnold, as copartner and administrator. The other defendant denied all confederacy and collusion; but as to all other facts stated in the bill, affirmed it generally. The cause was set down for a hearing upon the bill and answers, at November term, 1822, and by consent of the parties an interlocutory decree was then made, "that an account be taken by a master of all the property, estate, and effects of Jonathan Arnold, which has been sold, disposed of, or possessed, or received by the said Thomas, or by any other person or persons, by the order of the said Thomas, or for his use; and of the debts of the said intestate, and funeral expenses, which the said Thomas hath paid, or which remain unpaid, calculating interest on such of said debts as carry interest from the time they ought to have been paid, and the sum of money he paid for such debts; that the stated accounts mentioned in the said Thomas's answer, between him and the said intestate, ought to be opened, so far as that the plaintiff shall be at liberty to surcharge and falsify the same, but in all other respects to be held valid: that it be referred to a master, to take a general account of all other dealings and transactions, not included in the said accounts between the said Thomas and the said intestate; in the taking of which the master is to make all just allowances. And for the better taking the same account, the said Thomas is to be examined upon interrogatories, and to produce all books, and papers, and letters, in his custody or power, relating thereto, upon oath before the said master, as the said master shall direct. And in stating said account, the said master is directed, if found proper and necessary by him, to state an interest account between the said Thomas and the said intestate." The parties to be at liberty to apply to the court as occasion shall require.

The master made his report; upon the coming in of which, exceptions were filed on the part of the plaintiff, and afterwards argued by—

Snow & Searle, for plaintiff.

Bridgham & Whipple, for defendant, Arnold.

STORY, Circuit Justice. It is unnecessary to enter farther into the merits of this cause than the exceptions taken to the master's report require. The first exception is founded on the following facts: The intestate, Jonathan Arnold, in 1793, mortgaged to the defendant, Thomas Arnold, his interest (one third part) in a farm, called the "Paget Farm," for £850. Of this sum £100 was paid in his lifetime; and after his decease in June, 1807, the mortgagee (then being administrator of the estate) sold the estate and gave an absolute deed with warranty, for the sum of $6403, which exceeded the sum then due on the mortgage, computing simple interest thereon, by about $3449, which balance the plaintiff contends ought to be carried to the credit of the intestate's estate. The reason assigned for this proceeding by the mortgagee is, that he could not otherwise dispose of the estate, and the sum received by him was in his character as mortgagee, and not as administrator, and was the amount of the principal due him, and compound interest, that having been agreed by the intestate to be allowed him in consideration of his forbearance to enforce the mortgage after the money had become due. And he contends, that the equity of redemption of the heirs has not been and could not be extinguished by such sale. The master, under these circumstances, disallowed the claim of the plaintiff for the balance. The question is, whether he was right in this disallowance. My opinion is, that he was right. The mortgagee was not precluded by his character, as administrator, from disposing of his mortgage in any manner he might deem best. If, under the belief, that the estate would not be redeemed, or that the heirs would never disturb the sale, he chose to convey the title with a general warranty, it was at his own peril. He did not thereby prejudice any right of the heirs to redeem, if they thought it for their interest. But the truth is, that the estate was then insolvent, and nothing but the very late remuneration under the act of congress to the holders of Mississippi stock would have given it solvency. If the creditors had chosen to redeem, they were not precluded by the sale from applying any proper funds for this purpose. But the administrator was not bound to advance his own funds; and no application appears to have been made by them to him requiring him to redeem. The money received was as mortgagee, and not as administrator; and it cannot escape notice that a part of the consideration was his general warranty. He holds the money then for his own use, and not in trust for the heirs or creditors. He has interfered with none of their rights, and he is not bound to yield any of his own. The mortgage has never been foreclosed; nor was it extinguished by the sale. If the heirs have any remedy against the defendant, it is in his character as mortgagee, and not as administrator. They cannot require him to account for money, as administrator, which he received in his own right. It never constituted any part of the intestate's estate.

The second exception is the disallowance by the master of a sum which was drawn out of the Providence Bank by the defendant, as agent of the intestate, for which he gave the intestate's note, and which it is contended ought to be charged personally against the defendant. There is no evidence to prove that the money so drawn was not applied to the use of the intestate. The de-

fendant was then acting as his agent, and the natural presumption, taking all the facts together, is, that the note was given for the amount received for the intestate, by his agent, because the money was applied to the use of the intestate.

The third exception is, that the master has refused to allow interest upon the amount of the errors and omissions in the partnership accounts, settled between the defendant, Arnold, and the intestate, which have been admitted or proved, under the liberty to surcharge and falsify. The master disallowed the interest, because he was of opinion, that from the course of business between the parties and their proceedings in settling their accounts, no general interest account was ever contemplated between them. There is no pretence, that the accounts between the parties were fraudulently or designedly wrong; or that any undue advantage was taken on either side. On the contrary, there was entire good faith and confidence between them; and the errors and omissions were unintentional and by mistake. In such a case, where there has been no habit of charging interest between the parties, and there have been mistakes, as much attributable to negligence on one side as the other, I can perceive no ground for an allowance of interest before the ascertainment of the errors. This rule would apply as between third persons; but it applies with greater force to the case of partners. Interest is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners; unless the parties have otherwise agreed, or acted in their partnership concerns.

The fourth exception is to the allowance of $1364.09 by the master, in favour of the defendant, as compensation for his services and expenses, as administrator of the intestate's estate. The allowance by the master is quite liberal; and I do not mean to suggest, that it is unduly so. But the direct effect of the full allowance is, that the plaintiff will be entitled to recover a little less than $500, so that he will be deprived of his whole costs. There are several ways presented by the report, by which the plaintiff might fairly be entitled to recover to the extent of $500. But it appears to me, looking to all the circumstances of the case, that it would be inequitable to make so liberal an allowance, in a case of mere discretion, as necessarily to throw the whole costs on the plaintiff. I am not satisfied, that my duty requires it; and though the account might be reformed in some few other particulars so as to meet the justice of the case, I prefer to reduce the compensation in some degree, and thus accomplish the same object in an unexceptionable manner. I shall deduct from this item $364.09.

The fifth exception is, that the master has not charged the administrator with interest upon all the sums of money remaining in his hands during the time he has retained the same. There are no particular circumstances presented by this case, which distinguish it from ordinary administrations. Courts of equity do not, as of course, charge executors and administrators with interest upon assets in their hands. There must be some special circumstances to warrant it, such as the executor's having used the money for his own purposes, or having put it out at interest and received interest, or having been guilty of fraudulent misconduct, or having, for a long time, unconscientiously retained the money from the heirs or other persons entitled to it. See Newton v. Bennet, 1 Brown, Ch. 359; Perkins v. Bayntun, Id. 375; Foster v. Foster, 2 Brown, Ch. 616; Ratcliffe v. Graves, 1 Vern. 196; Lowson v. Copeland, 2 Brown, Ch. 156; Longmore v. Broom, 7 Ves. 124; Piety v. Stace, 4 Ves. 620; 3 Toll. Ex'rs, c. 10, § 4, p. 480; Wyman v. Hubbard, 13 Mass. 232. See, also, Stearns v. Brown, 1 Pick. 530. I do not enumerate these, as all the cases, but only as examples. Lord Hardwicke, in Adams v. Gale, 2 Atk. 106, seems to have thought, that an executor may make use of money, which is perpetually coming in by assets of the testator, and turn it to his own advantage; and in Child v. Gibson, Id. 603, he said, "There never was a case in the court, where interest was charged upon an executor, who makes use of assets come to his hands in the way of his trade." But this doctrine, if not overruled, has been greatly qualified and limited in later times. In Wilkins v. Hunt, Id. 151, Lord Hardwicke said, (which, I believe, has never been contradicted,) that it is not a rule in all cases, that an administrator should be charged with interest on account of personal estate. In Littlehales v. Gascoyne, 3 Brown, Ch. 73, Lord Thurlow laid down the doctrine, that an executor's paying or not paying interest depended on its being necessary for him to keep the money to answer the exigencies of the testator's affairs or not; but where the money was held longer than was necessary, he must answer interest; and he subsequently affirmed the same doctrine in Franklin v. Frith, Id. 433. Without undertaking to decide upon the extent of the application of this doctrine, and what are the reasonable qualifications, which ought to belong to it, I may be permitted to say, that there are no special facts warranting the court to decree interest in the present case. The estate was originally insolvent, and it does not appear, that the administrator has ever improperly withheld the assets. If any persons were injured by such delay, they were the creditors, and not the heirs. Since the receipt of the funds from the Mississippi stock, no delay has intervened, which may not be reasonably accounted for.

The last exception is, that a sum equal to the outstanding balances due to the creditors of the intestate has been allowed to be retained by the administrator for the purpose of discharging these debts. The ground of

this objection is, that the creditors are no longer entitled to claim their balances, the statute of limitations having barred their rights. By the laws of Rhode Island, actions against executors and administrators, must be brought within three years from the time of the probate and administration. Where the estate is declared insolvent, (as was the present case,) the claims of creditors are to be proved before commissioners, except under special circumstances, and the assets are to be divided among those, whose debts are legally established. Laws R. I. (Dig. 1798) p. 300, § 17. There is a farther proposition, that if the debts are not so established, the creditor is for ever barred of his action against the executor or administrator, unless these are assets beyond the amount of the claims allowed by the commissioners, or otherwise legalized. Laws R. I. (Dig. 1798) pp. 314, 315. All the debts now in controversy are upon claims, which have been allowed, and are the balances beyond the dividends received. They do not fall therefore within the terms of the latter provision of the act; but they are clearly within a like, if not a stronger, equity. Undoubtedly no suit would have lain against the administrator before the new assets were received, for he had made a complete distribution of the funds decreed according to the local laws. He might therefore have pleaded plene administravit, or the statute of limitations. But surely it can never have been the intention of the legislature, that if assets sufficient to discharge all the debts after such distribution come to the hands of the administrator, the creditors are not to be paid. They are guilty of no laches, and have no demand against the administrator, until after the new assets are received, whatever may be the lapse of time. In the view of a court of equity, such new assets are a trust fund for the benefit of the creditors; and when they are satisfied, for the benefit of the heirs of the intestate. It is not a case, to which the general statute of limitations is designed to apply. That statute does not, unless under special circumstances, attach upon trusts. The limitation of three years in the Rhode Island act, principally, though perhaps not exclusively, contemplated cases of solvent estates. A mode of proceeding essentially different is prescribed in cases of insolvency. Where the claims of creditors are proved under proceedings upon insolvent estates, they attach upon all the real and personal assets of the intestate, and according to the very terms of the act, "the same shall be distributed to and among all the creditors in proportion to the sums to them respectively owing, so far as the said estate shall extend." Whatever assets then come into the hands of the administrator are distributable among the creditors, whose claims are proved, until all are paid; and the administrator holds them in trust for such purpose. This exposition of the statute appears to me consistent with its true import, and with common sense and common justice. I have no doubt therefore, that the master was right in allowing the administrator to retain the balance still due to the creditors in his hands, and that the creditors have a right to resort to him for the discharge of them. The exceptions are therefore overruled, excepting the fourth; and as to this, the decree is to be reformed in the manner already suggested. The costs are to be borne in equal moieties by the parties. Report confirmed and decree accordingly.

NOTE. The decree ordered the administrator to pay to the plaintiff, as trustee, for the uses stated in the bill, one moiety of the sum due to him and Stephen Dexter, as trustees &c., with interest from the time of the coming in of the master's report to the confirmation thereof. The report having found a balance due to the administrator from Stephen Dexter, it was further ordered, that the moiety, so far as it had not been passed to his (Stephen's) credit in account, should be paid to him; or recouped from the balance by an acknowledgment of record by the administrator. It was farther ordered, that the sum retained for the creditors be paid to them by the administrator; and if not distributed within a year, the plaintiff to be at liberty to apply for a farther distribution. The costs to be borne in moieties by the plaintiff and defendants.

[NOTE. A petition for leave to file a bill of review was denied at the June term, 1829. See Case No. 3,856.]

Case No. 3,856.

DEXTER v. ARNOLD.

[5 Mason, 303.][1]

Circuit Court, D. Rhode Island. June Term, 1829.

BILL OF REVIEW—WHEN LIES—NEWLY-DISCOVERED EVIDENCE—NEW TITLE—PARTIES—ENROLLED DECREES—PRACTICE.

1. In what cases a bill of review generally lies. It lies for matter of error apparent on the face of the record.

[Cited in Irwin v. Meyrose, 7 Fed. 536.]

2. What is such matter? The error must appear on the decree and pleadings, for the evidence in the case at large cannot be examined to ascertain, whether the court misstated or misunderstood the fact.

3. A bill of review also lies for newly discovered evidence material to the issue, if such evidence was not known until after the period in which it could be used in the cause.

[Cited in Ocean Ins. Co. v. Fields, Case No. 10,406; Jenkins v. Eldredge, Id. 7,267; Doggett v. Emerson, Id. 3,961; Bentley v. Phelps, Id. 1,332; Irwin v. Meyrose, 7 Fed. 536. Cited in brief in Watson v. Stevens, 3 C. C. A. 411, 53 Fed. 32.]

4. Quaere, if such newly discovered evidence must not be some written paper or evidence.

[Cited in Wood v. Mann, Case No. 17,953.]

5. Quaere, if newly discovered testimony of witnesses, going to confirm or to contradict the original testimony, is admissible.

6. No bill of review will lie, if the newly discovered evidence could have been obtained by reasonable diligence before the original hearing.

[Cited in Massie v. Graham, Case No. 9,263; Jenkins v. Eldredge, Id. 7,267. Cited in

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

brief in Watson v. Stevens, 3 C. C. A. 411, 53 Fed. 32.]

7. Quaere, whether a bill of review lies upon new matter not in issue in the original cause; but which shows the decree erroneous.

[Cited in Baker v. Whiting, Case No. 786; Jenkins v. Eldredge, Id. 7,267.]

8. It does not lie, where the party seeks to set out a new title, and not to support the title in the original cause.

9. A bill of review lies for the party who obtained the original decree in his own favour, if the original decree was injurious to him.

10. A bill of review lies for error in law only where the original decree is enrolled. If not enrolled, the remedy is a re-hearing.

[Cited in Massie v. Graham, Case No. 9,263.]

11. All decrees in the courts of the United States are deemed to be enrolled at the term in which they were passed.

[Cited in U. S. v. The Glamorgan, Case No. 15,214; Robinson v. Rudkins, 28 Fed. 9.]

12. If the decree be not enrolled, a bill in the nature of a bill of review, and not strictly a bill of review for newly discovered evidence, lies.

13. The granting of a bill of review for newly discovered evidence is matter of discretion, and must be brought forward by petition to the court.

[Cited in Daniel v. Mitchell, Case No. 3,563; Massie v. Graham, Id. 9,263; Steines v. Franklin Co., 14 Wall. (81 U. S.) 22; Reeves v. Keystone Bridge Co., Case No. 11,661; Watson v. Stevens, 3 C. C. A. 411, 53 Fed. 32.]

14. Such a petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree.

It is not sufficient to state, that the petitioner expects to prove certain facts. He must state the exact evidence, to establish them.

15. On the hearing of such a petition affidavits may be admitted on each side, if necessary to explain the nature of the evidence.

16. Upon a bill of review for newly discovered evidence, the other party may controvert by plea or answer that it is newly discovered.

17. Petition of review, for matters of fact, denied upon all the circumstances of the case.

Petition to file a bill for the purpose of obtaining a review of a decree, rendered in this court at a former term, in the case of Dexter v. Arnold [Case No. 3,855]. The original bill, filed at the November term, 1821, charged Thomas Arnold, as surviving partner, joint owner, trustee, and agent of his brother Jonathan Arnold, and as administrator upon his estate. Upon the bill, answer, and exhibits, an interlocutory decree passed, for the defendant [Anna Arnold, administratrix of Thomas Arnold] to account upon oath, with directions to the master as to the mode of taking an account, and allowing the plaintiff to surcharge and falsify the stated accounts exhibited by the defendant. A report was made by the master at the June term, 1823, and a final decree entered for the plaintiff at the following November term, for five hundred dollars sixty-six and a half cents. The grounds, presented by the petition for a review of that decree, were, the discovery of new facts showing, that several sums of money had come into the hands of the defendant, belonging to Jonathan Arnold, which were not entered in Thomas Arnold's accounts, nor allowed by the master, and that several claims, made by Thomas Arnold and allowed by the master, were without foundation and erroneous. The counsel for the plaintiff made a particular statement of the several sums of money, which the plaintiff claimed should be added to the amount of the former decree in his favor, and of the new evidence to be produced to support his claim, and also of the several sums which should be deducted from the allowances made to the defendant, and of the new evidence to support these deductions, and made a call upon the defendant for the production of letters, accounts, &c.

Greene, Dist. Atty., contended, for defendant, that this was not a case in which a bill of review could be sustained; that the original decree being in favor of the petitioner, and the ground, upon which a review of that decree was sought, being, that a less sum was decreed to the petitioner than he thought himself entitled to, the court would at once dismiss the petition, in accordance with the rule laid down by elementary writers of high authority; that a bill of review would only lie in favor of the party against whom a decree was rendered. And he cited 2 Madd. Ch. Pr. 539; 1 Har. Ch. Pr. 176; Ch. Cas. 51; 2 Freem. 182, 183. Further, that if this position, which presented a positive bar to the granting of a bill of review in this case, could not be maintained, still, as the petitioner's claim was not one of strict right, but it was within the province of the court, as a court of equity, to reject it, whatever might be its merits, if they thought that course, upon an examination of the circumstances, the most equitable for all the parties interested, the court would refuse the petition without going into an examination of the character of the new facts set forth in it. The original bill was brought by the petitioner at such time as best suited his own convenience, and when he must be presumed to have been prepared to prove the allegations contained in it. The original respondent answered under oath all interrogatories put to him by the petitioner, and disclosed all matters relating to his accounts, about which any inquiry was made. His accounts were all carefully examined and audited by the master, under special instructions from the court, the petitioner or his counsel attending, and being heard on any item excepted to. A report was made to the court in favor of the petitioner, and a decree rendered thereon, as far back as the year 1823, to which no objection was made, or could be made, at the time of it. The original respondent has since then deceased; and now, after the expiration of four years from the rendering of that decree, the petitioner seeks to review it for the purpose of increasing the amount awarded to him, and to that end

cites in the administratrix of the original respondent, who must be presumed to be, and in fact is, entirely unacquainted with all the matters in controversy, and incapable of making such explanations and producing such evidence, as the original respondent could readily have done were he still living. The counsel for the respondent contended, that, under circumstances like these, let the merits of the petitioner's case be what they might, the court would take into consideration the great hardship, which the present respondent would suffer, if a review were allowed, and, exercising that discretion, which was wisely committed to them, they would reject the petition without examining the details of it. But he further contended, that, if the court should think proper to go into an investigation of the merits of the petitioner's case, there were certain well established principles of equity applicable to petitions for bills of review, to the spirit of which the petitioner's case must conform, or he could not succeed.

1. A bill of review may be filed upon newly discovered evidence, but the newly discovered evidence must be conclusive and relevant, such as a receipt, a release, &c. and not the mere accumulation of witnesses to a litigated fact. And he cited 3 Johns. Ch. 127; 3 P. Wms. 371; 2 Madd. Ch. 536; Hardr. 342, 451.

2. That the affidavit of the petitioner must state the nature of the new evidence, in order that the court may judge of its relevancy and materiality; and must also state, that the new matter could not have been produced or used before the decree. Coop. 92.

3. That a bill of review, upon matter of fact, must be upon special leave of the court, and upon oath of the discovery of "new matter or evidence, which has come to light after the decree, and could not possibly be had or used at the time when the decree passed." 3 Johns. Ch. 126; 16 Ves. 348; Coop. 91; 1 Har. Ch. Pr. 176; 2 Madd. Ch. Pr. 520, 538; 1 Ball & B. 142.

4. That a bill of review may be for error in law apparent on the face of the decree, as when an absolute decree is made against an infant, and cases of this kind; but not for an erroneous judgment. The error must be a palpable one. 2 Madd. Ch. Pr. 538; 17 Ves. 177; 2 Johns. Ch. 491.

5. That exceptions to a master's report cannot be assigned for error upon a bill of review. 1 Har. Ch. Pr. 175.

The counsel for the respondent then went into a minute examination of the particulars of the petition with reference to these principles, and contended that it could not be sustained.

Tillinghast, for plaintiff, contended, that the preliminary objection, presented by the defendant's counsel in the nature of a bar to the petition, would not be considered by the court as entitled to much consideration; that one or two ancient cases only were cited in support of it; and that, even if the circumstances of those cases were such as to sanction the principle to the extent, to which it was advanced by the defendant's counsel, still it was so inconsistent with those principles, which, in these times of improved equity, regulated investigations into the relative right of contending parties, that the court would not adopt it upon the authority of those cases alone.

As to the second ground taken by the defendant's counsel, he contended, that this was not one of those cases, where the hardship was so entirely on the side of the defendant, that the court would exercise the high discretion vested in it, of rejecting the petition without an examination into its merits; that this was a course, which would never be pursued by the court, excepting in extreme cases, and where the granting of a review would operate a great injury to the respondent, even if the issue of the case should be in his favor; that it was to be recollected, that the original defendant, Thomas Arnold, executed very important trusts in relation to the estate of his brother Jonathan; that it was his duty to execute these trusts with all fidelity and uprightness, and to make a just and true account of his doings when called upon; that all the documents, relating to the property in question, were in his possession, and all the facts, which it was important to the present petitioner to have made known on the former trial, were within his knowledge, and it was his duty then to have stated every thing important to a just knowledge and fair decision of the case; that if, for his own purposes, and to the injury of the petitioner, he then kept back facts which, if disclosed, would have produced a decree more favorable to the petitioner and more consonant with equity and justice, than the one actually rendered, his representatives ought not to deem it a hardship upon them, that whenever these facts should come to the knowledge of the original plaintiff, he should seek a revision of the original decree.

The counsel for the petitioner then went into an elaborate and minute examination of the particulars of the case.

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

STORY, Circuit Justice. The present is a somewhat novel proceeding in this circuit; and I am not aware, that, in any other circuit of the United States, any general course of practice has prevailed, which would supercede the necessity of acting upon this, as a case of first impression, to be decided upon the general principles of courts of equity. It comes before the court upon a petition for leave to file a bill of review of a decree rendered in this court at November term, 1823, principally upon the ground of a discovery of new matters of fact. The petition was filed at November term, 1827, and affidavits have been read in support of it.

Counter affidavits have also been admitted on the other side, not for the purpose of investigating or absolutely deciding upon the truth of the statements in the petition; but to present, in a more exact shape, some of the circumstances growing out of the original proceedings, which may assist the court in the preliminary discussion, whether leave ought to be granted to file the bill of review. This course, though not very common, is, as I conceive, perfectly within the range of the authority of the court (see Livingston v. Hubbs, 3 Johns. Ch. 124; 1 Norris v. Le Neve, 3 Atk. 25); and may be indispensable for a just exercise of its functions, in granting or withholding the review. If, indeed, it were doubtful, in case the bill of review should be allowed, whether the defendants could by plea or answer traverse the allegation in such bill, that the matter of fact is new, I should not hesitate to inquire, in the most ample manner, into the truth of such allegation, before the bill was granted, in order to prevent gross injustice. But as every such bill of review must contain an allegation, that the matter of fact is new, it seems to me clear upon principle, that, as it is vital to the relief, it is traversable by plea or answer, and must be proved, if not admitted at the hearing. In Hanbury v. Stevens (1784) cited by Lord Redesdale,—Redesd. Pl. Eq. 80 (3d Ed. 70),—the court is reported to have held that doctrine. The case of Lewellen v. Mackworth, 2 Atk. 40, Barnard, Ch. 445, though very imperfectly, and, as I should think, inaccurately reported, seems to me to support the same conclusion. It has been relied on by the best text writers for that purpose. Redesd. Pl. Eq. (3d Ed.) 231; Coop. Eq. Pl. 305; 1 Mont. Eq. Pl. 335, note; Id. 336; 2 Mont. Eq. Pl. 227, note 100. Lord Redesdale, in his original work on Equity Pleadings (Redesd. Eq. Pl., 2d Ed. 80), stated the point, as one which may be doubted; but upon principle I cannot see, how that can well be. And in the last edition (the third), revised by his Lordship, I find that he has questioned the propriety of such a doubt. Redesd. Pl. Eq. (3d Ed.) 70.

Before I proceed to consider the particular grounds of the present petition, it may be well to glance at some of the regulations, which govern courts of equity in relation to bills of review, that we may be better enabled to judge of their application to the courts of the United States. The ordinance of Lord Bacon constitutes the foundation of the system, and has never been departed from. It is as follows. "No decree shall be reversed, altered, or explained, being once under the great seal, but upon a bill of review. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without farther examination of matters of fact, or some new matter, which hath arisen after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise." Beame, Orders Ch. 1. A bill of review, therefore, lies only, when the decree has been enrolled under the great seal in chancery. If it has not been so enrolled, then for error of law apparent upon the decree the remedy is by a petition for a rehearing. Perry v. Phelips, 17 Ves. 173, 178. But if the ground of the bill is new matter, discovered since the decree, then the remedy is by a supplemental bill in the nature of a bill of review, and a petition for a rehearing, which are allowed by special license of the court. Redesd. Eq. Pl. 65 (78), 81; Coop. Eq. Pl. 88, 89, 90, 91; Beame, Orders Ch. 2, 3, notes; Sheffield v. Duchess of Buckingham, 1 West, 682; Mont. Pl. Eq. p. 330, c. 12; Norris v. Le Neve, 3 Atk. 26; Perry v. Phelips, 17 Ves. 173; Blake v. Foster, 2 Ball & B. 457, 460. This distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the courts of the United States, and perhaps rarely in any of the state courts of equity in the Union. I take it to be clear, that in the courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the term, in which they are passed. So that the appropriate remedy is by a bill of review.

In regard to errors of law, apparent upon the face of the decree, the established doctrine is, that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the court upon an appeal. But taking the facts to be, as they are stated to be on the face of the decree, you must show, that the court have erred in point of law. Mellish v. Williams, 1 Vern. 166; Cranborne v. Delahay, 1 Freem. 169; Combs v. Proud, 1 Ch. Cas. 54, 1 Freem. 181; 3 Rep. Ch. 18; Hardr. 174; Perry v. Phelips, 17 Ves. 173; O'Brien v. Connor, 2 Ball & B. 146, 154. If, therefore, the decree do not contain a statement of the material facts, on which the decree proceeds, it is plain, that there can be no relief by a bill of review, but only by an appeal to some superior tribunal. It is on this account, that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact for the decree. Combs v. Proud, 1 Ch. Cas. 54; Brend v. Brend, 1 Vern. 214, 2 Ch. Cas. 161; Bonham v. Newcomb, 1 Vern. 216; O'Brien v. Connor, 2 Ball & B. 146, 154. In the courts of the United States the decrees are usually general. In England the decree embodies the substance of the bill, pleadings, and answers; in the courts of the United States the decree usually contains a mere reference to the an-

tecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bill, answers, and other proceedings are, in our practice, as much a part of the record before the court, as the decree itself; for it is only by a comparison with the former, that the correctness of the latter can be ascertained.

In regard to new matter, there are several considerations deserving attention. In the first place the new matter must be relevant and material, and such as, if known, might probably have produced a different determination. Bennet v. Lee, 2 Atk. 529; O'Brien v. Connor, 2 Ball & B. 155; Earl of Portsmouth v. Lord Effingham, 1 Ves. Sr. 429. In other words, it must be new matter to prove what was before in issue, and not to prove a title not before in issue (Coop. Eq. Pl. 91; Patterson v. Slaughter, Amb. 292; Young v. Keighly, 16 Ves. 348; Blake v. Foster, 2 Ball & B. 451, 462); not to make a new case, but to establish the old one. In the next place the new matter must have come to the knowledge of the party since the period, in which it could have been used in the cause at the original hearing. Lord Bacon's ordinance says in one part it must be, "after the decree:" but that seems corrected by the subsequent words, "and could not possibly have been used at the time when the decree passed," which point to the period of publication. Lord Hardwicke is reported to have said, that the words of Lord Bacon are dark; but that the construction has been, that the new matter must have come to the knowledge of the party after publication passed. Patterson v. Slaughter, Amb. 293. The same doctrine was held in Norris v. Le Neve, 3 Atk. 25, 34, and has been constantly adhered to since. A qualification of the rule quite as important and instructive is, that the matter must not only be new, but that it must be such as that the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief. That doctrine was expounded and adhered to by Lord Eldon in Young v. Keighly, 16 Ves. 348, and was acted upon by Lord Manners in Barrington v. O'Brien, 2 Ball & B. 140, and Blake v. Foster, Id. 457, 461. It was fully recognized by Mr. Chancellor Kent, and received the sanction of his high authority in Wiser v. Blackly, 2 Johns. Ch. 488, and Barrow v. Rhinelander, 3 Johns. Ch. 120. And in the very recent case of Bingham v. Dawson, 1 Jac. 243, Lord Eldon infused into it additional vigor.

Upon another point there is not perhaps a uniformity of opinion in the authorities. I allude to the distinction taken in an anonymous case in 2 Freem. 31, where the chancellor said, that "where a matter of fact was particularly in issue before the former hearing, though you have new proof of that matter, upon that you shall never have a bill of review. But where a new fact is alleged, that was not at the former hearing, there it may be a ground for a bill of review." Now, assuming that under certain circumstances new matter, not evidence, that is, not in issue, in the original cause, but clearly demonstrating error in the decree, may support a bill of review, if it is the only mode of obtaining relief (see Norris v. Le Neve, 3 Atk. 33, 35; Roberts v. Kingsly, 1 Ves. Sr. 238; Earl of Portsmouth v. Lord Effingham, Id. 429; Redesd. Eq. Pl., Last Ed., 67; 1 Mont. Pl. Eq. 332, 333; Wilson v. Webb, 2 Cox, 3; Standish v. Radley, 2 Atk. 177. See, also, Lord Redesdale's observations in his third edition of his Equity Pleadings, p. 67); still it must be admitted, that the general rule is, that the new matter must be such as is relevant to the original case in issue. Lord Hardwicke, in Norris v. Le Neve, 3 Atk. 33, 35, is reported to have admitted, that a bill of review might be founded upon new matter not at all in issue in the former cause, which seems contrary to his opinion in Patterson v. Slaughter, Amb. 293 (see, also, Young v. Keighly, 16 Ves. 348, 354; Blake v. Foster, 2 Ball & B. 457, 462); or upon matter, which was in issue, but discovered since the hearing. But the very point in 2 Freem. 31 (if I rightly understand it), is that a newly discovered fact is ground for a bill; but not newly discovered evidence in proof of any fact already in issue. This seems to me at variance with Lord Bacon's ordinance, for it is there said, that there may be a review upon "new matter, which hath arisen in time after the decree," and also "upon new proof, that has come to light after the decree made. and could not possibly have been used at the time when the decree passed." It is also contrary to what Lord Hardwicke held in the cases cited from 3 Atk. 33, and Amb. 293. Lord Eldon, in Young v. Keighly, 16 Ves. 348, 350, said: "The ground (of a bill of review) is error apparent on the face of the decree. or new evidence of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority, that new evidence would not be sufficient ground." That was also the opinion of Lord Manners in Blake v. Foster, 2 Ball & B. 457. Mr. Chancellor Kent, in Livingston v. Hubbs, 3 Johns. Ch. 124, adopted the like conclusion; and he seemed to think, that such new evidence must not be a mere accumulation of witnesses to the same fact; but some stringent written evidence or newly discovered papers. Gilbert, in his Forum Romanum, p. 186, c. 10, leans to the same limitation, for he says, that in bills of review, "they can examine to nothing, that was in the original cause, unless it be matter happening subsequent, which was not before in issue, or upon matter of record or writing not known before, for if the court should give them leave to enter into proofs upon the same points that were in issue, that

would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury." See, also, Bart. Suit in Eq. 216; Tovey v. Young, Finch, Prec. 193; Taylor v. Sharp, 3 P. Wm. 371; Standish v. Radley. 2 Atk. 177; Chambers v. Greenhill, 2 Ch. R. 66; Thomas v. Harvie's Heirs, 10 Wheat. [23 U. S.] 146. There is much good sense in such a distinction, operating upon the discretion of the court in refusing a bill of review, and I should be glad to know, that it has always been adhered to. It is certain, that cumulative written evidence has been admitted; and even written evidence to contradict the testimony of a witness. That was the case of Attorney General v. Turner, Amb. 587. Willan v. Willan, 16 Ves. 72, 88, supposes, that new testimony of witnesses may be admissible. If it be admissible, (upon which I am not called to decide,) it ought to be received with extreme caution, and only when it is of such a nature as ought to be decisive proof. There is so much of just reasoning in the opinion of the court of appeals of Kentucky on this subject, that I should hesitate long before I should act against it. See Respass v. McClanahan, Hardin, 350; Head v. Head, 3 A. K. Marsh, 121; Randolph's Ex'r v. Randolph's Ex'rs, 1 Hen. & M. 180.

In the next place it is most material to state, that the granting of such a bill of review is not a matter of right, but of sound discretion in the court. Sheffield v. Duchess of Buckingham, 1 West, 682; Norris v. Le Neve, 3 Atk. 33; Gould v. Tancred, 2 Atk. 533. It may be refused, therefore, although the facts if admitted would change the decree, where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. Bennet v. Lee, 2 Atk. 528; Wilson v. Webb, 2 Cox, 3, and Young v. Keighly, 16 Ves. 348, are strong exemplifications of the principle. These are the principal considerations, which appear to me useful to be brought into view upon the present occasion. Let us now advert to the grounds upon which the petition is framed, and see how far any are applicable to them. The original bill was brought against Thomas Arnold (whose administrator is now before the court) for an account and settlement of his brother Jonathan Arnold's estate, upon which he had administered. The case is reported in Dexter v. Arnold [Case No. 3,855], and I refer to that for a summary of the proceedings and final decree.

In preferring the present petition, the proper course of proceeding has been entirely mistaken. The present counsel for the petitioner is not responsible for those proceedings, they having taken place before he came into the cause. A petition for leave to file a bill of review for newly discovered matter should contain in itself an abstract of the former proceedings, the bill, answers, decree, &c. and should then specifically state what the newly discovered matter is, and when it first came to the party's knowledge, and how it bears on the decree, that the court may see its relevancy and the propriety of allowing it. Coop. Eq. Pl. 92. The present petition, in its original form, contained nothing of this sort, but referred to an accompanying bill of review, as the one, which it asked leave to file, and then simply affirmed the facts stated in it to be true. This was sufficiently irregular. But upon looking into this bill of review the grounds of error are stated in a very loose manner, and in so general a form as to be quite inadmissible.

The first error assigned is in matter of law, and it is, that Thomas Arnold, the administrator, ought to have been charged with interest upon all sums of money, which he had received as administrator, because the said sums were used by him. The master in his report had declined to allow interest; and upon an exception taken the court confirmed his report on this point. I see no reason for changing the decree on this point, for the reasons stated in the cause of Dexter v. Arnold [Case No. 3,855], and there is no pretence to say, that there is any such proof of the use of the money in the report of the master, as justifies a different conclusion. There is no error in this respect apparent on the face of the master's report, or the decree. The allowance or disallowance of interest rests very much upon circumstances, and slight errors in this respect are not always held fatal. See Gould v. Tancred, 2 Atk. 533. There is no error apparent, therefore, on which a review ought to be granted.

The next ground assigned is, that Thomas Arnold did receive large sums of money and other property, which he has not accounted for before the master, and for which he ought to account; and that since the decree, the petitioner hath discovered new and further evidence in relation thereto, which would have materially changed the report of the master and the decree. The petition does not state what the new evidence is, nor when discovered, and it is quite too vague for any order of the court. The bill then proceeds, very irregularly, to require, that the administrator of Thomas Arnold should answer certain interrogatories as to the cargoes of the ship Friendship. It then states, that Thomas Arnold received six shares in the Tennessee Land Company; and that he received 8,000 dollars on a policy of insurance on the brig Friendship; and that he received large consignments of property from Vincent Gray in Cuba in bills of exchange, &c. belonging to Jonathan's estate; and finally, that he received divers other large sums of money as agent of Jonathan. Now, it must be manifest, that upon allegations so general and indistinct no bill of review would lie. Here is no assertion of newly discovered evidence to maintain one. Such a bill, so framed, ought never to be allowed by a court acting upon the correct principles

of chancery jurisdiction. Afterwards, an amendment of this bill of review was filed, containing more distinct specifications of new matter, most of which, however, as I shall have occasion to notice hereafter, are open to the same objections as those already stated. But the radical objection to both bills is, that they are improperly introduced into the cause at all. A bill of review can only be filed after it is allowed by the court, and upon the very grounds allowed by the court. The preliminary application by petition to file it should state the new matters shortly, distinctly, and exactly, so that the court may see how it presses on the original cause; and it is not permissible to load it with charges and allegations, as in an original seeking bill in equity. In the sense of a court of chancery there is not before this court any sufficient petition, upon which it can act. But as the proceeding is a novelty in this circuit, much indulgence ought to be allowed to the original counsel in the cause (for the present counsel is not at all chargeable) for irregularities of this nature, upon the first presentation of the practice. I advert to the posture of the cause, therefore, not so much with an intention to subject it to close criticism, as for the purpose of declaring, that, even if I could gather from the papers, that there is matter, upon which a bill of review would lie, it is not before the court in such a shape, that the court could judicially pass an order of allowance.

The case has, however, been argued, and with great ability, upon its merits; and waiving for the present any farther reference to the form of the proceedings, I will proceed to the consideration of the points made at the bar. The first point is one made by the defendant, and being preliminary in its nature, must be disposed of before the plaintiff can be farther heard. It is said to be a rule in equity, that where a party has less decreed to him than he thinks himself entitled to, he cannot bring a bill of review; for that lies only in favor of a party against whom there is a decree. For this the opinion of elementary writers (2 Madd. Ch. Pr. 412; 1 Har. Ch. Pr. 86), and the case of Glover v. Portington, Freem. 183, 2 Eq. cas. Abr. 174, is cited. The case, as here reported, certainly supports the doctrine. But it appears to me, that, if the doctrine is correct, it is so only in cases, where there is no error apparent on the face of the decree, and no newly discovered matter to support a bill of review, for then the proper remedy is by appeal. If there be no such remedy by appeal, but only by bill of review, it would be strange, if a material error could not be redressed upon such a bill by the party to whom it had been injurious; that if a man had 10,000 dollars due him, and had a decree for 100 dollars he was conclusively bound by an error of the court. The decision, reported in Freem. 182, was made by the master of the rolls, who allowed the demurrer; but from the report of the same case in 1 Ch. Cas. 51, it appears that it was afterwards reheard before the lord chancellor and Baron Rainsford; and the demurrer was overruled. See same case cited Com. Dig. "Chancery," G, to the same effect. So that the final decision was against the doctrine for which it is now cited. And Lord Nottingham, a few years afterwards, in Vandebende v. Levingston, 3 Swanst. 625, resolved, that the plaintiff may have a bill of review to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been. We may then dismiss this objection.

We may now advance to the examination of the points made by the petitioner in support of his petition for a review, assuming that the amended bill of review is to be received, pro hoc vice, as such a petition. I have already stated, that it is utterly defective in the essential ingredients of such a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered. It is not sufficient to say, that the petitioner expects to prove error in this or that respect: or that he has discovered evidence, which he hopes will establish this or that fact. But he must state the exact nature and form of the evidence itself, and when discovered. If written evidence, it must be stated, and its direct bearing shown. If of witnesses, what facts the witnesses will prove; and when the party first knew the nature of their testimony. It is impossible otherwise for the court to judge, whether the evidence is decisive, or is merely presumptive or cumulative; whether it goes vitally to the case, and disproves it, or only lets in some new matter, confirmatory or explanatory of the transactions in the former decree. The party must go farther, and establish, that he could not, by reasonable diligence before the decree, have procured the evidence. Now, in every one of these particulars, the amended bill, quasi a petition, is extremely deficient. I have looked it over carefully, and cannot find, that it points out a single written paper, which disproves the original case, or names a single witness, whose testimony, if admitted, would overturn it. It deals altogether in general allegations, that certain things are expected to be proved; and, like an original bill, proceeds to ask a discovery from the defendant of letters and papers in her possession as administrator, relative thereto. There are indeed, in the accompanying affidavits, some papers produced and relied on; but they cannot supply the defects of the original petition.

1. The first charge is in effect, that Thomas Arnold, as administrator of Jonathan Arnold, received certain property from Vincent Gray in Cuba, belonging to Jonathan's estate, which he has never inventoried or accounted for. The specifications under this head are: (1) The receipt of 40 boxes of sugar, upon which charges were paid out of Jonathan's estate, amounting to $190: (2) The remit-

tance of a bill to Thomas Arnold, drawn by Andrew Davis on William Davis, Philadelphia, for $1222: (3) The receipt by Captain Mathewson of $500. All these transactions took place in the year 1808, Jonathan having died in June, 1807. Now, the original bill charged a partnership between Jonathan and Thomas, and asked for an account and settlement of the partnership concerns, as well as of the administration. After the answer it was referred to a master to take the accounts, and he made a report accordingly, after hearing the parties many times. In the hearing before the master, the accounts with Vincent Gray were in controversy between the parties, and Thomas Arnold was interrogated as to the whole subject, and made his disclosures. So that the existence of an account with Gray, and the dispute, as to the receipts from him on account of Jonathan's estate, was matter of examination before the master. There is no pretence, that the residence of Gray was not well known; or that the plaintiff could not at that time, by reasonable diligence, have obtained his testimony, if he had desired it. He does not show, that he made any effort to obtain it; and if he had, the very papers now produced would have been obtained. What then is the posture of the case? The plaintiff goes on to a decree without seeking for evidence, though within his reach, and contents himself with such explanations as the defendant then gave; and now, after the lapse of several years, the defendant being dead, asks this court to grant him a bill of review for errors in the account, which ordinary diligence would have rectified at that very time. If such a course should be allowed, it would furnish a perfect immunity for the grossest negligence. According to my understanding of the principles, upon which bills of review are granted, this court, under such circumstances, is not at liberty to grant it. In Bingham v. Dawson, 1 Jac. 243, Lord Eldon refused to allow a bill of review under far less cogent circumstances, deeming it a most mischievous practice; and Mr. Chancellor Kent acted most deliberately to the same effect in Livingston v. Hubbs, 3 Johns. Ch. 124.

But as to the matter of fact; Mr. Gray's letters show, that the 40 boxes of sugar belonged to Thomas Arnold, and not to Jonathan Arnold, thus establishing the incorrectness of this part of the petitioner's case, and leaving only the $190 in his favour. Then, as to the bill on Davis; Thomas Arnold, on his examination before the master, expressly stated, that it had never been paid, Davis being insolvent. And there is not a tittle of new evidence, now offered, to show that he did receive it. It is therefore a mere effort to rehear the original cause on this point. Then, as to the 500 dollars received by Mathewson. In the report 270 dollars is credited to Jonathan's estate on this account; and the only question is, whether the remaining 230 dollars ought to have been credited. Mr. Gray, in his letters, (which, by the by, are mere statements now made, and not originals written at the time of the transactions, and are not sworn to by him,) does not pretend to any absolute certainty, as to the parties to whom the money belonged. He says in that of the 14th of April, 1826, that he had received of De La Motte $1,984, part of which he remitted to Thomas Arnold by the bill drawn on Davis. He did not then recollect how, or when, the balance was remitted. In his letter of the 14th of April, 1827, he states, that on examining his old accounts, &c. he finds, that he passed to the credit of the ship Tyre, Mathewson, master, for account of Thomas Arnold, in July 1808, $230, and in September of the same year, $270, in all 500 dollars; and he presumes, that this was the balance then collected. In his letter of the 27th of February, 1828, he adds, that the money, collected of De La Motte, belonged to Jonathan Arnold, and that the bill on Davis, the $500, the $190, and his commissions, made up the whole sum. Such is the explanation given by Mr. Gray, at the distance of 20 years after the original transactions; and it is too much to say, that his recollections, after such a length of time, ought to overturn the solemn proceedings before the master. It is, at best, testimony only of a presumptive character, cumulative in its nature, to a litigated fact, and, if admissible at all, as a ground for a review, is open to the suggestion of possible mistake. But it does so happen, that there is before the court a letter of Mr. Gray to Thomas Arnold, written on the 12th of April, 1808, (and which, there is much reason to believe, was, among other papers from him, laid before the master upon the hearing,) which may fairly lead to the belief, that Gray is now mistaken in supposing, that the money belonged exclusively to Jonathan Arnold. That letter begins by saying, "I have liquidated your accounts with Don Pablo De Motta, and taken the acceptance on the widow P. & H. for the balance due, &c. for 2,088 dollars 3½." It then goes on to state, that Mr. Barker, of Charleston, has requested him to pay into his hands the money received from De La Motte, which he declined. It then adds, "On examination of the accounts, if any thing should appear to be due to Mr. Barker over and above the 1,000 dollars heretofore received, I will remit it to him, or pay it into the hands of Mr. Bower. However, as you know better than I do, what sum ought to be paid to Mr. Barker, I wish you to settle the amount with him." If any thing is clear, from this language, it is, that Mr. Barker had, or was supposed to have, an interest in this very fund, and that Thomas Arnold was called upon to discharge it. And the first words in the letter, "your accounts," seem to indicate, that Thomas Arnold also might have a personal interest in the fund. If Mr. Barker had an interest, what proof is there, that it

did not amount to the 230 dollars, now sought to be credited in Jonathan's account? After this, what safe reliance can be placed upon Mr. Gray's recollection as to the $190 being paid out of the funds of Jonathan Arnold in his hands? It is certain, that, at that very time, he was collecting money for Thomas Arnold. The letter of instructions to Mathewson, in 1808, shows, that money was to be collected on the personal account of Thomas Arnold, as well as on account of Jonathan Arnold's estate. And Mr. Gray is certainly mistaken in supposing it was credited to the brig Tyre; for it was credited to the brig Perseverance. I do not mean to cast the slightest imputation upon this gentleman's credit. I do not doubt, that he relates the transactions, as he now supposes them to have been. But with the most perfect respect for his veracity, it is not too much to say, that, after such a length of time, no court would be safe to grant a bill of review upon such proofs, at once inconclusive and unsatisfactory. It is to be remembered, that the case stands here very differently from what it would on an original bill. Here, the onus probandi is on the petitioner to establish the error, and it must be proved by newly discovered evidence or facts, to entitle him to a review. Great reliance has been placed, at the argument, upon Moore v. Moore, 2 Ves. Sr. 596, as a case of relief founded upon analogous principles. Without doubt, if a substantial error is conclusively ascertained by newly discovered evidence, that furnishes a ground for a review. But that case was not like the present. There John Moore was made a party to a bill for an account, as one of the executors of C. M.; and the plaintiffs insisted, that he acted as executor. That was not proved; and therefore he was not decreed to account as executor, and he refused to account. Afterwards it was discovered, that he had received £2,500 mortgage money of the testator's estate. Lord Hardwicke thought this was proper matter of review; and that Moore ought to have disclosed the fact on his original answer, although he had not acted generally as executor. Now, there was nothing in this case to put the plaintiffs upon any inquiry as to any mortgage. They asked for an account generally of the testator's estate from his executors, in order to have a decree for their legacies. It would have been different, if the very mortgage had been in controversy between the parties, and brought out upon the account.

2. The next charge is, that in the account settled on the 31st of March, 1801, between Thomas Arnold and Jonathan Arnold, there was debited an item for one half of the premium on the schooner Fame, on her voyage home, of 180 dollars and 12 dollars interest, in all 192 dollars; which it is now said is erroneous, because no such insurance was made or premium paid, the vessel and her cargo being then insured out and home, by the Providence Insurance Company, for more than the value of both. One of the charges, in the original bill, was of errors in the settlement of this very account; and upon the hearing, the court decreed, that the account should stand, subject to any surcharge and falsification by the plaintiff. Of course, this item was open for contestation before the master. It was confirmed, as to this item, by the master; and if the court now reviews it, it undertakes, after a lapse of 28 years and the death of both parties, to open a settled account upon a mere presumption of mistake, founded upon a very imperfect knowledge of the real circumstances. Thomas Arnold was liable to examination before the master for every item in his account. He might have been inquired of, as to the facts, where the insurance was made, and when the premium was paid; and as to all other material circumstances. The petitioner waived such inquiry in the very case, in which he was keenly on the scent to discover errors. It does not appear that he made any inquiry, or was misled by any attempted misrepresentation or concealment on this head. If he then used no reasonable diligence in the matter, then before him, it must be a strong case to justify an interposition of the court now in his favour.

But what is the newly discovered evidence to falsify the item? It now appears, that by a policy underwritten on the 24th of July, 1800, by the Providence Insurance Company; Thomas Arnold for Jonathan Arnold, Barker & Lord, and James Schmeibar, caused insurance to be made of 9,000 dollars on the schooner Fame and cargo, viz. 7,000 dollars on the cargo, and 2,000 dollars on the vessel, from Charleston to Martinico, at and from thence to any one port in the United States, at a premium of 17 per cent.; with liberty to proceed from Martinico to any other port or ports in the West Indies, by adding three per cent. for every English windward port, and five per cent. for every other port. Upon the back of the office copy of the policy is the following indorsement. "October 26. Received information of her safe arrival at Charleston; touched at Trinidad and St. Thomas; for which add 8 per cent. to the premium. Return 9 per cent. on $—— deficiency of cargo from St. Thomas." This indorsement was doubtless made by the proper officer of the insurance company; but what settlement was actually made does not appear by any competent evidence. It appears, however, from William Holroyd's papers, that Barker & Lord were charged in settlement by Thomas Arnold with one half of the premium of the cargo of the Fame, $986.48; and the other half of the premium on the same cargo, viz. $986.48, was charged to Jonathan Arnold, in the above account, settled in March, 1801. It is impossible, I think, from such facts alone, to ascertain, whether the charge of the 192 dollars for premium on the vessel home was correct or not; non constat, that there might not have

been another policy on which it was paid. The very terms of the charge suppose it to be a premium, not for the whole voyage, but for the return voyage only. Besides, it does not appear from this policy, or the other papers, that Barker & Lord had any interest in the vessel. The charge against them is for premium on cargo only; and if they had had any interest in the vessel, and the sum charged included both, it would probably have been mentioned. The very circumstance, that there is a distinct charge of the premium on the vessel, following that of the cargo, which is stated to be settled with William Holroyd, in the account of March, 1801, is strong presumptive proof, that Jonathan Arnold was the sole owner of the vessel. And this is quite compatible with the terms of the policy of insurance. And, after all, the conjecture of the counsel may be well founded, that the settlement under the policy, whatever it was, was by compromise. Who can say, after such a length of time, when the transactions are involved in so much obscurity, that he now understands them better than the parties did at the time, when they were fresh in their minds, and were settled in their accounts? There would be, as I think, much rashness in such an assertion. But, supposing there might be some doubt, is that a ground for unravelling an intricate, settled account, after such a lapse of time? Was there ever a bill of review maintained under such circumstances, especially, when a prior decree had given the party leave to surcharge and falsify? In short, can it be endured, that a bill of review should be allowed, but upon proofs, which standing alone, would overturn the decree, and would be conclusive on the point? Ought they not to be direct, plain, unequivocal?

The next item is a supposed error in the account settled in March, 1801, where Jonathan Arnold is charged with the payment of $2,267.82, principal and interest on his note to Joseph Rogers. It is now said, that by newly discovered evidence the petitioner can show, that only $1,693.95 was in fact paid on that account; and for the payment of this, Thomas Arnold had, in 1798, bills, the property of Jonathan, to the value of £800 sterling, which he had used and enjoyed the interest of. Many of the remarks already made apply with increased force to this item. In the first place, there is a settled acknowledgment between the parties, that the sum is right, and the note was paid. In the next place, as to the bills of exchange. They are duly credited and admitted in the same account, as correctly applied. How then can we say, that they were used differently from what the parties intended? There is no new evidence, as to these bills; and they were included in the report of the master. But what is the new evidence now suggested as to the item of $2,267.82? It is simply this. Mr. William Holroyd was agent of some sort for Rogers, (we do not know how far,) and in his books (for he is dead) there are now found two credits to Joseph Rogers, one, under date of October 5, 1799, of $600, "received from Thomas Arnold in part of Jonathan Arnold's note;" the other under date of November 9, of the same year, of "amount of Thomas Arnold's note, $1,100, deduct discount, $6.05, viz. $1,093.95," making together the amount of $1,693.95. No other credits appear on Holroyd's books. Rogers is also dead, and in his books no other credits can be found in his accounts with Holroyd; and what is curious enough, the credit of $600 is stated to be "cash in part of T. Arnold's note," and not of Jonathan's. And in Rogers's cash account even the whole of these sums is not credited. What then is the plain amount of this evidence? not, that Thomas Arnold never paid the sum of $2,267.82 on Jonathan's note; but that the payments can not be distinctly traced, at this distance of time, in either Holroyd's or Rogers's books. And suppose they cannot. Is a settled account to be opened, because third persons, to whom payments have been made, omit to keep correct books, or enter full credits? Is their omission to prejudice the rights of others; and to overturn the deliberate settlements of parties? Are we to indulge in presumptions, that the parties did not know their own concerns, and that there has been fraud or mistake, because we cannot now trace back the origin of payments acknowledged by them? What proof have we, that the sums stated in these books were payments on account of the very note charged in the settlement? The payment of $1,093.95 purports to be on Thomas's note; how can we say, that it was on Jonathan's? The court is, then, called upon to re-examine this account upon mere surmises and conjectures; and the petitioner now demands, that the original note of Jonathan should be proved to verify the payment, exactly as if this were an original bill for an account, and a discovery. The original bill sought to set aside the settled accounts; leave was given to surcharge and falsify; and after a decree confirming the account, a discovery is sought upon new evidence of the loosest texture, and most inconclusive nature. The evidence, such as it is, was open to the plaintiff at the original hearing, if he had chosen to look for it, and by reasonable diligence it might then have been obtained, as well as now. If it had been obtained, I think it would have come to nothing. But as a foundation of a bill of review it is wholly inadmissible. I observe too, that the master states, that this very item was in controversy before him; and that Holroyd's books were examined for the purpose of explaining one or more payments to Rogers by Thomas Arnold on Jonathan's account.

The next item is, that there was an insurance at Malaga, of $8,000, on the brig Friendship's cargo, from that port to the Mediter-

ranean and home; that she was captured in 1797 on the voyage home; and that one half of this cargo belonged to Jonathan, and therefore half of the insurance ought to be credited to him. Now, this very item was not only in controversy before the master, as he states, but it was made the subject of a special interrogatory in the original bill, and a discovery prayed. Thomas Arnold, in his answer, expressly stated, that he had no knowledge of any insurance at Malaga; but had been informed, that there had been a policy there procured by Captain Proud (the master), on the cargo from Malaga to Genoa only; and as that risk terminated without loss, and the vessel was captured afterwards on her voyage home, he never received any thing on that insurance. Here, then, the petitioner was bound to use reasonable diligence, if he did not choose to rely upon the statement in the defendant's answer, and subsequent examination before the master. But he never sent to Malaga; and never made any search for Captain Proud or his papers. Captain Proud is now dead. There is not now the slightest proof, that any money ever was received from the insurance in Malaga. The petitioner now calls upon the other party for a discovery, exactly as he did in the original bill; not because any new fact has come to his knowledge since the decree; but because he has now discovered an old letter, unsigned and unfinished, in the handwriting of Captain Proud, (which does not appear ever to have been sent to the owners,) in which a suggestion is found about insurance made, or to be made by him, on cocoa (part of the cargo), up the Straits, and advising the owners to procure insurance on the vessel from Malaga home. The letter is exceedingly obscure in its terms, and it is utterly impossible to ascertain, what were the precise terms or nature of the insurance; though I should conjecture from its language, that it was limited to the cargo from Malaga to Genoa. If so, it stands completely in harmony with the original answer, and supports it. But if it were otherwise; what ground is here laid for a review? The paper, if newly discovered, is not evidence; and it establishes no receipt of any money by Thomas Arnold on the insurance, which is the material fact. A bill of review is not a bill for a discovery; but a bill founded upon a discovery already made of evidence material and decisive to the issue.

The next charge is, that in the master's report an allowance is made for a note of Jonathan Arnold to Minturn & Champlin, indorsed by Thomas Arnold, and by him paid to Joseph Jenkins, viz. $824.12½; whereas Minturn & Champlin had received 32 bags of pimento belonging to Jonathan, and had sold the same for $253, and applied the proceeds towards the discharge of the same note. It is sufficient to say, that there is no proof to this effect; nor any newly discovered evidence offered to support the statement. No reason is pretended, why Minturn & Champlin's accounts were not investigated at the original hearing.

The next charge is, as to the Tennessee Land Company shares, owned by Jonathan Arnold, the proceeds of which have been received by Thomas Arnold. The whole number owned by Jonathan was fifteen; Thomas accounted before the master for nine shares, as all received by him. The petitioner had the most ample means, by a search in the proper public office at Washington, to have ascertained the whole amount received by Thomas on the shares, if he had used any diligence. The case, therefore, falls precisely within the doctrine of Lord Eldon in Bingham v. Dawson, 1 Jac. 243. But the receipt, now produced from the public records at Washington, signed by Samuel Dexter, satisfactorily establishes, that Jonathan had long before sold the six shares, now in controversy, to Dexter. And that was the very explanation asserted before the master by Thomas Arnold. There is not a shadow of proof, that he ever received on these shares any money, which he has not accounted for. I pass over the next charge, which respects the £100 note, included in the mortgage on the Paget farm. It was disposed of upon an exception of the plaintiff in the former decree, which is reported in Dexter v. Arnold [Case No. 3,855]. No new evidence on this point is pretended. The next item is for an allowance made out of Jonathan's estate in the master's report of the sum of $4,800 and upwards, due from Jonathan's estate to the estate of Welcome Arnold, and secured by a mortgage given by Jonathan to Thomas Arnold, as administrator of Welcome, and which was allowed him upon his agreeing to cancel the mortgage, which he has not done, but refused ever afterwards to do. The mortgage appears to have been given to Samuel G. Arnold, as attorney of Thomas Arnold and Patience Arnold, administrators of Welcome Arnold. I agree, that it was the duty of Thomas Arnold to procure a cancellation of that mortgage after the credit was allowed, whether he made an express promise to do so, or not. If he had a right of retainer, as administrator on both estates, he had a right to the credit allowed in settling the account. It was not matter of exception, at that time, that it was done; and it furnishes no ground of review now. The proper remedy is by an original bill to compel satisfaction to be entered on the mortgage, and a re-delivery or cancellation of it. To such a bill the administratrix of Thomas Arnold might be properly made a party, at least for the purpose of compelling an application, or re-payment of the sum credited, if the mortgage deed is not canceled, and the credit has not been already made to Welcome's estate. If such a suit should be unproductive, I do not mean to say, that there might not be circumstances, upon which this court might give leave for a bill of review, in order, that the credit might be struck out, if Jonathan's estate were to sustain a real in-

jury, as if possession under the mortgage was insisted upon, and held at law under the mortgage. At present I do no more than say, that the matter now presented furnishes no such ground.

I have thus gone over all the principal grounds for the bill of review, supposing them to be before the court with all due distinctness and particularity, and in a shape regular and tangible. If I had more leisure I might comment, somewhat more at large, upon the principles applicable to this subject. But it being my deliberate judgment, that the case is not a fit one for a review, I content myself with ordering, that the petition be dismissed with costs.

The district judge concurs in this opinion, and therefore let the petition be accordingly dismissed.

Case No. 3,857.

DEXTER et al. v. ARNOLD et al.

[1 Sumn. 109.] [1]

Circuit Court, D. Rhode Island. June Term, 1831.

REDEMPTION OF MORTGAGES—LAPSE OF TIME—ACKNOWLEDGMENT—BILL TO REDEEM — PARTIES — PERSONAL REPRESENTATIVES AND BENEFICIARIES OF TRUST.

1. The circumstances under which a mortgage is redeemable.

2. Twenty years' undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period, there be any account or solemn acknowledgment of the mortgage, as subsisting, it is otherwise. See Dexter v. Arnold [Case No. 3,859].

[Cited in Slicer v. Bank of Pittsburg, 16 How. (57 U. S.) 579.]

3. An acknowledgment by the mortgagee in his answer to a bill in equity between other parties, that it remains a mortgage, is a sufficient acknowledgment to allow a redemption.

4. To a bill to redeem, the heirs of the mortgagee, as well as his personal representative, are ordinarily necessary parties.

5. Quaere, in what cases they may be dispensed with.

6. If the mortgagee has never taken possession during his lifetime, the mortgage belongs in Rhode Island to his personal representative, and the heirs need not be made parties to a bill to redeem.

7. Cestuis que trust under mortgagor cannot ordinarily redeem. The trustees must be made parties, and a reason shown, why they are not plaintiffs.

8. If a mortgage be of different parcels of land, some of which have been sold by the mortgagee absolutely, and others remain in his possession; and the right to redeem, as to the purchasers, is gone by lapse of time, this does not bar the remedy against the mortgagor, if otherwise well founded.

9. Acknowledgments of the mortgagee after sale do not affect or bind the purchasers, who are such bona fide and without actual notice of the mortgage.

10. Quaere, if a bill in equity can be maintained to redeem, where part only of the heirs of the mortgagee are before the court.

This was a bill in equity, brought by the plaintiffs [Edward Dexter, Jr., and others] at the June term of this court in 1828, to redeem a mortgage given many years ago, and it sought an account and other relief, according to the common course in bills of this nature. The mortgage was made by one Jonathan Arnold, (who was then the owner in fee,) on the 13th of February, 1800, to one Thomas Arnold, in fee conditioned for the payment of sixteen hundred dollars and interest on or before the 20th day of January, 1801. The mortgage embraced one part of a lot, and the stores thereon, situate on the west side of the Main street in Providence; and of one third (in fact he was owner of but one sixth) part of three other lots, at Fox's Point in said Providence. Jonathan Arnold, the mortgagor, died in October, 1806, without issue, being at that time insolvent, and leaving several persons his heirs, and among others Marcy Dexter, under whom the defendants claim, in the manner which will be hereafter stated. Administration upon his estate was taken by Thomas Arnold, the mortgagee, who entered into possession of the premises immediately on, or soon after, the execution of the mortgage, and continued in possession thereof until he sold the Fox Point lots in December, 1810; and the grantees and those claiming under them have ever since been in possession under that sale. Of the remainder of the mortgaged premises, viz., the Main street lot, the mortgagee continued in possession until his death, in October, 1826. At his death he left, as his heirs, Thomas Arnold, who soon afterwards took administration upon his estate, and as such is made defendant in the cause, and James Arnold, (a citizen of Massachusetts,) who is not made a party to the bill, because the bill alleges him to be resident out of the jurisdiction of the court. Marcy Dexter died on the 4th of September, 1817, and by her last will and testament devised as follows: "All the remainder of my estate or property of every kind and nature, (which included her interest in the mortgaged premises,) I give to my sons, Stephen Dexter and Edward Dexter, in trust for the use, maintenance, and support of my daughter, Susannah Dexter, in a comfortable manner during her natural life; and if there shall be any of my property remaining after supporting my daughter, Susannah Dexter, as aforesaid, my will is, and I do hereby give and order the same to be paid, one half to the children of the said Stephen, and the other half to the children of the said Edward, that may be then living, by my trustees aforesaid, share and share alike." And in the same will the testatrix nominated the said Stephen and Edward her executors, who accepted the trust, and were qualified according to law. In September, 1820, Susannah Dexter died intestate and without is-

[1] [Reported by Charles Sumner, Esq.]

sue. The plaintiffs are the children of the trustees and are designated as the ultimate cestuis que trust under the will.

J. L. Tillinghast, for plaintiffs.

R. W. Greene, Dist. Atty., for defendants.

STORY, Circuit Justice. This case has been very elaborately argued at the bar; but the view, which is taken of it by the court, does not require all the points and arguments to be brought into the reasoning, on which the decision is founded.

It appears to us very clear, that the trustees under the will were invested with the legal estate, and consequently they are the proper parties to file a bill to redeem. See 1 Pow. Mortg., by Coventry, with Rand's Notes, 331, 332; Grant v. Duane, 9 Johns. 591. It does not appear from the bill, that the plaintiffs are really entitled to any thing under the will; for it is not alleged that any thing would or did remain after satisfying the prior trust in favor of Susannah Dexter. If it did, still the trustees being owners of the legal estate, are solely entitled to redeem, unless they have refused to redeem, or have colluded with the mortgagee, or some other impediment is shown to the redemption on their part. The bill ought to have contained specific allegations on this head, stating a case, which would establish a residuary interest in the plaintiffs, and a ground for their claim to redeem, instead of the trustees. No such allegations are found in the bill; and on this account it is in its present shape fatally defective. It is true, that the trustees are made parties to the bill, and have answered. and there is a general charge of confederacy against them. But this will not supply the defect of proper allegations to establish the plaintiffs' claim to redeem. The trustees must be called upon to answer, and must answer specifically to such matters, as will justify the court in acting without or adversely to them. This, however, is a defect, which the court are not precluded from allowing the plaintiffs to supply, in order to prevent a failure of justice, if the plaintiffs have any merits.

All the other heirs of Jonathan Arnold, the mortgagor, or their representatives, are before the court, as defendants to the bill, with the exception of one Benjamin Arnold, a citizen of New York, who is alleged to be out of the jurisdiction of the court. But there is no allegation in the bill, that he is unwilling or unable to assist in the redemption. Now, in general, it is certainly proper, that all the persons, who are heirs of the mortgagor, should be before the court before a redemption of the estate is decreed. And this for two reasons; first that their rights and interests may not be affected by any change of the title without their consent; and secondly, that they may be parties to the account, and the mortgagee or his heirs and representatives not be harassed by a new suit for a new account. We do not know, that, where an heir is beyond the jurisdiction of the court, the difficulty is absolutely insuperable. But if it is not, still the court is bound in its decree to take care of his interests, as far as it may, and to give him by notice an opportunity, if practicable, of coming in before the master, and litigating for his interests in the taking of the account and the decree of redemption.

Another difficulty has suggested itself to our minds; and that is, whether the court can proceed to a decree of redemption, without having all the heirs of the mortgagee, as well as his personal representatives, before the court. The bill itself shows, that James Arnold, one of the heirs of the mortgagee, is not before the court, and he is stated to be out of the jurisdiction. No one can doubt the propriety of having all the heirs of the mortgagee before the court, if they can be made parties. See 1 Pow. Mortg., by Coventry, with Rand's Notes, 968, 970; Coop. Eq. Pl. 37, note N. The only question is, whether they are not indispensable parties. In England, the heirs must be before the court, in order to reconvey the estate to the mortgagor; for it descends to them, though generally in trust for the personal representative of the mortgagee. There may be peculiar cases, in which, where one of the heirs is beyond the jurisdiction, or cannot by any diligence be found, the court will act without him. 1 Pow. Mortg., by Coventry, 403, note N. But in these cases the relief granted must be necessarily imperfect, as it cannot bind persons not before the court. In the case at bar, if there had no entry or possession by the mortgagee, in his lifetime, in the premises, there would not have been any substantial difficulty in proceeding against the personal representative of the mortgagee, who is before the court. The statute of Rhode Island has declared, that in all cases debts due by mortgage shall be considered as personal property, and distributed as such. And where the mortgagee has deceased without taking possession of the mortgaged estate, the debt is deemed personal assets, and the mortgage under the same control of the executor and administrator as if it had been a pledge of personal estate; and the executor and administrator may bring an ejectment to recover possession, in which action it is made sufficient to declare on the seisin of possession of the mortgage. And the executor and administrator are authorized to discharge the mortgage on payment, by release, quitclaim, or other legal conveyance. St. R. I. Dig. 1798, p. 303; Dig. 1822, pp. 233, 234. So that, in such cases, the presence of the heir seems wholly unnecessary, and may therefore be dispensed with. But the difficulty in the case at bar is, that the mortgagee had taken possession during his lifetime, (in what manner we shall hereafter consider,) and continued that possession for about twenty-six years. And the question, therefore, whether

it is to be treated as a subsisting mortgage, or as an absolute estate, is most material to all the heirs of the mortgagee, and upon which they are entitled to be heard. The difference between the case of a possession, and of a want of possession by the mortgagee, has been treated by the supreme court of Massachusetts, under a local statute, very similar to that of Rhode Island, as most material; for, where there has been such possession, the estate is held to pass by descent to the heirs; where there has been none, it goes directly to the executor and administrator.. See Smith v. Dyer, 16 Mass. 18. Without, however, considering this objection as insuperable, and reserving it, as it has not been argued, for further consideration, as one of the heirs, against whom relief may be had pro tanto is before the court, we shall proceed to the main question in the cause.

And, in the first place, are the plaintiffs, supposing all other difficulties overcome, entitled to relief against the defendants, who are claimants and proprietors of the Fox Point lots? We are clearly of opinion, that they are not. They are bona fide purchasers for a valuable consideration without any actual notice of the mortgage, and affected by it only so far, as it varies constructively from the registry of the mortgage. The application is made after they have been in uninterrupted possession of the premises for eighteen years under their purchase, and have made valuable improvements thereon. We make no distinction between their possession of the upland, and the flats. The latter were a part of their grant, and, whether visibly occupied or not, follow the seisin of the other part, there being no pretence of any adverse possession. In addition to this, the mortgagee, when he sold to them, had been in visible possession of the estate for ten years. The mortgage had been forfeited by breach of the condition for nine years. The mortgagor had been dead four years; his estate was utterly and hopelessly insolvent at the time, and became solvent only by the ultimate settlement of the Yazoo claims by congress in 1814. The estate was administered upon by the mortgagee; and all the circumstances must have been well known to him, and to the heirs. At least, the heirs had far better means of knowledge than the purchasers, and must be presumed to have had constructive notice of their rights. Under such circumstances, the equity of redemption must, in respect to these purchasers, have been deemed of no value, and to have been abandoned by all parties. The heirs had no interest to redeem, for the estate was insolvent; the creditors made no effort to redeem; and the property lay in the hands of the mortgagee, as a pledge not worth redemption. If afterwards, after the estate became solvent, the heirs had then pressed forward their claim against the purchasers, there might have been some foundation for relief. But they lay by through a period of fourteen years more without any stir, and until the mortgagee was himself dead. Now, there is nothing in the case to break the force of these circumstances in respect to these purchasers. It is said, that in another suit in equity, in 1822, the mortgagee acknowledged, that he held the estate in mortgage, and that it was not irredeemable. But how can this affect these purchasers? They are not affected, much less bound by any admissions made by the mortgagee after the sale to them, whatever they may be. Their rights are not to be affected by his confessions. He sold to them, as absolute owner, and they are entitled to be secure against any subsequent admissions, which should control that solemn declaration under his own seal.

But it is said, that though the mortgagee took possession of the mortgaged estate, it was as agent of the mortgagor. This is the allegation in the amended bill. In the original bill the possession is stated without any such qualification. Now, this qualification of the possession is utterly denied by the answers, and of course must be proved in order to control those answers. No such proof exists in the case; and it seems to us, that it is in its nature almost incapable of proof. A mortgagee entering into possession, and taking the profits, must be deemed to take them in his character as mortgagee. If in any sense he can be said to take them as agent, it must be as agent-mortgagee. Before forfeiture he may properly be deemed, in some sort, an agent. But after forfeiture his possession is under his title; and if he then takes the profits, he must be deemed to take them as mortgagee, and not otherwise, unless there be the most plenary and irresistible proof, that he has disclaimed that character, and taken them to account, and has accounted therefor, as a stranger-agent. No such account is pretended in the present case. All the circumstances are against it. There has been no account whatever rendered, at any time, on the footing of the mortgage. When the mortgagor died, in 1806, the agency must at all events have terminated; and the possession after that time, was about twenty years without any account. There cannot be any reasonable doubt, that the utter insolvency of the estate at that period made it no object with the heirs to treat it as mere security; and the creditors, from ignorance, or laches, or indifference, slumbered over their rights. It appears to us, that under all the circumstances there would, after such a lapse of time, be gross injustice in allowing a redemption against these purchasers. Our judgment accordingly is, that the bill, as against them, ought to be dismissed, but without costs.

But, in respect to the Main street estate, which remained in the mortgagee's possession up to the time of his death, very different considerations may well enter into the

question of redemption. Generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage and security only. But, if the mortgagee has been in possession of the mortgaged premises for twenty years, taking the profits without any account or act done, by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagee; and a bill to redeem will not be entertained by a court of equity. This, as a general principle, is not denied; and is too clearly established by the authorities to admit of doubt. See 1 Pow. Mortg., by Coventry & Rand, p. 360, and notes T, U; Id. p. 366; Id. p. 369, and note B; Id. p. 370, note C; Id. p. 392, note 1. What acknowledgment, or other act done within the twenty years, shall be sufficient to entitle it to be deemed, between the parties, a subsisting mortgage, may be matter of discussion, according to the circumstances of each case. But no one can doubt, that a solemn acknowledgment in writing, made within the twenty years by the mortgagee, that he deems it a mere security, will open the estate to redemption. The authorities are pointed to this effect. See 1 Pow. Mortg., by Coventry & Rand, p. 370; Id. p. 371, note D; Id. p. 377, note G; Id. pp. 379-382, note H; p. 385, note 1; Id. p. 386.

Now, in the present case, there is the most solemn and pointed admission by the mortgagee, in his answer to the bill filed in 1821 against him for an account, as administrator of Jonathan Arnold, that he then held this estate as a mortgage, and only as a mortgage, under Jonathan Arnold. This admission was in a suit between third persons, and not between the parties now before the court. But that circumstance does not vary its force. It is still an admission, and a most solemn one under oath, by the mortgagor; and, as such, ought to bind his personal and real representatives, although it would not bind third persons. Cases are cited in the note to Mr. Rand's valuable edition of Powell on Mortgages, by Coventry (volume 1, p. 385, note 1), which are directly in point; and we gladly refer to them in their compendious form, as satisfactory and conclusive. Then, again, it may be suggested, that there cannot be any redemption of a mortgage, unless of all the premises contained in the original mortgage deed; and, therefore, if there be a bar to any part, that operates as a bar to the whole. Our opinion is, that this objection, (if it should be made,) is not maintainable in point of law. There is neither reason nor policy to support it; and we are not aware of any case, which goes the length of establishing it. It seems to us, that the authorities, so far as they go, point the other way. See 1 Pow. Mortg., by Coventry & Rand, p. 385, note 1, under pages 388, 389.

The present is not a case, where the mortgagee has entered into possession to foreclose his mortgage in the manner pointed out by the Rhode Island statutes (see R. I. Acts, Dig. 1798, p. 275, and Dig. 1822, p. 209), and where his possession, for the stipulated period, bars the equity of redemption. The case stands upon the general principles of a court of equity; and the bar, if any, arises only from the rules, which it has prescribed in its own administration of its jurisdiction.

Supposing, therefore, that the other difficulties already alluded to are overcome, we perceive no solid objection to allowing the plaintiffs to redeem according to the prayer of their bill, so far as respects the Main street estate.

What we propose at present is to pass an interlocutory decree, dismissing the bill, as against the purchasers and proprietors of the Fox Point lots; and, retaining the bill as to the other defendants, to allow the plaintiffs to amend their bill, as to the trustees under Marcy Dexter's will, in the particulars mentioned; and, as consequent thereon, to allow the trustees to answer as to such amendatory matter. And, in order to prevent any unnecessary delay, we propose, if the trustees do not interpose any objection, to refer it to a master to take an account of what is due on the foot of the mortgage; to direct notice to James Arnold and Benjamin Arnold before the taking of the report, that they may become parties to the bill, and contest for their interests in the matter thereof; and to reserve all their rights, to be heard fully by the court upon the merits, if they shall become parties. The question of the ultimate right of redemption by the plaintiffs, if no other parties shall appear, in the progress of the suit, than those who are now before the court, is to be reserved for future consideration, when the master's report comes in. Decree accordingly.

[NOTE. The cause was subsequently heard and decided on exceptions to the master's report. See Case No. 3,858.]

Case No. 3,858.

DEXTER et al. v. ARNOLD et al.

[2 Sumn. 108.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1834.

EQUITY—EXCEPTIONS TO MASTER'S REPORT—MORTGAGES—MORTGAGEE IN POSSESSION—RIGHTS AND LIABILITIES — FAILURE TO KEEP ACCOUNTS — OPENING ACCOUNTS — DEED OF MORTGAGED PREMISES.

1. In exceptions to a master's report, a general assignment of errors is insufficient, unless specific errors are shown.

[Cited in Greene v. Bishop, Case No. 5,763.]

2. The master was right in refusing to inquire into the original consideration of a mortgage, when this mortgage, in an account settled between the parties, was treated as a good subsisting mortgage for the full amount stated therein, and when the bill did not charge that the consideration was nominal, or that there was

[1] [Reported by Charles Sumner, Esq.]

any mistake therein, or ask for any examination thereof.

3. A mortgagee is bound to make all reasonable and necessary repairs upon the mortgaged premises while in his possession, and will be responsible for the damage occasioned by any wilful default or gross neglect in this respect. The natural effects of waste and decay, from time, he will not be bound to repair.

4. Quaere—If a mortgagee, who lays out money in permanent repairs for the benefit of the estate, may claim an allowance therefor.

5. Exceptions to a master's report must be founded on the facts stated in the report, or in the accompanying documents and proofs.

6. The master was right in refusing to open an account settled in 1801, as no leave was given to surcharge and falsify that account, and there were circumstances, which shewed, that the account had already been adjudicated in a former suit by this court.

7. The master was right in charging the estate of the mortgagee with the money received, as the consideration, on giving an absolute deed of the mortgaged premises.

8. An absolute deed of mortgaged premises given by the mortgagee operates as a conveyance of a defeasible title only, and not as a disseisin, as between the mortgagor and mortgagee.

9. A mortgagee, who keeps no accounts of the rents and profits received by him, is properly chargeable with what he may be presumed to have received, and, if in the occupation of the premises, also with an occupation rent. And the master was right in embracing all these items in an account of rents and profits received.

10. Where a mortgagee has kept no accounts of the rents and profits received by him, the master will exercise a sound discretion upon the whole evidence with regard to the amount for which he should be charged, without resorting to the standard of an occupation rent.

[Cited in Providence Rubber Co. v. Goodyear, 9 Wall. (76 U. S.) 804.]

Bill in equity to redeem a mortgaged estate. The cause, as formerly heard in this court, will be found reported in Dexter v. Arnold [Case No. 3,857]. It now came again before the court, upon the report of the master, W. R. Staples, Esq. The report was as follows:

On the 25th day, and on divers days afterwards, having been attended by counsel for the complainants, and for the defendants, said Anna and James Arnold, and having examined the evidence taken in chief in said cause, and taking the testimony of divers witnesses, produced before me, and the examinations of said Anna and James, under affirmation, upon interrogatories touching the matter directed to be inquired into; and having also examined the books, papers and documents produced by said Anna, as and for the books, papers and documents of said Thomas, relating to the subject-matter in dispute,—after due consideration of the same, I have stated the account of the amount due, upon the foot of the mortgage mentioned in the said decree, and of the rents and profits of said mortgaged premises, received by said Thomas Arnold, in his lifetime, and by said Anna, administratrix on the estate of said Thomas since his decease, allowing said mortgagee for repairs and expenditures in the premises.

The complainants contended, that all moneys received by said Thomas Arnold, on Jonathan Arnold's account, and not accounted for, ought to be presumed to have been received on account of this mortgage or the mortgage on the "Paget Farm," so called, under the existing circumstances of the case. In pursuance of this position, they claimed the following sums, to be deducted from the original consideration of this mortgage, to wit: The sum of $430, said to have been received by said Thomas, of Vincent Gray, of the Havana, together with interest thereon; the amount of a note for £100, part of the consideration of the mortgage given by said Jonathan to said Thomas, of the Paget farm; the said note, as they contended, being charged by said Thomas to said Jonathan in the account settled between them on the 31st March, 1801, and not endorsed on said mortgage of the Paget farm, —together with the interest thereon; the amount charged by said Thomas to said Jonathan in said account, settled March 31, 1801, for premium on schooner Fame, viz. one hundred and eighty dollars, with twelve dollars interest thereon, on the ground that the same was embraced in a previous charge in said account,—with interest thereon; the amount of five hundred seventy-three dollars, eighty-seven cents, being the difference between the amount of said Jonathan's note to Joseph Rogers, and the amount said to have been received on said note by said Rogers, of said Thomas, with interest thereon. These sums I rejected, and refused to receive evidence in relation thereto, on the ground, that they entered into and made parts of the account settled between said Thomas and Jonathan on 31st March, 1801, which account has been already adjudicated upon and settled by this honorable court; and that if any claim for the same exists against said Thomas or his representatives, it is against him as agent or administrator of said Jonathan, in both which capacities the said Thomas, in his lifetime, accounted to this honorable court. Considering also, that the mortgage in this cause is credited to said Jonathan by said Thomas in said account of March 31, 1801, I have deemed it unnecessary to inquire into the original consideration of said mortgage, or to require proof of the existence or payment of the notes and acceptances charged in said account, or to enter into or state interest account in relation to said account, presuming that when said account was so settled and adjudicated upon, this item of credit was considered, that the rest of the account was adjusted in reference thereto, as the same there stands credited. The complainants also contended, that they ought to be credited with rents of the mortgaged premises for the years 1793, 1794-5-6-7 and 8. This claim I have also disallowed, on the ground,

that the mortgage was dated in 1800, and admitting that said Thomas received said rents, he was liable for them as agent, and not as mortgagee, and in that capacity has accounted for them, or been called upon to account for them to this honorable court. I have however charged the respondents with rents from 5th November, 1799, in consequence of the admission of James Arnold, in his answer, that at the settlement of said account of March 31, 1801, it was the understanding and intention of said Thomas and Jonathan, that the rents from that time should inure to the benefit of said Jonathan, under said mortgage, and in consequence of the same being credited to the account, rendered by said Anna Arnold, of the rents and profits received toward said mortgage. The complainants also claimed for "damage of the store by the entire neglect of the mortgagee in possession, to shingle the store, eight hundred dollars." The store here referred to is the store on South Main street. That the premature decay and dilapidation of said store, was occasioned by neglect to repair it, I take to be fully proved, if not admitted, by said Anna and James. Yet I have not deemed it equitable to charge them with the damages occasioned by such neglect, inasmuch as the mortgagee during the whole period of his possession of said estate, under his mortgage, was a tenant thereof in common with Asa Arnold and the heirs at law of Welcome Arnold, and it was neither proved nor suggested that he was ever requested by the other owners to join in any repairs on said estate, or that Jonathan Arnold or any of his heirs, ever intimated the propriety or expediency of making any. While on the other hand it was proved that Samuel G. Arnold, the attorney of the administrators, on the estate of Welcome Arnold, and one of the heirs at law of said Welcome, occupied the upper part of said store from 1801 to 1811 or 1812, when it had become out of repair, and leaky, and must, therefore, have been intimately acquainted with its situation, and was requested by the agent of said Thomas, afterwards, to join in repairs, and refused so to do. The complainants also claimed "the value of one third part of the Fox Point lots, part of the mortgaged premises, sold by Thomas Arnold on 21st Dec., 1810, by absolute deed." This claim was resisted by the mortgagee. Nevertheless, it has appeared to me that said sale could not have been effected by said Thomas, had not this mortgage been held by him. That his covenants of warranty are mere personal obligations, insisted upon by the purchasers to protect what they knew, was, without them, an invalid title, and voluntarily entered into by said Thomas, either to insure the sale of the other undivided part of said lots, or to accelerate the collection of his mortgage debt, that the money so received was received for the mortgagor's property. And that the effect of said sale will be to deprive the mortgagor of part of his estate without an equivalent; and to vest the proceeds thereof in the mortgagee, without any consideration, unless the mortgagee is made to account for them toward this mortgage. For these reasons, I have allowed said claim for one third part of the amount received by said Thomas, for said lots, with interest thereon, from the day of said sale, December 21, 1810.

Much of the difficulty in ascertaining the rents and profits, with which the mortgagee ought to stand charged, has arisen from the fact that the mortgaged premises were an undivided third part of an estate. This difficulty has been increased by the following circumstances, viz. that Thomas Arnold himself was some years a tenant of a part of the estate; that Samuel G. Arnold, at one time, also occupied a part of the estate on Welcome Arnold's right, that sometimes Thomas Arnold received rents on Asa Arnold's right, sometimes charged rents to Samuel G. Arnold & Co.; at other times Samuel G. Arnold and Company received rents for Jonathan Arnold; sometimes Jonathan Arnold received rents himself of the tenants, and more than all, from the fact that Thomas Arnold kept no regular account of the rents he received. The account, presented by the administratrix on the estate of said Thomas, is made up, from the rent-rolls of said Thomas, his accounts with the tenants, his cash books, and credits given him by tenants in their accounts settled. I did not, therefore, consider myself bound by the account so presented, especially when on inspecting it and comparing it with the vouchers from which it was made, I discovered some inaccuracies and omissions. Nor could I satisfy myself with what rents said mortgagee should stand charged, without first estimating the fair rent of the whole premises, under their peculiar circumstances, and then charging him with one third part thereof. This course appeared to me the more proper, from the fact that certain rents were received by Samuel G. Arnold and Company, on account of Jonathan Arnold, which were relinquished by Thomas Arnold in the compromise settlement made between said Thomas and Samuel G. on the 13th day of June, 1823, the amount of which could not be ascertained by the evidence in the cause.

The estate consisted of a lot of land, forty feet in breadth, extending westward from South Main street to the channel of the river. On the east end is a store two stories high, about sixty-five feet in length, and twenty in width, with a cellar under the whole length of it. Towards the west end was an old store, two stories high, about twenty by thirty feet. To the west of this was a cooper's shop. When these buildings were erected, has not been made certain by any proof, nor the state of repair in which they were at the date of the mortgage. A hatter's shop was erected on the front of said lot, after the

date of the mortgage; but when or by whom no evidence has been produced to me. The cooper's shop is called, in the testimony, a very old building. This was either carried away by the "gale" in 1815, or demolished in the following year, when South Water street was opened. The old store was much injured in "the gale," the lower story being almost wholly demolished by it. But it was standing when partition was made in 1828. The store on South Main street was abandoned as untenantable in 1823, though the cellar under it, to the present time, has been occasionally occupied for storing such goods as would take no injury from wet. In 1828, a partition of said estate was made on the suit of the children and heirs at law of Samuel G. Arnold, by which the eastern part of said lot, extending back sixty-five feet from South Main street, and the north half of the wharf, being about twenty by twenty-five feet, was set off for the third part of the estate that belonged to Jonathan Arnold.

In ascertaining the fair rent of these premises, I have divided the time into five periods. The first of which extends from November 5, 1799, to November 5, 1805. During this period Paul and Hull, or Peleg Hull, rented the front shop in the store on South Main street at $80, and the room back of it at $30 per year. Samuel G. Arnold & Co. occupied the other parts of said building, but at what rent, is not shown. I have supposed it to be worth at least $75 per year, as afterwards the cellar alone was charged him by Thomas Arnold, at the rate of $36 per year. The old store was occupied by Thomas Arnold with one third the wharf; for this I have supposed $90 per year was a reasonable rent, as that amount was afterwards charged by said Thomas to subsequent tenants, and as the cooper's shop was occupied from 1802 at the rate of $25 per year. I had no hesitation in charging the mortgagee with the same rent during this period. I have, therefore, considered the fair rents of the mortgaged premises, during this term, to be three hundred dollars, and that the mortgagee of the undivided third part thereof, ought to be charged with one third part thereof.

The second period extends from November 5, 1805, to December 21, 1810; five years, one month, and sixteen days. During this period, Paul and Hull, or Peleg Hull, rented the same part of said premises, and at the same rent, viz. $110 per year. The old store continued to be occupied by Thomas Arnold, or rented to other tenants at the same rent, viz. $90 per year. The cooper's shop was rented for $25 per year, until April 1, 1807, and from that time to January 28, 1808, at $15 per year; the reduction being made in consequence of the increased state of decay of said building. After 1808 there is no evidence of any rent received for it by any person. I have estimated the fair average yearly rent during this period, to be $10 per year. The second floor and cellar of the store on South Main street was occupied or rented by Samuel G. Arnold and Company, during the whole of this period, and I could find no cause to change the amount of rent. I have, therefore, considered the fair rent of the mortgaged premises during this period, to be two hundred eighty-five dollars, one third part of which ought to be charged the mortgagee.

The third period extends from December 21, 1810, to December 21, 1823, being thirteen years. The lower part of the old store was rented until December 31, 1811, at $60 per year, and the upper loft until November 21, 1821, at $30 per year; the wharf was rented from March 11, 1822, to the end of this period, at $80 per year. I have considered $70 per year as a fair average rent of this part of said premises, during this period. Peleg Hull continued in the occupation of the front store on South Main street until 1823, at $80 per year; and in the occupancy of the room back of it until 1818, at $30, and from then until 1823, at $15 per year. I have considered one hundred dollars to be a fair average yearly rent of this part of said premises, during this period. The rent of the upper room and cellar of this store, I have estimated at $36 per year. The hatter's shop was probably built about 1811, by some tenant who was chargeable with the ground rent only, until he abandoned it to the owners of the land. In 1819, I find it rented for $60 per year. I have assumed $30 to be a fair average yearly rent during this period. The yearly rents from 1810 to 1823, of the whole premises, I have estimated at $236, one third of which should be charged said mortgagee.

The fourth period extends from December 21, 1823, to the time partition was made of these premises, in 1828, being four years and six months. The wharf and old store were rented from the commencement of this period, to March 11, 1826, at $80 per year, and from that time until partition was made, at $150 per year. I have considered $110 to be a fair average yearly rent for the same during this period. The store on South Main street remained, during this period, generally unoccupied; as the cellar under it was occasionally occupied, a fair rent of that part of the premises, I have estimated to be $40. The rent of the hatter's shop I have also estimated at $30. I have, therefore, considered the fair average yearly rent of the whole premises, from 1823 to 1828, to be $180, one third part of which ought to be charged said mortgagee.

The fifth and last period extends from the time partition was made, to June 15, 1833, being five years eleven months and twenty-five days. I have considered the store on South Main street with the cellar under it, to be of the yearly value of forty dollars, the hatter's shop to be of a yearly value of thirty dollars, and the north part of the wharf to be of the yearly value of twenty dollars; that being the sum for which the

same was rented in 1832. These comprehending the part of said premises, that was set off for Jonathan Arnold's share in said estate, the said amounts being ninety dollars per year, I have considered ought to be charged to said mortgagee.

As I found, on stating the account on these principles, that the rents to be accounted for by said mortgagee, up to the 21st day of December, 1810, together with the amount on that day received by him, on the sale of the Fox Point lots, exceeded the amount of interest due on said mortgage debt, and the repairs on said estate and interest thereon, up to said date, by the sum of $426.81, I deducted said sum of $426.81 from the principal, and allowing interest thereon, with interest also on the repairs, made on said estate up to the fifteenth day of June, 1833; I report that there is the sum of one thousand, three hundred and sixty-six dollars, thirty-six cents, due on said mortgage. My principal reason for reducing the rents in the second, third, fourth and fifth periods, was the increased dilapidation of the buildings from want of repairs; but the opening of South Water street in 1816, though it added much to the value of the whole estate, decreased its productiveness, as the most valuable part of the buildings stood on South Main street.

To this report exceptions were filed by the plaintiffs and defendants. Those of the plaintiffs were as follows:

1st. For that the said master, has stated and certified in said report, that there is due on the said mortgage, mentioned in plaintiff's bill, the sum of $1366.36, whereas, he ought, as the plaintiffs are advised, to have reported that there is nothing due upon said mortgage.

2d. For that the said master, in said report, has stated that he deemed it unnecessary to inquire, and he did not inquire into the original consideration of said mortgage, whereas the bill of the plaintiffs, charges that the nominal consideration mentioned in said mortgage, was never received by the mortgagor, who ignorantly signed said mortgage, and the said supposed consideration was stated in said mortgage, to consist of certain supposed and undescribed notes and acceptances, alleged by the mortgagee to have been taken up by him, which the plaintiffs did and do deny that he did take up, so as to be a creditor of the mortgagor therefor, at the date of said mortgage to the amount of said nominal consideration. And the said master ought, as the plaintiffs conceive, to have inquired into said consideration.

3d. For that the said master, in said report, and in the account annexed thereto, has allowed to the defendants, the full amount of said supposed consideration, and interest thereon, under the supposition, as by him in substance stated, that he was concluded thereby, whereas the said master, as the plaintiffs conceive, ought not to have allowed the same.

4th. For that the said master, in said report and account, has made a deduction, from the annual value and rent of the said mortgaged premises, as they were received by the mortgagee, on the ground that the same or parts thereof, became untenantable for want of repairs, while in the hands of said mortgagee and his representatives. Whereas the same were received in good tenantable order and repair, by said mortgagee, as appears by said report, and the exhibits accompanying the same, and were partly rented and partly used by the said mortgagee and his representatives, and the said master ought, as the plaintiffs conceive, to have reported and charged in said account, against said defendants, the annual value and rent thereof, for the whole time of possession by said mortgagee and his representatives, according to the value and rent thereof, at the time he took possession thereof, deducting a reasonable sum for repairs.

5th. For, that the said master, in said report and account, has reported and charged nothing against said mortgagee and defendants, for the destruction and dilapidation of the buildings on said mortgaged premises, although he has therein stated, that such destruction and dilapidation took place, while the premises were in the possession of said mortgagee and his representatives. Whereas he ought, as the plaintiffs conceive, to have charged in said account to said defendants, or credited said premises, and allowed and reported in favor of the plaintiffs, a sum equal to the damages by such destruction and dilapidation, with interest.

6th. For, that the said master has disallowed, and as stated in said report, refused to receive evidence, in relation to the charge of a note for £100, and interest thereon, exhibited and claimed by the plaintiffs, which note, as the plaintiffs allege, has been twice paid to said mortgagee, and has not been accounted for by him, whereas the said master, as the plaintiffs conceive, should have charged the defendants with said sum and interest.

7th. For, that the said master in said report and account, has not charged the defendants with the sum of $192, and interest, and refused to receive evidence in relation thereto, which sum was paid to said mortgagee, under a mistake and error, as for premium and interest, for insurance on the schooner Fame, when no such sum was due for such insurance. Whereas the said master, as the plaintiffs conceive, ought to have received evidence of said charge, and to have charged said sum and interest thereon, to the defendants in said account.

8th. For, that the said master, in said report and account, has not charged the defendants with the sum of $573.87½, paid to said mortgagee through error, as for money advanced by him, to take up said mortgagor's note to Joseph Rogers, being an excess paid to said mortgagee by said mortgagor, over and above the sum so advanced by said mortgagee, and refused to allow the same, and to

receive evidence thereof, on the grounds that the same had been already settled, and adjudicated and accounted for, by and between said mortgagor and mortgagee, whereas such is not the case, and said master ought to have received evidence in relation to said charge, and to have charged the defendants therewith, and with interest thereon, in such account.

9th. For, that the said master has certified in said report, that he refused to allow or to receive evidence, in relation to all moneys received by said Thomas Arnold (the said mortgagee), on Jonathan Arnold's account, and not accounted for, and that said master did refuse to allow such moneys received by said mortgagee, although from all the accounts and exhibits, offered and shown by the plaintiffs and defendants, it appeared that moneys had during said mortgagee's possession, been received by said Thomas, of said Jonathan, and his estate which were not appropriated, when received to any other account, than that of this said mortgage, which at the time of such reception of moneys, was the only undischarged evidence of claim or demand, on the part of said mortgagee against said mortgagor, the said Paget's mortgage having been adjudged by this honorable court to have been overpaid, and which moneys so received, were never accounted for, or credited by said mortgagee in any other account. Whereas the said master, as the plaintiffs conceive, ought to have received evidence of, and allowed the plaintiffs' charges, for said moneys and interest thereon.

10th. For, that the said master has, in said report and account, disallowed the sum of $430, and interest charged by the plaintiffs, on the ground that the same was settled in a certain account of March 31, 1801, between the mortgagor and mortgagee, whereas it appeared that said sum, (being a balance of $500, received of one Vincent Gray after deducting a credit,) was received by said mortgagee, of the proper moneys of the mortgagor, after the said 31st March, 1801, and did not enter into said account, and the same ought to have been charged by said master, to said defendants, with interest.

11th. For, that the said master, in said report and account, has charged interest on the consideration of said mortgage, from a time anterior to that, when there was any balance due from said mortgagor to said mortgagee, for and on account of any notes or acceptances, or payments therefor, secured or intended to be secured by said mortgage, and anterior to the dates and payments by the mortgagee, of any such notes or acceptances; and rejected the plaintiffs' evidence, in relation thereto, and declined entering into any interest account, in respect of the same, or to ascertain the respective times, for which interest should be charged on said notes and acceptances. Whereas the plaintiffs conceive, that said master should not have charged interest on said sum from said time, and should have received the evidence aforesaid, and stated an interest account in relation to said payments, and should have treated said mortgage as collateral security, for sums which were to be originally and truly evidenced by other vouchers.

12th. For, that the said master, previous to making said report, did not require of the defendant, Anna Arnold or James Arnold, the production of the cash books of said mortgagee, of the years previous to 1806, which were called for by plaintiffs, although it was admitted by said Anna in her answers to plaintiffs' interrogations exhibited with said report, that such cash books did exist, and were not out of her reach or power.

13th. For that the said master, at the hearing, ordered upon argument, that certain books, of the said mortgagee, should be produced by said Anna Arnold, administratrix, under a call therefor by the plaintiffs—which said books, were accordingly brought before him at the hearing, but the said Anna and James Arnold, refused to permit the plaintiffs or their counsel, to open or look into the same, and the said master did not, though requested by the plaintiffs, require said books so produced, to be opened for the inspection of the plaintiffs, as the plaintiffs conceive he should have done.

14th. For, that it is not stated in said report, when nor for what reason, the said Samuel G. Arnold refused to join in repairs, although it is stated, that the said premises had a long time previous, been suffered to be out of repair, without any attempt of said mortgagee to repair the same, and although in fact the said Samuel G. made no objection, except that he wished the title or proportions of ownership, to be first settled; and, although it does not appear by said report, that the mortgagee at any time did what he could, towards keeping said premises in repair. And, although the said mortgagee was at said times, and during his possession, also agent of the estate of the late Welcome Arnold, and had power as such to repair.

15th. For, that the said master declined receiving evidence in relation to the errors, in the said account of March 31, 1801, and has not allowed to the plaintiffs, the sums shewn to be errors in said account, although the said account was produced at the hearing of the defendants Anna and James Arnold, for the purpose of proving the reception and full amount of the consideration of said mortgage and the payments of notes and acceptances, mentioned in said mortgage by said mortgagee.

16th. For, that the amount credited by said master, for the annual value of the rents and occupation of said premises, is by far below the real annual value thereof, and as the plaintiffs conceive, much larger annual sums ought to be credited to said estate therefor in said account.

The exceptions filed by the defendants, were as follows:

1st. For, that it appears in and by said report and account, thereunto annexed, that the said master has allowed said complainants, for the one third part of the amount received by said Thomas, for the sale of the Fox Point lots, whereas the said complainants, ought not to have been allowed any part of said amount.

2d. For, that it appears in and by the decree of said court, that the master was ordered to take an account of the rents and profits, received by the said Thomas: Whereas the said master has charged the estate of said Thomas, with a large amount of rents, which have never been received by said Thomas, or his said administratrix.

3d. For, that the said master has allowed a much larger amount of rents, than are contained in the account of the administratrix, and has reported, that on comparing said account with the vouchers, he found several inaccuracies and omissions, whereas he should have allowed no more rents than are credited in said account, and should have reported that said account was correct, was confirmed by the vouchers and by the affirmation of the administratrix, and that there was no evidence in the cause shewing any inaccuracies or omissions in said account.

4th. For, that the said master, has allowed one third of what the whole premises would have let for, according to his estimate, whereas, if he went according to an estimated rent, instead of the actual amount received as credited, in the account of the administratrix, his estimate should have been of what an undivided third part would have let for at auction.

5th. For, that the said master has reported that said Thomas Arnold, kept no regular account of the rents he received, whereas he should have reported that the rent-rolls, cash book, and other books of account of said Thomas, produced before the master, exhibited a full, true and exact account of all the rents received by said Thomas, from said mortgaged premises.

6th. For, that the said master, in estimating the rent to be allowed for the first period, has taken into consideration a charge of $36 per year, which he reports as made by said Thomas against Samuel G. Arnold, for the rent of cellar of the store on South Main street; whereas the cellar referred to in said charge, is the cellar of an old store, belonging to said Thomas, above the bridge.

7th. For, that the said master, in estimating said rents, has estimated the rent of the whole premises, and for long periods of time, by what particular parts let for, for short periods of time; whereas the estimate should have been, according to what an undivided third of the premises would have rented for, during the period for which the rents are charged.

8th. For, that the said master in estimating said rents, has taken the rents of late periods, as the rule to fix the estimate for much earlier periods; whereas, the rents should have been allowed according to what they would have been, during the period for which they are allowed.

9th. For, that the said master has allowed, for a continuous occupancy of said premises, for thirty-three years; whereas he should have deducted the time during that period, when said premises may reasonably be supposed to have been unoccupied.

10th. For, that the master has reported no allowance to the mortgagee, for the hatter's shop on said premises; whereas, he ought to have reported an allowance for the fair value of said shop: or to have deducted such a sum, from the rents charged to the mortgagee, as such mortgagee reasonably allowed the tenant, for building the same.

11th. For, that the said master has allowed $40 per year, for rent of store and cellar on South Main street, from 1823 to the time of making his report, whereas he should have reported that after the year 1823, the said store and cellar were in such a state of decay, that they were untenantable, and that no rent was received for them by the mortgagee, and now ought to be charged the mortgagee, since that period.

J. L. Tillinghast, for plaintiffs.

Richard W. Greene, for defendants.

STORY, Circuit Justice. The exceptions have been argued by the learned counsel at large; but our opinion will be briefly stated upon all of them, as we do not think, that they involve any serious difficulty. We shall first consider the exceptions of the plaintiffs.

1. The first exception is utterly unmaintainable. It is too loose and general in its terms, and points to no particulars. It comes to nothing, unless specific errors are shown in the report; and those errors, if they exist, should have been brought directly to the view of the court in the form of the exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none.

2 and 3. The second and third exceptions apply to the refusal of the master to inquire into the original consideration of the mortgage. Under the circumstances, the master was perfectly right. In the first place, in the account settled between the original parties, on 31st of March, 1801, the mortgage was treated as a good subsisting mortgage for the full amount of the debt stated therein. In the next place, the bill does not charge, that the consideration of the mortgage was nominal, or less than the amount stated therein; or that there is any error or mistake therein; neither does it ask for any examination or overhauling of the original consideration upon any alleged error or mistake. It was clearly, therefore, a matter not properly in issue before the master. See Chambers v. Goldwin, 9 Ves. 265, 266.

4. The fourth exception is on account of the master's having made a deduction of the sup-

posed rent, upon the ground, that the premises were out of repair, and partly untenantable, while in possession of the mortgagee and his representatives. The argument seems to proceed upon the ground, that the mortgagee was bound to keep the premises in good repair; and therefore ought to be accountable for such rents, as might have been obtained, if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises. while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended, that he is bound to make new advances on the estate. In Godfrey v. Watson, 3 Atk. 518, Lord Hardwicke said, that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In Russel v. Smithies, 1 Anstr. 96, it was decided, that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact also, that there has been a diminution of value of the rents, was there declared not to be sufficient proof of a want of proper repairs. See Chambers v. Goldwin, 9 Ves. 265, 266. It is quite a different question, whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. See 1 Pow. Mortg., by Coventry & Rand, 189a; 3 Pow. Mortg. 956. note a; Saunders v. Frost, 5 Pick. 259; Moore v. Cable, 1 Johns. Ch. 385; Trimleston v. Hamill, 1 Ball & B. 385; Marshall v. Cave, cited 3 Pow. Mortg. 957a. But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage occasioned thereby. That was the doctrine asserted in Hughes v. Williams, 12 Ves. 495.[2] And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made, to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the master's report, which establishes any fact of wilful default or gross negligence in the mortgagee.

5. These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever, that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

6, 7, 8, 10. The sixth, seventh, eighth, and tenth exceptions are disposed of by two simple considerations. (1.) They all relate to matter which had been already disposed of in a former suit. Dexter v. Arnold [Case No. 3,856]. (2.) If Thomas Arnold (the intestate) was accountable at all for any of these matters, he was so in a suit brought against him as agent or administrator of Jonathan Arnold, and not in this suit, which is merely a bill to redeem a mortgage.

9. The ninth exception admits of the same answer, with this additional consideration, that the facts referred to in it are not stated in the master's report.

11. The eleventh exception proceeds upon the objection that the master has allowed interest, where none was due. This exception proceeds upon the supposition, that the second and third exceptions were well founded. We have already decided, that the master was right in holding the consideration stated in the mortgage deed to be the true sum due, as ascertained in the account settled in 1801.

12. The twelfth exception is, because the books of Thomas Arnold were not produced before the master, or required by him to be produced. This is founded in a clear mistake; for the affidavits of Anna Arnold and James Arnold establish the fact, that they were produced.

13. The thirteenth exception is to the supposed denial to the plaintiffs of the right of examining the books of Thomas Arnold, produced under notice before the master. This exception has no facts, on which to rest it in the master's report. The plaintiffs had no right to examine those books generally; but only such parts as related to entries, charges and accounts relative to the matters in controversy in the suit. If we pass aside from the master's report, it appears by the affidavits, already alluded to, that a full examination, as to these matters, was allowed, so far as any of the books contained entries, charges, or accounts relative thereto.

14. The fourteenth exception is, that the report states no reason for the refusal of Samuel G. Arnold to join in making repairs on the premises. That was not necessary. It was mere matter of evidence for the

[2] S. P. Wragg v. Denham, 2 Younge & C. 117, 121. In the latter case, Mr. Baron Alderson, in delivering his judgment, said: "It is clear, that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature, decaying by ruin, as was the case in Anstruther," (above cited). He added, "I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take, who keeps the possession of his own property. But if there be gross negligence, by which the property is depreciated in value, the mortgagee, who is in possession, is trustee to the mortgagor to that extent, that he ought to be made responsible for the deterioration during the time of his possession." (The above has been added since the original opinion was given by Mr. Justice Story.)

consideration of the master, in examining the point, whether there was any wilful default, or gross negligence of the mortgagee in not making repairs upon the premises.

15. The fifteenth exception is to the refusal of the master to open the account settled in March, 1801. No leave was given to surcharge or falsify that account before the master; and after the long lapse of time and the circumstances stated by the master, that that account had already been adjudicated upon by this court in a former suit, we have no doubt, that he was right in his refusal to open the account. See 1 Pow. Mortg., by Coventry & Rand, 390a, note; Chalmer v. Bradley, 1 Jac. & W. 66.

16. The sixteenth and last exception is, that the rents allowed by the master are too low. There is no evidence of that; and we are well satisfied with his report on that head.

Let us in the next place proceed to the consideration of the exceptions of the defendants.

1. The first exception is, because the master has charged Thomas Arnold's estate with one third of the amount received by him upon the sale of the Fox Point lots. These lots were a part of the premises included in the mortgage now in question; and Thomas Arnold had sold them in December, 1810, as his own property, by an absolute deed. In that deed there is a covenant of general warranty. The argument of the defendants is: First, that this covenant of warranty formed a part of the consideration and price given by the purchaser for the store lots; and secondly, that as the conveyance was absolute, and not an assignment of the mortgage to the purchaser, the representatives of Jonathan Arnold are not now entitled to any part of that price. We think, that the master was right, and that the reasons stated by him for his judgment are sound. Thomas Arnold, the mortgagee, could not lawfully sell this one third of the premises except under his mortgage. In selling an absolute estate to the purchaser, he was guilty of a fraud and wrong upon the mortgagor; and he ought not now to be permitted to take any benefit or advantage from that misconduct. The covenant of warranty makes no difference in the principles applicable to the case. The deed, though absolute in its form, operated as a conveyance of a defeasible title only to the purchaser as to this one third, and not as a disseisin, as between the mortgagor and mortgagee. The case is precisely the same, in legal effect, between the present parties, as if the mortgagee had elected to sell the one third for the benefit of the mortgagor, who subsequently adopted the act.

2. The second exception is, that the decree was, that the master should take an account of the rents and profits received, by the mortgagee, whereas the master has allowed rents and profits not received by him. The master was right. In the first place the mortgagee kept no proper accounts of the rents and profits received by him; and, therefore, upon general principles, he was properly chargeable with what he might have received, and must be presumed to have received. In the next place, if the mortgagee was in the personal occupation of the premises, or of any part thereof, he was justly chargeable with an occupation rent, which might properly be considered, under such circumstances, as received by him, in the sense of the decree. See Wilson v. Metcalfe, 1 Russ. 530; 3 Pow. Mortg., by Coventry & Rand, 946a, 948b, 949, and note. There is more of technical nicety than solid justice in this exception, and we should not be disposed to encourage it, when it had no bearing on the merits.

3. The third exception is, that the master has allowed a much larger amount of rents than is contained in the accounts of the administratrix of the mortgagee, and admitted to have been received by him. We are of opinion, that the master was right, for the reasons stated by him. The mortgagee kept no regular accounts; and the master has, therefore, been compelled to exercise a sound discretion upon the whole evidence as to the amount, with which he should be charged for rents and profits. The doctrine contained in Hughes v. Williams, 12 Ves. 493, and in Williams v. Price, 1 Pow. Mortg., by Coventry & Rand, 949a, note, 1 Sim. & S. 581, and Anon., 1 Vern. 45, shows the true grounds, on which courts of equity proceed in cases of this nature.

4. The fourth exception insists, that the master should not have estimated the rents, for which the mortgagee is charged upon his general judgment; but should have charged only such a rent as might have been obtained by a letting at public auction. We think otherwise. The master was bound to charge the mortgagee with a reasonable rent. What, under all the circumstances, was a reasonable rent was matter for the exercise of a sound discretion, upon all the circumstances of the case. An auction rent would not in many cases afford either a just or a satisfactory standard of the real value, for which the premises might be let, or at which the mortgagee should be entitled to occupy them.

5. The fifth exception is, that the master has reported, that Thomas Arnold kept no regular accounts, which is an incorrect statement. We see no proof of that. The master was the proper judge of that fact upon examining the books and the other evidence in the case. There is no evidence before us, that establishes in the slightest degree, that his conclusion was incorrect.

6. The sixth exception is founded on the supposed incorrectness of the charge of cellar rent. But there is not any evidence whatsoever upon the face of the report, which shows any such error of the master;

and, therefore, the report must stand. We cannot presume errors, or go into evidence in support of them, which was not laid before the master, or brought by him to the notice of the court. Exceptions must be made to matters apparent upon the face of the report, or upon the accompanying documents and proofs laid before the court upon the allegations and objections of the parties.

7, 8, 9, 10, 11. All the other exceptions are founded in objections to the master's estimate and allowance of rents charged against the mortgagee. We are of opinion that, upon the circumstances stated in his report, that estimate was perfectly just and reasonable. It was a matter for his judgment; and there are no facts in the case, which impugn the propriety or soundness of his conclusions.

Upon the whole our judgment is, that all the exceptions on both sides ought to be overruled, and the report ought to stand confirmed.

Decree: This cause came on to be heard on the report of the master, and the exceptions filed by the parties, and was argued by counsel, on consideration whereof it was ordered, adjudged, and decreed by the court that the exceptions, filed by the parties respectively, be, and the same are hereby overruled, and that the report of the master do stand confirmed, and thereupon it is further ordered by the court, that the plaintiffs be at liberty to redeem the said premises by paying to the defendants the said sum of $1366.66, being the sum reported by the said master to be due on the said mortgage (together with interest thereon until the same is paid at six per cent.), within ninety days from the day of rendering of this decree; otherwise, that plaintiffs be foreclosed of their right of redemption. And if any of the plaintiffs shall pay towards the redemption of the said mortgage more than his proportion of the money due thereon, he shall be deemed to have a lien thereon to the extent of the moneys so paid by him more than his proportion thereof, and that the plaintiffs do recover their full costs in the premises.

Decree accordingly.

Case No. 3,859.

DEXTER et al. v. ARNOLD et al.

[3 Sumn. 152.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1837.

REDEMPTION OF MORTGAGES—LIMITATION—STATE STATUTES—ACKNOWLEDGMENT BY MORTGAGEE—PLEADINGS AS EVIDENCE—ADVERSE POSSESSION—CO-TENANTS.

1. Courts of equity follow the analogies of the law, as to the limitation of the right to redeem a mortgage.

[Cited in Badger v. Badger, Case No. 718.]

2. The statute of Rhode Island respecting the redemption of mortgages, though specially addressed to the supreme court of the state, is proper to be followed by the circuit court of the United States, sitting in equity.

3. The general rule in equity is, that twenty years' exclusive possession by a mortgagee is a bar to the equity of redemption.

[Cited in Wyman v. Babcock, Case No. 18,113; Amory v. Lawrence, Id. 336.]

4. Courts of equity will allow a redemption of a mortgage, under peculiar circumstances, even after a lapse of more than twenty years.

5. The acts of a mortgagee, within twenty years, admitting the title to be a mortgage, are sufficient to keep open the equity. So, also, are solemn recitals and acknowledgments of the mortgage, in deeds and other written transactions with third persons.

6. Quaere; whether parol admissions, within twenty years, are sufficient to keep open the equity.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

7. There is no instance of a decree being made upon parol evidence, in favor of the party seeking to redeem.

8. Whatever may be the true rule, the confession and admission of the mortgagee, in the present case, are too infirm to justify a decree in favor of redemption.

9. The answer of a defendant in another suit, though good evidence against him, is not admissible against a co-defendant.

10. The possession of one co-tenant is not, ordinarily, to be treated as adverse to that of other co-tenants.

Bill in equity, to redeem the one third of certain real estate, called the "Paget Farm," which the plaintiffs [Henry H. Dexter and others] sought to redeem, claiming title under the mortgagor, Jonathan Arnold. The material facts were as follows: In May, 1793, Jonathan Arnold and Aza Arnold were each seized and entitled to one third of the Paget farm, in his own right and fee simple, the other third being owned by the children of their deceased brother, Welcome Arnold. On the 6th of the same month, Jonathan Arnold mortgaged his one third, together with his one half of the stock and farming utensils thereon, to his brother Thomas Arnold, for the payment of the sum of £750, and £100, with lawful interest, on or before the first of April, 1794. Jonathan Arnold died on or about the first of October, 1806, leaving his brothers, Thomas and Aza, and his sisters, Marcy Dexter, (under whom the plaintiffs claim title), and Abigail Greene and Elizabeth Arnold, and the children of his deceased brother, Welcome Arnold, (who died in 1798), his sole heirs. It did not appear, that Thomas Arnold ever entered into possession of the mortgaged premises, until after the death of Jonathan Arnold. On the 23d of March, 1807, Thomas took administration upon Jonathan's estate; and on the 3d of June of the same year, sold to his brother Aza Arnold, for the sum of $6403 67, by an absolute deed of general warranty, the same one third of the Paget farm, which was mortgaged to him by Jonathan Arnold, the deed describing it as "the same third part of said farm which I purchased of Jonathan Arnold, by his deed of mortgage, bearing date," &c. Under this

[1] [Reported by Charles Sumner, Esq.]

deed, (which was immediately put on record), Aza Arnold either entered into, or remained in possession of the whole of the Paget farm, taking the rents and profits, two thirds for himself, and one third for his co-tenants, viz. the heirs of Welcome Arnold, until his death, which happened about the 3d of December, 1833. By his will, dated the 28th of June, 1830, he devised to the heirs of his brother, Thomas Arnold, (who died on the 11th of December, 1826,) and the heirs of his brother Welcome, (who died, as has been already stated, in 1798,) all his right in the Paget farm. By the same will he devised to other persons, who were his heirs at law, other portions of his estate. Marcy Dexter died on the 4th of September, 1817, and by her will devised the remainder of her estate, (including her right, viz. one sixth in the premises), in trust for the benefit of certain persons, among whom were the plaintiffs. Anna Arnold (the defendant) took administration in the estate of Thomas Arnold ,in December, 1826. The defendants were all persons claiming title to the same one third of the Paget farm, under the will of Aza Arnold, or under the will of Marcy Dexter. All the defendants, also, the heirs or descendants of the heirs of Jonathan Arnold, in different degrees; and all of them, except those deriving title under Marcy Dexter, resisted redemption. The bill was filed on the 15th of September, 1835, that is to say, more than forty years after the mortgage became absolute at law, from the breach of the condition.

Mr. Snow, for plaintiffs.

Mr. Dorr, R. W. Greene, C. F. Tillinghast, and A. C. Greene, for defendants.

STORY, Circuit Justice. There is no dispute about the deraignment of title of either party; and the whole question is, whether, under the circumstances, after such a lapse of time, the plaintiffs are entitled to redeem.

The act of Rhode Island, for quieting possession (Dig. 1798, p. 465, and of 1822, pp. 363, 364), gives to a quiet seisin and possession of lands in fee simple, for twenty years, the full effect of a good and rightful title in fee, subject only to the common exceptions in favor of persons under age, femes covert, non compotes mentis, or imprisoned, or beyond seas. The act of Rhode Island, respecting mortgages (Dig. 1798, p. 275; Dig. 1822, p. 210), declares, among other things, that the equity of redemption of mortgages made prior to 1798 shall be "within twenty years after possession shall have been obtained of any mortgaged estate, by consent of parties, without legal process;" with a proviso that the supreme court of the state may "allow a redemption of any mortgaged estate after a possession of twenty years, obtained without legal process, if any peculiar circumstances shall, in the opinion of the court, render such redemption equitable." The policy of the legislature, however, manifestly is to shorten the time of redemption in ordinary cases; for, in all cases of mortgages made since 1798, and before 1822, the equity of redemption is limited to six years, after possession by process of law, or a peaceable and open entry in the presence of two witnesses; and the equity of redemption of mortgages, made since 1822, is limited to the still more restricted period of three years after such possession; without any such proviso giving the court authority, upon equitable circumstances, to open the right to redeem, after the lapse of these respective periods. In cases of mortgages courts of equity, upon general principles, follow the analogies of the law as to the limitation of the right to redeem. Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489; and Cholmondeley v. Clinton, 2 Jac. & W. 1. And if there were no statute in Rhode Island, touching this particular subject, the limitation of twenty years, provided for the quieting of possessions, would furnish to this court by analogy the proper rule for limiting the equity of redemption to the same period. But I think, that the statute respecting mortgages ought to govern in this case; and though the clause, giving the state court authority to allow a redemption, after twenty years' peaceable possession under mortgages, made prior to 1798 (as the present mortgage was), is specially addressed to that court; yet it ought to govern us in the present case for two reasons: First, because it furnishes the appropriate analogy upon the known doctrine of courts of equity; and, secondly, because it is but a mere affirmation of the general principles, upon which courts of equity act in allowing or refusing a redemption. Whenever, notwithstanding a great lapse of time, peculiar circumstances render the redemption of a mortgage equitable, courts of equity have been in the habit of disregarding any formal limitation, prescribed by its own authority in the exercise of its jurisdiction on this subject. Thus, in Ord v. Smith, 2 Eq. Cas. Abr. 600, Sel. Cas. Ch. 9, a redemption was allowed, under very special circumstances, after about forty years from the time when the mortgage was made. But in the same case it was said, that the general rule should be inviolably abided by; for it is for the quiet of men's estates. Smart v. Hunt, cited in Hardy v. Reeves, 4 Ves. 479, is to the same effect, as is also Hansard v. Hardy, 18 Ves. 455. But there were, in each of these cases, circumstances of a very peculiar nature, showing that the mortgagee, within twenty years, had solemnly treated it as a mortgage, not merely by parol admissions, but by solemn acts and admissions in writing.

It appears to me, that the possession of Aza Arnold, under the deed of Thomas Arnold, must be treated as the possession of a person claiming title in fee, as absolute owner of the one third of the premises conveyed by that deed. There is no pretence,

that Aza ever kept any account of the rents and profits, or ever accounted therefor to any persons, except to the heirs of Welcome Arnold. His title was an absolute title, with covenant and warranty; and although he had notice at the time of the conveyance, that the original title of Thomas Arnold was under a mortgage; yet it by no means follows, that, he did then know or believe, that there was a subsisting, unextinguished equity of redemption at that time in Jonathan Arnold or his heirs, or that he had not in his lifetime by some act informally surrendered it to Thomas Arnold. Jonathan appears to have died abroad, and to have been abroad for some years before his decease; and I think it may fairly be inferred, from an account annexed to the answer of Aza Arnold and James Arnold, that Jonathan Arnold was indebted to Thomas in other sums than those stated in the mortgage; or, at all events, that there were other unliquidated accounts between them. Be this fact as it may, it seems to me, that at all events it may fairly be inferred, that Aza Arnold gave the full value of the one third of the farm at the time of his purchase; and that the title and covenants of general warranty were taken upon that foundation. Under such circumstances, he must be deemed to have entered into and to have held possession of the premises adversely to the title and claims of the other heirs of Jonathan Arnold. His possession was notorious and open. The deeds were all recorded. He kept no accounts, and never was called upon to account for any rents or profits by any persons claiming as heirs under Jonathan. His sister, Marcy Dexter, was then living, and did not die until 1817; yet she never made any claim whatsoever in her lifetime, nor have her devisees made any claim until the present bill was contemplated to be brought. So that here we have an uninterrupted and undisputed possession by Aza Arnold for the space of twenty-six years, and until his death, manifestly under an assertion on his part of an absolute title, and that possession acquiesced in by those, who had a known interest to contest it. It is true, that Aza Arnold might lawfully be in possession of the whole of the farm as a co-tenant, and therefore his possession might be consistent with that of the other heirs of Jonathan Arnold; for the possession of one co-tenant is not ordinarily to be treated as adverse to that of the other co-tenants. But, on the other hand, one cotenant can oust his co-tenants, and thereby acquire an adverse possession to them; and if he is long in possession, claiming an exclusive right and title in himself, and taking the rents and profits accordingly, and that claim is notorious under a recorded deed conveying an absolute title, it affords clear and determinate evidence of a disseisin of the other co-tenants. Such I take the established rule at law to be; and it seems to me directly applicable to the circumstances of the present case. See Prescott v. Nevers. [Case No. 11,390], and the cases there cited. I cannot but impute the acquiescence, during so long a period, of Marcy Dexter and her devisees, (for none of the other heirs of Jonathan Arnold seek any redemption,) to one of two causes; either that the equity of redemption had been in fact, though informally, extinguished, or that the mortgaged property was not worth redemption; and, therefore, the adverse possession, though known, was not deemed fit, under the circumstances, to be resisted.

But let us take the case in the most favorable view for the plaintiffs in which it can be contemplated; and that is, as a case in which Aza Arnold had full notice of the mortgage as a subsisting mortgage, with the equity of redemption attached thereto, at the time of his purchase, and, of course, that, as to the other heirs of Jonathan Arnold, he was to be treated only as a mortgagee in possession. What then would be the operation of the circumstances in a court of equity? The general rule in equity is, that twenty years' exclusive possession by a mortgagee is a bar to the equity of redemption. The exceptions are, where there have been, within that period, acts done, or solemn acknowledgments made, by the mortgagee, recognizing the title as a mere mortgage. The statute of Rhode Island, applicable to this very mortgage, prescribes the same limitation of twenty years. Are there, then, in the present case any peculiar circumstances which render a redemption equitable after the lapse of twenty-six years? No acts have been done by the supposed mortgagee, Aza Arnold, within this whole period, which recognize his title to be purely that of a mortgagee. No accounts have been kept by him as such; no written acknowledgments or transactions are shown, even with strangers, pointing to such a mortgage title. His acts, so far as they go, are all the other way. His title, so far as we can trace it from the title-deeds, is opposed to such a conditional right. It is upon its face purely absolute. Admitting that he was made by the notice, in contemplation of law, as to the other heirs of Jonathan Arnold, a mere assignee of the mortgage, it is certain, that he did not claim merely as such assignee; but his title-deed purported to convey to him an unconditional title; and under that, and not otherwise, he entered, at least as far as any clear proofs exist in the case.

Now, I am not disposed to doubt the authority of those cases, which have decided, that the acts of the mortgagee within twenty years, clearly admitting the title to be a mortgage, are sufficient to keep open the equity; such, for example, as the bringing of a bill to foreclose within the twenty years; or keeping accounts of the rents and profits under the mortgage; or receiving interest from the mortgagor on the footing of the mortgage; or devising the estate as mortgaged property. See 1 Pow. Mortg., by Coventry & Rand, 380–

402, and the notes of the editors, where the principal cases are collected. Hughes v. Edwards, 9 Wheat. [22 U. S.] 489; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152; Dexter v. Arnold [Case No. 3,857]; Whiting v. White, 2 Cox, 290, and cases there cited; Ord v. Smith, Sel. Cas. Ch. 9; Hansard v. Hardy, 18 Ves. 459. Nor am I disposed to question the authority of another class of cases, where there has been a solemn recital and acknowledgment of the mortgage, as such, in solemn deeds and other written transactions with third persons. Such were the cases of Smart v. Hunt, cited in 4 Ves. 479; Hardy v. Reeves, Id. 466; Hansard v. Hardy, 18 Ves. 455. See, also, the cases cited in 1 Pow. Mortg., by Coventry & Rand, p. 385, and note; Whiting v. White, 2 Cox, 290, 293, 294. But, there is no pretence, that there is any evidence in the present case, which brings it within the reach of the principle of either of these classes of cases.

What, then, is the principal ground of reliance of the plaintiffs to sustain the right to redeem? It is founded upon certain parol acknowledgments, asserted by two witnesses, Elisha Angell and Jonathan Arnold, to have been made to them in conversation by Aza Arnold. One question which has been argued is, whether any naked, verbal admissions, or parol acknowledgments in conversations, are sufficient to establish the fact, that the mortgagee has treated the conveyance as a mortgage within twenty years. Such admissions and acknowledgments are certainly open to the strong objection, that they are easily fabricated, and difficult, if not impossible, to be disproved in many cases, and that they have a direct tendency to shake the security of all titles under mortgages, even after a very long, exclusive possession by the mortgagee; nay, even after the possession of a half-century. I am fully sensible of the force of the objection, and I can scarcely think it can be overstated. Lord Alvanley in Whiting v. White, 2 Cox, 290, 300, Coop. 1, reprobated the introduction of any such parol evidence; and, commenting on the case of Perry v. Marston, 2 Brown, Ch. 397, where it has been supposed, though it is not, perhaps, certain (see 1 Pow. Mortg., by Coventry & Rand, pp. 381, 382, and note H; Reeks v. Postlethwaite, Coop. 161, 164; Lake v. Thomas, 3 Ves. 17: See, also, Mr. Belt's note to his edition of 2 Brown, Ch. 397), that Lord Thurlow thought parol evidence admissible, and sufficient to give the plaintiff a decree for redemption; but he, in fact, decided against it, on another ground. Lord Alvanley said,—"I cannot help thinking, that it would have been a very wise rule, if no parol evidence had been admitted upon these subjects. It is clear, that the party obtains an irredeemable interest by twenty years' possession; and then that interest is to be totally changed by this sort of loose conversation." He afterwards added,—"I will not take upon myself, in the present case, to lay down any rule that shall contradict that authority, because it is not necessary. But, at any rate, I think the declarations must be clear and unequivocal; and in the present case I do not think that the evidence is of that clear and unequivocal nature, as to justify the court in giving the plaintiff a redemption." The same point came before the vice chancellor (Sir Thomas Plumer) in Reeks v. Postlethwaite, Coop. 161; and he, after admitting, that there was no case in point, upon principle decided, that parol evidence was so admissible. But after sifting the evidence in that case (which sufficiently shows the dangers of such evidence), he decided, that it was not satisfactory, and refused the redemption. Then came the case of Barron v. Martin, Coop. 189, 19 Ves. 326, where Sir William Grant thought the parol evidence admissible, but at the same time, on account of its being unsatisfactory, decided against the redemption, and adhered to the rule laid down by Lord Alvanley, that it ought to be clear and unequivocal to justify a redemption. But there is an important remark made by this eminent judge in the same case, which is worthy of special notice. "It is now decided," (said he), "that twenty years' possession by a mortgagee, will prima facie bar a right of redemption; and it lies on the mortgagor to show, that such length of possession ought not to produce that effect." He added—"The onus lies on the mortgagor to show that fact, in order to defeat the effect of the possession." In Marks v. Pell, 1 Johns. Ch. 594, the same point came before Mr. Chancellor Kent; and the only evidence relied upon in favor of the redemption, was certain naked, unassisted confessions of the mortgagee, stated by witnesses. The learned judge decided, upon a review of the evidence, that the redemption ought not, under all the circumstances, to be allowed; for "it would be setting up a dangerous precedent, to give effect to a stale claim, upon such uncorroborated and loose confessions." In delivering his opinion, he said; "It was once observed in the supreme court (6 Johns. 21), that acknowledgments of the party as to title to real property, are a dangerous species of evidence; and though good to support a tenancy or to satisfy doubts in cases of possession, they ought not to be received as evidence of title, as it would counteract the beneficial purposes of the statute of frauds. That doctrine strikes me as just and sound; and principles are essentially the same in both courts." From this language I cannot but infer, that the learned chancellor was against the admissibility of the evidence, though he did not deem it necessary to decide the case on that point. His very able reporter (Mr. Johnson) has supposed differently, in his marginal note of the case; but I have been unable so to read the case.

I have not in my researches found any other cases upon the point. And, what is very remarkable, there is no instance of a decree being made upon such parol evidence in

favor of the party seeking to redeem. In the present case I am spared the necessity of deciding the general principle; for, admitting that parol evidence is admissible (which I am by no means prepared to decide, and I wish to reserve for further consideration), I am of opinion, that the parol evidence of the confessions and conversations of the mortgagee, testified to by the witnesses, is wholly unsatisfactory, too loose, and too equivocal, and too infirm in its reach and bearing and circumstances, to justify any decree in favor of a redemption.

What is this evidence? Elisha Angell says, that in 1828, (just twenty-one years after Aza Arnold had been in possession of the estate,) he was employed by Aza Arnold in rebuilding a saw-mill on the Paget farm. Aza told him, that he must charge it in a separate account, different from any other charges against him; for the reason, that his brothers' heirs had an interest in that estate, and that was a building he built on his own account. His other charges he had made against Aza. His work on the mill he charged, so much per day, for work on the saw-mill. Upon being interrogated by the plaintiff's counsel, as to the conversation, whether Aza named what heirs and what brothers were interested in the saw-mill, he answered, that it was so long ago, and he had no interest in the business, that he could not be positive; that his words were pretty much, that his brothers' heirs had an interest in that estate, and none in the mill; and that he could not say, that he named any brother. Now, it is plain, that every word of this statement may be true, and yet no reference whatever have been had to any supposed title in his brother Jonathan's heirs; for the children and heirs of his deceased brother, Welcome Arnold, had an undisputed title in one third of the Paget farm.

The other witness is Jonathan Arnold. He is one of the heirs of Jonathan Arnold the mortgagor; and of course would be incompetent to give testimony in the case, while he retained his interest as such heir. After the bill was brought, and indeed as late as August, 1836, he sold his interest to his son, John Randall Arnold, as he asserts, for fifty dollars; and it cannot be disguised, that, in all probability, the sole object of the conveyance, pendente lite, was to qualify himself as a witness in the cause. So much, then, for his position in the cause, as to his general credibility under such circumstances. He says, that three or four years ago, (that is to say, about one or two years before Aza Arnold's decease), he was at the Paget farm, and had a conversation with Aza Arnold, who is his uncle. He asked his uncle, if he had bought the right of his uncle Jonathan in the farm; and he told him, he had got a deed of Thomas Arnold of his right, that is, Jonathan's right; that he had bought out the mortgage right of him; that he had a warrantee deed, from Thomas Arnold, of Jonathan's interest in the farm; that he does not recollect any other particulars of the conversation, except what is above-stated. Now, taking this conversation together, it may be true; and yet it establishes nothing beyond what the deed from Thomas to Aza Arnold upon its very face imports. It does not establish, that the title, that Aza then claimed in the premises, was a mere mortgage title, or that any mortgage was then subsisting. And if it did, I must say, that such loose and indeterminate conversations, which I cannot but suspect were designedly had with Aza, with a view to being used as testimony against him, would weigh with me very little in a case of this sort. No man would be safe, if upon such conversations his title to real estate, as an absolute owner, after twenty-five years of exclusive possession, could be thus cut down to that of a mere mortgagee.

This is the whole testimony to establish the right of redemption; for the testimony of Stephen Dexter was rejected by the court at the hearing, as the legal owner of the title, though a trustee for the benefit of the plaintiffs, the cestuis que trust, in the premises in controversy. It is true, that he is made a defendant in the bill; but he cannot be treated otherwise than as a substantial plaintiff, and, indeed, as the proper party to redeem. If, indeed, his testimony had been admissible, it would not, under the circumstances, have changed in the slightest manner, in my judgment, the posture of the case; for I think it impossible that the conversation which he states can, without straining (even if its credibility were fully admitted), be interpreted to amount to a clear and unequivocal admission by Aza Arnold, that he then held title to the farm as a mere mortgagee. Even the witness, though put by a cross-interrogatory to that very point, does not pretend to say that.

The answer of Thomas Arnold in the former case of Dexter v. Arnold [Case No. 3,855], in 1822, was offered in evidence in the present case, and objected to as evidence against all the defendants. Although I am clearly of opinion, that nothing contained in that answer can be evidence against Aza Arnold, or those who claim title under him to the Paget farm; yet it was allowed to be read, de bene esse, at the argument. I still retain the same opinion of its inadmissibility; but as, in my judgment, nothing contained in it can rightfully trench upon the title vested in Aza Arnold, under the deed of Thomas Arnold to him in 1807, I have not thought it necessary to enter upon any general argument to establish its incompetency.

Upon the whole, my opinion is, that the bill ought to be dismissed, with costs.

DEXTER (ARNOLD v.). See Case No. 557.

DEXTER (CRAWFORD v.). See Case No. 3,368.

Case No. 3,860.

DEXTER v. DEXTER.

[4 Mason, 302.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

DESCENT AND DISTRIBUTION—ANCESTRAL PROPERTY—FIRST AND SECOND COUSINS.

Under the statute of descents of Rhode Island of 1882 (Laws, p. 222), where the intestate died seised of an estate, which came to him from his ancestor by descent, and he left no children, but only first and second cousins of the whole blood, it was held that the first cousins were not exclusively entitled to the estate as next of kin, but that the second cousins also were entitled to share by right of representation of their parents.

[This was an action of ejectment by Edward Dexter, Jr., against William Dexter.] The cause came on to be heard upon a special statement of facts agreed by the parties, as follows: "It is agreed that the estate described in the plaintiff's declaration, descended from Stephen Dexter, the grandfather of the brothers, Joseph Dexter and Moses Dexter, late of North Providence, deceased, through their father, Joseph Dexter, first to the said first named Joseph, the brother, and transmitted by inheritance from him to his brother, the said Moses, the person last seised, as follows, viz. That the said Stephen married Mary Whipple, and died December 27, 1758, intestate, having had issue by his said wife, four sons, viz. Joseph the oldest, Christopher the second, Jeremiah the third, Edward the fourth son; and three daughters, viz. Susan, Freelove, and Waite, of which issue, the said Joseph died, during the life of said Stephen, having married Mary Esten, by whom he had issue the said brothers Joseph the oldest, and Moses, both surviving their said father, Joseph Dexter. That the said Joseph Dexter, brother of said Moses, at the decease of his said grandfather Stephen, took the said estate as oldest son and heir at law of his said deceased father, Joseph Dexter, the right of primogeniture then being the law of the state, and died intestate and without issue, and so seised of the premises between the years 1798 and 1822, to wit, in 1811. That the said Moses, on the decease of his said brother, took, and was seised of the said estate, by inheritance in fee simple, and continued so seised during the residue of his life, and in the latter part of the year 1825, died so seised intestate without issue. That the said Christopher Dexter, second son of said Stephen, died many years before the decease of said Moses, having had issue William, Abigail, Amey, Hetty, Alice, Lydia, Ada, Waite, who survived the said Moses, and are living, and Lewis, who died before the decease of said Moses, leaving issue now living. That the said Jeremiah Dexter, third son of Stephen, died many years before the decease of said Moses, having had issue eight children, of whom four died without issue in the lifetime of said Moses, and four, viz. Stephen, Edward, Susan Ann, and Freelove survived said Moses and are living. That the said Edward, fourth son of said Stephen, died many years before the decease of said Moses, having had issue Susan, Stephen, Abigail, and Edward, the grantor of the plaintiff, of whom two only survived said Moses, and are living, viz. Stephen and the said Edward, and the said Susan died without issue in the lifetime of said Moses, and the said Abigail last aforesaid died in the lifetime of said Moses, having married and had issue Abigail and Ephraim Comstock, of whom the said Ephraim Comstock survives, and the said Abigail Comstock died in the lifetime of said Moses, having married and leaving issue, Thomas and Abby Fosdick, who survive. That the said Susan, the oldest daughter of said Stephen married William Brown, and died long before the decease of said Moses, having had issue six children, of whom five, viz. Dexter, Freelove, Mary, Huldah, and Waite died before the decease of said Moses, leaving issue, some of whom are still living, and the other child of said Susan, viz. Amey, now Amey Martin, is still living, having issue. That Freelove, the second daughter of said Stephen, married Peter Randall, and died long before the decease of said Moses, having had issue seven children, of whom five, viz. Joseph, William, John, and Stephen Randall, and Waite Harris, are still living, and two, viz. Freelove and Amey died before the decease of said Moses, having each married Enoch Angell, by whom they left issue, each two children still living, viz. Sally, Nathaniel, Elisha, and Randall Angell. That Waite, the third daughter of said Stephen, married Charles Field, and died in 1808, before the decease of said Joseph or Moses, having issue one daughter, Waite, who married John Brown, and died in 1819, before the decease of said Moses, having issue one daughter, Martha, now Martha Howell, one of the defendants, still living."

The sole question in the case was upon the construction of certain clauses in the statute of descents of 1822, of the state of Rhode Island. The defendants contended, that under that statute Martha Howell, as heir and representative of her grandmother, Waite Dexter, and her mother, Waite Brown, was a co-heir of the estate. This was denied on the other side.

J. L. Tillinghast, for plaintiff.

Thomas Burgess and Mr. Hunter, for defendant.

STORY, Circuit Justice. The statute of descents of Rhode Island (page 222), enacts, "that when any person, having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred," in the manner pointed out by the act. One of the clauses, applicable to the facts of the present case, is, "if there be no grandfather,

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

then to the grandmother, uncles, and aunts, on the same side, and their descendants, or such of them as there be." Afterwards comes the following clause: "The descendants of any person deceased shall inherit the estate, which such person would have inherited, had such person survived the intestate." And immediately succeeds the following clause: "When the title to any real estate of inheritance, as to which the person, having such title, shall die intestate, came by descent, gift, or devise, from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be." Moses Dexter died seised of the estate in question intestate; he took the estate by descent from an ancestor, to whom all the parties are of the whole blood. All the claimants stand in the relation of first or second cousins to the intestate. The argument on behalf of the plaintiff is, that, under the clause of the statute last quoted, this being an ancestral estate, none but persons, who are of kin next to the intestate, can inherit; and although all the claimants are of the whole blood, yet the first cousins are alone, in the sense of the act, next or nearest of kin. The second cousins, such as Martha Howell, are not, within the clause, next of kin.

If the case stood singly upon this clause of the statute, the argument would be irresistible, for the first cousins are nearer of kin than the second. But the prior clause in the statute provides for the right of representation of all descendants. If Waite Dexter, or Waite Brown, had survived the intestate, they would doubtless have been entitled to share in the estate. By this clause the descendants, by representation, are to inherit, as their ancestor would, if the ancestor had survived the intestate. It is argued, that this clause is not applicable to special cases, like the present, but only to cases falling within the general scheme of descents traced out by the act. But there is nothing in the act itself, which leads to such a conclusion. The mere priority of the clauses in the act establishes nothing; for each is an independent canon, and must be construed to apply to all cases, to which it may, in its general sense, be applied. The clause itself is universal and absolute in its terms. It includes all cases. What ground is there for the court to narrow down its universality? Under the old law of descents, no right of representation was allowed, except as far as brothers' and sisters' children. The act of 1822 abolished this limitation, and allowed this right of representation ad infinitum. The clause, as to ancestral estates, is perfectly sensible and correct without any limitation. Its object plainly is to ascertain, who are of the whole blood; and when this is ascertained, the scheme of descents is the same as in common cases. In other words, the next of kin are to be ascertained by the general regulations of the act; and these provide for an indefinite representation by descendants of the person, who, if living, would have been the next of kin.

The judgment of the court is, that the plaintiff is entitled to recover only one eighteenth part of the estate. Judgment accordingly.

DEXTER (EARL v.). See Case No. 4,242.

Case No. 3,861.

DEXTER v. HAIGHT.

[Cited in Smith v. Atlantic Mut. Fire Ins. Co., Case No. 13,005. Nowhere reported; opinion not now accessible.]

DEXTER (HALL v.). See Case No. 5,929.

Case No. 3,862.

DEXTER v. HARRIS et al.

[2 Mason, 531.][1]

Circuit Court, D. Rhode Island. June Term, 1822.

VENDOR AND VENDEE—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE—PURCHASE BY ADMINISTRATOR — MORTGAGE — NATURE OF TITLE—RELEASE OF EQUITY OF REDEMPTION.

1. A bona fide purchaser for a valuable consideration, without notice of any fraud in the grant to his vendor, shall hold the estate against the original grantor and his heirs.

2. Where real estate of an intestate was ordered by the legislature to be sold by a person appointed by the legislature, for payment of his debts, the general administrator upon the estate may be a purchaser at the sale. If the sale by the agent be fraudulent, yet a bona fide purchaser without notice shall hold against the heirs of the deceased.

3. A mortgage in fee conveys an estate at law, upon which a real action may be maintained. A release of the equity of redemption does not operate by way of merger of the estate conveyed by the mortgage, but as an extinguishment of the equity of redemption.

[Cited in Dundas v. Bowler, Case No. 4,140; U. S. v. Stowell, 133 U. S. 19, 10 Sup. Ct. 248.]

4. A purchaser has not by law constructive notice of all matters of record; but only of such, as the title deeds of the estate refer to, or put him upon inquiry for.

5. A release to a purchaser at a marshal's sale by the judgment debtor, who holds the estate under two titles, one by mortgage, and the other by a distinct conveyance, conveys both titles to the purchaser.

Ejectment, in the nature of a real action, according to the local practice. This case was tried at the last November term in this district, and a verdict found for the plaintiff [Edward Dexter] upon the following facts: Both parties claimed a title to the demanded

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

premises under one Charles Harris, who died in October, 1784. The defendants [Andrew Harris and others] are the children and heirs of Charles Harris. The plaintiff claimed a derivative title, as a purchaser, paramount to that of the heirs. The plaintiff's title, as it was made out at the trial, was as follows. Charles Harris, on the 18th of November, 1794, mortgaged the estate in question to John Harris for £368. In November, 1792, Charles Harris, by a sealed instrument, delivered seizin and possession to the mortgagee of a part of the mortgaged premises in consideration of $1,400, a part of the mortgage money, reserving to himself the right of redemption. The mortgagee and those claiming under him have held the exclusive possession of the estate so delivered ever since that period. Charles Harris retained possession of the other part of the mortgaged premises until his death in 1794, acknowledging however by the sealed instrument above referred to, that it was liable for £64, the residue of the mortgage money (principal and interest) then unpaid. In January, 1795, John Harris and Mary Harris (the widow of Charles Harris) took administration on his estate and returned an inventory of his personal estate of £123 1s. 9d. In June, 1796, the administrators presented a petition to the legislature, stating that the personal estate of the intestate was insufficient to pay his debts, that his real estate was under mortgage, and that it would be for the benefit of his widow and children, that the whole real estate should be sold, &c. and prayed, that some suitable person might be appointed to sell, and execute a deed or deeds of the real estate, by and with the advice and direction of the town council of the town of Scituate, where the intestate had his residence, and the real estate was situated. The legislature granted the petition, and authorised a sale to be made by one James Aldrich, declaring "that a deed by him given, as prayed for, shall vest in the purchaser or purchasers all the right, title and interest, which Charles Harris had in the premises at the time of his decease." In March, 1797, James Aldrich by a deed, reciting the legislative proceedings and authority, and that the sale was made by the advice and consent, and under the directions of the town council of Scituate, in consideration of $2,250, (the alleged amount of the intestate's debts) and also of a lease of the dwelling house and parcel of the premises, made by John Harris to Mary Harris, conveyed the mortgaged premises to John Harris in fee simple. The lease referred to was executed on the same day, and purported to demise the dwelling house, (parcel of the premises) for fourteen years, with certain allowances of fire wood, &c. for the benefit of Mary Harris and her children during the term. In November, 1809, the demanded premises were sold (among other real estate) by William Peck, marshal of the United States, to satisfy a judgment and execution against John Harris at the suit of Philip Ammidon & Co., and were duly conveyed to the plaintiff, who was purchaser at the sale, for $4,550. In February, 1812, John Harris, by his deed of that date, released to the plaintiff in consideration of $100 all his title, &c. to the premises, and Mary, his wife, by the same instrument, also released her right of dower. Such was the deraignment of the plaintiff's title. No exception was taken to the admissibility of any of the deeds constituting the title.

The defence turned upon two points: First, That John Harris as administrator, was to be considered a trustee of the estate, and as such was incapable of becoming a purchaser of the estate from Aldrich, and therefore the conveyance to him was utterly void. This objection was overruled upon the ground, that John Harris did not stand in the situation of a trustee; and therefore, that the doctrine did not apply; and if he had been a trustee, the conveyance would not be void in law; but at the most would have been voidable in equity only, upon a bill framed for suitable relief. The second ground of defence was, that the estate was sold below its real value; and if so, then under the circumstances, in which John Harris stood, the sale could not have been bona fide, and the conveyance to him was invalid. In support of this last point the defendants offered to give in evidence, that the estate was greatly undervalued. The plaintiff objected to the admission of this evidence, and it was rejected by the court. The defendants then further offered certain papers to show misconduct in John Harris in the administration of the intestate's estate in other particulars, with the view to fortify the presumption, that the sale was collusive. This evidence was also objected to by the plaintiff and rejected by the court. The ground of the rejection was, that the plaintiff was a bona fide purchaser of the estate, and unless he had notice of the fraud, supposing there was any in the sale by Aldrich, he took the estate under the judgment sale purged of the fraud. No notice was pretended of any such fraud by the plaintiff, and therefore, taking the case the most strongly for the defendants, the evidence did not establish any legal defence. Independently of this general ground, the court intimated, that it could not be admitted for a moment, that a sale at an under value was necessarily void. That mere inadequacy of price was not in general a sufficient ground to rescind a contract. There must be other ingredients in the case. It must be so gross as to repel all notion of good faith. It must be such as would lead to the conclusion, that the sale was collusive and fraudulent. That the misconduct of John Harris in the general administration, clear of this transaction, could not be admitted as proof, that this sale was fraudulent; for that, whatever might be his laches, it could not affect Aldrich with the

imputation of fraud, since he had nothing to do with the general administration, but was merely a confidential agent, appointed by the legislature for the special purpose of making this sale. It was also intimated, that the plaintiff had a right to draw in aid the mortgage of Charles Harris to John Harris, against which there was no imputation of fraud; and as this was a subsisting mortgage, the title under it either passed by the judgment sale, or was conveyed by the release in 1812 to the plaintiff, and in either view was sufficient to support his action. Upon these suggestions and directions by the court the defendants made no farther opposition to a verdict for the plaintiff.

A motion for a new trial was afterwards made, and argued at this term by—

Mr. Searle, for plaintiff.

Whipple and Robbins, for defendants.

STORY, Circuit Justice. This motion for a new trial has been made and argued upon grounds, which were not stated or relied upon at the trial. And the granting of the motion must be in the exercise of a sound discretion by the court, because injustice has been done to the defendants under circumstances which entitle them to relief. If there was error in the law originally laid down to the jury the defendants are entitled, I might almost say, ex debito justitiae to a new trial; but if there was no such error, the court ought clearly to see, that manifest injury and injustice have arisen, which it is its solemn duty to correct, before it ventures to set aside the verdict. The defendants' counsel have surrendered the first point made at the trial, to wit, that John Harris was a trustee incapable of becoming a purchaser, and therefore the deed to him was void at law. Nor is it now contended, that if the purchase by the plaintiff was without notice of any fraud in the original sale by Aldrich, he is not entitled to be protected in his title, and to recover in this action. These points, which were in fact the only points in controversy at the trial, and which disposed of the whole cause, may be dismissed without further commentary; though I take the doctrine of the court to be perfectly established by general principles, as well as by direct authority.

The ground now assumed is, that the papers offered in evidence at the trial do establish the sale by Aldrich to have been fraudulent; and that the plaintiff had notice of the fraud. I will not stop to consider, how far any fraud might have been made out in the sale, if all the circumstances, which have been stated in the defendants' argument, had been in proof before the jury. There is such strong colouring in his statement, that, if it could have been sustained on the trial, it would certainly have raised a strong presumption of bad faith. But much of what is now asserted was not in proof; and inferences are now advanced from the dry text of the written documents, which do not appear to me warranted in law or in fact. I agree, that the question of fraud was a question for the jury, of which they were to judge upon the evidence before them, and in respect to their judgment on the facts I had neither the inclination nor the right to interfere. But the question of the admissibility of evidence belonged to the court; and it was its duty to prevent any from going to the jury, which as between these parties was not by the rules of law admissible. The evidence of fraud in the original sale was not by law admissible in this suit, unless knowledge of the fraud could be brought home to the plaintiff. Such knowledge was not pretended at the trial. How could the court then do otherwise than reject it? But it is now said, that the plaintiff had notice of the fraud; and that the documents show it. It is not contended, that the plaintiff had any direct actual notice; but it is contended, that he had constructive notice, because he is presumed to know every fact that constitutes a part of his title, and every fact, which is matter of record, or of necessary inference from matter of record. This is a pretty broad ground of imputing constructive notice, and I should have been glad to see some authority in support of such a sweeping position. None is produced; and I have been accustomed to consider the doctrine of constructive notice as resting on much narrower grounds. There is no such principle of law, as that what is matter of record shall be constructive notice to a purchaser. The doctrine upon this subject as to purchasers is this, that they are affected with constructive notice of all, that is apparent upon the face of the title deeds, under which they claim, and of such other facts, as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts extrinsic of the title, and collateral to it no constructive notice can be presumed; but it must be proved. Apply this doctrine to the present case. The plaintiff claims under a purchase at the marshal's sale the estate in question. That estate was derived under John Harris; and his title was, first, by a mortgage to him from Charles Harris; and secondly, by a deed of conveyance of his remaining interest from Aldrich. Whatever is contained in these deeds must be presumed to be known to the plaintiff. The petition therefore to the legislature, the approbation of the town council, the legislative resolve, the sale under the resolve for the consideration stated in the deed, are facts, of which he had notice. But how can it be pretended, that the facts stated in these papers, if true, constitute a case of fraud? Whether true or not the purchaser was not bound to inquire, nor had he the means of inquiry, nor was he put upon inquiry. He

found John Harris in the legal possession and ownership of the estate, according to the manifest purport of the deed, twelve years after its execution. He had no right to presume the possession to be fraudulent. The legislature had sanctioned the previous facts by authorising the sale; and the sale itself was approved by the town council. The fraud therefore, if any there was, was latent, and rested in matters in pais the knowledge of which could not be inferred from the terms of the deed or the other written documents connected with it. If there had been any evidence of notice, its weight ought to have been left to the jury. But as it was not pretended at the trial, that there was any, the court would not have been justified in admitting facts, which did not touch the merits of the case as between these parties. The case now stands in a somewhat different predicament; for the verdict ought not to be set aside, unless the court perceives clearly, that the papers did legally conduce to prove notice of the asserted fraud by the plaintiff. I see no such proof; on the contrary, as far as it goes, the evidence seems to me altogether to repel the presumption of notice. It is therefore wholly unnecessary to enter into the consideration of the question, whether the Aldrich deed was in fact fraudulent; though I think one ought to listen with some distrust to the inflamed representations on this subject. They are easily made, where there have been any irregularities of conduct; but irregularities are not always proof of fraud. They may arise from ignorance, mistake, or inconsiderateness. Be this as it may, the asserted fraud cannot touch a bona fide purchaser without notice, as the plaintiff in my judgment, upon the evidence now before the court, clearly is.

Then again, if the ground of notice fails, it is argued, and it is a new point not suggested at the trial, that the sale by Aldrich was bad, because it was not a sale at public auction. The natural answer is, that the legislative resolve does not require the sale to be at public auction. It merely requires, that it should be with the advice and direction of the town council. But it is said, that every sale authorised by the legislature must be at public auction, unless the contrary is expressly provided for in the resolve. No authority is produced to establish this position; and I am not able to perceive any reason for it. It must depend upon an examination of the very terms of each legislative act, whether a public or private sale be intended. And if the legislature by an act direct a sale by its own agent, and especially, if the sale be under the control of another public body, it seems to be the first rule of construction to hold any sale, either private or public, as a compliance with the act, unless from the context a necessary implication arises, which compels us to restrict the general meaning of the word, "sale," to a specific mode of selling. If A. authorizes B. to make sale of his estate, such an authority need not be executed by a public sale. And the case of a sale by legislative authority does not necessarily differ from one by private authority. In short, the whole is a question of intent; and where there is nothing to restrain the meaning, the power is to be construed as broadly, as the terms used ordinarily import. This objection to the sale is not in my judgment supported in point of law.

But assuming, that the sale by Aldrich is invalid, and that the title of the plaintiff stands affected by the original infirmity of that sale, which is assumed merely for the purpose of argument, what is to defeat the plaintiff's right of recovery upon the derivative title under the mortgage of Charles Harris to John Harris? There is no pretence, that that mortgage was not an honest transaction for a valuable consideration. But it is said, that the mortgage was not a subsisting title at the time of the purchase of the estate by the plaintiff, because it was extinguished by merger in the superior title acquired by John Harris under the deed of Aldrich; or because it had been previously satisfied. As to the merger, it is clear, that there can be no such operation, as the argument supposes. At law by the mortgage a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich would be to extinguish the equity of redemption, and thus to remove the condition. If that conveyance was good, it had the effect, not to enlarge the estate, but to extinguish a right. It was not the drowning a lesser in a greater estate, for the estate was already a fee simple; but it was an extinguishment of the condition or equity. If that conveyance was void or voidable, it left the mortgaged estate exactly, where it found it. As to the mortgage having been satisfied, there is not the slightest proof of it. Every paper in the case, affords a presumption the other way. No such point was attempted at the trial; and not a scintilla of evidence is now offered to sustain the suggestion. It was true, that the original mortgage was not produced, because it was not asked for, nor shown to be in the plaintiff's possession or power, nor was the official copy objected to. The plain reason for all this was, that no such point was in controversy. Nay, the very opening of the defendants' argument upon the motion before the court asserts, "that there were no debts against the estate, except his (John Harris's) own; he was the sole creditor, and he a creditor by mortgage, and his mortgage without any collateral security, and the estate ample for the debt." But if it had been otherwise, so long as the mortgage remained uncancelled and unreleased, it constituted at law a conveyance of the estate, and would sustain a recovery in a real action. If then the estate under the mortgage was a bona fide and subsisting title, it is not denied, that it passed to

the plaintiff, either by the marshal's deed in 1809, or by the release of John Harris in 1812. The release being for a valuable consideration would alone convey it either by way of assignment, or confirmation, or by passing the estate or right of the releasor.

The defendants then have made out no case at law, that shows the verdict wrong, or that entitles them to relief. The verdict then ought not to be set aside. It was not improvidently given, nor do the defendants show, that they could now make a better case. What may be the defendants' remedy, if any, in equity, I pretend not to consider. It will be sufficient to decide that, if the question should ever come before the court. The judgment in this case can decide no more than the legal rights of the parties.

The motion for a new trial is overruled, and judgment must be entered for the plaintiff.

DEXTER (HODGSON v.). See Case No. 6,565.

DEXTER (MALLETT v.). See Case No. 8,988.

Case No. 3,863.

DEXTER v. MUNROE et al.

[2 Spr. 39.][1]

District Court, D. Massachusetts. Nov., 1861.

ADMIRALTY JURISDICTION — WHALING VOYAGES — RIGHTS OF MASTER AND CO-OWNER—SET-OFF.

1. The libellant was master and a co-owner of a whaling-vessel. After the voyage had been made up and the amount due for his lay ascertained, and the proceeds of the voyage were in the hands of the other owners, *held*, that the libellant was entitled to recover, in admiralty, the amount due him as a master, notwithstanding his co-ownership.

2. A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities.

[Cited in Todd v. The Tulchen, 2 Fed. 603; The Gazelle, 128 U. S. 487, 9 Sup. Ct. 143; The Journeyman, 60 Fed. 296.]

3. Where it was agreed that the libellant, in his capacity as owner, was indebted to the other owners in some amount not then ascertainable, but it was not shown that this indebtedness was, either by agreement or usage, connected with the contract of hiring; *held*, that the libellant was not precluded from recovering the whole amount due him as master.

4. The claim of the owners in such case is a matter of set-off, of which admiralty has no jurisdiction.

[Cited in The Two Brothers, 4 Fed. 159.]

5. The power which a court of admiralty possesses over its own process will enable it to do complete justice to all parties.

R. C. Pitman & C. T. Bonney, for libellant.
Eliot & Stetson, for respondents.

SPRAGUE, District Judge. The libellant was master of the ship Union, and brings this suit to recover his share, one-twelfth, of the proceeds of a whaling voyage, which began in May, 1860, and ended in September, 1861. Prior to and during the voyage, the libellant was the owner of one-sixteenth of that vessel, and the respondents own, or by agreement are to be deemed, for the purpose of this suit, the owners of fifteen-sixteenths. At the termination of the voyage, all the catchings—that is, the oil and bone—were delivered to the respondents, who by their agent have disposed of the same, and the voyage has been made up, and the amount of the master's one-twelfth ascertained, and it is now held by the respondents in the hand of their agent. This statement is derived from the facts admitted by the parties.

It is objected that the libellant cannot sue his co-owners, because the contract to serve as master was made with all the owners, of which he was one, and he cannot sue himself. But the first proposition in this objection is not true. The master did not and could not make a contract with himself; he made a contract with the respondents, who owned fifteen-sixteenths of the vessel, and had the control of her. By this contract he agreed, that he would proceed on the voyage as master, and upon his return would deliver the catchings to the owners who controlled the vessel, that is, to the respondents; and they promised to make sale of the catchings, and pay over to him one-twelfth part of the net proceeds, such payment to be made as soon after the sale as the voyage could be made up. The libellant has performed his part of this contract; the catchings have come to the hands of the respondents, and have been sold by them; the voyage has been made up, the net proceeds are in their hands, and it only remains for them to pay over one-twelfth part to the libellant, according to the terms of their contract. Justice requires this to be done; and the artificial or technical objection which has been raised is not sufficient to preclude the court from enforcing the clear obligations of the respondents. Courts of admiralty are not restrained from doing substantial justice by mere forms or technicalities. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 172.

Another objection goes to the jurisdiction of the court. It is agreed that the libellant, "in his capacity as owner," is indebted to the other owners, and that this will appear "upon a due and proper adjustment of the affairs of the enterprise." But the amount in which the libellant is so indebted as owner is very much less than his one-twelfth of the proceeds of the voyage. It is contended in behalf of the respondents, that the libellant can recover only the balance which shall be due to him after deducting from his share as master the amount of his indebtment as owner, and that this amount cannot be ascertained without a complete adjustment of all the accounts between the owners, and that such adjustment cannot be made by a court of admiralty. This objection deserves consideration.

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

In what manner the libellant became indebted as owner is not specified. It appears that the business of this vessel was conducted by an agent of the owners; and I suppose that it is to be inferred, that the cost of outfits for the enterprise was to be borne by the several owners in proportion to their respective interests, and that the libellant, not having paid his share of such expenses, is now indebted therefor. No evidence of the actual agreement between the owners respecting this voyage has been introduced, nor is the court enlightened by any proof of usage. I have only the naked statement that the libellant as owner is indebted to the other owners, as will appear by a due adjustment of their accounts. This indebtedness of course arose under some agreement, expressed or implied. Now the burden is upon the respondents to show that this agreement, whatever it may have been, was connected with the contract with the libellant as master, and that the two may properly be deemed only parts of one general agreement; so that, when the libellant claims his share as master, the respondents can say, that, under our whole agreement, you must wait for your wages or lay, until a full settlement of the accounts between the owners.

Such may have been the understanding between the libellant and the respondents at the time he was hired as master, but I cannot say that it has been proved that it was so. The contract between the respondents and the master is explicit as to the share he is to receive and the time of payment. He is to have one-twelfth of the proceeds, to be paid to him as soon after the termination of the voyage as the oil and bone can be sold and the voyage made up. This is the contract as to the time of payment, and there is no evidence that the master ever agreed to vary these terms. As before stated, an adjustment of this voyage has been made up; the shares of all the ship's company, the master included, have been ascertained; and the time for payment has arrived. The accounts between the owners themselves have not been made up; are said to be complicated, and to require much time and perhaps the intervention of a court of chancery, as suggested in the answer; and the respondents insist that the libellant cannot claim his lay or wages according to the terms of their agreement with him as master; but that they have a right to hold his one-twelfth of the proceeds, and carry it into the account between the owners, and, if they cannot agree upon an adjustment, the whole must be submitted to a court of equity. It may be desirable for the respondents to retain his share of the proceeds in their hands until the final settlement between the owners, and it would seem not inequitable that they should retain so much as may be necessary to pay his indebtedness to the other owners. But it is now impossible to ascertain that amount; and it is not shown that the master ever agreed that they should hold his share of the proceeds, to recover any balance which might be found against him as owner, or that he has entered into any arrangement or understanding by which his contract of hiring is connected with, or made a part of, any other contract or agreement. The claim of the respondents against the libellant as part owner does not arise under the contract for which this suit was brought, but presents a distinct and independent demand which this court is not required to notice, as it does not take cognizance of accounts in set-off. But the fact that a respondent to a suit upon a maritime contract has claims against the libellant which might properly be allowed in other courts by way of set-off does not oust this court of its jurisdiction, or preclude it from proceeding to investigate and decide the cause before it. Willard v. Dorr [Case No. 17,680]; The Hudson [Id. 6,831].

The power which it possesses over its own final process will enable it to complete justice between the parties.

No evidence has been introduced, but the facts have been agreed upon partly in writing and partly by parol. I state this because any one who should look at the written statement alone, would be misled as to the case which is actually submitted to the court. The pleadings also are defective; material allegations are omitted, and issues presented which at the hearing were verbally withdrawn. The pleadings should be reformed so as to present the true issues.

Case No. 3,864.

DEXTER v. PROVIDENCE AQUEDUCT CO.

[1 Story, 387.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1840.

WATERS AND WATER COURSES—INJURY TO SPRING—INJUNCTION—SUBMITTING FACTS TO JURY.

Where a bill in equity charged the defendant with digging and sinking a deep well and fountain, and thereby occasioning a diversion of the water from a certain spring and watercourse on the meadow land of the plaintiff, so as to render the same dry during a portion of the year, and prayed for an injunction and relief therefrom; and the answer denied the facts stated in the bill, alleging, that the diminution of water was occasioned by other and natural causes; It was *held*, that if the facts were, as alleged in the bill, the plaintiff was entitled to the relief sought. But, in consideration of the contradictory nature of a great mass of testimony, relating merely to the matter of fact, and dependent upon the credibility of the witnesses, the court proposed, that the following questions should be submitted to a jury, to aid it in its decision: (1) Whether there was any such diversion of the water, as that alleged in the bill. (2) If so, what damages have been sustained thereby. (3) What is the permanent diminution or loss in value of the plaintiff's meadow land, occasioned thereby.

Bill in equity for an injunction and relief. The bill in substance states, that on or about the 20th day of December, 1832, the plaintiff

[1] [Reported by William W. Story, Esq.]

[Henry H. Dexter] was, and still is, the lawful owner and possessor of a certain close or meadow, situated in the said city of Providence, containing about five acres and one half of an acre of land, and for twenty years and upwards, before that time, and the time of committing the injuries and grievances complained of, he, and those from whom he derives his title, had been in the uninterrupted, quiet, and peaceable possession and enjoyment of the same with all its rights and privileges, and of a certain spring and watercourse therein situated, and passing and flowing upon and over, and extending and running through a part of the meadow, for the purposes of irrigation and for drink for his cattle feeding therein all that time, and ought now to have it so run for the same purposes. That during all that time, they were accustomed to use said spring for these purposes, and thereby derived profit and advantage. That on or about said 20th day of December, 1832, the defendants, well knowing the premises and the great value and importance of the said spring and watercourse to the orator in this respect, and contriving and unlawfully confederating and intending to injure him, and deprive him of the use, benefit, and advantage of the water of the said spring and watercourse naturally flowing therefrom, as it had been immemorially accustomed to run and flow, and irrigate and fertilize said meadow, and supply drink for the cattle feeding therein, wrongfully and injuriously did dig, sink, and cut a certain deep well, fountain, or pit near to and adjoining the said meadow, of the depth of thirty feet and of the diameter of about twenty-five feet, and cut or dug a trench therefrom, and laid and placed therein large iron pipes or watercourses leading from the said fountain to divers parts of the said city; and on or about that day diverted, and continually thenceforward have drawn and diverted the water from the said spring and watercourse, and have so diverted the natural flow of the water, that the spring and watercourse are dry a considerable portion of the year, and the water is thereby hindered and prevented from running and flowing as it had been immemorially accustomed to run and flow over and across the said meadow, irrigating and fertilizing the same so extensively and beneficially, as it might and otherwise would have done, and as it had been accustomed to do; whereby the orator is and has been greatly injured, as set forth in the bill. The bill further states, that at the November term, 1835, of this circuit court, the plaintiff commenced an action of the case against the defendants, for the recovery of his damages before that time sustained, for the unlawful diversion of the water as before stated, and to establish his right, by judgment of court, to the natural flow of the water in the said spring and watercourse, for the purposes aforesaid; in which suit the defendants appeared and answered, and such proceedings were had, that the orator recovered a verdict, and judgment was rendered thereon for his damages for the wrongful diversion of the water, which judgment is in full force and not annulled; yet the defendants still continue to divert the water wrongfully and injuriously. And the bill prays, that the defendants may be restrained by injunction from continuing to divert the water, or drawing the same from their fountain through the said iron pipes, and for the appointment of a master to ascertain his damages by reason of the premises, and for general relief.

The defendants in their answer state, that they know nothing of the complainant's title to the said close or meadow, and leave him to make proof. That they were incorporated by the general assembly of Rhode Island, at their October session, 1831, for the purpose of supplying the city of Providence with sweet and wholesome water, as great inconvenience had been previously felt by the inhabitants, and the charter was applied for by them, and granted by the general assembly to remedy the inconvenience. That they dug their fountain in December, 1832, on land previously purchased by them, consisting of one acre and a quarter. That in January, 1833, the laying of their water pipes was completed, and they began and have continued to supply the inhabitants with water. That the digging of their fountain and the drawing the water therefrom has no effect whatever in diminishing the quantity of water in the plaintiff's spring or watercourse. That from the time of digging the fountain, there has been a succession of drier seasons than had been known for many years before. That a number of the small streams and springs in the neighbourhood of Providence have been very low, and some of them dry, during the last five years, which have not been dry for many years before; and that the drying up of the plaintiff's spring and watercourse has been owing to the dryness of the seasons, and not to the defendants' fountain; and that it was not unusual for the plaintiff's spring and watercourse to be dry before the fountain was sunk, and that they were always dry in dry seasons. That the verdict, rendered in the said suit at law, was against the evidence; that within two days after the rendition of said verdict, and before judgment, the counsel of the defendants presented a petition to said court to set aside the verdict, and for a new trial, which petition was founded on two grounds; first, that the verdict was against the evidence; second, that after the rendition of the same, the defendants had discovered new and material evidence, which they had no opportunity to introduce; but that the counsel for the defendants were informed by the court, that the defendants were not bound by the said verdict, except for its payment, leaving the general question open and undecided, and if petition were granted, it would be on pay-

ment of costs, which would be about equal to the verdict; and that the main question might as well be tried in a second action, as by a new trial. And thereupon, the plaintiff's counsel being present, the defendants' counsel withdrew the said petition. The defendants on their answer further state, that they then had such new and further evidence, as would have disproved the truth of the said verdict, and shown, that their fountain had not in anywise diminished the water in the plaintiff's said spring and watercourse, which evidence they had not had an opportunity to introduce during the trial. That they would have been able to prove by said evidence, that previous to digging the said fountain, in all dry seasons, the plaintiff's spring and watercourse were as much dried up as since; and that such evidence the defendants were unable to obtain previous to the trial, although they had made diligent search and inquiry. The defendants further contend, that the said verdict is not evidence against them in this case. That it could not have been, had no petition been presented and withdrawn. That the action was an action on the case, and the inquiry confined to the effect of the fountain previous to the date of the writ. The act might have been proved to have been then injurious, but is not necessarily a continuing injury. That if a connection be established between them, they deny, that because it is injurious in a dry season, it would be so in a wet season. In wet seasons there would be a redundancy of water for the purposes stated by the plaintiff, and if then diminished by the fountain of the defendants, it would not be disadvantageous to the plaintiff. The diminution must be injurious to sustain the plaintiff's bill; but the defendants deny, that it has any effect whatever in a dry or wet season on plaintiff's spring or watercourse. That the constant succession of almost unprecedented dry seasons, which have occurred since the digging of the fountain, has rendered it impossible to ascertain, by actual observation, what the state of the spring and watercourse would be in a wet season. That if, as the defendants assert, the fountain has no effect in a dry season, it can have no effect in a wet. That the said spring is not a natural spring, but a hole has been dug about three feet deep, in a wet place, and a barrel placed therein, the water flowing from the wet land, adjoining, fills up this hole and runs off, constituting the spring and watercourse in the plaintiff's bill described. To this answer the plaintiff filed a general replication.

The cause came on to be heard at this term upon the bill, answer, and other pleadings, and the evidence taken by the parties; and was argued by—

Mr. Snow, for plaintiff.

R. W. Greene and Mr. Whipple, for defendants.

STORY, Circuit Justice. This cause has been very ably argued upon both sides. It does not appear to me to involve any real difficulty in point of law; but the great stress of the controversy rests on matters of fact. The short statement of the ground of the suit is, that the plaintiff asserts himself in the bill to be the owner of a certain meadow in Providence, containing about five acres, and that, for twenty years and more, before December, 1832, he, and those, under whom he claims and derives his title, were in peaceable possession thereof, with all the rights and privileges of a certain spring and watercourse thereon situated, and passing and flowing upon and over, and extending and running through a part of the meadow, for the purpose of irrigation, and for drink for his cattle feeding therein; that the defendants, knowing the premises, in December, 1832, dug, sunk, and cut a deep well, fountain, and pit in an adjacent close of the depth of thirty feet, and of the diameter of twenty-five feet, and dug a trench therefrom, and laid and placed iron pipes or watercourses, leading from the well or fountain to the city of Providence, and have ever since continued to do so; whereby they have diverted the water from the said spring and watercourse, and so diverted the natural flow of the spring and watercourse, that the same are dry for a considerable portion of the year, and the water is thereby hindered and prevented from running and flowing, as it had been immemorially accustomed to run and flow, over and across the said meadow, irrigating and fertilizing the same. Now, the title of the plaintiff to the meadow is not controverted; and if the gravamen, thus stated, is made out by sufficient proofs, I have no doubt that the plaintiff is entitled to relief under the bill. The case of Balston v. Bensted, 1 Camp. 463, is directly in point, if, indeed, the same principle of law had not been fully recognized from very early times. See Tyler v. Wilkinson [Case No. 14,312]; Hazard v. Robinson [Id. 6,281]; Sury v. Pigot, Poph. 166.

The defence principally turns upon a denial of the matter of fact, that the spring and watercourse have been diverted at all, or, if diverted at all, that it has been caused or occasioned by the digging of the well and fountain and water pipes of the company. In short, the company attribute the diminution of the water to other natural causes, wholly independent of their well, fountain, and aqueduct. There is a large body of evidence, introduced into the cause by both parties, which is, in many of its most important bearings, contradictory or conflicting. The weight, which ought to be attached to it, therefore, must, in a great measure, depend upon the comparative credibility of the respective witnesses. It appears to me, that under these circumstances, and in matters, connected with the common business of practical life, where the experience of a jury

might be of great advantage to aid the court in its ultimate decision, it is exactly such a case, as ought to be submitted to a jury upon an issue to be framed for that purpose. I am the more disposed to have this course pursued, because both the bill and answer admit, that there has been one trial of the question by a jury, on the common law side of this court, in which a verdict was found for the plaintiff. That verdict is alleged by the defendants to have been entirely unsatisfactory, founded upon very imperfect evidence, and materially affected by the new evidence, which has since been obtained. I cannot, therefore, give it full weight under such circumstances, especially as a new trial was intended to be moved for, but was waived upon a supposed suggestion of the court, that small damages only were given, and it might be as well to leave the merits to be decided in another action, or in a bill in equity. If another verdict is found on the same side, it will almost of itself be decisive. If found the other way, it will take away the entire force of the former verdict, which is now greatly relied upon by the plaintiff, as a strong ground for a perpetual injunction.

What I propose, then, is, to have an issue framed to be tried by a jury at the bar of this court to ascertain: (1) Whether there has been any diversion and drying of the spring or watercourse, occasioned by the digging and sinking of the fountain and aqueduct of the defendants. (2) If there has been any such diversion and drying, what damages have been sustained thereby by the plaintiffs, since the former suit was brought, and before the present bill was filed; or, if it be thought preferable by the parties, (3) what is the permanent diminution or loss in the value of the plaintiff's meadow land, occasioned by the defendants' digging and sinking the fountain and the aqueduct, as stated in the bill. See Hammond v. Hall, 10 Sim. 551.

Case No. 3,865.

DEXTER et al. v. The RICHMOND.

[4 Law Rep. 20; 4 Hunt, Mer. Mag. 455.]

District Court, D. Massachusetts. March 2, 1841.

SALVAGE—SERVICES BY PILOTS — EXTRA COMPENSATION.

Libel for salvage by pilots: *Held*, that the services rendered in this case constituted no claim for salvage; but the libellants were permitted to amend their libel and file a supplemental bill for extra compensation as pilots, which, on a hearing, was allowed to them.

[Cited in Flanders v. Tripp, Case No. 4,854; The Cachemire, 38 Fed. 523.]

This was a case in which the libellants, pilots of Martha's Vineyard, claimed salvage of the owners of the bark Richmond, belonging to Providence, R. I., for services rendered in getting the bark into Holme's Hole, on the 27th of November last, she being forty-two days from New Orleans, bound for Boston. It was in evidence that the value of the bark, with her cargo, consisting of cotton and lead, was more than $50,000. On the 19th of November, in a violent gale, as appeared by her log, her rudder was lost, and a temporary steering apparatus was arranged to supply its place. The evidence of the libellants tended to show, that the vessel being, as they maintained, then without a rudder and otherwise crippled, and short of provisions, was spoken and boarded by the libellants off Block Island, with two signals of distress flying; that on the morning of the 27th of November, they put a pilot aboard and stood by her, at the request of the master, all day, and towed her some hours; and that, without the assistance rendered by them and their boat, the bark could not have reached a harbor that evening. The claimants maintained that the whole statement of the pilots was greatly exaggerated, and offered evidence tending to show, that the bark was in no danger on that day from wind and sea; that she was not out of provisions, and could have made Holme's Hole on that day without other assistance than that of a pilot; and they contended that the libellants had not gone beyond the ordinary line of their duty as pilots, and could not at law recover a salvage compensation.

After the first hearing of the case, and after consideration and consulting the authorities cited on both sides; DAVIS, District Judge, intimated his opinion, that the libellants in the case, as pilots, could not recover a salvage compensation. The libellants then moved for leave to amend their libel and file a supplemental bill for extra compensation as pilots, to which the claimants objected. At a subsequent day, amendment was allowed, and a further hearing had, and evidence introduced to show the fair value of such services, and how they are usually compensated. The claimants proved the payment of $128—being $40 for pilotage into Holme's Hole; $28 for keeper's fees 14 days there, and $60 for pilotage thence to Boston. A large portion of which, they contended, was for extra pilotage services, and also a tender of $150 in addition, and thought this was all they should be called upon to pay. The libellants contended, that a liberal allowance should be made for services attended with danger, and brought some evidence tending to show, that $500 or $600 would be a fair compensation.

Mr. Dexter and G. W. Phillips, for libellants.

Mr. Pope and C. H. Parker, for claimants.

DAVIS, District Judge (in delivering his opinion), said there were three kinds of cases of this nature—one purely salvage, where property had been saved from imminent peril; one purely pilotage; one between the two, where extra services beyond pilotage

had been rendered, and had become entitled to extra compensation. The present case was one of the latter class. The bark was here in no imminent peril. Her crew was full. There was no distress other than the loss of her rudder, which she had been without for ten days previous to the assistance rendered. The only pretence of danger was the possibility of a change of wind, which might prevent her weathering Gay head. It was undoubtedly expedient to keep the pilot boat in attendance under the circumstances; but the services thus rendered constituted no claim for salvage, but were to be compensated for as extra pilotage. The libellants did no more than, as pilots, they should have done. It appeared that, in addition to one hundred and twenty-eight dollars pilotage paid by the respondents, which the learned judge considered a very liberal payment upon their part, a tender of $150 had been made. Allowing that each of the libellants had met with the best possible success on the 27th of November, the extent of their earnings would not have exceeded $40. The tender of $150 would give to each of them about $90 apiece, which exceeded, in amount, the monthly pay of the whole ship's crew. The sum was ample and more than the libellants should expect to receive under the circumstances. Their mistake had been from the outset in expecting a salvage compensation, which had led them to exaggerate and inflame the amount of their claim. It was well in all cases to allow a liberal compensation, and though in his opinion, the amount here paid and tendered, had been very liberal, yet considering the expense here incurred, and the policy of encouraging the rendering of similar services by persons in the situation of the libellants hereafter, he should give them the amount tendered, of $150, and one-half of their costs.

Case No. 3,866.

DEXTER v. SMITH et al.

[2 Mason, 303.][1]

Circuit Court, D. Rhode Island. June Term, 1821.

JURISDICTION OF FEDERAL COURTS — SUIT ON ASSIGNED JUDGMENT—FRAUDULENT CONVEYANCES.

1. Where a judgment has been rendered in a state court between citizens of different states, and the judgment has been since assigned to a citizen of the same state as the original plaintiff, the circuit court has jurisdiction to sustain a bill in equity in favour of the assignee, although the original ground of the suit, on which judgment was rendered, was a negotiable chose in action, on which the circuit court could not have held jurisdiction under the restrictive clause of the 11th section of the judiciary act of 1789, c. 20 [1 Stat. 78].

2. A mere volunteer from a grantee under a fraudulent conveyance stands in the same predicament as his grantor, as against the persons intended to be defrauded.

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

This was a bill in equity brought by Edward Dexter against the defendants [Simon Smith and others], and was, in most respects, precisely like the case of Bean v. Smith [Case No. 1,174], excepting in this, that "William Stone," Jr., who was not made a party in the other case is made a defendant in this. On the 14th day of January, A. D. 1809, the plaintiff was the holder of certain notes of the late Farmers' Exchange Bank, for the payment of which William Colwell, the cashier, drew two bills of exchange upon Andrew Dexter, Jr. of Boston, in favour of Simon Smith, who indorsed the same in blank, and they were then indorsed by John Harris, Smith and Harris being stockholders and directors in said bank. The said bills were payable in ninety days, one for the sum of $5,184 44, and the other for $4,120, and were by the cashier delivered to said Dexter in payment of said notes of the bank. The plaintiff forwarded said bills to his correspondent in Boston, Philip Ammidon, to be collected and passed to the credit of the plaintiff, who was indebted to said Ammidon in a considerable sum. The bills were protested for non-acceptance and non-payment, the indorsers duly notified, and they were then forwarded by said Ammidon to Mr. Searle, of Providence, and an action commenced upon them in the name of Ammidon against said Simon Smith. A judgment was obtained, and the said Smith was committed to jail on the execution. He afterwards gave his note for the amount in conformity to the statute, and was discharged from jail on taking the poor prisoners' oath. In the year 1818, Ammidon having adjusted his concerns with Dexter, assigned and transferred to him the said debt and judgment, and this bill in equity was brought by Dexter on the said judgment.

Searle and Snow, for plaintiff.
Mr. Whipple, for defendants.

STORY, Circuit Justice. The principal facts in this case are the same as those in the case of Bean v. Smith [supra], which has been just disposed of; and therefore it is not necessary to discuss them. I shall content myself, therefore, with a short reference to those circumstances in which they differ.

And in the first place, on the point of jurisdiction, Dexter claims as assignee of a judgment in favor of Philip Ammidon. That assignment was made long after the conveyances in September and November, 1809; but if the plaintiff's title stood on that ground alone, there would be no pretence to sustain the objection; for Ammidon is, and at that time was, a citizen of Massachusetts, and entitled, as such, to sue the present parties in this court with reference to his judgment. So that the case does not fall within the restrictive clause of the 11th section of the judiciary act of 1789, c. 20 [supra]. But in truth the plaintiff was the original holder of

the drafts, and Ammidon was his agent only, and recovered the judgment, as such, as is charged in the bill, and is admitted by the answer of Simon Smith; so that if the plaintiff was ever competent to sue, being remitted to his former right independent of the new assignment.

Another circumstance is, that the present bill proceeds against William Steere, Jr. (to whom his brother Amasa in 1817, released and conveyed all his interest) to subject the estate conveyed to them by Ahab, Darius, and Thomas Smith, by their deed of the 7th of February, 1816, to the plaintiff's debt. As to the moiety of that estate conveyed by Ahab, it is sufficient to say, as has been already stated, that as the young Messrs. Steere claim it as a gift, by the very terms of their own life lease to him, they stand in the same predicament, as if the estate were now held by Ahab; and he clearly held by a fraudulent conveyance.

As to the moiety of Darius Smith, for reasons that have already been stated, the conveyance to him by his father must be deemed fraudulent. There are some circumstances, however, in his case fortifying that conclusion, which deserve notice. The father in his answer admits, that Darius paid only $500 of the purchase by an ultimate discharge of so much of the debt due to Zephaniah Andrews, and says, that he owed his son the residue. And several of the witnesses for the respondents assert the same. I cannot, however, consider Thomas Smith or Amasa Steere as witnesses competent in this cause. Both have a direct interest, the former as a co-grantor to Amasa and William Steere, Jr. and the latter as a grantor to his brother William of the land now in controversy. See Roberts v. Anderson, 3 Johns. Ch. 371, 375. It appears, however, that Simon Smith had purchased a farm for his son Darius, in January, 1797, for $3,000, and that the deed was taken in the son's name, though the consideration was paid by the father. The gift, too, of the Lewis and Tinkham farm by the father to Darius in March, 1808, has been already adverted to in the other cause. These liberal advances to his son, considering too the attempts now made to show the father's deep embarrassment by debts, do not increase the confidence, one might be disposed otherwise to indulge towards the mass of family testimony brought into this cause, to establish debts due to the children. We should be almost driven to the conclusion, if we could believe such testimony, that there was as much profusion and extravagance, as there was want of good faith, in the conduct of the father.

The only remaining consideration is, whether the Messrs. Steere, or William, the present holder, are purchasers for a valuable consideration without notice of the fraud from Darius Smith. They were clearly conusant of the deed of conveyance to Darius and Ahab, under which they derive title, for it is referred to in the deed to them. Considering the immediate family connexion between the parties, and the age of the grand-children, it seems almost incredible, that they should not have had an intimate knowledge of all the transactions accompanying the conveyances in September and November, 1809. I observe, too, that Amasa Steere in his deposition, which if competent for any purpose, is competent for this, states, that he lived with his grandfather Simon Smith, at the time of these conveyances, and professes a thorough intimacy with the execution of the deed to Darius and Ahab, and the consideration, on which it was founded. Can any one believe, that his co-grantee was ignorant of the same facts? There is not the slightest reason to presume it; and I am not justified in allowing them the benefit of a title, which is set up under circumstances so pregnant with suspicion, and so strongly imbued with the coloring of a family compact. I shall, therefore, make the same decree in this case as in that of Bean v. Smith, adding, that Messrs. Amasa and William Steere, Jr. are not purchasers for a valuable consideration without notice, and therefore are liable to the same equities, as if the property were now in the hands of the heirs of Darius. I think, however, that they ought not to be held liable, so far as respects the lands claimed from Darius and his son Thomas, until all other funds have been exhausted.

Decree. This cause came on to be heard on the bill, answer, pleadings, and evidence in the case, (the due execution of all the deeds in the case being admitted by the parties) and was argued by counsel; on consideration whereof, It is ordered, adjudged, and decreed, as follows, to wit: That the conveyances made by the said Simon Smith mentioned in the bill and answers in this cause, bearing date the fifteenth day of September, in the year of our Lord one thousand eight hundred and nine, to the said Esther Steere and Elizabeth Foster, and to William Steere and the said William Foster, for two certain farms lying in Gloucester and Foster in the county of Providence, within said district of Rhode Island, containing three hundred and thirty five acres of land, one called the Wells farm, and the other called the Rounds farm; and also the conveyances, in the said bill and answers mentioned, made by the said Simon Smith to the said Ziba Smith, bearing date the fifteenth day of September, in the year of our Lord one thousand eight hundred and nine, for a farm or lot of land, situate in Smithfield, in said district, and known by the name of the Waterman lot, containing fifty four acres, and also the conveyances, in the said bill and answers mentioned, made by the said Simon Smith to Darius Smith, and to Darius Smith and the said Ahab Smith, bearing date the fifteenth and eighteenth days of September, in the year of our Lord one thousand eight hundred and nine,

for the farm on which the said Darius then lived, situated in Gloucester aforesaid, called the Daniel Eddy farm, lying on both sides of the turnpike road; and also the deed, in the said bill and answers mentioned, made by the said Simon Smith to the said Ziba Smith, bearing date the eighteenth day of September, in the year of our Lord one thousand eight hundred and nine, for a lot of land situate in said Gloucester, containing twenty-six acres; and also the deed, in the said bill and answer mentioned, made by the said Simon Smith to the said Ziba Smith and Simon Smith, Jr. bearing date the twenty-second day of November, in the year of our Lord one thousand eight hundred and nine, for the farm whereon the said Simon Smith then lived, situate in said Gloucester, it being all the land he had purchased of John Eddy, Elijah Cooke, and Abel Potter, and is about three hundred acres, were made by the said Simon Smith with the intent to defraud his creditors, and particularly the plaintiff, and are, therefore, as to the plaintiff utterly void.

And it further ordered, and decreed, that the deed, in the said bills and answers mentioned, made by Darius Smith, Thomas Smith, and Ahab Smith, to William Steere, Jr. and Amasa Steere, bearing date the seventh day of February, in the year of our Lord one thousand eight hundred and sixteen, of the Daniel Eddy farm, before mentioned; and also that the lease, in the said bill and answers mentioned, made by the said Amasa Steere, and William Steere, Jr. to the said Ahab Smith, bearing date the seventh day of February, A. D. 1816, for that part of the Daniel Eddy farm, which the said Ahab Smith had conveyed to the said Amasa and William Steere, Jr. on that day; and also that the deeds in the said bill and answers mentioned, made by the said Ziba Smith to the said Simon Smith, Jr. and by the said Simon Smith, Jr. to the said Ziba Smith bearing date the thirtieth day of May, in the year of our Lord one thousand eight hundred and twelve, of certain portions of the said farm, that Simon Smith conveyed to them by deed, bearing date the twenty-second day of November, A. D. 1809; and also that the deed, made by the said Amasa Steere to the said William Steere, Jr. mentioned in said bill and answers, bearing date the first day of January, A. D. 1818, for the one half part of the said farm conveyed to the said Amasa and William Steere, Jr. by the said Darius, Thomas, and Ahab Smith, on the seventh day of February, A. D. 1816, were made by the said Darius, Thomas, Ahab, Ziba, Simon, Jr. Amasa, and William, Jr. in furtherance, and with the knowledge of the original intention of the parties, to defraud the creditors of the said Simon Smith, and particularly the plaintiff, and are, therefore, as to the plaintiff, utterly void; that the said conveyances before mentioned, having originated in a meditated fraud upon the creditors of the said Simon Smith, cannot be permitted to stand as a security for any debts then due to the grantees, or for any subsequent advances by them made in furtherance of the original intention of the parties thereto.

And it is further declared, and decreed, that the plaintiff has a right to be paid the principal debt due to him, with interest up to the time of this decree, and that the same ought to be, and is decreed to be, a charge on the same lands, and on the rents and profits, (making all proper allowances) which have accrued to the respective respondents, or might have accrued to them without wilful default, since the estates mentioned in the same conveyances have come to their hands, possession, and use; and it is declared, and decreed, that the said lands, rents, and profits are specifically holden for, and charged with, the payment of the plaintiff's said debt.

And it is further declared, and decreed, that the respondents be permitted to pay in the proportion of the value of the estates respectively conveyed to them, to be ascertained by a master, the amount due to the plaintiff for principal and interest, with costs, if they shall elect so to do, within sixty days after the date of this decree, and in that event the plaintiff is to assign to them, by conveyances to be approved by a master, all his right and title to the judgments stated in his bill, and to the debts due, and his right and title under this decree; and the respondents shall be admitted to hold the same accordingly as a charge on the same lands; but if the respondents shall not pay the said debt and costs, within the period aforesaid, then the same master is to ascertain the rents and profits of the said estates as aforesaid, which are to be paid by the respondents respectively towards the discharge of the plaintiff's debt, and if this fund shall not be sufficient, or shall not be productive, then it is further declared, and decreed, that the master shall sell the lands so conveyed to the respondents by the conveyances aforesaid, or a sufficiency thereof, to pay the plaintiff's debt, interest and costs, at public auction to the highest bidder, in manner as shall hereafter be decreed by the court, and make due and legal conveyances thereof to the purchaser or purchasers thereof; and the respondents Simon Smith, Ziba Smith, Ahab Smith, Simon Smith, Jr., Esther Steere, William Foster, Elizabeth Foster, and William Steere, Jr. shall respectively join in such conveyance or conveyances, releasing their right, title, and interest therein, and thereto, and covenanting against their own acts, in such manner as the master shall approve, and the proceeds of such sale shall be brought into this court to discharge the plaintiff's debt, and costs of suit.

And it is further declared, and decreed, that it be further referred to the same master to ascertain by an examination of the plaintiff on oath and otherwise, what was the value, at which the plaintiffs received the

Farmers' Exchange bills for which the drafts, on which his judgments were founded, were given, at the time when he received or bought the same, and that the plaintiff is to be allowed that sum, the damages on said drafts at the rate allowed by law on the bills of the like nature, and his costs of suit, in the state courts of Rhode Island, as his principal debt, and the interest is to be computed thereon as aforesaid; and the same master is to make his report as soon as may be, and in the mean time all further proceedings and orders are reserved for the consideration of the court.

Case No. 3,867.

DEXTER et ux. v. SPEAR.

[4 Mason, 115.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

LIBEL — WHAT CONSTITUTES — PRESUMPTION OF MALICE—NEWSPAPER PUBLICATION — LIABILITY OF PUBLISHER AND AUTHOR.

1. Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime, punishable by law, or of an act odious or disgraceful in society, is a libel.

2. Where a publication is libelous, and is knowingly made, the law presumes it malicious, unless it is proved to be published on an innocent or justifiable occasion.

3. Malice, in the sense of the law, means wilfulness.

[Cited in Wiggin v. Coffin, Case No. 17,624; U. S. v. Taylor, Id. 16,442.]

4. It is no justification or excuse for a libel printed in a newspaper, that the printer of the newspaper did not personally know the party libelled.

5. The publisher is equally responsible with the author of a libel.

Case for a libel on the wife before marriage. The declaration alleged the purport to be a charge of illicit and criminal intercourse between the husband [Edward Dexter] and wife before the marriage. The libel was contained in a newspaper called "The Beacon," which was published by the defendant [William S. Spear]. Plea not guilty.

At the trial the cause was argued by R. W. Greene and Mr. Tillinghast for the plaintiffs, and by Rivers & Whipple for the defendant.

In the defence it was contended, (1) that the publication was not a libel on any person; (2) that if a libel, it was not applied or applicable to the wife; (3) that if applied to the wife, it was not a malicious publication; that the defendant was not the author of it, but it was a communication to him, and he was not personally acquainted with the plaintiffs; that unless there was malice, the action was not maintainable. If the author had malice, that was not sufficient, unless the publisher also had malice, &c., &c.

For the defendants were cited People v. Croswell, 3 Johns. Cas. 354; Holt, Libel, 307; 3 Chit. Cr. Law, 867, 869; Lamb's Case, 9 Coke, 59.

For the plaintiffs were cited Holt, Libel, 54, 55, 223, 234, 241, 242, 243, 240, note; 10 Johns. 443; Russ. Crimes, 303, 340.

The cause was argued at great length; but the arguments are not thought necessary to be reported at large, as they were principally addressed to the facts, and the points of law are stated in the opinion of the court.

STORY, Circuit Justice (after summing up the facts to the jury). This cause has been argued, as if there was something peculiar in an action for a libel, and as if it rested on harsh and extraordinary principles, not to be encouraged in an enlightened age. I know of nothing that justifies such a notion. The case of libels stands upon the same general grounds as other rights of action for wrongs. The general rule of law is, that whoever does an injury to another is liable in damages to the extent of that injury. It matters not, whether the injury is to the property, or the person, or the rights, or the reputation, of another. The law has declared all these entitled to its protection; and whoever wantonly assails them must answer in damages for the consequences. Civil society could not exist upon any other terms. Injuries to the reputation, by gross slanders and degrading libels, are oftentimes more extensive in mischief, and more fatal to the public peace and to private happiness, than any which can affect mere corporeal property. Indeed the dearest property, which a man has, is often his good name and character; and as to a woman, without the possession of a fair fame, and pure, unsullied chastity, she is deemed a ruined outcast, unworthy of confidence, and sunk in irretrievable degradation.

Nor is there any difficulty in defining or ascertaining what the law deems a libel. Notwithstanding the suggestions thrown out in the defence, it is as plain and well settled as any doctrine of the law. Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred; or which accuses him or her of a crime punishable by law, or of an act odious and disgraceful in society, is a libel. If it is false, he who knowingly writes, publishes, or circulates it, is responsible, in a civil action, for damages to the party injured. No man has a right to state of another that, which is false and injurious to him. A fortiori no man has a right to give it a wider and more mischievous range by publishing it in a newspaper. The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no

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

right in printers, any more than in other persons, to do wrong. If a writing is libellous, and is knowingly published, the law presumes it to be malicious, unless it is proved to be published on an innocent or justifiable occasion. No man can protect himself from responsibility for a libel by pleading his ignorance of the real parties who are attacked, if he knows the publication to be libellous. He is bound not to do a wrong to another, whether personally known or unknown to him. Indeed, malice is so far from being disproved, by showing that the printer did not know who were the parties libelled, that it often aggravates the malignity of the case, by showing a wanton and indiscriminate malice, and an indifference to the peace of the innocent. It often takes away the pretence of good motives in the publication, since the party does not know and does not care, whether it be truth or falsehood. A printer of a newspaper is bound to abstain from publications, which he knows to be libellous, with more than ordinary care, for the wide circulation of his paper may often inflict upon the innocent an irreparable injury. It is no apology for him, that he is not the author; he who wantonly publishes a libel is just as guilty, in the eye of the law, as he who writes it. The author may write from private malice; but the injury is done by the publication.

The real questions then for the jury are, in the first place, whether the publication is a libel; and of this it seems to me there can be no doubt, unless we choose to shut our minds against the obvious meaning of the language. If it is a libel, then the next consideration is, whether the wife was the party alluded to, and whether the import of the language is truly set forth in the innuendoes in the declaration. The next inquiry is, whether the publication was made, by the defendant, with a knowledge that it was libellous. If so, the law presumes it to be malicious; for there is no pretence to say, that there was any justification from the occasion of publication, and an act is deemed malicious, not only when it arises from personal spite, but when it is a wanton and intentional injury. Malice is wilfulness. See Duncan v. Thwaites, 3 Barn. & C. 556, 581, 585; Bromage v. Prosser, 4 Barn. & C. 247.

Verdict for plaintiffs, $800.

Case No. 3,868.

DEXTER v. SULLIVAN.

[Brunner, Col. Cas. 585;[1] 14 Law Rep. 455.]

Circuit Court, D. Rhode Island. 1851.

PRACTICE—PRODUCTION OF PAPERS IN CAUSE IN STATE COURT.

The federal courts will not grant a subpoena duces tecum for the purpose of bringing up the original papers in a cause in a state court.

During the progress of the cause, Burgess, for defendant, applied for a writ of subpoena duces tecum, to have the original papers in a case in the supreme court of Rhode Island brought into the circuit court.

THE COURT refused the application, on the ground that it would not make a demand on another court, which would not be granted if made to this court, it being a rule of the circuit court not to allow original papers to go out of the clerk's office.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

DEXTER (TABOR v.). See Case No. 13,723.

Case No. 3,869.

DEXTER v. UNITED STATES.

[Nowhere reported; opinion not now accessible.]

Case No. 3,870.

In re DEY.

[3 Ben. 450;[1] 3 N. B. R. 305 (Quarto, 81).]

District Court, S. D. New York. Nov., 1869.

LIENS ON BANKRUPT'S ESTATE—MECHANIC'S LIEN LAW OF NEW JERSEY.

1. A lien, to be recognized by the bankruptcy court, as a valid lien on property which passes from the bankrupt to the assignee in bankruptcy by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of those proceedings.

[Cited in Stuart v. Hines, 33 Iowa, 60.]

2. A bankrupt filed his voluntary petition on May 17th, 1869. Among the property which passed to the assignee were buildings and machinery situated in New Jersey, upon which work had been done prior to May 17th, 1869, for which mechanics' liens were claimed on the buildings, under the laws of New Jersey, the earliest claim of such lien, however, being filed on May 29th, 1869. The assignee in bankruptcy filed a petition asking for a determination as to the validity of the claims of lien: *Held*, that under the mechanic's lien law of New Jersey, the lien did not exist as a lien upon the property at the time of the commencement of the bankruptcy proceedings; that, the assignee must distribute the estate without reference to the mechanics' liens, as such.

[Distinguished in Clifton v. Foster, 103 Mass. 233; Sabin v. Connor, Case No. 12,197. Disapproved in Re Coulter, Id. 3,276.]

[See note at end of case.]

This case came before the court on testimony taken under an order of reference. on a petition presented to the court by the assignee in bankruptcy, asking for a determination [as to the claims of certain mortgagees and] as to the validity of certain alleged liens, claimed as mechanics' liens, under the laws of New Jersey, on certain real estate, buildings and fixed machinery situated on the Hackensack river in New Jersey, owned by the bankrupt, and used by him in his business as a manufacturer there of poudrette. [There seems, on the evidence, to be no ques-

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

tion as to the validity of the mortgage liens against the assignee in bankruptcy. The only question to be determined is as to the alleged mechanics' liens.][2]

The petition in bankruptcy, which was a voluntary petition by the bankrupt [James R. Dey], was filed on the 17th of May, 1869. The earliest claim of lien, in respect to any of the alleged mechanics' liens, that was filed under the laws of New Jersey, was filed on the 29th of May, 1869. The work was done and the materials were furnished, in respect of which the liens were claimed, prior to the 17th of May, 1869. It was contended. on the part of the assignee in bankruptcy, that, under the laws of New Jersey, no lien had attached to the property in question, in favor of any one of the claimants of the alleged mechanics' liens, at the time of the commencement of the proceedings in bankruptcy. [The determination of this question involves a construction of the mechanic's lien law of New Jersey, upon the point as to whether the lien given thereby attaches when the work is done and the materials are furnished, or not until the claim of lien is filed.][2] The act in question was passed on the 11th of March, 1853 (Nixon's Dig., 2d Ed., p. 487; Id. p. 571). The 1st section of that act declares. that every building shall be liable "for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected." The 5th section provides, that "every person intending to claim a lien upon any building or lands by virtue of this act, shall, within one year after the labor is performed or the materials furnished. for which said lien is claimed, file his claim in the office of the clerk of the county where such building is situate. which claim shall contain these matters," specifying four. The same section further provides, that, "when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars," which is one of the four matters, "shall contain any wilful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim." The 8th section provides, that, "when a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit, in the circuit court of the county where such building is situated, which suit shall be commenced" and prosecuted in the manner thereafter specified. The 9th section provides, that the declaration in the suit "shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot. describing the same as in such claim," and that the owner of the land and building "may plead that said house or land are not liable to said debt, and, in such case, it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with." The 12th section provides, that "no debt shall be a lien by virtue of this act, unless a claim is filed as hereinbefore provided, within one year from the furnishing the materials or performing the labor for which such debt is due." The 13th section provides, that "such land and building may be discharged from any lien created by this act," in four specified ways: (1) By payment and a receipt therefor, given by the claimant, and filed by the clerk, and an entry made by him in the lien docket, opposite the entry of the lien; (2) By paying to the clerk the amount of the claim; (3) By the expiration of the time limited for issuing a summons on the lien claim, without any summons being issued, or without notice thereof endorsed on said claim; (4) By showing, by the filing of an affidavit, that the owner gave a notice to the claimant, requiring him to commence suit to enforce such lien in thirty days from the service of such notice, and that such time has elapsed without such suit being commenced or without an entry of the time of issuing such summons being made on such claim. The 14th section provides, that "all lien claims for erecting the same building shall be concurrent liens upon the same and the land whereon the same is erected."

J. H. Strahan, for assignee.

J. H. Randolph and W. H. Peckham, for mechanic's lien creditors.

A. Thompson, for mortgagees.

BLATCHFORD, District Judge. It is impossible to read the provisions of the act in connection with each other, as a systematic whole, without seeing that it is not the intention of the statute that the performing of the labor or the furnishing of the materials. shall, of itself. constitute a lien for the debt upon the building or the land. The creating of the debt by such means only gives a right to the creditor to constitute the lien, by filing the claim within the time and in the manner specified. If he does not, as the 9th section declares, comply with the provisions of the act which are made requisite to constitute the lien, there is no lien; and the 12th section expressly declares, that the debt shall not be a lien, that is, shall not become at all a lien, unless the claim is filed in accordance with the 6th section, and within one year from the furnishing of the materials or the performing of the labor. It is true, that the 11th section of the act provides that the deed to be given on a sale of a building and lot on a special writ of fieri facias on a judgment against such building and lot, shall convey the estate in the lot which the owner

[2] [From 3 N. B. R. 305 (Quarto, 81).]

had at or any time after the commencement of the building, within one year before the filing of the claim in the clerk's office. But this is merely a provision that, when the lien is created or constituted by the due filing of a claim, it becomes a lien by relation, as of the time of the commencement of the building. Until the claim is filed, the lien rests only in posse. When such claim is filed, it becomes a lien in esse, as of the time when the building was commenced. That there is no lien until the claim is filed, is the view held of the statute by the court of chancery of New Jersey. In the case of Morris County Bank v. Rockaway Manuf'g Co., 1 C. E. Green [16 N. J. Eq.] 150, 161, the court (Chancellor Green,) held, that a claim not filed according to the requirement of the statute, constituted, under the provisions of the law, no encumbrance on the premises; and that the fact that a judgment at law had been entered upon the lien, when the lien claim had not been filed pursuant to the statute, did not give the debt any priority in payment or advantage over liens upon which judgment had not been rendered. No decision of any court in New Jersey was cited, on the argument, in conflict with these views.

There was, therefore, no lien, in this case, in respect to any of the alleged mechanics' liens, at the time the petition in bankruptcy was filed. The filing of such petition, followed by an adjudication of bankruptcy, is made, by section 38 of the bankruptcy act, the commencement of proceedings in bankruptcy under the act. By section 14 of the act, the assignment to the assignee in bankruptcy relates back to the commencement of the proceedings in bankruptcy. It is claimed, on the part of the holders of the alleged mechanics' liens, that, although their lien claims were filed after the commencement of the proceedings in bankruptcy, yet, as they were filed within the time limited by the statute of New Jersey, they became, by such filing, liens which must be respected and allowed by this court. The law is otherwise. Any lien, to be recognized by the bankruptcy court as a valid lien on property which passes from the bankrupt to the assignee by virtue of the proceedings in bankruptcy, must be a lien at the time of the commencement of the proceedings in bankruptcy. In re Bernstein [Case No. 1,350]; In re Schnepf [Id. 12,471]; In re Smith [Id. 12,973]; Pennington v. Sale [Id. 10,939]; Jones v. Leach [Id. 7,475]; In re Ellis [Id. 4,400]; In re Housberger [Id. 6,734]. The property in question passed under the jurisdiction of this court on the 17th of May, 1869, so as to cut off any liens subsequently sought to be imposed on it, and no proceeding thereafter, under the state law, to impose on it a lien not then created or constituted, was valid. If the subsequent imposition of the lien in this case were to be upheld, it would be difficult to deny, on principle, the right of a judgment creditor, by a judgment recovered before the commencement of the proceedings in bankruptcy, to create, as against the assignee in bankruptcy, a lien on personal property, by issuing or levying an execution thereon after the commencement of such proceedings, but within the time allowed by the law of the state therefor.

It results, that the assignee must distribute the estate without reference to the alleged mechanics' liens, as liens.

[NOTE. This case was subsequently brought up in the circuit court on a petition for review of the order of the district court. See Case No. 3,871. The decree of the district court was so modified as to secure to the petitioners the payment of their liens, in preference to the claims of the mortgagees and the rights of the assignee.]

Case No. 3,871.

In re DEY.

[9 Blatchf. 285.][1]

Circuit Court, S. D. New York. Jan. 3, 1872.

MECHANICS' LIENS—MORTGAGES—PRIORITY—BANKRUPTCY.

Under the mechanics' lien law of the state of New Jersey (Nix. Dig. 4th Ed., p. 571), A. performed labor and furnished materials in erecting a building on real estate of B. in New Jersey. Afterwards, B. executed a mortgage to C., on such real estate. After that B. was adjudged a bankrupt, on his own petition, in the district court for the southern district of New York, and an assignee of his estate was appointed. Thereafter, and within one year after the performance of such labor, A. filed his claim, under said law, in the office of the clerk of the county, in New Jersey, in which such building was situated: *Held*, that the lien of A. attached as of the time the labor was performed, and was superior to the lien of C. under his mortgage, and that the real estate, in the hands of the assignee in bankruptcy, was subject to such lien of A.

This case came up on a petition by Hewes and Phillips, and a petition by Uzal Cory, for the review of an order of the district court [for the southern district of New York] touching the distribution of the bankrupt's estate, which order excluded liens claimed by the petitioners severally under the law of New Jersey, known as the "mechanics' lien law." 3 Ben. 450 [Case No. 3,870].

John H. Strahan, for assignee in bankruptcy.

Morris S. Thompson, for mortgagees.

Wheeler H. Peckham, for Hewes and Phillips.

Joseph F. Randolph and B. F. Randolph, for Cory.

WOODRUFF, Circuit Judge. The petitioners respectively claim liens upon certain real estate of the bankrupt, in New Jersey, for work and materials done and furnished for the erection of buildings thereon, prior to the adjudication in bankruptcy, made

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

upon the application of the bankrupt, for which liens, after such adjudication, and within one year after the performance of the labor and the furnishing of the materials, they have respectively filed their claims in the office of the clerk of the county, in New Jersey, in which the buildings, &c., were situated. The assignee and certain mortgagees subsequent to the commencement of the building, insist that, by the filing of the petition in bankruptcy, the adjudication thereon, and the appointment of the assignee, intermediate the performance of the work, &c., and the filing of the claims of lien, the assignee takes title free of all such liens and claims, and that the mortgagees subsequent to the commencement of the building are let in, to the exclusion of such liens. The petitioners, on the other hand, insist, that, under the statute of New Jersey, they have liens which the bankrupt could not, by his proceedings in bankruptcy, divest. On the one hand, it is claimed, that no lien is created until the claim therefor is filed, and, therefore, that, when the property passed to the assignee in bankruptcy, no act of any creditor could thereafter create such lien. On the other hand, it is claimed, that the moment work is done, or materials are furnished, a lien attaches in favor of the creditor, which the proceedings in bankruptcy could no more divest than could any act of the bankrupt himself. Obviously, the question in contest depends upon the construction and legal effect of the statute of New Jersey; and it is settled, that, if any doubt appears to exist touching that construction and effect, this court must look to the decision of the courts of that state, if any there be, as its guide in determining the question. The construction given by the district court was deemed sustained by the case of Morris County Bank v. Rockaway Manuf'g Co., in the court of chancery of New Jersey (1 C. E. Green [16 N. J. Eq.] 150, 161), and the district judge states, in his opinion, that no decision of any court in New Jersey was cited, on the argument, in conflict with the views stated. I cannot doubt, that, had counsel called to the attention of court the numerous cases, some of which are below referred to, in which the judges of the courts of that state have declared their opinion upon this statute, a different conclusion would have been the result.

The 1st section of the act (Nixon's Dig. 4th Ed., p. 571) provides, that every building shall be liable "for the payment of any debt, contracted and owing to any person, for labor performed, or materials furnished, for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected." Although it would have been unwise to leave this section to operate, without enacting other supplemental provisions touching the duration of the lien, the notice thereof to be given, and the manner of its enforcement, it is not doubtful, I think, that, if there had been nothing more in the act, a party performing work, or furnishing materials, would, by virtue of this section, have a lien which it would be the duty of a court of equity to recognize and enforce. No language would make the intent more plain, to secure the creditor payment by a charge on the premises, to secure the debt eo instanti it was incurred, by making it then a lien. Such language in an instrument executed by the owner to the party performing labor or furnishing materials, would give the latter a lien, in equity, which would be enforced, even though the legal title were not conveyed. Much more should the statute have that effect when, within its clear power and authority, it so enacts. What, then, is the effect of the subsequent provisions?

In the first place, it was obvious to the legislature, that the alienability of the property ought not to be too long hindered by the uncertainty which any proposed purchaser would feel in regard to the existence and amount of such debts; and, second, it was practically certain, that many of such debts would be paid, or otherwise secured, so that the creditor would neither desire nor need to assert his lien. It was, therefore, enacted (section 6) that the creditor "intending to claim a lien" shall, within one year after the labor is performed, or the materials furnished, for which such lien is claimed, file his claim in the office of the county clerk, containing the particulars specified in the statute, and that, when such claim shall not be filed in the manner or within the time aforesaid, or, if the same shall contain any wilful or fraudulent misstatement of the matters required to be stated, "the building or lands shall be free from all lien for the matters in such claim." It is claimed, that it is the filing of this claim which "constitutes" the lien upon the premises; that, until then, although the statute has enabled the creditor to acquire a lien, has given him the right to acquire such lien, no lien, in fact, exists until such claim is, in fact, filed; and that, although, by a subsequent section, if the claim be so filed, it relates back to the commencement of the building, and takes precedence of mortgages, or conveyances, or other liens, made or created after the commencement of the building, the lien itself has no existence until the claim is filed. This is giving to the provision requiring the claim to be filed a plain repugnance to the terms of the first section, which declares that the building shall be liable for the payment and the debt shall be a lien. In a large degree, it defeats the purpose of the act, which was to furnish an instant security while the work was in progress, on which laborers and material men might rely. Such a construction is not necessary to the giving of full force and effect to the provision itself. It was intended to operate, and it does operate, as a limitation of the time within which persons

desiring to assert their liens must place their claim in the proper office, within the inspection of purchasers and others; and it enabled them and the owner to know, and be protected by the assurance, that the various persons performing labor or furnishing materials, but not asserting liens, had been paid or otherwise provided for. In effect, it operated, as to all creditors, as a condition subsequent, defeating any pre-existing lien, and as a conclusive bar to the assertion thereof. This satisfies the language, and harmonizes both of the sections.

This construction is also in harmony with the subsequent 8th section, which provides, that, "when a claim is filed, agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit," commenced and prosecuted as directed in the act. As the premises are, by the previous section to be free of the lien, if the claim be not filed within one year, so, in the last-named section, it is provided, that, when filed, it may be enforced by suit; and, by necessary implication, if not filed, it cannot be enforced. This is not only consistent with the previous sections, but seems a necessary conclusion therefrom. The 11th section, in a pointed manner, indicates the intent of the legislature to make the liability and lien declared in the first section efficient beyond the control of the debtor or owner of the building, by providing that, when such suit has proceeded to judgment, a conveyance, in pursuance of a sale on the execution, shall convey the estate which the owner had in the land at, or at any time after, the commencement of the building, free from all subsequent estates or incumbrances by deed or mortgage, made by such owner, or any person claiming under him. This provision, read in connection with the previous sections, shows that it was not in the power of the owner to defeat the security provided to laborers and material men by the statute; that such security was to operate effectually from the time the building was commenced; and that the right of such creditors was prior in time to that of such subsequent grantees or mortgagees. It was conceded, by the counsel for the assignee, that, if the claim was filed within the year limited, the lien which he insists was then first constituted related back to the commencement of the building, and, when enforced, operated to hold and convey all the interest of the owner at that time, but, still, that, until the claim is in fact filed, no lien exists. I have already expressed the opinion that the first section gives the lien, and that the filing of the claim is not a condition precedent to the liability declared in that section, but only a condition subsequent, which operates to discharge or bar the assertion of the right which the first section confers.

Nothing can be more plain, however, than this. The first section confers a right, whether it be what is therein called, the liability of the building, or a lien on such building and the land whereon it stands, in the sense of a legal lien. In virtue of work performed and materials furnished, the creditor is secured the right, within one year, to file his claim, bring suit and sell the property, divested of all estates or incumbrances by deed or mortgage. This right is vested by the statute. Twice, in sections subsequent to the first, it is called the lien "created by this act"—that is, created not by the filing of the claim, but by force of the act itself. This right was vested in the creditor the moment he was brought within the scope of the statute. I do not deem it very material to enquire by what name this right is called, when the question is whether an adjudication in bankruptcy defeats it. Let it be conceded that it is only a right in equity to acquire a legal lien, or an equitable right. Whatever it is, it is absolute in the creditor. It is the security in reliance upon which he has performed the work, or furnished the materials, and is indefeasible by act of the debtor or owner, or those claiming under them by title subsequently acquired. Why, even in this view, should the title of the assignee in bankruptcy be held, in a court of bankruptcy, proceeding as a court of equity, to defeat that right? The reasoning of the counsel for the assignee is, in a high degree, technical. It overlooks the evident purpose of the statute to furnish security that will accompany the credit given. It fails to recognize the claim of the creditor as being even equitable. This case illustrates, in a marked manner, the utter subversion of the design of the statute, and the disregard of all equities resulting therefrom, by its operation on the subsequent mortgagees, who are here contesting these liens. Their mortgages are subsequent to the commencement of the building. It is conceded, and is expressly enacted, that the right of these petitioners, when they had filed their claims, was complete, perfect, and prior to those mortgages, and that, when duly prosecuted, a sale must follow, which would cut them off, and give the proceeds of sale to the holders of these mechanics' liens. What is the effect of the construction for which they and the assignee contend? It is not claimed that their title is not prior to that of the assignee; and the consequence is, under the order before us for review, that the mechanics' liens are excluded, the mortgages are sustained, and, in direct contravention of the purpose of the statute, the mortgages are to be paid by the proceeds of the property. Surely the design of the bankrupt law was not thus to affect the relations between these lien claimants and such subsequent mortgagees, and give the latter a preference, where the statute made their claims subordinate to those of the former. This incidental effect may not be a conclusive reason for rejecting the construction claimed, but it is a reason for doubting its correctness, and for adhering to

a more just and equitable view of the statute, if its terms will permit.

The case bears no analogy to judgments sought and obtained by creditors of an insolvent, with knowledge of such insolvency, in a struggle to obtain preferences in fraud of the bankrupt law, and which, as well as executions issued after petition filed, have been held inoperative, as against the title of the assignee. The right here asserted, according to the views above expressed, was acquired cotemporaneously with the performance of the labor and the furnishing of the materials, and, therefore, is free from any suggestion of such fraud upon the law.

It must be conceded, that the language of the 12th section furnishes plausible ground for the interpretation given to the statute in the district court, namely: "No debt shall be a lien, by virtue of this act, unless a claim is filed, as herein before provided, within one year from the furnishing the materials, or performing the labor, for which such debt is due." But that section is to be read in connection with the other provisions, and it is fully satisfied, while the prior indefeasible right of the creditor in equity, vested the moment the work is done, is sustained. It is enough, that no claimant can assert a lien, who has not filed his claim within the prescribed period. No case could arise under the statute, in which a lien could be successfully asserted, unless such claim was filed within twelve months. But, looking at the whole statute, it does not follow, that, if, before the lapse of twelve months, the state of the property and title, and the rights of all parties, became a proper subject of inquiry in the courts of New Jersey, they must say that parties heretofore performing labor, or furnishing materials, have no interest in the property, no rights arising and vested, entitling them to perfect their security, by complying with the statute within the time limited thereby.

The construction and legal effect of the act, as stated by the learned judges of the courts of New Jersey, seem to me clearly to support the validity of the lien claimed in this case. In Ayres v. Revere, 1 Dutcher [25 N. J. Law] 474, 480, 481, Green, C. J. (afterwards chancellor), in giving the opinion of the supreme court, says: "The beneficial design of the act must have been to enable parties interested, before the work was done, or materials furnished, to ascertain whether they must look to the responsibility of the builder, or may rely upon the security of the building itself." "The man who has furnished a brick, or a stone, or a plank, for the erection of the building, or who has labored a day in its construction, is secured his remuneration in full. * * * It reaches to the claims of mortgage and judgment creditors, and supersedes even these incumbrances, if created after the building is commenced, in favor of the subsequently created debts of a favored class of creditors." In Tomlinson v. Degraw, 2 Dutcher [26 N. J. Law] 73, the same distinguished chief justice says: "Where the claim is filed within the time prescribed by the act, the statute makes the debt a lien on the building, and on the land whereon it stands. The lien attaches at the commencement of the building, or one year before the filing of the claim in the clerk's office." In Edwards v. Derrickson, 4 Dutcher [28 N. J. Law] 39, Vredenburgh, J. (pages 61, 62), regards the filing of the claim as in the nature of a bill in equity, and then says: "This statute gives to the plaintiff a right to file his lien, or bill in equity, if we choose to call it so, against the estate either of the original owner, or a subsequent purchaser or incumbrancer under him, and, as in case of the mortgagee in chancery, he sells only the estate of the person against whom he seeks, by his lien claim, to enforce his lien. * * * The fair meaning of the statute is, that the lien may be filed against any estate in the lands, either at the time of the attaching of the lien, or at any time afterwards before the lien is filed." In his opinion, the expression, "the attaching of the lien," is repeatedly used to indicate, not the time the claim is filed, but the time when the right accrued to the party. Chief Justice Green, in the same case (though he dissented from his associates on the question whether the claim filed in that case was sufficient to entitle the party to maintain the suit), says (page 75) on the subject now under consideration: "The lien attaches, and becomes a valid, subsisting incumbrance, at the time of the commencement of the building, and upon the estate of the then owner." After reciting section 11, he adds (page 76): "This language renders it very clear, not only that the lien attaches, at the commencement of the building, upon the estate of the then owner, but, also, that the said owner, against whom the suit is commenced, and who is to be specified in the claim filed, is the owner at the time the building is erected." In Gordon v. Torrey, 2 McCart. [15 N. J. Eq.] 112, 114, the same learned chief justice, now chancellor, says: "The lien attached at the commencement of the building, upon the estate of Torrey," the then owner. "A change of ownership does not affect the validity of the incumbrance." "The statute, in express terms, makes the debt a lien from the commencement of the building. The proceeding to enforce the lien is a proceeding in rem. It does not create the lien, any more than a proceeding and decree for the foreclosure of a mortgage creates the incumbrance. There is nothing in the statute which requires that the time of the commencement of the building, and the consequent attaching of the lien, should be specified, either in the lien or in the record of the judgment." The opinion of the same chancellor, in Morris County Bank v. Rockaway Manuf'g Co., 1 C. E. Green [16 N. J. Eq.] 150, 161, was supposed to support the claims of the assignee, but I think, on ex-

amination, it merely indicates what is above conceded, namely, that, unless the creditor asserts his lien, by filing his claim with the county clerk within twelve months after the work is done, &c., he has no standing in court thereon, and loses all right to enforce his lien. By the non-performance of that condition, his lien is defeated, and he has thereafter no lien on the premises. The chancellor was discussing various objections to the claims of certain parties, who were reported by the master as having liens, but who had not filed their claim with the county clerk, and he adds: "The radical objection is, that the claim was not filed according to the requirement of the statute, and constitutes, therefore, under the provisions of the law, no incumbrance upon the premises." The contest was between mortgagees and sundry lien claimants, and the purpose was to marshal the proceeds of sale. The observation of the chancellor was of a present fact. The claim had never been filed. The words of the chancellor are but a reiteration of the statute, and are in entire harmony with the views above expressed.

I am constrained to the conclusion, that the rights of these petitioners were not cut off or defeated by the act of the owner, Dey, in presenting his petition in bankruptcy, or by the adjudication thereon, and that the order under review should be modified so as to require payment to them of the debts secured by their liens, in priority to the mortgagees, and to the rights of the assignee. The costs of this review should be paid out of the estate.

Case No. 3,872.

DE ZALDO v. UNITED STATES.

[Hoff. Land Cas. 98.][1]

District Court, D. California. Dec. Term, 1855.

APPEAL FROM BOARD OF LAND CLAIMS.

Objection removed by further testimony in this court.

Claim for a lot fifty varas square [in the mission of Dolores] in San Francisco county, rejected by the board, and appealed by the claimant [Elizabeth De Zaldo].

Stanly & King, for appellant.
S. W. Inge, U. S. Atty.

The claim in this case is for a fifty vara lot in the former mission of Dolores. It is founded on a grant by Francisco Sanchez, justice of the peace, to one Carlos Moreno or Charles Brown. The genuineness of the grant and the delivery of possession to the grantee are fully proven. The claim was rejected by the board for want of the necessary mesne conveyance to connect the title of the present claimant with that of the original grantee. That defect has been supplied in this court, and no objection to the confirmation is perceived by us or is suggested on the part of the United States.

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

Case No. 3,873.

The D. F. KEELING.

[Blatchf. Pr. Cas. 92.][1]

District Court, S. D. New York. Dec., 1861.

CONFISCATION—PROPERTY OF ALIEN RESIDING TEMPORARILY IN CONFEDERACY.

Under the confiscation act of July 13, 1861 [12 Stat. 257], a vessel belonging to an alien female, who resided transiently at New Orleans, having gone there to visit some relatives and attend to some matters of account, with the intention of then returning abroad, and who was engaged in no mercantile business there, was *held* not to be subject to forfeiture.

BETTS, District Judge. This was a libel of information, filed November 8, 1861, by the United States district attorney, in behalf of the United States, alleging the seizure of the above-named vessel [the schooner D. F. Keeling], on the 30th of October last, in the port of New York, by the collector of the port, and charging that she was the property of Mary Hutchinson, an inhabitant of the city of New Orleans, in the state of Louisiana. It alleges that the said vessel, her tackle, &c., has become forfeited to the United States by virtue of the act of congress of July 13, 1861. The claimant, in her answer, asserts that she is sole owner of the above vessel, which is a British vessel, and that the claimant has been sole owner of her since May 25, 1861, and is a British subject, and that the vessel is protected by subsisting treaties between Great Britain and the United States from seizure under any allegations in the libel. She denies that she is an inhabitant of New Orleans in rebellion against the United States, and that she is such an inhabitant thereof as could cause the vessel to become forfeited under or by virtue of the act of congress referred to in the libel. She avers that she is a native of Ireland, a widow, feeble and aged, about sixty years old, and in no way engaged in merchandise, or any other business. She denies that the vessel, &c., has incurred any forfeiture to the United States.

Evidence was given upon both sides on the point whether the vessel, when seized, belonged, within contemplation of law, to a citizen or inhabitant of New Orleans, in the state of Louisiana. The assistant district attorney, on the argument, contending that the claimant, on the true construction of the words of the act, was an inhabitant of the state of Louisiana during her ownership of the vessel, but stated that, "if her abode there was merely temporary and transient, the confiscation of the vessel was not claimed." The evidence is that she is a native subject

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

of Great Britain; that after the death of her husband she came from London to New Orleans to visit two of her sisters and some grandchildren, all residing in New Orleans, and that she intended to return to London. The precise time she has been in New Orleans is not specified in the proofs, but one of the witnesses, a brother of her son-in-law, says that he knew her there a few months. It is proved that she took the transfer of this vessel from a Mr. Leitch, then residing in New Orleans, and having, also, connexion with a house of trade in Minatitlan, in Mexico, in part payment of a debt bona fide owing her from him; and that he, because of disaffection with the rebellion in Louisiana, and being loyal in his sentiments to the Union, left New Orleans in the vessel. The vessel was laden and dispatched from New Orleans to Vera Cruz and Minatitlan in her name and for her use, and from the latter place to New York, with a cargo, in the same way, and, when seized, was destined to return to Minatitlan in the same interest. The penal language of the act under which the seizure was made is in these words: "Any ship or vessel belonging, in whole or in part, to any citizen or inhabitant of said state or part of a state whose inhabitants are so declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited to the United States."

The title to the vessel did not pass to the claimant as being herself in any business pursuits, or having a mercantile domicile in Louisiana. She acquires it as a neutral creditor, having an honest debt, exceeding its value, owing to her by the vendor, and who immediately abandoned the state to avoid aiding the rebellion therein. There does not, therefore, appear to have been any semblance in the purchase of the vessel of purpose to promote the trade and interests of the enemy in the transaction, or to enable the vessel or claimant to become mixed with enemy trade or operations. But, without feeling that the case, in its special features, demands any close examination of the scope of the enactment, I take the alternative concession of the United States attorney as the true exposition of the law which the government desires to be made in this suit, and say that the evidence, in all its bearings, is satisfactory that the claimant is a foreign subject, engaged in no mercantile business in New Orleans, and that her residence or inhabitancy there was transient, and limited to the intention of visiting near relatives residing in that place, and settling some matters of account, and then returning to her home in London. I accordingly consider that she was not, at the time, such citizen or inhabitant of New Orleans as will subject this vessel to be forfeited to the United States. No costs can be awarded by the court against the United States, and, without discussing the merits of a claim to costs, I order a decree acquitting the vessel, her tackle, &c., from arrest, and their redelivery to the claimant.

Case No. 3,874.

The DIADEM.

[5 Adm. Rec. 561.]

District Court, S. D. Florida. June 11, 1856.

SALVAGE—COMPENSATION—MISCONDUCT OF SALVORS.

[$12,000 *held* to be a reasonable reward for getting a ship and cargo worth $125,000 off a reef at Key West; but this amount reduced by one half because of 24 hours' delay resulting from carelessness, negligence, and gross errors of judgment on the part of the salvors.]

[Cited in Roberts v. The St. James, Case No. 11,914.]

[This was a libel for salvage by William Reynolds and others against the ship Diadem and cargo.]

William R. Hackley, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. It appearing to the court, that this ship and cargo estimated at the value of $125,000, while on a voyage from New York to New Orleans, got ashore on Loo Key, where she was in imminent peril of total loss, and from which she was saved by the libellants, with their vessels carrying sixty eight men, and twenty eight men in small boats, and that for this service twelve thousand dollars would be a reasonable salvage, but for the fact, that in consequence of their negligence, carelessness and gross errors of judgment, the ship was not got off the reef so soon by twenty four hours as it might have been, for which negligence, carelessness and errors they ought in justice to be held accountable, and that their salvage on account thereof ought to be diminished one half. It is therefore ordered, adjudged, and decreed, that the libellants have and recover in full compensation for their services rendered said ship and cargo as by them alleged the sum of six thousand dollars and their costs and expenses of suit, and that upon the payment thereof the marshal restore said ship and cargo to the master thereof, for and on account of whom it may concern. It is further ordered that the salvage be referred to Commissioner Baldwin to apportion and divide among the different salvors according to their several agreements or the standing rule of court, and that he make report of such division which when confirmed by the court will be constituted as a part of this decree, and that the clerk pay the several salvors their shares of salvage when so ascertained. That the shares of Richard Hamlon, seaman, belonging to the schooner Dart and of John Murtugh, seaman, belonging to the schooner Relampago, be forfeited for embezzlement, and returned to the master of ship and cargo for the benefit thereof, and that all other questions be reserved.

Case No. 3,875.

The DIADEM.

[4 Ben. 247.][1]

District Court, E. D. New York. June, 1870.

DELIVERY OF CARGO—TENDER OF FREIGHT—LEAKAGE—STEVEDORE.

1. Where casks of wine were stowed in a ship by stevedores, employed, directed and paid by the shippers, and on delivery two of them were found to be nearly empty: *Held*, that even if the loss had been the result of bad stowage, as it had not been proved to be, the ship was not responsible for it.

[Cited in The T. A. Goddard, 12 Fed. 184; Guerard v. The Lovspring, 42 Fed. 860.]

2. On the arrival of a ship at New York, her consignees published a notice, stating the place of discharge, and calling on consignees to attend to the receipt of their goods, and giving notice that all goods remaining on the dock after five o'clock p. m., would be stored at the risk and expense of the consignees of the goods. Under this notice thirty-five of thirty-nine casks of wine, composing one consignment, were discharged and delivered to the consignee, without objection and without any demand of freight. The delivery of the other four was refused to the carman, unless the freight was paid. The consignee of the wine being informed of this, with reasonable dispatch caused the freight to be tendered to the master of the ship on board, and demanded the four casks which were then on the wharf, it being then almost five o'clock. The master declined to receive the freight, or deliver the casks, for the reason, that he did not know the correct amount, and that the place to pay the freight, was the office of the consignees of the ship, but offered to deliver the casks, if a sum much larger than the freight was deposited with him as security. The consignee did not assent to this, and the goods were sent to a storehouse. This was on Saturday. On Monday morning the consignee of the wine paid the freight to the consignee of the ship, who received it and tendered an order on the warehouse, for the delivery of the goods on payment of charges. The consignee of the goods refused to accept such an order, and thereafter filed a libel against the ship, to recover the value of the goods: *Held*, that the master of the ship, when the freight was tendered to him at the ship, had the right to take a reasonable time to ascertain the correct amount of the freight, but had not the right meanwhile to store the goods at the expense of the owner.

3. *Held*, that the ship was liable for the value of the goods.

This was an action to recover the value of certain casks of wine, which were shipped on board the bark Diadem at Marseilles, consigned to order at New York. Upon the arrival of the vessel in New York, the consignees of the bark published the usual notice of the arrival of the vessel, stating her place of discharging, calling on consignees to attend to the receipt of their goods, and giving notice that all goods remaining on the wharf after five o'clock p. m., would be stored at the risk and expense of the consignees.

Under this notice the vessel began to discharge, and thirty-five of the casks of wine, which composed the consignment in question, were delivered to the libellant, Joseph Buisson, as they came out, without objection and without any demand of freight, two of the thirty-five, thus received being nearly empty. The remaining four casks came out on Saturday, and their delivery was refused to the carman, unless the freight was then paid. The consignee, on being notified of this fact, with all reasonable dispatch, caused the freight to be tendered to the master of the ship on board, and demanded the four casks then on the wharf ready for delivery, the discharging for the day not being ended, although it was just about five o'clock p. m.

The master of the ship declined to receive the freight tendered, and refused to deliver the casks, assigning as a reason, that he did not know the amount of the freight. At the same time while he referred the consignee to the office of the consignee of the ship, as the place to pay the freight, he offered to deliver the casks as demanded, if a sum, exceeding by a considerable amount the freight actually due, were deposited with him as security therefor.

The libellant not assenting to this, the goods were not delivered on Saturday, but were sent to store subject to the order of the consignees of the ship. On Monday morning the libellant paid the freight to the consignees of the ship, who received the same, and tendered to the libellant an order on the storehouse, for the delivery of the goods, on payment of the charges i. e., cartage and a month's storage. The libellant declined to pay the charges and demanded an order, on which he could obtain his goods, free of all charges. This was refused. Thereafter this action was commenced in which the libellant seeks to recover the value of the four casks not delivered to him, and the loss on the two casks which were delivered nearly empty of their contents.

Francis H. Dykers, for libellant.
James K. Hill, for claimant.

BENEDICT, District Judge. As to the claim for the wine lost from the two casks, I am of the opinion, that upon the proofs the libellant cannot recover that portion of his demand. The cause of the loss of the wine, was doubtless owing to the pressure of the cargo, and the heavy weather. The proofs do not make out a case of bad stowage; and if they did the ship would not be responsible, as this wine was stowed in the ship by stevedores employed, directed and paid by the shippers of the wine.

As to the four casks demanded on Saturday and not delivered, I consider the libellant entitled to recover their value. These casks were duly demanded of the master of the ship, at the ship, during proper hours, and when they were on the wharf for delivery. The demand was accompanied with a tender of all the freight due on the whole consignment, of which all, but these four casks, had already been delivered without objection or demand of freight.

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

There is no evidence of a notification to the libellant, that he must pay his freight at the office of the consignee of the ship, nor that a pre-payment must be made before delivery, and the delivery of the casks was offered, provided a sum greater than the freight was deposited with the master.

The master of this ship, having designated his consignees to collect his freight, and having deposited with them his bills and documents, showing the amounts of the freight, had the right upon the tender of freight being made to him at the ship, to take a reasonable time to enable him to ascertain the correctness of the amount of the freight, before accepting the tender and delivering the cargo; but he had no right meanwhile to store the merchandise at the expense of the freighter. It is not shown that any difficulty existed to prevent his taking in these four casks, and holding them until Monday, which was the earliest time at which the freight could be ascertained by him, or be paid at the office of the consignee. Nor under the circumstances of this case, could the master be held to have the right to store the goods at the expense of the consignee after tender of freight, were it to be considered proved, as the claimants insist, that according to the usage of this port, in the case of a foreign ship, freight must be always paid in advance, and to the consignee of the ship alone. For here the greater part of the consignment was delivered without any payment or demand of freight, or any order of the consignee, and the master offered to deliver the balance on a deposit being made with him. And when the libellant was notified of the stoppage of the four casks, it was at such a late hour on Saturday, that the libellant was justified in proceeding at once to the ship, where the demand of freight had been made, to pay his freight there in time to prevent his goods from going to store. The freight being then tendered and refused, he was, even under the usage as claimed, entitled to a reasonable time, after he was notified, to proceed to the office of the consignee, and there pay his freight. This was not afforded him, but the goods were at once stored, and thus subjected to cartage, and a month's storage.

The position taken on the trial, that the master was justified in refusing to deliver the casks, when the freight was tendered, because no bill of lading or other evidence of property was there produced, is untenable, for the reason that the libellant's right to receive the goods had already been acknowledged by the delivery to him, of the greater part of the consignment.

The libellant was justified in refusing to pay the charges on the goods, and, having paid all the freight due and demanded his goods free of charges, on being refused became entitled to maintain an action for the non-delivery of the four casks, according to the bill of lading.

The decree will accordingly be that the libellant recover the value of the four casks, with interest and costs. Let a reference be had to ascertain the value of these casks, if it cannot be agreed to.

DIALOGUE (PENNOCK v.). See Case No. 10,941.

DIAMOND (WASKERN v.). See Case No. 17,248.

Case No. 3,876.

The DIANA.

[2 Gall. 93.][1]

Circuit Court, D. Massachusetts. May Term, 1814.

PRIZE PRACTICE—CUSTODY OF PAPERS—DELIVERY OF PRIZE ON BAIL—EVIDENCE—ILLEGAL TRADE—APPEALS.

1. The custody of the papers of captured vessels belongs exclusively to the prize court.

2. It is the duty of captors, immediately upon arrival in port, to deliver, upon oath, all the papers of captured vessels into the registry of the prize court.

[See The Arabella and The Madeira, Case No. 501; The Flying Fish, Id. 4,892.]

3. Prize goods are never delivered on bail until after a hearing; and a contrary practice is a great irregularity. Nor is a claimant ever entitled to a delivery on bail, even after a hearing, unless he show a prima facie legal title to the property. If he claim by an illegal act, he is not entitled to a delivery on bail.

[See Dunl. Adm. Pr. c. 7, p. 174; The Euphrates, Case No. 451. Criticised in The Ella Warley, Id. 4,370.]

4. During war, no claim standing in opposition to the ship's papers and preparatory evidence is ever admitted in a prize court.

[Followed in U. S. v. The El Telegrafo, Case No. 15,049. Cited in The Revere, Id. 11,716.]

[See The San Jose Indiano, Case No. 12,322, and The Ann Green, Id. 414.]

5. No commission to take evidence in an enemy's country is allowable by the practice of the prize courts.

6. A shipment, made after a known war, by an American citizen, from an enemy's port to a port in his colonies, is illegal by the law of war. It is a trading with the enemy.

[Cited in Caldwell v. Southern Exp. Co., Case No. 2,303.]

7. It seems, that if a delivery on bail has been allowed by the district court in a gross case of illegality, the appellate court will not hold itself bound by the transaction; but direct the claimant to account for the whole proceeds on oath.

[Cited in The San Jose Indiano, Case No. 12,322.]

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

The facts in this case were as follows: The ship Diana and cargo were captured by the private armed ship Thomas, commanded by Thomas M. Shaw, on or about the 19th of May, 1813, and sent into the port of Wiscasset, in the district of Maine, for adjudica-

[1] [Reported by John Gallison, Esq.]

tion. From the papers found on board and the preparatory examinations it appeared, that the ship and cargo were duly documented as British property, and that she sailed from Liverpool in Great Britain, in the month of April, 1813, touched at Cork for convoy, and at the time of capture was steering in the regular course of her voyage for Halifax in Nova Scotia, the port of her destination. The cargo consisted altogether of goods of British manufacture, and was consigned, by merchants in Great Britain, to merchants in Halifax. Proceedings on the prize side having been instituted in the district court of Maine, and no claim having been interposed to the vessel, or to any part of the cargo, except thirty-nine cases of merchandise, the whole property, except the thirty-nine cases of merchandise, was condemned, as lawful prize to the captors, at a special district court held on the 23d of June, 1813. The thirty-nine cases of merchandise were claimed by Mr. John Tappan, a native citizen of the United States domiciled at Boston, who in his affidavits of claim asserted, that he verily believed the same merchandises were purchased in England by his agent Mr. John Gregory (who is a merchant, domiciled in England) and shipped by him, on account and risk of the claimant, on board of the Diana, without having previously received from the said claimant any advice or instructions whatsoever, as to the time or manner, in which the said merchandises were to be shipped. In further support of this claim the affidavit of Mr. George Searle was introduced, in which the deponent states his knowledge of the actual agency of Gregory, and certain other facts and information, from which he infers, that the property claimed belonged to Mr. Tappan. At the time of interposing the claim, Mr. Tappan prayed for a delivery of the property on bail, which, after appraisement, was granted by the court. The claim was then continued for further proof, and a commission, as it should seem, was awarded by the court, to take the testimony of witnesses in the enemy's country, in support of the claim. At a special term held in December, 1813, the claim was further heard upon the original evidence, and upon certain letters and papers then produced by the captors, and admitted by the court, as part of the original letters and papers found on board at the time of the capture, and upon an admission made, for that trial only, by the captors, that the property belonged to Mr. Tappan, as claimed. Upon the hearing, the district court awarded a sentence of restitution, from which sentence the captors appealed, and upon that appeal the cause came before this court.

Mr. Pitman, for captors.

G. Blake and Mr. Prescott, for claimant.

STORY, Circuit Justice. It is not easy to extract from the record now before the court a perfect state of the whole case, because no papers have come up, except such as were deemed applicable to this particular claim. As far, however, as the obscure lights of the record, and statements at the bar admitted to be correct, will carry us, it is difficult to conceive a cause more irregularly conducted.

In the first place, it appears, that all the ship's papers and documents were not in the first instance lodged in the registry of the court. This was a very great irregularity. It is the duty of the captors, by the general law of prize, immediately upon arrival in port, to deliver upon oath to the registry of the court, all papers found on board the captured ship. This duty is enforced by the general instructions of the executive in the most positive manner. A strict adherence to it is expected on all occasions; and every deviation will be watched by the court with uncommon jealousy. It is not for the captors to select such papers, as they may deem important, and present them in the cause. Infinite mischiefs and inconveniencies might result from such a course. It would afford temptations to improper suppression of papers, and jeopard the rights, not only of citizens, but of neutrals. In the present case, the papers, which were omitted to be produced, had a most material character. It is said, as an apology, that all the papers were in the first instance produced to the district court, and were deemed not properly to belong to that court, but to the captors, and therefore were returned to their custody. If this be true, and it is not denied by the parties, the irregularity is certainly excusable; and in all probability it was this circumstance, that induced the court below to admit the papers on their last production. I trust, that hereafter it will not be a matter of doubt, to whom the custody of prize papers belongs. The court of prize has a right, and I will add, an exclusive right, to the custody of them.

Another irregularity was the delivery on bail of the property claimed by Mr. Tappan; a delivery, which, from the proceedings in the case, appears to have been considered as a matter of course. I take the practice of the prize court to be, not to deliver property on bail, until after a hearing of the cause, and then only in cases, where the claimant shows a prima facie title, which may ultimately entitle him to restitution. And, if the property be ultimately destined for sale in the country, where the court sits, there is not generally any strong reason for a delivery on bail after appraisement. A much more correct and equitable course for all parties would, in such case, be an order of sale, and a deposit or delivery on bail of the proceeds. It is a matter of public notoriety, that appraisements are extremely inaccurate, and unsatisfactory. And I do not think, that a court can be too strict in guarding against applications of this sort in prize proceedings. Here the application was made upon the ground, that the goods were liable

to deterioration, the very case in which a prize court usually orders a sale under a perishable monition.

The claim too of Mr. Tappan was in total opposition to all the papers and preparatory examination. The ship and cargo were documented as British property, bound from one British port to another British port, nine months after the declaration of war. The papers respecting the shipment now before the Court clearly evince, that it was made on account or risk of Messrs. Forsyth, Black and Co. of Halifax. There is not the slightest intimation of any interest in any other persons. Now I take the general rule to be, that no claim shall be admittted in opposition to the depositions and the ship's papers. It is not an inflexible rule, for it admits of exceptions; but on examination it will be found, that those exceptions stand upon very particular grounds, in cases occurring in time of peace, or at the very commencement of war, and granted as a special indulgence. The Vrow Anna Catharina, 5 C. Rob. Adm. 15; La Flora, 6 C. Rob. Adm. 1. But in times of known war, to admit claims in opposition to all the preparatory evidence and papers, to enable parties to assume the enemy's garb for one purpose, and throw it off for another, would be holding out an invitation to frauds, and subject the court to endless impositions. The rule can never be relaxed to such an extent without prostrating the whole law of prize.

And how was this property to be proved in the claimant in opposition to all the evidence on board of the ship? By the affidavit of the claimant, and by the testimony of the shippers, or consignees, under a commission sent into the enemy's country. The very parties, who are without dispute enemies, are to be permitted to devest themselves of property documented as their own, by swearing a transfer to a neutral or friend, and in that way extract it from the law of prize. A more simple or more effectual mode of eluding the rights of captors could not well be devised. If successful in this instance, (I mean no imputation on the present claimant), it could not well fail of success in every other. The issuing of a commission to take evidence in the enemy's country was also of itself an irregularity, and contrary to the established practice of the prize court. The Magnus, 1 C. Rob. Adm. 31.

On the whole, I am entirely satisfied, that the claim of Mr. Tappan, standing, as it does, in direct opposition to all the papers and preparatory examinations, ought even if he had been a neutral, to have been rejected in limine.

But there is another view, which is so decisive against his claim, that it is difficult to perceive in what manner it could ever have been sustained. Mr. Tappan is an American citizen domiciled in Boston, and now asserts an interest in an enemy's shipment made nine months after the war, in a trade betweeen the enemy's ports. If there ever was a case, in which there could be no doubt that the traffic was illegal, it seems to me to be this case. Upon what pretence can an American citizen, after full knowledge of the war, claim to be rightfully engaged in a commerce with the public enemy, and in a trade too peculiarly his own, a trade betweeen the mother country and its colony? After the decisions of the supreme court in The Rapid, 8 Cranch [12 U. S.] 155; The Sally, 8 Cranch, Id. 382; and the Alexander, 8 Cranch, Id. 169,—it would be useless to discuss the general doctrine of the illegality of a trade with the enemy. It is too plain for argument, that Mr. Tappan's claim must be rejected, even if his proofs of property were incontestable, as he must be deemed to be engaged in a traffic reprobated by the law; and he can never found a claim for restoration by showing his own illegal conduct.

Under these circumstances, where Mr. Tappan had neither a legal nor a documentary title to the property, it is difficult to perceive the ground, upon which a delivery on bail was allowed. The bail bond (it should have been a stipulation) is also incorrect. The terms of it, taken strictly, are inapplicable to the case of a decree of condemnation in an appellate court, and it would require uncommon astuteness to fasten a different construction on the language. Until I saw this record, I had presumed that the proceedings in prize causes, in the first circuit, had at last assumed an uniform regularity. And with the highest respect for the learned judge of the district court of Maine, I have felt it a public duty to notice irregularities, which affect the rights of parties, and introduce so many embarrassments into the prize proceedings.

An objection has been urged by the claimant's counsel against the court's proceeding to adjudication in favor of the captors, upon the ground of the irregular conduct of the captors, in omitting to bring in all the original papers at the first hearing. It is a sufficient answer to that objection, that the papers produced at the first hearing contained sufficient proof of enemies' property, and the claimant's own affidavit is decisive against his claim. It is not for one, who has no legal title before the court, to moot difficulties. If the captors fraudulently suppress papers, the court, in the exercise of its own functions, will take care that they shall derive no benefit from such conduct; but I am yet to learn, that the mere omission to produce papers, by mistake or negligence, especially excused as it is in the present case, is a forfeiture of their rights under the capture. It may induce the court to suspend judgment, to call for exact information, and search with rigorous jealousy; but something more should appear, than mere error, to call forth such penal consequences, supposing it were in the power of the court to apply them.

I am for reversing the decree of the district court, and condemning the property claimed, as good and lawful prize to the captors. As the district judge concurs in the opinion, let a decree be entered accordingly.

Decree reversed. Condemned to the captors with costs and expenses.

After the decree of condemnation, Mr. Pitman, for the captors, moved the court for a monition to the claimant to bring into court, on oath, an account of the sales of the goods, and to pay the proceeds of the sales into court instead of the appraised value of the goods, upon the ground that the property ought not to have been delivered on bail, and had been sold by the claimant, within a few days after the appraisement, for $10,000 more than the appraised value.

STORY, Circuit Justice, delivered the opinion of the court.

Without meaning to say, that in no case the court ought to grant a monition to the effect prayed for, we shall deny the present application. Cases of gross fraud, and perhaps other cases may exist, in which it would be proper to order the whole proceeds into court, notwithstanding a delivery on bail. We shall issue a monition to the party to pay into court the appraised value pending the term. Although he has claimed an appeal to the supreme court, which will be allowed on filing the proper security, we think that the circumstances of the case require the court to lay its hands on the property. Where the title of the claimant is so palpably unsound, he ought not to profit by any delays incident to the prosecution of an appeal.

The appeal was abandoned.

Case No. 3,877.

DIAS et al. v. The REVENGE.

BUSTAMENTO et al. v. SAME.

[3 Wash. C. C. 262.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

WAR—PRIVATEERS—CHARACTER AND STATUS—PIRATICAL ACTS OF OFFICERS AND CREW—LIABILITY OF OWNERS.

1. Libels were filed in the district court, in order to make the owners of the privateer Revenge answer in damages, for the injury sustained by the owners of the Portuguese and Spanish vessels, for piratical acts of the officers and crew of the Revenge, and for which they had been indicted in the circuit court. 3 Wash. C. C. 209, 224, 228 [Cases Nos. 15,494–15,496]. The question, in these cases, was, whether the owners of a commissioned privateer are liable, civilly, for piratical acts committed by the officers and crew of their vessel?

[Cited in Ralston v. The State Rights, Case No. 11,540. Quoted in McGuire v. The Golden Gate, Id. 8,815.]

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

2. To a certain extent, a privateer is a national vessel, and forms a part of the national force.

3. Provisions of the laws of the United States, relative to commissions to be granted to privateers; the powers which are derived from such commissions; and the obligations and responsibilities of the owners and commanders of such vessels, under the law.

4. For the conduct of the officers and crew, in the execution of the business in which they may be employed, the owners are, by the maritime law, liable; if through ignorance, or illegally, they do an injury to others. But if the master exceed his authority, and violate his orders, and is guilty of faults or crimes to the injury of others, acting in some business different from that for which he was employed, the owner is not liable.

[Cited in Ralston v. The State Rights, Case No. 11,540; Mendell v. The Martin White, Id. 9,419; In re Mullhouse, Id. 9,910; Knight v. Old Nat. Bank, Id. 7,885; Taylor v. Brigham, Id. 13,781; The Florence, Id. 4,880; Gabrielson v. Waydell, 135 N. Y. 8, 31 N. E. 969. Explained in McGuire v. The Golden Gate, Case No. 8,815.]

5. To warrant the conclusion that the owners of the privateer are liable for injuries done by the master and crew, there must be a capture as prize of war; but in a piratical unauthorized seizure and spoliation, these acts not being in the business of the expedition, the owners are not liable beyond the penalty of the bond given according to law, and the loss of their vessel.

[Cited in McGuire v. The Golden Gate, Case No. 8,815; Tait v. New York Life Ins. Co., Id. 13,726.]

These were appeals from the district court [of the United States for the district] of Pennsylvania, dismissing the libels of the appellants, which sought to make the appellees liable for acts of piracy committed by the officers and crew of the privateer, on the high seas. By the evidence in the first case, it appears, that in November, 1812, the Portuguese brig Triomphe de Mars was chased and brought to by the privateer Revenge, Butler master, under English colours, which continued flying during all the transactions which afterwards took place. The brig was boarded by an officer from the Revenge, who, after a slight view of the ship's papers, presented a pistol to the breast of the captain, and told him that he was a prisoner. He then ordered the officers' trunks to be opened, from which he took all the money he could find, which, together with some sugar, rigging, the clothes belonging to the officers and crew of the brig, and other property, he carried on board the privateer. After remaining on board the brig for about four hours, the officers and crew of the Revenge returned to their own vessel, and the brig was permitted to proceed on her voyage to New-York, where she arrived in safety. In the other case, the Iris, belonging to Spanish subjects, bound on a voyage from Havana to Cadiz, with a cargo also the property of subjects of Spain, was, some time in November, 1812, chased by the above privateer, which fired a gun to bring her to: the ship then fired a gun, hoisted Spanish colours, and lay to. The privateer came up with her, un-

der English colours, and after firing two broadsides into her. and a round or two of musketry, an officer was sent on board the ship, with orders to send the master and some of the crew to the Revenge; which was accordingly executed. The master and crew of the ship were then manacled; after which, a bag containing 800 dollars in silver, eight boxes containing 3000 silver dollars each, and about 400 pounds of bullion, together with a number of other articles, were brought from the ship to the privateer, and deposited in the cabin. All the property of value, found on the persons of the master, his officers and crew, including their wearing apparel, were seized by order of Captain Butler; and after some hours' detention, they were permitted to return to their ship, and to proceed on their voyage. A few days after this, the Revenge again overhauled the Iris attempting to make some port of the United States, in order to procure clothes for the crew. Some of the clothes, which had been taken by the privateer's-men, were then restored to the crew of the Iris; the master was ordered to proceed to Cadiz, and, at the peril of being very severely treated, they were cautioned not to be seen again on the American coast. To ensure the execution of this order, the Revenge accompanied the Spanish ship for two days; when they parted. The money thus plundered from the Spanish ship was, a few days after it was taken, divided amongst the officers and crew of the privateer.

It was contended by C. J. Ingersoll and J. R. Ingersoll, for the appellants, that, upon the doctrine of law, as applicable to master and servant, the owners of a privateer are responsible for acts of piracy, committed by the officers and crew which they have appointed. Their commission being general, to capture the vessels of neutrals as well as of enemies, the master acts within the general scope of his authority, when he commits outrages of this sort; and of course, if he abuse this authority, the owners are liable. Cases cited, 3 Bl. Comm. 431, 430; 1 Ld. Raym. 224, 264, 739; Salk. 234; 2 Dyer, 238b, 161a; 1 Bin. 240; [Vance v. Campbell] 1 Black [66 U. S.] 430; Dom. 238, 239; [Jackson v. Winchester] 4 Dall. [4 U. S.] 206; [Del Col v. Arnold] 3 Dall. [3 U. S.] 333; [Purviance v. Angus] 1 Dall. [1 U. S.] 185; 2 Vern. 543; Roccus, 27; Molloy. 212, 213, 203; 1 C. Rob. Adm. 84; The Mercurius, Id. 288; The Vrouw Judith, Id. 150; The Columbia, Id. 154; The Rising Sun, 2 C. Rob. Adm. 104; The Calypso, Id. 154; The Shepherdess, 5 C. Rob. Adm. 262; The Karasan, Id. 291; The St. Juan Baptista, Id. 33; The Die Fire Damer, Id. 357; Hopk. 65; Bynk. 150; Beaw. Lex. Merc. 207. The principle of all the cases is, that the owner puts it into the power of the master to commit the wrong. 2. This is not a case of piracy, which cannot be committed by a commissioned privateer. Bynk. 128, 135; Azuni, Mar. Law, 3; Woodeson, 443.

Chauncey and Binney, for appellees, contended, that the whole question turned upon the nature of the taking—if as prize, though wrongful, the owners are liable, because the master is authorized to make capture as prize. But if piratical, they are not liable, because the master has no authority to commit acts of piracy. This distinction will explain all the cases, and reconcile them. They cited, upon the two points made by the appellants' counsel, the following cases; Sea Laws, 339, 369, 462, 469; 2 Browne, Adm. & Civ. Law 461, 472; 1 Molloy, 64; Beaw. Lex. Merc. 228; [Vance v. Campbell] 1 Black [66 U. S.] 429; Salk. 282, 441; Moore, 786; Skin. 228; 15 Vin. Abr. 310; Comb. 459; 1 East, 106; Lee, Capt. 224, 228, 229; Molloy, 66; Vatt. Law Nat. 150; Bynk. 129, 133, notes; Sea Laws, 475, 476; Molloy, 55; Grot. bk. 2, c. 17, § 20, Subsec. 1; 2 Azuni, Mar. Law, 352; Rolle, Abr. 530; Moore, 776; 2 Molloy, 90; Sea Laws, 444, 476, 447.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The argument, in these cases, has taken a very wide range, in which most of the principles and authorities of common, maritime, and national law, which appeared to the counsel to have any bearing upon them, have been pressed into the service of one side or the other. In the view which we shall take of them, we shall commence with the precise question before the court, noticing the authorities which do not directly apply to it, merely as illustrations of the doctrines by which our decision will be governed.

The question is, whether the owner of a commissioned privateer is liable to make good the damages which a neutral has sustained, by an act of piracy, committed upon him by those to whose management the owner had intrusted his vessel? In order to arrive at any satisfactory result, in this inquiry, it will be necessary to consider—1. What is the precise character of a privateer, and what are the acts which she is authorized to perform? To a certain extent, she is a public vessel, and forms a part of the national armed force. The declaration of war authorizes the president to issue letters-of-marque and general reprisal, in such form as he shall think proper, against the vessels, goods, and effects, of the government of Great Britain, and the subjects thereof; and by the prize act, he is empowered to revoke such commissions, whenever it may be his pleasure to do so. The commission, so issued, authorizes the privateer to subdue, seize, and take, any British vessel found within the jurisdictional limits of the United States, or elsewhere on the high seas, and to bring the same into some port of the United States; to recapture American vessels, or those belonging to friendly nations, found in possession of the enemy; and also to detain, seize, and take all vessels and effects, to whomsoever belonging, which may be liable thereto, according to the law of nations,

and the rights of the United States as a power at war; and to bring them in for adjudication. The president is also empowered, to establish suitable instructions for the better governing and directing the conduct of vessels so commissioned, their officers and crews; copies of which are to be delivered to the commanders. And, for the better security of those who may be injured by the improper conduct of such vessels, in the execution of the powers imparted to them by their commissions, the owners (a list of whose names and places of residence is required to be made out and filed with the secretary of state) and the commander of the privateer, are required to give bond to the United States, with sureties, in a certain penalty, with condition that the owners, officers, and crew, to be employed on board such vessel, will observe the treaties and laws of the United States, and the instructions which shall be given them, according to law, for the regulation of their conduct; and will satisfy all damages and injuries which shall be done and committed, contrary to the tenor thereof, by such vessel, during her commission; and to deliver up the same, when revoked by the president. As further evidence of the public character of a vessel so commissioned, the officers and seamen are liable to be tried and punished by a court martial, for any offence committed on board any such vessel, in such manner as the like offences may be tried and punished when committed by any person belonging to the public ships of war of the United States. In other respects, such a vessel is to be considered as private property; equipped and fitted for war, at the sole expense of the owner; navigated by officers and crew, chosen and appointed by himself, and paid by him; and subject to such lawful orders and instructions as he may think proper to give. In consideration of the expense to which the owner thus subjects himself, in co-operating with the public armed force in hostile operations against the enemy, the nation cedes to him, and those he may employ to conduct the privateer, the exclusive benefit of all the spoil which his vessel may lawfully capture as prize; to be distributed between himself and the officers and crew of his vessel, according to any written agreement which shall have been made between them; and in case no such agreement should have been made, then according to a certain ratio prescribed by law. It results from all this, that the employment of a privateer, and the trust confided to her officers and crew, is to subdue and seize the vessels and effects of the enemy found at sea, as well as all other vessels and effects, to whomsoever belonging, which may be liable thereto, according to the law of nations; and to bring all such property into a port of the United States, for adjudication as prize of war.

2. This being the case, the next question is, what are the responsibilities of the owner of the privateer, for any improper conduct of his officers and crew, in the execution of the business in which they were employed? This question is answered by Bynkershoek, in the most satisfactory manner, in the 19th chapter of his treatise on the Law of War: "The master," says this learned jurist, "who captures in consequence of an authority that he has received, is appointed for that particular purpose; and he who appointed him is by that alone responsible for every thing, good or bad, that he may do in the execution of his trust." "He who appointed the captain of a privateer," he continues, "must have known that his business was to make captures, and that if he should execute it improperly, it would be imputed to the owner, for having appointed a dishonest or unskilful captain." In another part of the same chapter, where the author is examining the liability of the owner, in the case of a capture made without authority, he observes that "in such case, the owner cannot be made, in any manner, liable; for he, indeed, has put the master in his place and stead, but merely as to the business which he has ordered him to transact; and if, in the course of that business, the master has committed a fault, or has been guilty of a fraud, the owner is bound to answer for him; otherwise not." It is very clear, that throughout the whole of this chapter, the author is speaking of illegal captures as prize of war, made by privateers; and the principle which lies at the root of all the law which he lays down, is, that the owner of a privateer, like the owner of a merchant vessel, is bound to provide honest, skilful, and faithful persons, to navigate her; and that if he fail to do so, he is liable for all damages which others may sustain, by the mistakes or wilful misconduct of those he employs, in executing the business with which he has intrusted them. Against a claim for full compensation for injuries illegally inflicted upon third persons, it is not competent to the owner to shield himself, by saying that the privateer constitutes a part of the naval armed force of the nation; that she acts under the president's instructions; and therefore, he is not liable. The answer given by Bynkershoek in the chapter above noticed, is conclusive.

It may be proper, at this stage of the discussion, to notice the analogies relied upon by the counsel, drawn from the common law, in relation to master and servant; and also, from the maritime law, in relation to owner and master of merchant vessels and privateers.

As to the first;—the vintner whose servant sold unwholesome wine;—the smith, whose servant lamed a horse which he was intrusted to shoe;—the householder, whose servant, by negligently keeping his fire, caused the destruction of an adjoining house;—the carman, whose servant, from want of care, in one instance drove over and maimed a child in the street; and in another, destroyed a pipe of wine in a cart which he overturned;—the

sheriff, whose deputy seized the property of one person, under process against another, and who levied an execution for costs, where none were due; these cases proceed, all of them, upon the same principle. In each of them, the servant was employed by the master, and committed the injury wilfully, or from want of skill in the business in which he was employed. The master, in neither case, gave him an authority, either expressly or impliedly, to act in this manner; but he is not, on that account, excused from making reparation for the wrong done by a third person employed by him, for whose skill and fidelity he is answerable. The general position laid down by Lord Holt, in the case of Middleton v. Fowler, 1 Salk. 282, is, that the master is not chargeable with the acts of his servant, but when he acts in execution of the authority given him. The case of M'Manus v. Crickett, 1 East, 106, proves too much in relation to a case of capture, for which it was cited by the counsel for the appellees. It admits, that for the mischief arising from the unskilful or negligent driving of the master's carriage, the master is liable, in an action on the case; but not so, if it were wilfully committed; because, it is said, that in the latter case, the servant does not act in pursuance of the authority given him. Neither does the master of a privateer, act in pursuance of the authority given him by his owner, when he wilfully commits spoliations on property seized as prize; and yet in this, and in similar cases, the owners are clearly liable for the misconduct of the master. The cases of the innkeeper and common carrier, who are responsible; the first, for the goods of his guest, stolen by any person in his house, and the second, for goods delivered to his servant to carry, of which he is robbed; depend upon a stricter, and somewhat different principle of law. They are not in the situation of common bailies; but from the nature of their employment, and for the safety of the public, they impliedly contract with all persons who may intrust their property to their keeping, to keep it safely; and consequently, they cannot, as in other cases of bailment, excuse a breach of this contract, by alleging that they were robbed of the property; nor can they call upon the injured party to prove a particular neglect.

Passing from the supposed analogy of master and servant, at common law, to cases governed by the maritime law, in relation to owner and master; we find that the former is liable for all the acts of the latter, done in execution of the business in which he is employed, by which third persons are injured; whether the injury was occasioned by the wilful acts, or by the negligence or want of skill of the master. "The owner of a vessel," says Roccus (page 23), "is responsible for the contracts and the criminal acts of the master appointed by him; and also, for the faults of the mariners, committed at sea." In the same note, he explains these general expressions, by saying, "If a servant be guilty of any improprieties in the office or employment assigned him by his master, the master is liable for such improprieties, as he should not have employed such a servant; and the fault may therefore be imputed to him." In subsequent notes, the same author lays it down, that if the master exceed his orders, for example, if he charter his ship generally, against express orders; if he take in a cargo, when he is ordered to take only passengers; if he was appointed for a certain voyage, and he proceeds on a different voyage; the owner is not liable. And, indeed, he lays down the doctrine in very general terms, that the owner is not liable for the faults or crimes of his master, if he exceed his instructions, unless the owner is benefited by such act. We should, however, understand this author to mean, throughout, that the exemption of the owner from responsibility, is only in those cases where the master acts, not only without or against orders, but in some other business than that in which he was employed. It is upon this principle, that the owner is liable for spoliation of papers; for injury sustained by a prize, by the unskilfulness of the prize-master put on board of her; for embezzlement of the property taken as prize by the officers or crew; and for ill-treatment, unnecessarily inflicted upon the persons of the prize-crew. The master was in the execution of a business for which he was employed, and abused his trust by wilful misconduct, or by the want of skill or care.

3. Having thus seen for what acts of the master, the owner of a merchant vessel or privateer is answerable, the question immediately before the court remains to be examined;—is he liable civilly, for the piratical acts of his master and crew? It is contended, in limine, by the appellant's counsel, that the plunder of these vessels did not amount to piracy; because, in the first place, the master acted under a public commission; and in the next, the vessels, particularly the Iris, were taken possession of as prize; and the subsequent conduct of the officers and crew of the privateer, amounted to nothing more than spoliation and embezzlement, for which it is admitted the owners are liable. As to the first reason, it was so fully examined by this court, in the case of U. S. v. Jones [Case No. 15,494], one of the officers of this privateer, upon an indictment for this alleged piracy, that it will be unnecessary to go over the same ground in this case. That was a case, in which, if in any, the court would have felt inclined to favour the doctrine now contended for, if the principles of law would have warranted it. But it was decided, that the acts imputed to Jones amounted to piracy, for which he was liable to be tried and punished, notwithstanding the commission under which the privateer sailed. As to the second reason assigned, why the robbery committed upon these vessels could not be

piracy, it is totally unsupported by the facts in the case. The hostile act of the privateer, in firing upon the Spanish vessel, was for the purpose of bringing her to; and might, in part, though certainly not to the wanton excess to which it was carried, be justified; if the fact were, as stated by some of the witnesses, that the Spanish vessel fired two guns, loaded with ball, at the Revenge. But the quo animo, with which a merchant vessel is brought to by a vessel of war, cannot be always determined, until after she has obeyed the order to come to, and has submitted to an examination. It is upon a view of her papers, the examination of the cargo, the declarations of those on board, and a variety of other circumstances, that the master of a privateer is to decide, whether the vessel is, in his judgment, good prize or not. If he decides affirmatively, it is then his duty to put a prize-master, with such additional force as he may think necessary for her security, on board of the prize, and to order her to some port of his own country for adjudication. To vest a right in the captor to claim condemnation, he must not only give some evidence that the seizure was made as prize of war, but he must do no act which amounts to an abandonment. But in this case, there was no examination of papers; no seizure as prize, either by words or acts. No person was put on board, in order to conduct these vessels in for adjudication; nor any attempt made by the spoliators, after they came into the United States, to condemn the property which they had seized. All was lawless and indiscriminate pillage; and the plunder which, if the vessel had been legally seized as prize, would have belonged in part to the owner after condemnation, was divided on the spot amongst the officers and crew. The true and only character, then, of this seizure, is clear beyond all possibility of doubt. It was a piratical act, and nothing less. Supposing this to be the case, it is then contended, by the appellant's counsel, that for these acts of piracy the owner of the privateer is liable; because his commission authorizes him to capture, not only property belonging to the enemy, but that of all other persons, to whomsoever belonging, which may be liable thereto, according to the law of nations, and the belligerent rights of the United States; and consequently, that capture generally, being the business in which the officers and crew of the privateer were employed; the owner is liable, upon the admissions of the adverse counsel. This argument is ingenious, but it will not bear examination. It is true, that the commission authorizes the capture of vessels belonging in reality to friends, as well as to enemies, if the friend has so conducted himself, as to bear, pro hac vice, the character of a belligerent; and therefore, if an illegal capture had been made in this case, whether wilfully or by mistake, the owners would have been answerable for all the damages resulting from the act. But there must be a capture as prize of war, in order to warrant the conclusion drawn by the appellants' counsel; because, otherwise, the master did not act in execution of the business with which his owners had charged him. The commission did not authorize him to seize, in any manner he pleased, the property he might find at sea, to whomsoever it might belong, but to seize as prize of war;—to exercise an acknowledged and legitimate belligerent right; in doing which, he might be guilty of a mistake, or might wilfully abuse this right; in either of which cases, he acts at his own and his owner's peril. Still, however, he acts in a lawful employment. But if he turns his back upon the business intrusted to him, and sanctioned by his commission, and commits acts of piracy, for which he was not directly or impliedly employed; such acts are imputable to those only who perform them, and cannot, upon any principle of common, maritime, or national law, be visited upon his owners, beyond the penalty of their bond, and the loss of their vessel. If, from general principles of law, we go in search of adjudged cases upon the point in question, the pursuit terminates in disappointment; and yet this very circumstance strongly fortifies the general principles. Taking it for granted, that acts of piracy have been frequently committed by the commissioned privateers of other civilized nations; and considering also the general incompetency of the master and crew, to make reparation for the injuries which such acts inflict, it is scarce possible, that cases should not have occurred, in which the owners were called upon to make the compensation, unless from a prevailing opinion amongst legal men, that they were not liable. It is by no means a satisfactory answer to this remark, to say, that the owners, when these claims have been made, may have adjusted them without suit, considering the law to be against them; because, so far as a dictum upon the point is to be met with, the liability of the owners is denied. It must at the same time be admitted, that there is very little information upon the subject, from any elementary writer. We have looked into the cases cited, and relied upon by the counsel for the appellees, without having derived much satisfaction or assistance from them. The passages read from the Sea Laws, from Molloy, and from Beawes' Lex Mercatoria, refer to Rolle, Abr. 530, as their authority; and where Beawes gives an opinion as his own, it is so obscurely stated, that it is impossible to say, whether he is speaking of captures or piracies. Lee, in the place which was cited, is clearly speaking of captures; and consequently, his opinion, that in such a case, the owner is not bound to answer beyond his ship, and the penalty of his bond, is not law. Rolle's Abridgment, therefore, is the only authority which was cited; and he merely says, that "if a letter-of-

marque commit an act of piracy on a friend of the king, without the knowledge or assent or the owner; yet, for this, the owner shall lose his vessel by the admiralty law, of which our law ought to take notice;" but nothing is said respecting the personal responsibility of the owners. We feel, nevertheless, perfectly satisfied, with deciding this question upon the general principles of law before stated, fortified by the circumstance of the absence of any contrary decision or dictum, to be met with in any book.

The transactions which have given rise to these suits, are marked by circumstances of such wicked atrocity, that it is impossible to think of them without feeling the deepest disgust and abhorrence. Regardless of their duty to their owners, to their country, and to their God—lost to all the feelings of justice, honour, and humanity—the persons engaged in these disgraceful robberies, were not satisfied with plundering these unprotected strangers; they even denied to the officers and crew of the Spanish ship, the liberty of seeking an asylum in the United States, where they might obtain the means of rendering their passage across the Atlantic, at that advanced season of the year, more comfortable and more safe, than it was likely to prove in their destitute and disabled condition. But concealment of their crimes, was to these men every thing; the comfort, and even the lives of those whom they had injured, nothing;—that the laws are incompetent to afford a suitable redress to the sufferers, is to be regretted. But let these foreigners remember, that this defect does not arise from any thing peculiar to the jurisprudence and laws of the United States; but that it is universal, and exists equally in their own, and every other country, where the civil and maritime laws prevail. The liability of those to whom they owe their wrongs, is admitted; their inability to make retribution, if such should be their situation, is a misfortune for which the tribunals of no country can supply a remedy. Those against whom the redress is sought, in this instance, did not commit, or in any manner authorize or countenance, the spoliation of which the libellants complain. They are, therefore, equally innocent with the libellants; and are equally entitled to the protection of the law. The government has done all that a just nation can be required to do, and all that our free constitution would permit, to bring the principal offenders to justice. They have been prosecuted at the public expense; and the law officer of this court, charged with the management of the prosecution, has faithfully and ably performed his duty. But a jury, selected according to the humane provisions of our laws, have acquitted them, upon evidence different from that which has appeared in these cases; and such as, we doubt not, that body most conscientiously thought was insufficient to warrant the conviction of the accused. All, then, that remains, for us, is to pronounce what we as conscientiously believe to be the law in these cases; which is, that the decrees of the district court ought to be affirmed.

Case No. 3,878.

DIAZ v. UNITED STATES.

[Hoff. Op. 32.]

District Court, N. D. California. March 15, 1858.

LAND GRANTS BY MEXICAN GOVERNORS—ABSENCE OF DOCUMENTARY PROOFS.

[When no expediente or other evidence of the existence of the grant is produced from the archives, or its absence accounted for, and there is no evidence whatever that any of the preliminary steps required by the regulations have ever been observed, and the evidence as to occupation or cultivation by the claimant is unsatisfactory, the claim should be rejected. U. S. v. Cambuston, 20 How. (61 U. S.) 59, followed.]

Rejection of the claim of Manuel Diaz.

HOFFMAN, District Judge, rejected the claim of Manuel Diaz to a ranch eleven square leagues (48,823 acres) in Sacramento county, and delivered the following opinion in the case:

The claim of the appellants is founded on a grant alleged to have been issued by Pio Pico, dated Los Angeles, May 18, 1846. No expediente or other evidence of the existence of the grant is produced from the archives, nor is its absence accounted for. There is no evidence whatever that any of the preliminary steps required by the regulations have ever been observed. Henry Cambuston, on whose testimony the claim chiefly rests, swears that he never saw the petition of Diaz. The grant is dated five days previously to that of Henry Cambuston, and is said by the latter to have been conveyed to Diaz by himself. The only evidence of any occupation or cultivation by the claimant, is that of Henry Cambuston. If his statement be true, the promptness shown by Diaz in fulfilling the conditions of his grant was certainly extraordinary. The case, as presented, is almost identical with that of Henry Cambuston, recently determined in the supreme court. [U. S. v. Cambuston, 20 How. (61 U. S.) 59.] Under the principles laid down by the court in that case, this claim must be rejected.

Case No. 3,879.

DIBBLE et al. v. AUGUR.

[7 Blatchf. 86.][1]

Circuit Court, S. D. New York. Dec. 30, 1869.

PATENTS—ASSIGNMENT AND LICENSE — BILL FOR INFRINGEMENT—PARTIES — TRUSTS — CONSTRUCTION OF CLAIMS — INFRINGEMENT — NOVELTY — SEWING MACHINES.

1. R., being the owner of a patent, assigned to D. all his, R.'s "right, title, interest, claim

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

or demand whatsoever, in, to or under" the patent. On the same day, three corporations, and R., and D., signed an agreement reciting that the corporations were desirous of purchasing the patent, and providing as follows: (1) R. assigns the patent to D., and releases the corporations from all damages for infringing the patent; (2) R. is to have the right to receive and retain all damages for past infringement of the patent by others than the corporations, and the right to recover and retain all damages for infringement of the patent after such day by others than the corporations, and their licensees, agents or customers; (3) after the granting by the corporations of any license to use the patent, all claim for damages thereafter accruing to R. is to cease; (4) all suits prosecuted by R. are to be at the sole expense of the corporations; (5) the corporations are not to grant any license to use the patent except to their general licensees: *Held*, that the effect of the two instruments was to vest in D., as trustee for the corporations, all R.'s interest in the patent, and to vest in D., as trustee for R., all interest in all claims for past infringements of the patent against others than the corporations, and all interest in all claims for future infringements of the patent against others than the corporations and their licensees, agents, or customers.

[Applied in May v. County of Juneau, 30 Fed. 245. Explained in May v. County of Saginaw, 32 Fed. 630.]

2. The assignment from R. to D. did not, by conveying all of R.'s "right, title, interest, claim or demand whatsoever, in, to or under" the patent, convey claims for past infringements.

3. A bill to recover for infringements committed before such assignment and agreement were made, filed against a defendant, not one of the corporations, ought properly to be brought in the name of D., as trustee for R., joining R., as the owner of the equitable interest.

4. The addition, as plaintiffs, of D., as trustee for the corporations, and of the corporations themselves, is surplusage; but where the objection to such addition was not raised until the hearing, and R. had, after the filing of the bill, assigned to D., as trustee for the corporations and for R., all claims for past infringements of the patent, the bill was allowed to stand.

5. Where, by a license under a patent, the licenser agrees that he will not make any further claim of license fees from the licensee under any other patents which he owns or controls, or may thereafter own or control, the license will be *held* not to apply to infringements committed by the licensee before the date of the license, of a patent, the control of which, including the right to recover for such infringements, passed to the licenser after the granting of such license.

[Cited in Gordon v. Anthony, Case No. 5,605; Consolidated Oil Well Packer Co. v. Eaton, Cole & Burnham Co., 12 Fed. 870.]

6. The first claim of the patent granted to Thomas J. W. Robertson, November 22, 1859, for an "improvement in sewing machines," namely: "The employment, in combination with the needle of a sewing machine, of a plate, K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp, or other material, upon the surface of the fabric, as set forth," is a claim to the employment, in combination with the needle of a sewing machine, of a separate detachable plate, constructed and operating substantially as shown and described in the patent, for the purpose of laying and holding braid, gimp, or other material, upon the surface of the fabric, as set forth, as contradistinguished from the employment, in such combination, of a guide not formed in a separate detachable plate.

[Followed in Dibble v. Sibley, Case No. 3,883.]

7. The braiding attachment used in the Florence sewing machine, being a separate, detachable plate, with a guide for braid, arranged in connection with the presser foot, is not an infringement of such first claim of the Robertson patent.

8. The second claim of the Robertson patent, namely: "The arrangement of the guides, e, e, e, to extend past the centre, and on each side of the needle hole, as and for the purpose herein set forth," is infringed by such braiding attachment of the Florence sewing machine.

9. The claims of the Robertson patent are not invalid for want of novelty.

In equity. This was a final hearing on pleadings and proofs. The bill was filed by Sydney W. Dibble, trustee of the Wheeler and Wilson Manufacturing Company, the Grover and Baker Sewing Machine Company, the Singer Manufacturing Company, and Thomas J. W. Robertson, by the said three companies, and by the said Robertson, as plaintiffs, against James M. Augur, as agent of the Florence Sewing Machine Company. The bill was founded on letters patent of the United States, granted to Robertson, on the 22d of November, 1859, for "an improvement in sewing machines." Robertson, being the owner of the entire patent, on the 8th of May, 1868, assigned to Dibble "all his, said Robertson's, right, title, interest, claim or demand whatsoever, in, to, or under" the said letters patent. On the same day, a written agreement was made between the three companies and Robertson, and was also signed by Dibble, reciting that the said companies were desirous of purchasing the said patent, and providing as follows: (1) Robertson assigns the patent to Dibble, and releases and forever discharges the said companies, their agents and customers, from all damages and claims for damages for infringing the patent; (2) Robertson is to have the right, in the name of Dibble, or otherwise, to sue for, receive, and retain all damages for past infringement of the patent by others than the said companies, and the right, in like manner, to sue for, receive, retain, and collect all damages, profits, and royalties for infringement of the patent, after the 8th of May, 1868, by others than the said companies and their licensees, agents, or customers; (3) from and after the granting of any license by the companies to use the patent, all claim for damages, compensation, or royalty thereafter accruing to Robertson, is to cease; (4) all suits prosecuted by Robertson, whether in his own name or that of Dibble, shall be at the sole expense of the companies, for costs, if required; (5) the companies are not to grant any license to use the patent except to their several licensees. The bill of complaint was sworn to on the 8th of June, 1868, and filed on the 13th of June, 1868. On the 16th of June, 1868, Robertson assigned to Dibble, as trustee for the three companies and for Rob-

ertson, all claims for past infringements of the patent. The only evidence of infringement was an admission of the defendant, that he, as agent for the Florence Sewing Machine Company, sold, prior to February 20th, 1868, "one or more Florence sewing machines, like Exhibit 7, with the braiding attachment, Exhibit 8, attached to the foot thereof, as shown.' The answer set up as a defence, that the Florence Sewing Machine Company "had owned the right, since February ——, 1868, to apply said patented improvements to their machines, if so disposed." To sustain this defence, the only evidence was a license granted by the three companies to the Florence Sewing Machine Company, dated February 20th, 1868, licensing the latter company to manufacture, use, and vend for use, certain of the inventions contained and described in some sixteen patents mentioned in the license, not including the patent to Robertson, so far as the same or any of them were contained in three specimen sewing machines that day deposited with the receiver of the licenses. Such license provided for a specified patent rent for every sewing machine which should be made or sold under the license by the licensees, while the license remained in force. It also contained this clause: "And said licensers also respectively agree, that they will not, while this agreement remains in force, and is performed on the part of said licensees, make any further claim of license fees from said licensees under any other patents which they now or may hereafter own or control, covering any of the devices embodied in said specimen machines."

Frederick H. Betts, for plaintiffs.
Augustus L. Soule, for defendants.

BLATCHFORD, District Judge. On the facts in this case, it is contended, on the part of the defendant, that the right to recover for the profits derived from infringements of the patent, committed prior to February 20th, 1868, did not pass to Dibble by the two instruments of the 8th of May, 1868; that, when the bill was filed, the right to recover for such profits was in Robertson alone; that the proper remedy was by a suit at law, in the name of Robertson; that this bill will not lie in behalf of Robertson, because he has a full, adequate, and complete remedy at law, and does not bring the bill for discovery, and was not, when it was filed, the owner of the patent; that it will not lie in behalf of the plaintiffs other than Robertson, because, when it was filed, they had no interest in the claim for such profits; that, whatever may have been the rights of Robertson when the bill was filed, he, after that, conveyed to Dibble, as trustee, all right to collect such profits; and that the enforcement of the claim for such profits in behalf of the three companies, is a violation of the provisions of the license of February 20th, 1868.

The bill is filed in the name of the three companies, and of Robertson, and of Dibble, as trustee of the three companies and Robertson. I think that the purport and effect of the two papers of the 8th of May, 1868, were, to vest in Dibble, as trustee for the three companies, all Robertson's interest in the patent, and to vest in Dibble, as trustee for Robertson, all interest in all claims for past infringements of the patent against others than the three companies, and all interest in all claims for future infringements of the patent against others than the three companies and their licensees, agents or customers. The two papers of the 8th of May, 1868, must be construed in connection with each other. By the naked assignment of that date, Robertson did not transfer to Dibble his claims for past infringements of the patent. There are no words therein looking to the past. The language is wholly future in its scope. In conveying all of Robertson's "right, title, interest, claim or demand whatsoever, in, to or under" the patent, it conveys only the right to claims for infringements which should be committed after such assignment. Moore v. Marsh, 7 Wall. [74 U. S.] 515. The words "claim or demand whatsoever, in, to or under" the patent, are not sufficient to cover claims for past infringements. Besides, the other paper of the same date clearly shows that Robertson did not intend to convey to Dibble individually, or otherwise than as trustee for him, Robertson, any claim for any past infringement of the patent against others than the three companies. When the bill in this case was filed, it ought, properly, so far as the claim in respect to the alleged infringements covered by the admission before referred to is concerned, to have been filed in the name of Dibble, as trustee for Robertson, joining Robertson as the owner of the equitable interest, the legal interest of which was represented by Dibble, as trustee. It was so brought, adding, as plaintiffs, Dibble, as trustee for the three companies, and the three companies themselves. Such addition was surplusage: but, as the objection thereto was not raised until the hearing, and as, by the paper of the 16th of June, 1868, the title to the claim in respect to the alleged infringements covered by such admission, was transferred by Robertson to Dibble, as trustee for the three companies, and for Robertson, and as the bill is brought in the name of such trustee and of the cestuis que trust, it will be allowed to stand. The defendant, if compelled to respond in this suit to such plaintiffs, in respect to the alleged infringements covered by such admission, will be responding to every person who can possibly make a claim against him in respect to such alleged infringements. The suit, being for an account of profits, is properly brought in equity.

The license of the 20th of February, 1868, can apply only to machines made or sold by

the licensees after that date. It, therefore, has no application to the alleged infringements covered by the admission before referred to.

The next question is, whether the "Florence sewing machines, like Exhibit 7, with the braiding attachment, Exhibit 8, attached to the foot thereof," infringe the Robertson patent. It is claimed by the plaintiffs, that such Florence sewing machine, with such attachment, infringes the first and second claims of such patent. The specification of the patent states, that the nature of the invention consists, first, in combining a braiding guide with a sewing machine; second, in the peculiar form of said guide, to enable the operator to keep the ornamental stitching always in the centre of the braid, in turning corners, circles, &c. The machine is described as having a needle holder, and a needle, and a foot or pressure for stripping the cloth from the needle. The guide plate, which contains the guides for the braid, is attached to the table of the machine by a screw, so as to be adjustable. It has, on the under side of it, two cavities, which begin at the small end of the plate and branch out at the other end into six small grooves or guides of various widths, to accommodate different widths of braid. The guide plate is made long enough to nearly or quite cover the needle hole in the table. To enable the needle to pass through, a notch is cut in the plate in the centre of each groove or guide. The braid is passed through that one of the guides which is nearest its width and the guide plate is then adjusted, so that the centre of the guide which has the braid in it shall be in a line with the path of the needle, and the guide plate is then fastened there by the screw. The fabric to be ornamented is placed under the foot or pressure, the machine is set in operation, and, as the fabric is fed, the braid, being fastened to the cloth by the stitching, is drawn through the guide. The guides, being extended past the centre of the needle hole, and the top of the guide being cut away for the passage through of the needle, the guides hold the braid in position until it is sewed on the cloth. The specification states, that if the guide plate were made so short that the needle would pass without such cutting away, the ornamental stitching would not always be in the centre of the braid in turning circles, corners, &c., but that, by making the guides in the manner shown, the stitching is always in the centre; and that the top of the guide plate is bevelled off at the end nearest the needle, to avoid the sudden change in the position of the cloth. By the patented arrangement, the braid is sewed on the under surface of the cloth. The specification says, that, instead of the movable guide plate, an adjustable guide may be made in the table, "or the guide may be arranged in connection with the foot, so as to lay the braid on the upper surface of the cloth." The patentee further says, in his specification: "I do not mean to limit myself to the precise form of the devices herein shown, as they may be varied in many ways, without altering the nature of my invention. Neither do I mean to claim broadly a guide to lay on a braid, for I am aware that a device called a braiding guide has long been used, but this is only applicable to sewing binding on the edge of a piece of cloth or other material, while my device can be used on any part of the fabric, producing a totally different effect, one being simple binding and the other handsome embroidery. I am also aware that there are devices in use for laying a cord between two thicknesses of material, and confining the cord in its place by stitching the material together on both sides of the cord, forming a kind of raised or embossed work. This I do not claim." The two claims alleged to have been infringed are these: "First. The employment, in combination with the needle of a sewing machine, of a plate, K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp, or other material upon the surface of the fabric, as set forth. Second. The arrangement of the guides, e, e, e, to extend past the centre and on each side of the needle hole, as and for the purpose herein set forth."

The braiding attachment in the defendant's machine is attached to what is called in the Robertson patent the foot or pressure for stripping the cloth from the needle. Such braiding attachment has a single channel for the passage and guidance of the braid, covered on all sides except where the braid enters and leaves the channel. The ends of the channel project, on each side, beyond the centre of the needle hole.

I think that the first claim of the Robertson patent must be construed as claiming the employment, in combination with the needle of a sewing machine, of a separate detachable plate, constructed and operating substantially as shown and described in the patent, for the purpose of laying and holding braid, gimp, or other material, upon the surface of the fabric, as set forth, as contradistinguished from the employment, in such combination, of a guide not formed in a separate detachable plate. This separate detachable plate is described in the specification as constructed with grooves or guides of various widths, to accommodate different widths of braid, and as being attached to the table of the machine. The grooves are on the under side of the plate, between the upper or ungrooved face of the plate and the surface of the table, that surface alone forming the bottom of the grooves. The cloth passes between the bottom of the presser foot and the upper face of the plate. The braid issues from under the plate, and passes between the under side of the cloth and the surface of the table, and is sewed to the under side of the cloth out of view of the eye of the operator. It is true, that when the machine, with the

plate attached, is in operation at any given time, and braid of a given width is being sewed, but one groove is in use in connection with the needle, and that such groove and the needle are adequate instrumentalities, in connection with the extension of the sides of the grooves past the centre of the needle hole, to sew the braid on with the stitching always in the centre of the width of the braid. It is also true, that the specification says, that, instead of the movable guide plate, an adjustable guide may be made in the table, or the guide may be arranged in connection with the foot or pressure, so as to lay the braid on the upper surface of the cloth. But the specification does not show how the guide is to be arranged in connection with the foot or pressure. The 6th section of the act of July 4, 1836 (5 Stat. 119), requires, that an inventor shall, in the description of his invention, in the case of a machine, fully explain the several modes in which he has contemplated the application of the principle or character of his invention, by which it may be distinguished from other inventions, and shall particularly specify and point out the part, improvement or combination, which he claims as his own invention or discovery. Instead of fully explaining the mode in which the separate detachable plate, described in the specification and shown in the drawings, is to be arranged in connection with the foot or pressure, the patentee contents himself with suggesting that "the guide" may be arranged in connection with the foot or pressure, so as to lay the braid on the upper surface of the cloth. Indeed, it is not clear, from the specification, what it is that the patentee suggests may be arranged in connection with the foot or pressure. It is not the movable guide plate that is to be arranged in connection with the foot or pressure, because he says, that, "instead of the movable guide plate," "an" adjustable guide may be made in the table, or "the" guide may be arranged in connection with the foot or pressure. Unless it is the movable guide plate that is to be arranged in connection with the foot or pressure, the first claim of the patent does not cover it, for that is confined to the combination of such plate, constructed and operating substantially as shown in the patent, with the needle; and, if it be the movable guide plate that is to be so arranged, the specification leaves it to be invented how such arrangement is to be made. The patentee himself, in his testimony, shows that he did not contemplate the application to the foot or pressure, of the movable guide plate shown in his patent. He says, that it is an object to have the foot as small as possible, so that it will not cover any more of the cloth than necessary; and that, when too much of the cloth is covered, the operator cannot see so well the line in which the sewing is to be done. When asked, on cross-examination, whether it would not be a decided disadvantage, to have the foot or pressure made with an attachment for braiding containing a set of channels or grooves of various widths, for the passage of braid of like various widths, he replies, that, if the guide plate is beneath the material, it would be no objection. When further asked, whether it would not be objectionable if such attachment were adjusted to the foot or pressure, he replies that it would hide the work somewhat from the operator, and that he, therefore, applied it to the table or plate of the machine. In my judgment, the braiding attachment found in the defendant's machine does not employ the combination specified in the first claim of the Robertson patent. It has no plate constructed and operating substantially like Robertson's plate. It required invention to make a separate detachable plate, with a guide for braid, available and useful when attached to the foot or pressure, notwithstanding all that is found in the Robertson specification. The guides of Robertson had to be reduced to a single guide closed on all sides except where the braid enters and leaves the channel, and the plate had to be so arranged as to be reduced to a size that could be conveniently used in connection with a small foot or pressure.

On the construction which I have given to the first claim of the Robertson patent, there is nothing in the alleged invention of Thorp that interferes with that claim, on the question of novelty, as Thorp had no separate detachable plate.

The second claim of Robertson's patent is, I think, infringed by the defendant, and is not anticipated by Thorp.

There must be a decree for a perpetual injunction and an account, in respect to the second claim, with costs.

Case No. 3,880.

DIBBLE et al. v. DUNCAN et al.

[2 McLean, 553.] [1]

Circuit Court, D. Ohio. July Term, 1841.

ASSUMPSIT ON NOTE—SUFFICIENCY OF PLEA—PAROL EVIDENCE TO SHOW RELATIONS OF PARTIES—SPECIAL PLEAS.

1. A plea that the defendant, who was sued as principal, indorsed the note as guarantor and not as principal, being demurred to, it was held the plea was good.

2. The undertaking of the defendant was collateral, and he can only be made liable in the character assumed.

3. It may be doubtful whether parol evidence is admissible to show that a defendant is surety against the terms of the note. But, if the intent with which the indorsement was made be doubtful, it may be explained by parol.

4. A special plea which amounts only to the general issue is bad. But in the action of assumpsit there are many defences which may be pleaded specially or given in evidence under the general issue.

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

5. In special pleas in bar color to the plaintiffs' right must be given.

Brush & Gilbert, for plaintiffs.

Mr. Smythe, for defendants.

OPINION OF THE COURT. This is an action of assumpsit [by Dibble, Pray & Co. against Duncan and others]. The declaration contained a count on a promissory note, one for goods sold and delivered, another for money had and received, &c. Two pleas were filed: First, the general issue, and secondly, Duncan pleaded that he was not a joint maker with the said Converse and Birkey of said promissory note, nor was he in any wise interested in the subject matter of said contract, but that his name was placed upon said promissory note as an indorser merely and guarantor of the payment of the same. The plaintiffs demurred to this plea, and assigned the cause of demurrer as follows: First: That the plea amounts to the general issue. Second: It states a conclusion of law. Third: If the facts alledged be true they constitute no bar.

It may be admitted that the matters set up in the plea might be proved under the general issue, but it does not follow that the special plea is therefore improper. In the action of assumpsit there are many defences which may be pleaded specially or given in evidence under the general issue. Of this character are all such matters as go to discharge the action; such as infancy, a release, want of consideration, accord and satisfaction, foreign attachment, or that a higher security had been given, payment, &c. A special plea which amounts to the general issue is bad; and, therefore, a special plea must give express or implied color to the plaintiffs' right, and not deny it as is done by the general issue. By Reg. Gen. Hil. T. 4 Wm. IV. all matters in defence, in England, except a denial of the promise, are now required to be pleaded specially; and this is justly considered a great improvement in the rules of pleading. The plea in this case admits the signature of the defendant on the note, but alledges that it was placed there as a security and not as principal. And this is admitted by the demurrer. Now if the defendant, Duncan, undertook, as guarantor, to pay the note, and not as principal, he can only be made liable in the character he assumed. As guarantor he was entitled to notice, and it is incumbent on the plaintiffs to show that they have used legal diligence. The plea gives color to the plaintiffs' right, and, it therefore, does not amount to the general issue. As regards the present action, the effect of the plea, if true. may be the same as the general issue; but the form is substantially different. In many cases it is advisable to plead specially rather than to give the facts in evidence under the general issue, as it may narrow the grounds of defence. The plaintiffs are called upon either to admit or deny the special matter pleaded.

In pleading facts only are to be stated and not arguments, or inferences, or matter of law. Should a matter of law be stated it may be regarded as surplusage. It is not perceived, however, that the above plea is liable to this objection. 1 Chit. Pl. (Ed. 1837) 245. In the case of Bright v. Carpenter, 9 Ohio 139, it was held "that where a stranger to a promissory note indorse it in blank at the time of making it, the payee of that note may sue him with the maker as a joint maker of the note and he is entitled to the privileges of a surety." "That such blank indorsement may be filled at any time in form to oblige the indorser as principal, or the court may regard it as so filled up. And that parol proof was admissible to show the intention of the parties as to the extent of the indorsee's liability." And in Dean v. Hall, 17 Wend. 214, "where a note was made by A, payable to B, or bearer, C indorsed it, and an action was brought by a third person claiming, by transfer, from B, charging C as the maker of the note. it was held on demurrer, that the declaration was bad." "It seems that where an indorser to such a note is privy to the consideration he may be charged directly as maker or as indorser, and that a bona fide holder may, in all cases, write a bill of exchange over the name of the indorser, or fill up the blank in any form consistent with the intent of the parties." It is objected to the plea that it does not alledge the defendant signed the note as guarantor after its execution. The plea states that the defendant was not in any wise interested in the subject matter of the contract, but that he signed it as guarantor. This, we think, is sufficient. It shows that the undertaking of the defendant was collateral, and that he cannot be sued as principal. It may be doubted whether, on general principles, evidence is admissible to show that the defendant is surety when, by the terms of the note, he appears to be a principal. In Laxton v. Peat, 2 Camp. 185, it was held. that an acceptor of a bill of exchange might show that he was merely an accommodation acceptor. And under this authority the case of Collott v. Haigh, 3 Camp. 281, was decided; but these cases were overruled in the case of Fentum v. Pocock, 5 Taunt. 192. In Rees v. Berrington, 2 Ves. Jr. 540, Lord Loughborough says, "where two are bound jointly and severally. the surety cannot aver by pleading that he is bound as surety; and to this effect is the case of Garrett v. Jull, Selwyn, N. P. 387.

It is not important on what part of the note a guarantor shall sign his name. It may be placed on the back or face of the note; and the intent with which the name was indorsed, it would seem, might be shown by parol. There could be no doubt of this if the effect of the indorsement was in itself doubtful, and the note was in the hands of the payees. This would be in explanation of the indorsement, and not against its terms

or legal effect. As appears from the plea the defendant, Duncan, was not privy to the consideration. and the case in Wendell, above cited, sustains the plea. The decision from the Ohio Reports, in the admission of parol evidence, may have been influenced by a statute which requires an execution to be levied first on the property of the principal.

Upon the whole, we think that the demurrer to the plea must be overruled.

DIBBLE (EGBERTS v.). See Case No. 4,-307.

Case No. 3,881.

DIBBLE et al. v. MORGAN.

[1 Woods, 406.][1]

Circuit Court, E. D. Texas. Dec. Term, 1873.

SHIPPING — DELIVERY OF GOODS — PILING ON WHARF — BILL OF LADING — DANGERS OF THE SEA—ACT OF GOD.

1. By the general usage of commercial and maritime law, a carrier by water must convey from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf.

2. To constitute a good delivery upon the wharf, the carrier should give due and reasonable notice to the consignee, so as to give him a fair opportunity of providing suitable means to remove the goods or put them under proper custody.

[Cited in Turnbull v. Citizens' Bank, 16 Fed. 147.]

3. The goods of the various consignees when landed must be placed in separate piles. Where the goods of several consignees were piled together in one bulk upon the wharf during a rainy and stormy day, and covered with tarpaulins so as not to be fairly open to the inspection of consignees, and a fair chance afforded to remove them; *held*, that this was no delivery.

4. An actual inspection of the goods and their removal by the consignee is not necessary to a delivery, but there can be no delivery without the opportunity to inspect and remove.

5. By the exception "dangers of the sea," as used in bills of lading, is meant all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God.

6. A loss which might have been avoided by proper foresight and prudence cannot be attributed to "dangers of the sea," and to relieve the carrier from liability for such loss, he must show that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.

7. A loss by the "act of God" must be shown to have happened by a natural and unavoidable necessity, arising wholly above the control of human agencies, and independent of human action or neglect.

8. Any act of omission or carelessness on the part of the master or crew contributing to the loss, takes away the defense that the loss was occasioned by the act of God.

W. P. Ballinger, for plaintiffs.
T. N. Waul, for defendant.

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

WOODS, Circuit Judge. This suit was brought by the plaintiffs [Dibble & Seligson] to recover of the defendant as a common carrier the value of certain merchandise shipped by them at New Orleans and Galveston, in July, 1866, in the steamship Harlan, to be delivered at Indianola, Texas. One of the bills of lading acknowledges the receipt of the goods in good order and condition, and provides that they are to be "delivered in like good order and condition at the end of the ship's tackles at the port of Indianola, the dangers of fire at sea or on shore, collisions, and accidents from machinery, boilers, steam, or any other accidents and dangers of the seas, rivers, and steam navigation of whatever nature or kind soever excepted," and that "the landing of the goods upon the wharf should be considered a delivery to the consignee." The other bill of lading simply provides for the delivery of the goods therein mentioned in good order and condition at the port of Indianola (the dangers of the seas only excepted.) The plaintiffs allege that the goods were never delivered, and judgment is asked for their value. The defendant answers that the Harlan arrived at the port of Indianola on July 11, 1866, of which plaintiffs had immediate notice, and that the goods were delivered to them before noon on the same day.

The facts as developed by the testimony, are as follows: There is but one wharf at Indianola where goods are usually delivered. It extends into the bay about one-eighth of a mile. The Harlan arrived at the head of this wharf a little before 8 o'clock, a. m., of the 11th of July, 1866, and immediately commenced discharging her cargo upon the wharf head. At this time the weather was misty and there was drizzling rain, and before noon the weather became violent and stormy. The freight of the Harlan was all landed before 12 o'clock, m., upon the wharf head, and the goods of the various consignees were piled up in one bulk and covered with tarpaulins. At least twice during the day and once at least after all the freight was landed, application was made to the officer of the ship, who had charge of the cargo, by draymen and consignees, for leave to remove some of the goods from the wharf to the shore, but he would not permit it to be done, and said they were not ready to deliver. Early in the afternoon, the draymen whose business it was to carry goods from the wharf head to the shore, put up their horses and drays for the day, believing that no goods could be delivered on account of the violence of the weather. Some of them thought it unsafe to drive a horse and dray out to the wharf head. During the afternoon the weather became more and more boisterous; the wind blew a gale. The weather was so bad that it was not considered suitable for the removal of goods. They were left under the tarpaulins in charge of a watchman employed by defendant. During

the night the wind blew a hurricane. A sailing vessel which was anchored to the windward of the wharf, broke from its moorings and was blown against the wharf and gradually broke it down and was driven through it. In this way the goods were thrown into the bay and lost.

The first question presented by the pleadings and evidence is, was there a delivery, actual or constructive, to the consignees, whereby the defendant was discharged from his liability as a common carrier? It is not disputed that the goods were landed at the right place, and where both parties expected them to be landed. They were landed at a proper time of day. The plaintiff says, however, that the weather was so bad when they were landed, that he could not be expected to receive them, that he did not receive them, that he was not allowed to receive them, and that, therefore, there was no delivery. The evidence shows that as fast as the cargo of the Harlan, which comprised much merchandise, etc., besides the goods of the plaintiff, was landed, it was placed in bulk under the tarpaulins. By the general usages of the commercial and maritime law, it is settled that the carrier by water shall carry from port to port or from wharf to wharf. He is not bound to deliver goods at the warehouse of the consignee. It is the duty of the consignee to receive his goods out of the ship or upon the wharf. But to constitute a good delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods or put them under proper care and custody. Richardson v. Goddard, 23 How. [64 U. S.] 39. Delivery upon the wharf, in case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and conveniently accessible to the owners. The Eddy, 5 Wall. [72 U. S.] 495; The Santee [Case No. 12,328]. I am clear in the opinion that there was no delivery of the goods in this case, under the rules of law just cited. The goods of the various consignees were piled together in one bulk upon the wharf, under tarpaulins, during a rainy and stormy day, where they could not be fairly said to be open to the inspection of the consignee, and a fair opportunity afforded him to remove his goods. An actual inspection of the goods by the consignee, and their removal by him, are not necessary to a delivery of the goods, but there can be no delivery unless the consignee has the opportunity to inspect and carry away. No one can say, that upon the testimony in this case, such opportunity was given the plaintiffs. The officer of the ship, who had charge of the landing of the cargo, declared, as the testimony shows, to one of the plaintiffs and to one of the draymen sent to carry goods from the wharf, that the goods were under tarpaulin, and that the ship was not delivering them, and refused to allow them to be disturbed.

Taking all of the facts of the case into consideration, I am satisfied that when the goods were landed upon the wharf, they were not delivered, nor did the officer of the ship, in charge of the unloading of the ship intend to deliver them by placing them upon the wharf. If I am correct in this view, it follows that the liability of the plaintiff, as a common carrier, continued after the landing of the goods. His obligation as such could not be discharged except by delivery. actual or constructive, to the consignee, unless the carrier was relieved by the act of God or through some exception in his bill of lading. The clause in one of the bills of lading, that the landing of the goods upon the wharf was to be considered a delivery to the consignee, cannot be construed to mean, that any sort of a landing would be a delivery. The bill of lading must receive a reasonable construction. A landing in the night without notice, or a landing in the midst of a storm, whereby the goods are lost, could not be considered a delivery to the consignee.

This brings us to the next inquiry. Is the defendant relieved from his liability, as a common carrier, by the loss of the goods through the vis major, or is he exempt by reason of any exception in his bill of lading? One of the exceptions in the bill of lading is, "dangers of the seas." As long as his liability as a common carrier remained, the defendant was protected by this exception. Do the facts of the case bring him within it? By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused unless they arise from the act of God. To ascertain whether the loss was by such "dangers," it must be inquired whether the accident arose through want of proper foresight and prudence, and to relieve the carrier from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. Johnson v. Friar, 4 Yerg. 48; Whitesides v. Russell, 8 Watts & S. 44. The evidence shows that the goods were allowed to remain upon the wharf after the master of the ship was satisfied that a hurricane was imminent, so that he considered it prudent to cast off from the wharf and anchor in the stream. The agent of the defendant left the wharf with the goods upon it, and went to his home and never returned until next morning, after the mischief had all been done. A watchman was left over the goods, who might have given warning of danger to them in time to have them removed to a place of security. But instead of this, he abandons his post, and, after daylight, his lantern is found burning upon the wharf. No agent of the de-

fendant, either on ship or shore, after the landing of the goods, and after a hurricane was known to be imminent, took any pains to put the goods in a place of security. Even after the demolition of the wharf had commenced, it was so gradual, that with alacrity and energy, the goods might have been saved. It cannot, therefore, be said, that the loss of the goods was the result of unavoidable accident which could not have been prevented by due diligence and proper skill. It was, therefore, not occasioned by the danger of the seas, and it does not fall within the exceptions of the bill of lading. If follows, as a further inference from these facts, that the loss was not occasioned by the act of God; for to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 Kent, Comm. 597. Any act of omission or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defense, that the loss was occasioned by the act of God. The Zenobia [Case No. 18,209]. It follows from these views, that there never has been any delivery of the goods, and that defendant has not excused the want of delivery. He is, therefore, liable for the value of the goods, and judgment must be given, therefor, against him.

Case No. 3,882.

DIBBLE v. ROBERTSON et al.

[1 Hayw. & H. 65.][1]

Circuit Court, District of Columbia. March 28, 1842.

PETITION FOR LEAVE TO RECORD DEED.

The court will pass a decree for the registration of a deed, subject to the limitations of the act of assembly of Maryland of 1715 (chapter 47, § 8), in cases where the neglect to record the same within the time limited by the act, was without any fraudulent design or intention.

The petitioner [Orange H. Dibble], in his bill, sets forth the purchase from the Bank of the United States, in the year 1830, of a lot in the city of Georgetown, D. C.; that he had paid the purchase-money and had received a conveyance of the premises in fee simple; that he had neglected, without any fraudulent intent, to record the deed; that the time limited by law for the registration of such instruments had expired; and that it could not now be done without the aid of the court, and he prayed that leave be granted accordingly. The defendants [James Robertson and others, trustees of the Bank of the United States] answered, stating their willingness that the court should decree that the deed might be forthwith recorded.

R. P. Dunlop, for petitioner.

W. Redin, for defendants.

THE COURT passed the following decree: The petition filed in this cause having been set for hearing upon the bill, answer and exhibit, and by consent of the parties, and it appearing to the satisfaction of the court that the deed from the president, directors and company of the Bank of the United States to Orange H. Dibble, described in the petition, has been omitted or neglected to be recorded by the said Orange H. Dibble, without any fraudulent design or intention on his part; it is, therefore, ordered by the court, this 28th of March, 1842, that the said deed be forthwith recorded subject to the limitations and conditions imposed by the act of assembly of Maryland of 1715 (chapter 47, § 8),[2] in virtue of the provisions of which act of assembly, this decree is now made.

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

[2] "That from and after the publication hereof, no manors, lands, tenements or hereditaments whatsoever, within this province, shall pass, alter or change from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made by reason of any bargain and sale only, except the deed of conveyance by which the same shall be intended to pass, alter or change the same, be made by writing, indented and sealed, and the same to be acknowledged in the provincial court, &c., where such manors, lands, tenements or hereditaments do lie and enrolled within six months after the date of such writing indented as aforesaid," &c. By Act 1794, c. 57, indenting is declared not necessary to the validity of deeds thereafter to be made.

Case No. 3,883.

DIBBLE et al. v. SIBLEY et al.

[7 Blatchf. 209.][1]

Circuit Court, S. D. New York. April 18, 1870.

PATENTS—CONSTRUCTION OF CLAIM—SEWING MACHINES.

1. The first claim of the patent granted to Thomas J. W. Robertson, November 22d, 1859, for an "improvement in sewing machines," being a claim to "the employment, in combination with the needle of a sewing machine, of a plate K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp and other material upon the surface of the fabric, as set forth," is not only restricted to a separate, detachable plate, but cannot extend to a detachable braiding guide arranged in connection with the presser foot of a sewing machine. [Dibble v. Augur, Case No. 3,879, followed.]

2. The braiding device used in connection with the Wilcox and Gibbs sewing machine, not being a separate, detachable plate, but being a part of the presser foot, does not infringe such first claim.

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

3. Nor does such braiding device infringe the second claim of such patent, inasmuch as the guides or sides of the braiding channel or groove in it do not extend past the centre, and on each side, of the needle hole, for the purpose of keeping the stitching always in the centre of the braid, in turning corners, circles, &c., by holding it in position until it is sewed on the cloth.

[In equity. Bill by Sidney W. Dibble and others against John J. Sibley and Nesbit D. Stoops for the alleged infringement of letters patent No. 26,205, granted to T. J. W. Robertson, November 22, 1859.]

Frederick H. Betts, for plaintiffs.
L. E. Chittenden, for defendants.

BLATCHFORD, District Judge. This suit is founded on letters patent of the United States granted to Thomas J. W. Robertson, November 22d, 1859, for an "improvement in sewing machines." The patent relates to a braiding attachment to a sewing machine, and the question involved in this suit is, whether the braiding device used in connection with what is known as the "Wilcox and Gibbs Sewing Machine," that being the machine in which the defendants have dealt, is an infringement of the Robertson patent. That patent was before me in the case of Dibble v. Augur [Case No. 3,879], which was a litigation between the present plaintiffs and a person who was alleged to have infringed the Robertson patent by selling the braiding attachment used in connection with what is known as the "Florence Sewing Machine." I then gave a construction to the first claim of the patent, and expressed my views at such length that I deem it unnecessary now to state them again. The evidence in the present case and the argument at the bar have served only to confirm those views. The conclusion arrived at in regard to the first claim of the patent was, that that claim, in claiming "the employment, in combination with the needle of a sewing machine, of a plate K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp or other material upon the surface of the fabric, as set forth," must not only be held to be restricted to a separate, detachable plate, but could not extend to a detachable braiding guide arranged in connection with the presser foot of a sewing machine.

The braiding guide alleged in the present suit to infringe, is not a separate, detachable plate, but is formed in, and as a part of, the presser foot. It does not employ the combination specified in the first claim of the patent. It has no separate, detachable plate constructing and operating, in combination with the needle, in substantially the same manner as Robertson's plate, and the combination of braiding guide and needle found in the defendants' machine, such braiding guide being made in the presser foot, is not substantially the same combination with that claimed in Robertson's first claim. Therefore, the defendants have not infringed the first claim of the patent.

Nor has the second claim been infringed. That claim requires that the guides, or sides of the braiding channel or groove, shall extend past the centre, and on each side, of the needle hole, for the purpose of keeping the stitching always in the centre of the braid, in turning corners, circles, &c., the guides so extended being made to effect such purpose by holding the braid in position until it is sewed on the cloth. It is shown by the proofs, that the defendants' braiding device does not keep the stitching in the centre of the braid in turning corners, circles and curves, and that fact was also demonstrated by the actual working of the device in the presence of the court. The guides or sides of the braiding channel or groove fail, therefore, to hold the braid in position until it is sewed on the cloth, and they thus fail because they do not extend past the centre, and on each side, of the needle hole. In the defendants' device, the braid is not held in position, independently of the turning of the cloth, but, so long as the presser foot is down, moves out of the line of centrality of the stitching when the cloth is turned according to the curvature of the pattern, requiring the machine to be stopped, and the presser foot to be raised, and the braid to be restored to the line of centrality, and the presser foot to be replaced, before the operation of sewing the braid can be resumed. The necessity for these manipulations is created by the fact that the sides of the braiding groove do not, in the defendants' device, extend, in the sense of Robertson's patent, past the centre, and on each side, of the needle hole. If they did, the result attained by Robertson would follow. The bill must, therefore, be dismissed, with costs.

Case No. 3,884.

In re DIBBLEE et al.

[3 Ben. 283;[1] 2 N. B. R. 617 (Quarto, 185); 1 Chi. Leg. News, 355.]

District Court, S. D. New York. June 2, 1869.

ACT OF BANKRUPTCY—INSOLVENCY — JUDGMENT—PREFERENCE — FIDUCIARY DEBT — ORDINARY COURSE OF BUSINESS — CONSTRUCTION OF STATUTE.

1. One member of a firm, composed of three persons, which was indebted to I. & Co., gave them a confession of judgment on February 25th, 1869. I. & Co. kept the confession till April 30th, 1869, when they filed it, entered judgment for $54,105, and issued execution to the sheriff, who, on the same day, went to the store of the debtors and levied on their goods, and remained in possession till about 10 p. m. of the next day, when a transfer of $46,000 of accounts, bills receivable, and other securities, was made to I. & Co., in payment of the debt. On the morning of April 30th, before the sheriff came, one of the firm paid $2,000 to K., up-

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

on a fiduciary debt of $4,000, and the next day, while the sheriff was in possession, he gave K. $2,000 worth of securities to pay the rest of such debt: *Held*, that the giving of the confession of judgment did not, of itself, raise a presumption that the firm was insolvent when it was given.

2. If, at the time the sheriff appeared with the execution, the firm was unable to pay their debt to I. & Co., in the ordinary course of business, they were insolvent, within the meaning of the bankruptcy act [of 1867 (14 Stat. 517)].

[Applied in Scammon v. Cole, Case No. 12,-433. Cited in Baldwin v. Wilder, Id. 806.]

3. The ordinary course of business does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due.

[Applied in Scammon v. Cole, Case No. 12,-433.]

4. If a debtor, at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature, in the ordinary course of business, he contemplates insolvency.

5. If a debtor, knowing that a debt is past due, and being insolvent or contemplating insolvency, refrains from going into voluntary bankruptcy, and his property is taken on legal process, the debtor suffers his property to be taken on legal process.

[Cited in Re Heller, Case No. 6,337. Explained in Re Dunkle, Id. 4,160.]

6. If the taking of the property of the firm by the sheriff had the necessary effect to give to I. & Co. a preference, which they would not have had otherwise, and if the firm, being insolvent or contemplating insolvency, suffered its property to be taken on that execution, they intended, in law, to give the preference which the taking of the property conferred.

[Cited in Re Marter, Case No. 9,143.]

7. If the transfer of the 1st of May put I. & Co. in a better position, as to their debt, than they occupied by reason of their levy, that gave them a preference which the law forbids.

8. The fact that the confession of judgment was signed by only one member of the firm, did not impair the effect of the judgment in determining the question of bankruptcy.

9. The fact that the debt to K. was a fiduciary debt, was not of consequence, nor was the fact that K. pressed for payment of it.

10. All the words of a statute must be construed in such manner as to give them force and effect.

[Cited in Re Merchants' Ins. Co., Case No. 9,441.]

11. Every one is supposed to intend the natural consequences of an act committed by him.

12. Neither the question whether the property, the transfer of which is alleged to have been an act of bankruptcy, shall be retained by the creditor to whom it was transferred, nor the question whether the bankrupt shall receive his discharge, will be affected by the verdict of the jury on the question whether an act of bankruptcy has been committed.

[Cited in Re Bunster, Case No. 2,136. Quoted in Re Dunkle, Id. 4,160.]

This was a proceeding in involuntary bankruptcy. The petition was filed by the firm of Garrett, Clark & Co., against the firm of Henry E. Dibblee & Co., of the city of New York, and alleged four acts of bankruptcy: (1.) That, on or about the 25th of February, 1869, the debtors, being insolvent and in contemplation of insolvency, gave to A. Iselin & Co. a warrant to confess judgment, and did procure and suffer their property to be taken on legal process, in favor of A. Iselin & Co., and that, on April 30th, 1869, said judgment was entered in the supreme court of the state, for $54,105, and execution was issued on it, and the debtors' goods levied upon, and that this was done with intent to give a preference to Iselin & Co., and to defeat and delay the operation of the bankruptcy act. (2.) That the debtors, being insolvent and in contemplation of insolvency, made a payment of money to Iselin & Co., with intent to give them a preference as creditors. (3.) That, on the 1st of May, 1869, the debtors, being insolvent and in contemplation of insolvency, made a transfer to Iselin & Co. of property amounting to about $46,000, with intent to give them a preference as creditors, and with intent to defeat and delay the operation of the act. (4.) That, in April, 1869, the debtors, being insolvent and in contemplation of insolvency, made a payment of $4,000, in money and bills receivable, to the wife of John J. Krauss, with intent to give a preference to her.

The bankrupts took issue on the petition, and the case was tried before a jury. On the trial the following facts appeared: The defendants gave the confession of judgment on the 25th of February. It was at that time delivered to Mr. Iselin. He kept it in his possession, or under his control, until the 30th of April. He then took it to the proper officer, and a judgment was entered up upon it for $54,105, and an execution was immediately issued on the judgment, to the sheriff of the city and county of New York. On the same day, the sheriff went to the store of Dibblee & Co. with the process, and made a levy on their goods, and took possession of such goods, to hold them, to be administered by the state court and applied upon the judgment. The sheriff remained in possession of the property during the remainder of that day—the 30th day of April—and all through the next day, which was the 1st of May, until about ten o'clock in the evening of the latter day, when a transfer of $46,000 worth of accounts, bills receivable, and other securities, was made by the three debtors, to Iselin & Co., in absolute payment and extinguishment of their debt. With the extinguishment and payment of the debt, the judgment and execution fell to the ground, the transfer of securities having been accepted by Iselin & Co. as a payment of the debt.

The facts in regard to the Krauss matter were as follows: On the morning of the 30th of April, before the sheriff came with the execution, Mr. Dibblee paid to Mr. Krauss, for Mrs. Krauss, $2,000 in money, on a debt of $4,000 due to her. During the next day, the 1st of May, while the sheriff was in possession under the execution, and before the making of the transfer of securities to Iselin & Co. on the evening of the 1st of May, Dibblee

handed over to Mr. Krauss $2,000 worth of securities, to pay up the balance of the debt of $4,000 due to Mrs. Krauss.

C. H. Smith, for petitioning creditors.
A. R. Dyett, for bankrupts.

BLATCHFORD, District Judge, charged the jury as follows:

This case, gentlemen, is one involving principles of very great importance under the bankruptcy act. The general features of that law, and the object which congress had in view in enacting it, are undoubtedly very well understood by you, as business men, engaged in the daily avocations of life. The counsel for the petitioning creditors, in summing up, has stated very aptly and clearly the objects which the bankruptcy law contemplates, and intends to carry out, in destroying the system that had previously obtained, by which failing debtors were enabled to prefer whom they pleased as their creditors, such preferences taking different forms—in some cases, chattel mortgages; in other cases, judgments; in others, the turning over of securities; and the numerous other forms in which creditors could be preferred by insolvent debtors. To such debtors the bankruptcy law says, in explicit language—"You must not make these preferences, but you must give all your property up to be distributed equally among your creditors."

In this case there are, in the petition, four different acts of bankruptcy charged. The first one is, that, on the 25th of February, 1869, the three debtors, Dibblee, Bingley and Krauss, composing the firm of H. E. Dibblee & Co., being insolvent, gave to Iselin & Co. a warrant to confess judgment, and procured and suffered their property to be taken on legal process. Although the petition is so drawn as to state the fact that, on the 25th of February, the debtors, being insolvent, gave to Iselin & Co. a warrant to confess judgment, and suffered their property to be taken on legal process, the evidence is, that no property was taken on legal process until the 30th of April. But the same allegation of bankruptcy goes on to state, that, on the 30th of April, 1869, said judgment was entered in the supreme court of the state of New York, and a judgment roll was filed for $54,105, and execution was issued thereon against the property, &c. It appears, therefore, that the statement in regard to suffering the property to be taken on the 25th of February, is a clerical error, the substance of the averment being, that the debtors gave a confession of judgment on the 25th of February, when insolvent, and, on the 30th of April, when also insolvent, suffered the property to be taken under an execution issued on that judgment.

Now, so far as the giving of the warrant on the 25th of February is concerned, there is no evidence in the case upon which you could safely base any verdict that, at that time, the debtors were insolvent, or contemplated insolvency; and the case has not been tried upon that idea. The transactions of the 30th of April, and of the 1st of May, are the transactions to which your attention is to be directed. For aught that appears, notwithstanding a confession was given on the 25th of February, there was no insolvency at that time, and no contemplation of insolvency; because, the giving, as security, of a warrant to confess judgment, on which the creditor might enter a judgment at any time, by no means, of itself, raises any presumption of insolvency.

To come, then, to the transactions of the 30th of April and the 1st of May, the averment is, that, on the 30th of April, these three debtors, being insolvent, or in contemplation of insolvency, suffered their property to be taken on this execution, with intent thereby to give a preference to the Iselins, and with intent, by such disposition of their property, to defeat and delay the operation of the act. On that subject the act is very explicit. The question you are to try is solely, whether Dibblee, Bingley and Krauss shall be adjudged bankrupts, by reason of any acts which they committed or suffered. You are not now, in any manner, trying the question whether Iselin & Co. shall be compelled to refund what they received, or whether Mrs. Krauss shall be compelled to refund the money and securities which she received. These questions are not at all involved here. If these debtors shall be declared bankrupt, and an assignee shall be appointed, and he shall bring an action against Iselin & Co. and an action against Mrs. Krauss, nothing that has transpired here—neither your verdict nor the adjudication of the court, if your verdict should be in favor of the creditors—will in any manner whatever determine or affect any question that will be involved in any such suit. Nor will your verdict in any manner affect the debtors on the question of their discharge in bankruptcy. If they shall be put into bankruptcy, and shall hereafter apply to be discharged, and no one of their creditors shall choose to oppose them, and they shall take the oaths which the law requires, they will be discharged, notwithstanding they may be adjudged bankrupts in this proceeding. Therefore, the case is stripped of all questions as to the discharge of the bankrupts hereafter, and of all questions as to the right of Iselin & Co. and of Mrs. Krauss to hold what they received.

In regard to Iselin & Co., I state this further proposition, that, to put a debtor into bankruptcy, for such causes as are alleged as the first ground of bankruptcy in the petition in this case, it is only necessary that the intent spoken of should have existed on the part of the bankrupt. If Iselin & Co. had, at the time they took a preference, if they did take one, no reasonable ground to believe that the debtors were insolvent, they cannot be compelled to pay back what they

received, notwithstanding the debtors were, in fact, insolvent, and notwithstanding the debtors knew they were insolvent, and notwithstanding the debtors intended to prefer Iselin & Co. Therefore, the sole question is, whether these debtors shall be adjudged bankrupt, so that their estate shall be administered by this court, in bankruptcy, and nothing is involved in regard to the title of Iselin & Co. or of Mrs. Krauss to what they received, or in regard to the right of the debtors to receive their discharges hereafter from the court. I say this for the purpose of disabusing your minds of any impression they may have received from the remarks made by counsel.

The statute provides, that if any debtor, being insolvent, or in contemplation of insolvency, makes any conveyance or transfer of property, or money, or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with intent, by such disposition of his property, to defeat or delay the operation of the act, he commits an act of bankruptcy, for which this court may take his property and treat him as a bankrupt. In this, there are, as you perceive, several ingredients. In the first place, the debtor must either be insolvent, or contemplate insolvency. In the second place, he must make a conveyance or transfer of money or property, or he must suffer his property to be taken on legal process. In the third place, he must do this with the intent, on his own part, to give a preference to the creditor, or with the intent, on his own part, to defeat or delay the operation of the act.

The first question for your consideration, gentlemen, is, whether, at the time this property was taken by the sheriff on legal process, on the 30th of April, Dibblee and his firm were insolvent or contemplated insolvency. So far as concerns the financial transactions of the firm, Dibblee appears to have been the firm, and I shall treat him as the firm for the purposes of this case, because the other debtors appear to have been merely salesmen. Now, at the time the sheriff came with his process, on the 30th of April, to take this property, the firm owed Iselin & Co. this debt. It was past due. Iselin & Co. appear to have had a right to enter judgment, and this debt appears to have been legally due at any time after the 25th of February, although there may have been some understanding that judgment should be withheld for thirty days. At all events, the debt had been overdue for more than thirty days at the time the sheriff arrived. So far as appears, it was the only debt then due. But, one overdue debt is sufficient to put a party in the condition of owing a debt which he is unable to pay. If, at the time the sheriff appeared with the execution, to levy on the stock of goods, the firm owed this debt to Iselin & Co., and were unable to pay it in the ordinary course of their business, they were then insolvent, in the language of the bankruptcy act, and within its meaning. No matter how many other debts there were, not yet due, if they were unable to pay that debt, in the ordinary course of their business, they were insolvent. The "ordinary course of their business" does not mean an ability to turn out goods, or bills receivable, or assets or securities, to pay that one particular debt, at the same time leaving other debts, which are certain to become due, unprovided for, and not leaving sufficient assets in the hands of the debtors to meet them when they become due. It is not in the ordinary course of business for a party who has a store of goods and other securities, and owes a matured debt, to turn out a large portion of those goods, or to take the most valuable of his securities, and turn them over to the creditor, to extinguish that debt, if sufficient assets do not remain to pay the rest of his debts, in the ordinary course of his business. That is an extraordinary course of business, and not the ordinary course of business. Therefore, if, when the sheriff appeared to levy on this stock of goods, the firm was not able to pay this debt to Iselin & Co., in the ordinary course of business, it was insolvent. If, at that time, Dibblee, in his own mind, from a view of the state of things which surrounded him, contemplated that his firm would not be, and continue to be, thenceforth, able to pay their debts, as such debts should mature, in the ordinary course of their business, then he contemplated insolvency; and, if he contemplated insolvency, that puts the case in precisely the same predicament as though he had been insolvent, because, the language is, "being insolvent or in contemplation of insolvency." A debtor has no more right to do the forbidden act when he contemplates that, in view of the existing aspect of affairs, he will not be able to pay his debts, in the ordinary course of his business, than if he were actually at the time insolvent. If he contemplates insolvency, it is of the same force and effect as if he were actually insolvent, by reason of his not being able to pay a debt past due at the time.

If you shall find that, at the time the sheriff appeared, Dibblee, or his firm, were insolvent, or contemplated insolvency, you will then pass to the second question. If you find that he and his firm were not insolvent, and did not contemplate insolvency, that disposes of this branch of the case. But, if you find that he or they were insolvent, or contemplated insolvency, then you will inquire—Did they suffer their property to be taken on legal process at that time?

The act provides, that, if the debtor shall, under the circumstances stated, "procure or suffer his property to be taken on legal process," he shall be adjudged a bankrupt. The word "procure" and the word "suffer" have different meanings. The former is active, and the latter is passive. A man may suffer a thing to be done, when he has the means

of doing something other than suffering it to be done, without procuring it to be done. In this case, the debtors knew that the warrant to confess judgment had been given on the 25th of February. They knew that the debt to Iselin & Co. had been past due for at least thirty days. They knew that Iselin & Co. could at any moment enter up judgment on the warrant. And, if Mr. Dibblee, at the time the sheriff came there, or any time prior thereto, was insolvent, or contemplated insolvency, he was in a condition in which the bankruptcy law required him to take proceedings for coming into the bankruptcy court, and submitting his property voluntarily to the administration of the bankruptcy law; because, in order to enable a person to come voluntarily into the bankruptcy court, it is only necessary that he should present a petition stating the necessary jurisdictional facts, and averring that he is unable to pay all his debts in full. If, therefore, Dibblee, at the time the sheriff came there, or at any time previously, knowing of this debt to Iselin & Co., and that it was past due, and being insolvent, or contemplating insolvency, refrained from going into bankruptcy voluntarily, then, in judgment of law, he suffered his property to be taken on legal process; because, if, prior to the entry of that judgment and the issuing of an execution thereon, he had gone voluntarily into bankruptcy, the bankruptcy court would have taken the property, and the judgment and execution would have had no force or effect to take it. Therefore, in judgment of law, if he omitted to go into bankruptcy, under such circumstances, he suffered his property to be taken on legal process. Unless this construction be given, there is no more meaning to the word "suffer" than to the word "procure." All the words of a statute must be construed in such manner as to give them force and effect.

If you shall find that Dibblee contemplated insolvency, and suffered his property to be taken on legal process, you will then consider the question, whether he did so with intent to give a preference to Iselin & Co., or with intent to defeat or delay the operation of the bankruptcy act. This intent must be an intent on the part of Dibblee; and, unless Dibblee, at the time, knew that he was insolvent, or contemplated insolvency, he could have no intent to give a preference to one creditor over another. If a person, while paying one creditor, honestly supposes that he is able to pay every creditor, there can be no intent to give a preference. Therefore, if Dibblee did not, at the time, believe he was insolvent, and did not contemplate insolvency, he could have had no intent to give any preference. But, if he was insolvent, or contemplated insolvency, and suffered his property to be taken in this way, then, if the taking of the property by the sheriff had the necessary effect to give to Iselin & Co. a preference which they otherwise would not have had, Dibblee, in judgment of law, intended to give the preference which the taking of the property conferred and effected; and the burden is thrown on him, Dibblee, to show that he had no such intent, and to make that out to your satisfaction. In law, every one is supposed to intend the natural consequences of an act committed by him.

It is of no consequence that an arrangement was made, originally, to give to Iselin & Co. this preference. The paper signed and given on the 25th of February did not give a preference. It would have amounted to nothing if the judgment had never been entered and the execution had never been issued. The preference was given by the issuing of the execution, followed by the levy, so far as the goods were concerned. Therefore, you have nothing to do with the fact that there was an arrangement made originally, when the money was loaned by Iselin & Co., that they should have this species of security.

On the question of intent, there is the further alternative point, whether there was an intent to defeat or delay the operation of the act. Very little has been said on that subject, and I think it hardly worth while to call your attention to it, because the whole case turns upon the other branch.

So far, in respect to the Iselin matter, your attention has been directed to the levy by the sheriff. But the Iselin matter has another phase, namely, the transaction on the evening of the 1st of May, in regard to the bill of sale, which transferred securities to Iselin & Co. in payment of their debt. That is a separate and independent transaction, and is made a separate ground, in the petition, for asking to have Dibblee & Co. adjudged bankrupts. All the debtors joined in making the bill of sale. In respect to the confession of judgment, Dibblee appears to have signed it with his individual name, and also with the firm name. The other partners did not sign it, and appear to have known nothing about it; and I am asked to charge that on that ground it is illegal and void. I do not conceive that this court has anything to do with that question. If the state court has permitted the judgment to be entered up against all three of the debtors, and the execution to be issued, I must presume that this was done in the legal and proper way. This court must treat the record of the state court as being in due form; and, therefore, although the other partners appear to have had nothing to do with giving the confession of judgment, I must treat the judgment and execution as not being impaired by reason of any defect of that kind.

I now recur to the third alleged act of bankruptcy. It is, that the debtors, on the 1st of May, being insolvent, or in contemplation of insolvency, made to Iselin & Co. a conveyance or transfer of a large number of bills receivable and accounts belonging to the firm, to the value of $46,000, with intent

to give a preference to Iselin & Co., and to delay and defeat the operation of the act. The same elements of insolvency, or contemplated insolvency, enter into this branch of the case, as into the first, and the same remarks are applicable. It is urged, on the part of Dibblee, that, because of the prior levy, no preference was given to Iselin & Co. by this transfer. But, although the levy of the sheriff on the property was in force from the time it was made, on the 30th of April, until the bill of sale was given, and although Iselin & Co. thus had whatever security such levy gave to them, still, if, in your judgment, upon the evidence, the transaction of turning over these securities, by a bill of sale, to Iselin & Co., had the effect of putting them, as creditors, into any better position in respect to their debt than that which they occupied by virtue of the levy on the stock of goods, then it gave to them a preference which the law forbids. If it did not have that effect, then it gave them no preference.

If you shall find that there was such a preference given by the bill of sale, the next question will be, whether Dibblee, at that time, had the intent to put Iselin & Co. in a better position, by the bill of sale, and thus to give them a preference. Now, all the remarks on the law as to insolvency, or contemplation of insolvency, which I made to you in regard to the state of things which existed when the levy was made by the sheriff, are applicable to this branch of the case. But, in applying the law to the facts of the case, you will bear in mind that, between the time the sheriff came and the giving of the bill of sale, there was a material change in the condition of the firm, which has been stated to you very clearly by Dibblee himself, in his testimony. He states that Iselin's levy destroyed their credit; and that, after that, they could not have gone on; that, when the execution was levied, if they could have gone on in business, he thinks they could have paid their debts in full; but that the levy destroyed their credit, and they could not go on. Therefore, the fact of the sheriff's levy, and that he had taken possession of the store, the necessary publicity, and the consequences which followed it, none of which existed at the instant before the sheriff came there, and all of which existed on the evening of the 1st of May, when the transfer was made by bill of sale, must be taken into consideration by you in determining whether, (if you find that the transfer had the effect of putting Iselin & Co. in a better condition than they were in by reason of their levy,) when the bill of sale was given on the evening of the 1st of May, the firm were insolvent, or contemplated insolvency. Did they, at 10 o'clock on the evening of the 1st of May, the sheriff being then in possession of their goods under a levy, and the matter having become public, believed that they were able to pay the debt of Iselin & Co., in the ordinary course of business, or believe that, if they continued on, in that state of things, they would be able, in the ordinary course of business, to pay their debts in future, as they should become due, in the ordinary course of business?

This disposes, as I understand it, of all the questions connected with the Iselin matter, which have been called to my attention by the counsel for the respective parties.

The fourth act of bankruptcy alleged is the Krauss matter, which has two phases—the payment of the $2,000 in money, on the 30th of April, and the transfer on the following day, while the sheriff was there, of the $2,000 in bills receivable. The fact that the debt, as between Mrs. Krauss and the firm, was a fiduciary debt, is of no consequence in this case. For the purposes of this case, it was nothing more than an ordinary debt. It stood in no better condition, and the firm had no more right to pay it, than any other debt. Nor does it make any difference that Mrs. Krauss asked for it, and pressed for payment of it. This doctrine has no place under the present bankruptcy act. That act recognizes no distinction between the giving of a preference when a creditor asks for it, and the giving of a preference when the creditor does not ask for it, provided the intent exists on the part of the debtor, in giving the preference, that the particular creditor shall have the preference. If, therefore, you shall find that this firm, being insolvent, or contemplating insolvency, paid $2,000 to Mrs. Krauss, on the 30th of April, with intent to prefer her over other creditors, or, on the next day, handed over to her $2,000 worth of securities with that intent, they committed an act of bankruptcy.

If you shall find in favor of the petitioning creditors on any one of the questions which I have submitted to you, they will be entitled to your verdict. It does not require that you should find for them on all those questions; but, if you shall find that any one of the alleged acts of bankruptcy is established to your satisfaction, your verdict will be for the creditors.

The petitioning creditors having withdrawn the second and third acts of bankruptcy alleged in the petition, the jury rendered a verdict in favor of the creditors as to the first and fourth acts of bankruptcy alleged in the petition.

[NOTE. For further proceedings in this case, see Cases Nos. 3,885–3,887. In a suit subsequently brought by the assignee in bankruptcy, the transfers to Iselin & Co. were declared void by the district court, and its decree was, in the main, affirmed by the circuit court on appeal. See Clark v. Iselin, Cases Nos. 2,824 and 2,825. On appeal to the supreme court, however, these decrees were reversed, and the transfers sustained as valid. Clark v. Iselin, 21 Wall. (88 U. S.) 360.]

Case No. 3,885.

In re DIBBLEE et al.

[3 Ben. 354;[1] 3 N. B. R. 72 (Quarto, 17).]

District Court, S. D. New York. Aug. 6, 1869.

BANKRUPTCY—COMPOUNDING DOUBTFUL DEBTS.

The bankruptcy act [of 1867 (14 Stat. 517)] does not authorize the court to empower an assignee in bankruptcy to compound all doubtful debts, with the consent and approbation of a committee of creditors.

[In bankruptcy. In the matter of H. E. Dibblee and others. See Case No. 3,884.]

[By I. T. Williams, Register:] I, the undersigned, one of the registers in bankruptcy, do hereby certify to this honorable court that at the first meeting of creditors in the above entitled case, it was represented by Mr. Charles H. Smith, of counsel for a large number of the creditors, that there were very many small debts due the bankrupts, which were of doubtful collectibility, and that the interest of the creditors would in all probability require that many of them should be compounded and compromised. That as the trouble, delay, and expense, applying to the court to obtain leave so to compound or compromise, would be considerable, he moved the following resolution: "That this court be requested to make an order that the assignee in this case be authorized and empowered to compromise any and all doubtful debts due to said bankrupts, by and with the consent and approbation of Effingham Townsend, William Lattimer, and Reese M. Obesteuffer, as a committee of creditors." This resolution was voted for by all the creditors present save two. Whereupon, I do hereby certify the same to this honorable court for its action in the premises. I also submit an affidavit made by the assignee. Under the requirements of the 19th rule of this honorable court, I respectfully submit, that as no provision is made in the act for such an order as is hereby asked for, I beg to call the attention of the court to the provisions of section 43, which contemplates a practice similar to the one here sought to be inaugurated. No proceedings have yet been had under this section before now; parties have been embarrassed by the omission in the form No. 63 of the words "or as the assignee in bankruptcy would have done had not this resolution been passed," which are contained in the section, although it is clearly an inadvertence; and as the words of the act must govern, the omission does not seem as of much importance. Still, some have feared that proceedings thereunder might be questioned. Objections of this character have, I think, deterred parties from availing themselves of the provision of this section, and thus appointing a trustee who (acting under a committee of creditors) might compromise and compound debts due to the bankrupt, without the expense and trouble of a special application to the court.

BLATCHFORD, District Judge. I do not think that the order asked for is warranted by the provisions of section 43, or of any other section of the act, or of general order No. 17.

[NOTE. For further proceedings in this case, see Cases Nos. 3,886 and 3,887.]

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

Case No. 3,886.

In re DIBBLEE et al.

[4 Ben. 137;[1] 3 N. B. R. 754 (Quarto, 185).]

District Court, S. D. New York. May 4, 1870.

BANKRUPTCY—COUNSEL FEES OF PETITIONING CREDITOR.

A claim by petitioning creditors in involuntary bankruptcy, for counsel fees incurred by them, in the proceedings before adjudication, cannot be entertained by the register in the first instance, but must be presented to the court, on petition.

[In bankruptcy. In the matter of Henry E. Dibblee, John J. Krauss, and David P. Bingley. See Cases Nos. 3,884 and 3,885.

[By I. T. Williams, Register:] I, the undersigned, one of the registers in bankruptcy, do hereby certify to this honorable court, that James R. Clark, Jr., through his counsel, Charles H. Smith, Esq., presents a claim of his firm of Garrett, Clark & Co., against the estate of the bankrupts, for sums of money paid or incurred by them for services of counsel in proceedings had by them as petitioning creditors of the said bankrupts before the adjudication; and asks me to specify such sum as upon the final auditing and passing of his accounts, as assignee, may be allowed therefor, and make an order of distribution for the payment of the same—according to the custom and practice in cases of distribution by him in the ordinary discharge of his duties as assignee. He cites a decision of the circuit court in the Case of the New York Mail Steamship Company—a manuscript copy of which, furnished me by Mr. Smith, I annex hereto. [Case No. 12,208.] It appears from the decision, that the claim is one that the law recognizes, and which is an equitable lien upon the estate or funds in the hands of the assignee—and if so, it would seem right that the assignee should pay it, or such sum as may be just and reasonable, from such funds. The question, however, that presents itself is, whether this claim is not one strictly within the equity jurisdiction of this court, to be passed upon in each case by the court, and then sent down to the register to ascertain what would be a reasonable sum, and order distribution accordingly. I think this court has favored a practice in harmony with the suggestion, and that the practice of filing a pe-

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tition, on the part of the creditors, and obtaining an order of reference, has, in similar cases, prevailed. I am more reluctant to act in this case without a special order, as the petitioning creditor and the assignee are the same person. In such case, it is, no doubt, the duty of the register to act with caution, and perhaps not without notice to other creditors. All of which is respectfully submited.

BLATCHFORD, District Judge. The register cannot entertain the application in the first instance. There must be a petition to the court, by the party, setting out the facts, and asking the relief desired.

[NOTE. For further proceedings in this case, see Case No. 3,887.]

Case No. 3,887.

In re DIBBLEE et al.

[4 Ben. 304.][1]

District Court, S. D. New York. Sept., 1870.

EXPENSES OF DISCHARGE—INVOLUNTARY BANKRUPT.

Where one member of a firm of involuntary bankrupts, having applied for a discharge, petitioned for the payment by the assignee of disbursements made by him in the proceedings to obtain such discharge, under the 47th section of the bankruptcy act [of 1867 (14 Stat. 540)]: *Held*, that the act makes no distinction between a voluntary and an involuntary bankrupt, as to the right to be discharged, and that the claim should be paid.

[In bankruptcy. In the matter of Henry E. Dibblee, John J. Krauss, and David P. Bingley. For previous proceedings, see Cases Nos. 3,884–3,886.]

This was a petition to the register, in behalf of John J. Krauss, one of the bankrupts, praying that the sum of $36.66, paid by, and on behalf of said Krauss. in the proceedings incident to his discharge, might be allowed, and paid out of the funds of the estate of the bankrupts, in the hands of the assignee. On the petition the register granted an order, that the assignee show cause why the amount should not be so paid by him. On the day appointed, the assignee appeared by counsel and objected to the payment thereof, on the ground that the petitioner was an involuntary bankrupt, and, therefore, not entitled to have the disbursements incident to his proceedings for a discharge paid out of the fund. The register certified the matter to the court. stating, that, as the entire claim was for sums disbursed by the bankrupt, (one of a firm,) which were all within the provisions of the 47th section, he saw no reason for excluding it from the operation of that section, especially as the act makes no distinction between a voluntary and an involuntary bankrupt, as to his right to be discharged.

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Simeon E. Church, for bankrupt.
Charles H. Smith, for assignee.

BLATCHFORD, District Judge. The register is correct in his view.

Case No. 3,888.

DIBBLEE et al. v. FURNISS et al.

[4 Blatchf. 262.][1]

Circuit Court, S. D. New York. Jan. 11, 1859.

FEDERAL COURTS—FOLLOWING STATE LAWS—PARTIES AS WITNESSES.

Under the 34th section of the judiciary act of September 24, 1789 (1 Stat. 92), which provides, that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," the law of a state allowing a party to a suit to be examined as a witness on his own behalf, is a rule of decision to guide the judgment, and not a rule of practice, and must be adopted as a rule in this court.

[Cited in Gravelle v. Minneapolis & St. L. Ry. Co., 16 Fed. 436.]

In this case, which was an action at common law, on the trial before INGERSOLL, District Judge, and a jury, one of the defendants was offered as a witness for the defendants [James E. Furniss and others]. An objection was made, on the part of the plaintiffs [Henry E. Dibblee and others], to the admissibility of the testimony.

William M. Evarts, for plaintiffs.
Charles O'Conor, for defendants.

INGERSOLL, District Judge, referring to the case of Wayman v. Southard, 10 Wheat. [23 U. S.] 1, 24, said that, under the 34th section of the judiciary act of September 24, 1789 (1 Stat. 92), which provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," he should hold that state laws prescribing rules of practice could not be regarded in this court, but that the law of New York allowing parties to be examined as witnesses in their own behalf, on ten days' notice of the points on which they were to give testimony, must be considered to be a rule of decision to guide the judgment, and not a rule of practice, and must, therefore, be adopted as a rule in this court. He said that he had made a like decision in the circuit court of the United States for the Connecticut district, in reference to a statute of Connecticut, which was, in substance, the same as the statute of New York, except that no notice of the examination of a party to a suit was required to be given, and that such decision

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

had been concurred in by Mr. Justice Nelson. He, therefore, allowed the witness to be examined on behalf of the defendants.

Case No. 3,889.

DIBBLEE v. SHELDON.

[10 Blatchf. 178.][1]

Circuit Court, D. Connecticut. Sept. 24, 1872.

SALE—FALSE REPRESENTATIONS—AFFIRMANCE BY ACTION FOR PRICE.

Where a vendee purchases goods by means of such fraudulent representations as entitle the vendor to disaffirm the sale and reclaim the goods as his own property, and the vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the price, that is, as matter of law, an affirmance of the sale, and the vendor cannot thereafter set up title, and claim the goods, on the ground of the original fraud.

[In error to the district court of the United States for the district of Connecticut.

[Action by William Dibblee against Gad Sheldon.]

Charles E. Perkins, for plaintiff in error.
Hubbard & Hyde, for defendant in error.

WOODRUFF, Circuit Judge. The single question raised by the bill of exceptions in this case is this: Where a vendee purchases goods by the means of such fraudulent representations as entitle the vendor to disaffirm the sale and reclaim the goods as his own property, and such vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the price, is that, as matter of law, an affirmance of the sale, or may he thereafter set up title, and claim the goods, on the ground of the original fraud? On the trial, the bringing of such suit was held an affirmance of the original sale, and the judge declined to submit to the jury to determine the intent of the vendor therein, or its effect or operation on the rights of the parties.

The defendant in error, who was the plaintiff in the district court, is the assignee in bankruptcy of A. F. & S. E. Loomis. That firm had purchased certain tobacco from one Mitchelson, by what, for the purposes of the case in error, must be assumed to have been fraudulent representations. The defendant gave evidence tending to prove, that, upon the discovery of the fraud, and on the 25th of November, 1869, Mitchelson went to the tobacco house of the purchasers, to try to get back his property, and there found the tobacco. He there saw John D. Loomis, to whom he had been informed the vendees had made a pretended sale of the tobacco, and who had taken possession thereof, and claimed it as his own. He informed the said John D. that he wanted to get his tobacco back, and offered to give him $100 if he would give it up to him. John D. refused, and Mitchelson "tried all he could to induce him to give it up, without success." He then enquired of him concerning the time when he purchased the tobacco. He then employed a brother, Winthrop Loomis, to use his influence with John to induce him to give up the tobacco, but John refused. Afterwards, on the 29th of the same month, he consulted counsel, and thereupon commenced an action of assumpsit, in the state court, against the original vendees of the tobacco, the declaration wherein contained the common money counts and counts for goods, wares and merchandise sold and delivered, &c., in form, to recover the price of the tobacco sold. In the writ issued in such suit, the sheriff was directed to attach the goods and chattels of the said A. F. & S. E. Loomis, and the counsel issuing the writ caused the tobacco in question to be attached, as the property of the defendants in the writ, the original vendees. The writ was made returnable, and was returned, to the then next December term of the court.

I do not feel called upon to discuss at length the question thus raised. It seems to me very plain, that the ruling of the judge, at the trial below, was correct. The original owner, after seeking, in vain, to obtain the possession of the tobacco, after finding that there was an adverse claim set up by an alleged or pretended purchaser from the fraudulent vendees, voluntarily affirmed the original contract of sale. He had full knowledge of all the facts. He was at liberty to disaffirm the sale, and, by an action of tort, to assume to contest the validity of John's title. He was equally at liberty to insist upon the contract of sale and claim payment from his vendees. With full knowledge of the fraud, he was as competent to affirm the sale, as he would have been to make the sale, had all the facts been known to him when the sale was made.

It is claimed, that the question of intent should have been submitted to the jury, and that they should have been permitted to say whether he intended, when he brought the suit, to waive his right to reclaim the property. But it is, upon undisputed facts, no more for them to decide what amounted to a voluntary affirmance of a sale, than whether an undisputed transaction amounted to an original transfer of title.

I do not think it material to the discussion to say, that it does not appear, by the bill of exceptions, that the action for the price is not still pending. There are no facts in evidence here which can prevent a recovery of judgment, in that suit, for the price, and it would be anomalous to hold here, that, nevertheless, the title to the property is in the plaintiff therein. That fact I do not deem material, because it is the fact, that the vendor elected his remedy, and acted affirmatively upon that election, that determines the point in issue, and not the ex-

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

tent to which he pushes his election; and I am not aware of any sufficient ground for saying that he is not concluded until he has recovered judgment. It is quite clear, that, upon the facts stated in the bill of exceptions, the vendees could not successfully claim to prevent a judgment on the ground that the vendor had rescinded the sale. If not, then the facts fail to show such a rescission, but show the contrary.

The judgment must be affirmed, with costs.

DIBRELL (BLACKWELL v.). See Case No. 1,475.

DICK (BEALL v.). See Case No. 1,162.

DICK (CLARK v.). See Case No. 2,818.

Case No. 3,890.

DICK v. HAMILTON et al.

[Deady, 322.][1]

Circuit Court, D. Oregon. Dec. 2, 1867.

EQUITY—ANSWER AS EVIDENCE—CONVEYANCE BY HUSBAND TO WIFE—SEPARATE PROPERTY—LIABILITY FOR HUSBAND'S DEBTS.

1. In equity, the general rule is that the separate answer of one defendant is not evidence to support the complainant's cause as against a co-defendant; and the exceptions to this rule appear to be limited to cases where the defendants stand in such relation to one another as to render their admissions out of court evidence against each other.

2. Where the wife purchased real property with money received from the sale of her property, but which had become the husband's by virtue of the marriage, and took a conveyance to herself: *Held*, that although this was in effect a voluntary conveyance from the husband to the wife, it was valid, if the husband was solvent at the time, and it was not made with intent to defraud subsequent creditors.

[Cited in U. S. v. Griswold, 8 Fed. 562.]

3. It is not to be presumed that a creditor of the husband's, trusted him upon the faith of property, which, although occupied by him in conjunction with his wife, appeared from the registry of deeds to have been at the time the property of the wife.

4. A subsequent creditor has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor.

5. A conveyance of real property to the wife by a third person in consideration of a release of a right of dower by the former in certain other property, is a conveyance upon a consideration moving from the wife, and valid as against the existing or subsequent creditors of the husband.

6. Where an insolvent husband lived with his family in the house of his wife, and during the time made repairs thereon, so as to keep it habitable: *Held*, that the property was not liable to the creditors of the husband for the value of such repairs.

7. At common law a married woman is incapable of contracting a personal obligation, and therefore a conveyance of real property to one in consideration of her promissory note for the purchase money, is in effect a gift to her.

8. Where real property is conveyed to the wife, to hold the same free from the control of her husband and for her own separate use, it becomes, by force of the terms of the conveyance, her separate property, and the husband as such has no right in or to it.

[Cited in U. S. v. Griswold, 8 Fed. 569.]

9. A conveyance to the wife, the husband being insolvent, in consideration of a promissory note signed by the husband and wife and secured by a mortgage on the separate property of the latter, ought, unless the contrary is shown, to be presumed to have been made upon the faith of such security.

This was a suit by a creditor of Alexander Hamilton and Thomas, his son, to subject certain real property situate in the city of Portland, and held by the wife of said Alexander, to the payment of his debts upon the ground that it had been acquired with his means and credit, and the conveyance taken to the wife with intent to defraud creditors. The defendant, Christina Hamilton, answered the bill, but said Alexander and Thomas did not, and as against them the bill was taken for confessed.

The court found the material facts of the case to be as follows:

I. That the defendants, Alexander Hamilton and Christina Hamilton, were intermarried in the year 1853, at Portland, Oregon, and that the relation of husband and wife has ever since subsisted between them.

II. That prior to the marriage of the defendants as aforesaid, Christina Hamilton inherited from her mother, a piece or parcel of real property situated in the state of Missouri, and that in July, 1857, she sold and conveyed the same to her brother, Asa Chandler, for the sum of one thousand dollars; and that she received from her said brother at the said time, the additional sum of two hundred dollars, in payment for the prior use and occupation, by said Chandler, of said real property.

III. That on February 13, 1858, in consideration of the sum of five hundred dollars, paid by Christina Hamilton, to Daniel H. Lownsdale, the latter conveyed to the former, the real property described in the complaint as block 250, to have and to hold the same to her and the heirs of herself by the defendant, Alexander Hamilton, forever.

IV. That the defendant, Christina Hamilton, since her marriage aforesaid, has not received from any source or person, other than her husband, any money or property, except the sum of $1,200 as aforesaid.

V. That during the spring of 1858, Alexander Hamilton purchased the real property described in the pleadings as blocks 251 and 252, and lots 3, 4, 5, and 6, in block 253, and that of the money expended in making such purchase he obtained $700 of his wife—the same being a part of the $1,200 paid her by her brother; and that during the summer of the same year, Alexander Hamilton had these blocks cleared, and a dwelling house built upon the lots in block 253, at a cost of about $1,900.

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

VI. That in the spring of 1858, Alexander Hamilton was solvent, and so continued until the spring of 1859, when from causes not foreseen or contemplated by him, he became insolvent and still remains so.

VII. That on January 14, 1862, blocks 251 and 252, and lots 3, 4, 5 and 6 aforesaid, were sold on execution to satisfy a decree of the circuit court of Multnomah county, foreclosing a mortgage thereon, executed by Alexander Hamilton to one William A. Abbott; and that said Abbott was the purchaser at such sale, and afterwards conveyed said property to Thomas Robertson.

VIII. That Christina Hamilton was not a party to the mortgage aforesaid, and, notwithstanding the sale and foreclosure aforesaid, had a contingent right to dower in the property conveyed to Robertson as aforesaid; and that afterwards, on August 9, 1864, in consideration of the release of such right of dower, in said blocks 251 and 252, by Christina Hamilton to Robertson, the latter and wife conveyed to the former, and to her heirs of her body by her then husband, lot 4 aforesaid, to have and to hold to her said heirs aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her husband.

IX. That on the day of August aforesaid, Robertson and wife, for the consideration of $700 paid by Moses H. Young, conveyed to said Young lots 3, 5 and 6 aforesaid; and this purchase and conveyance was made and received by said Young at the request of Christina Hamilton and upon the agreement between said Christina and Young, that the latter would sell and convey to the former said lots for a like consideration—to which effect said Young executed his bond to said Christina.

X. That on September 5, 1865, said Young and wife, in consideration of the promissory note of Christina Hamilton for the sum of $700, conveyed said lots 3, 5 and 6, to said Christina and her heirs of her body by her then husband, to have and to hold to her said heirs aforesaid, to her and their own separate use, benefit and behoof forever, free from all control of her husband.

XI. That the dwelling house aforesaid, is located in the greater part upon lot 4 of said lots, and has been occupied since its erection continuously by the defendant, Alexander Hamilton and his family, as a dwelling place.

XII. That the property aforesaid was a part of the donation claim of Nancy Lownsdale, deceased, the wife of Daniel H. Lownsdale aforesaid, and that in a suit by certain of the heirs of said Nancy, against Christina and Alexander Hamilton and others, for partition of said claim, the circuit court for the county of Multnomah, on August 12, 1865, among other things, adjudged and decreed that said heirs, for and on account of the inequality in quantity and value of the partition then made of the lands of their ancestress, should have and hold a lien upon block 250 for the sum of $1,423.91, and $103.37, costs and expenses of the suit, and upon lots 3, 4, 5 and 6 aforesaid, for the sum of $911.96.

XIII. That on September 16, 1865, Christina Hamilton borrowed $700 to pay the note aforesaid, given by her to Moses Young, and that with the money so borrowed she paid $550 on said note to Young, and that the remainder thereof is still unpaid; and that the $700 aforesaid was borrowed of James Catlin upon a promissory note signed by said Christina and Alexander Hamilton, and secured by a mortgage executed by each of them upon lots 3, 4, 5 and 6 in block 250 aforesaid, which note and mortgage still remain unpaid and in force.

XIV. That on February 16, 1866, Christina Hamilton borrowed of Frances Young, wife of Moses Young aforesaid, a sum sufficient to satisfy and discharge the lien aforesaid upon block 250, in favor of the heirs of the said Nancy Lownsdale; and that said sum was borrowed upon a promissory note, signed by said Christina and Alexander Hamilton, and secured by a mortgage executed by each of them upon block 250 aforesaid; and that said note and mortgage still remain unpaid and in force, except as to the sum of $109, which has been paid by Christina Hamilton; and that with the money so borrowed, said lien was then satisfied and discharged; and that the lien aforesaid, in favor of the heirs aforesaid, upon the said lots 3, 4, 5 and 6, still remains wholly unsatisfied and in force.

XV. That during the years 1858, 1859, 1860 and 1862, Alexander Hamilton expended in improvement upon block 250 the sum of $600, about $400 of which sum was expended prior to and during the spring of 1859; and that during the summer and fall of 1864, and after the conveyance thereof to Christina Hamilton, said Alexander expended upon lots 3, 4, 5 and 6 the sum of $277, as follows: $247 upon the dwelling-house aforesaid, situate thereon, and in fencing the same, $30.

XVI. That since the commencement of this suit, J. M. Starr, in pursuance of a judgment of this court, given in an action therefor against Alexander Hamilton, has recovered the possession of block 250 aforesaid, for the life of the said Alexander Hamilton.

XVII. That the complainant and James Vantine, on and before January 9, 1867, were doing business in San Francisco, California, under the firm name of James Vantine & Co.; and that said firm on said day of January recovered judgment in this court against the defendants, Alexander and Thomas Hamilton, for the sum of $2,306.44, and $63.52 costs and disbursements; and that on February 2, 1867, execution issued out of this court to enforce said judgment, which execution was duly returned wholly unsatisfied; and that said judgment was

given as aforesaid, in an action upon an account for goods, wares and merchandise purchased of said James Vantine & Co. by said Alexander and Thomas Hamilton, between September 4, 1863, and May 27, 1864; and that before the commencement of this suit said James Vantine was deceased, and the complainant, David Dick, was thereafter and now is the sole surviving partner of the firm aforesaid.

J. H. Page & W. W. Reed, for complainant.

W. Lair Hill, for defendant, Christina Hamilton.

DEADY, District Judge. The defendants, Alexander and Thomas Hamilton, have not answered, and as against them the complaint is taken for confessed. Counsel for the complainant maintained that the default of these defendants, and the consequent admission by them of the facts stated in the complaint, is to be taken as evidence against their co-defendant, Christina Hamilton. But, in my judgment, the rule of law is otherwise; and consequently, in arriving at the foregoing conclusions of fact, as between the complainant and Christina Hamilton, I have disregarded the default of these defendants. The admission of these defendants, arising from their failure to answer, cannot in any view of the question have a more favorable effect for the complainant than if such defendants had answered and affirmatively admitted the truth of the complaint. The general rule seems well established, that the separate answer of one defendant is not evidence to sustain the complainant's case against a co-defendant. The exceptions to this rule are not uniformly defined in the authorities. But the current of them appears to limit the exceptions to cases where defendants stand in such a relation to each other that the admission of each, if not under oath, would be evidence against the others, as in the case of several defendants standing in the relation of copartners, or as having a joint interest in the subject matter of litigation. Christie v. Bishop, 1 Barb. Ch. 105; Leeds v. Marine Ins. Co., 2 Wheat. [15 U. S.] 380; Chapin v. Coleman, 11 Pick. 331, 1 Greenl. Ev. § 178. It seems, also, that the exceptions include the case where one defendant succeeds to the rights of another, or claims through another, pending the litigation. Osborn v. Bank of the United States, 9 Wheat. [22 U. S.] 738; Cowen & Hill's Notes, 648. 650. This case does not come within any of these exceptions. Even admitting then (which is not clear) that the silence of these defendants is equivalent, as to their co-defendant, to an answer affirmatively admitting the truth of the facts stated in the complaint, still such admission is not evidence against Christina Hamilton.

The complainant alleges in his complaint that the various conveyances by which Christina Hamilton was invested with the legal title to block 250 and lots 3, 4, 5 and 6 in block 253, were in fact procured by the husband and upon his money and credit, for the purpose of defrauding his creditors. The answer of Christina Hamilton denies these allegations of the complaint. The legal effect of the transactions in question and the intent with which they were procured and done must be controlled and determined by the law arising upon the facts found. The $1,200 which the wife received from the sale and use of her land in Missouri, by operation of law, became the property of the husband, as soon as she received it. The provision in the state constitution (article 15, § 5) concerning the property of married women, does not apply, as the constitution did not go into force until February 14, 1859, nearly two years after the receipt of the money by the wife. This being the case, the purchase by the wife of block 250 with $500 of that money, was in contemplation of law a purchase by the husband for her benefit. The circumstances under which this money was obtained by the husband may disclose an adequate and proper motive for the conveyance to the wife, but they fail to show that the consideration in point of law moved from her. It is a post nuptial settlement—the consideration moving from the husband and the conveyance being made to the wife, and, as to the creditors of the former, is to be considered as a voluntary conveyance from the husband to the wife. Sexton v. Wheaton, 8 Wheat. [21 U. S.] 241. As between the latter, there are no circumstances shown upon which the law would imply that the wife took the legal estate in trust for the husband. Upon the facts proved, the conveyance must be considered as an absolute gift from the latter to the former. The husband being free from debt at the date of the conveyance, it must be sustained, unless made with intent to defraud subsequent creditors, like the complainant. 2 Kent, Comm. 173; Reade v. Levingston, 3 Johns. Ch. 481. The statute of frauds of this state in favor of creditors (Code Or. 656) is substantially a copy of St. 13 Eliz. c. 5. The English and American decisions made upon this statute, all hold that a voluntary conveyance to a wife or child by a husband or father, not indebted at the time, is valid as against subsequent creditors, unless it affirmatively appears that it was made with intent to defraud and deceive them. There is nothing in the facts of this case to warrant the conclusion that this conveyance was made with intent to deceive and defraud subsequent creditors, unless it be that the grantor subsequently became insolvent. In some of the English cases it has been held that subsequent insolvency of the grantor is sufficient to warrant the conclusion that the conveyance was made with a view to such insolvency, and therefore with intent to defraud and deceive. But in these cases the insolvency occurred soon after the execution of the deed—it appeared to have been contemplated

by the grantor at the time, and it is to be supposed, as was the custom then in England, that the conveyance was secret—not put upon record—and that therefore the subsequent creditors acting upon the unchanged and visible possession of the grantor, were misled and deceived into crediting him upon false appearances.

In this case it is shown that the grantor did not contemplate insolvency at the time of the conveyance to the wife, and that he did not even contemplate engaging in the mercantile partnership which caused his insolvency for nearly a year afterwards. A fair and reasonable motive is shown for the conveyance—the investment by the husband of a part of the money which he had received from his wife, for her benefit. In addition, the conveyance was put upon record within six days after its execution. This is an important fact, and in my judgment sufficient in itself to show that the same was not made to defraud and deceive subsequent creditors. In Sexton v. Wheaton, 8 Wheat. [21 U. S.] 251, the supreme court, in contrasting the circumstances of that case with those of Stephens v. Olive, 2 Brown, Ch. 90, say—"The reasons why they" (these circumstances) "should not be considered in this case as indicating fraud, were stronger than in England. In this District" (of Columbia), "every deed must be recorded in a place prescribed by law. All titles of land are placed upon the record. The person who trusts another upon the faith of his real property, knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in Jos. Wheaton. His creditors, therefore, never had a right to trust him on the faith of this house and lot." So in the case under consideration. The title to block 250 was never in the husband, and prior to the conveyance of it to the wife, the husband was never in the possession or control of it. Since February 19, 1858, the records of the county have shown that the title was in the wife. Under these circumstances it would be preposterous to presume that Vantine & Co. trusted the husband in 1863-4 upon the faith of this property, and there is as little reason for concluding that the husband procured the conveyance to be made and put upon record with the intent to defraud or deceive his subsequent creditors. If the husband had gone into the possession of the property, and kept the conveyance to his wife a secret, there might be good reason, in the absence of explanatory circumstances, for regarding the transaction as a fraudulent contrivance, intended to give him a fictitious credit with the world. But as it is, the means employed were inadequate to such an end, and it ought not to be presumed that they were intended to accomplish it.

In Sexton v. Wheaton, already quoted, the court, in speaking of a voluntary conveyance, says: "A man who makes such a conveyance, necessarily impairs his credit and, if openly done, warns those with whom he deals not to trust him too far; but this is not fraud." That case and this are very similar in all their important particulars. In some respects the objections to the validity of the conveyance were stronger than in this case. The court decided that the conveyance to the wife was not fraudulent as to subsequent creditors. The opinion of the court was delivered by Marshall, Ch. J., and in the course of it, he examines and construes all the leading English cases on the subject. It will be found to sustain the validity of this conveyance upon every point on which it is questioned. The complainant also seeks to charge this block 250, with the value of the improvements made upon it by the husband. The amount expended by the husband upon the property is $600. Two thirds of this sum was expended before the husband became insolvent, and all of it before he became indebted to Vantine & Co. Whatever might be the right of a creditor, who was such at the time the improvements were made, subsequent creditors can have no claim on the property on that account, unless it appears that this money was thus bestowed upon the wife, with intent to defraud and deceive such creditors. For the reasons already given when considering the validity of the conveyance of this property, there can be no presumption that this money was bestowed upon the wife with any such intention or end in view. It was done openly. The money was expended for improvements upon property, the title to which was on record as that of the wife's. There is as little reason for supposing or presuming that Vantine & Co. trusted the husband upon the faith of these improvements on block 250, as that they trusted him upon the faith of the property itself. At the date of the conveyance of block 250 to the wife, the effect of marriage upon the property of the wife was regulated and prescribed by the rules of the common law. The conveyance by its terms does not exclude the property from the marital rights of the husband. The husband then took an estate for his life in the premises. Starr v. Hamilton [Case No. 13,314]. The improvements placed upon the property were only temporary in their character, and primarily calculated to promote the use and enjoyment of the premises by the tenant for life. The ownership and possession of this life estate of the husband's, together with the use and enjoyment of these improvements, have, by virtue of a judgment of this court, already passed to a prior creditor of the husband's. The only interest of the wife in block 250, is the estate in remainder, after the determination of the particular estate for the life of the husband. In my judgment, this estate of the wife's, ought not, nor cannot, be charged with the value of these temporary improvements, even in favor of creditors

whose debts existed at the time they were made. But, however this may be, their value, as an incident of the husband's life estate in the land, has already been appropriated to the payment of his debts, and is therefore beyond the reach of the present creditor. This disposes of the case of complainant, so far as block 250 is concerned, except as to the interest therein, purchased from the Lownsdale heirs, which will hereafter be considered. As to the lots in block 253, the circumstances of the case are different. At the date of the conveyance of these to the wife, the husband was actually and notoriously insolvent, and Vantine & Co. were among his existing creditors. Although notwithstanding these circumstances, these conveyances may be valid, yet they are sufficient to excite suspicions of fraudulent contrivances, which will induce a court to scrutinize the motives and conduct of the parties closely and with more or less distrust. The purchase and conveyance of lot 4 will be first considered. This was not a conveyance from the husband to the wife, either directly or by procurement of the former. It was a purchase in point of fact by the wife. At common law a wife could purchase an estate in fee, even without her husband's consent (2 Kent, Comm. 150), and her power in this respect is not qualified by any statute of this state. The consideration for the conveyance moved directly from the wife, and the purchase in no way diminished the husband's resources or hindered or delayed his creditors in the recovery of their debts. The consideration was the release by the wife of her contingent interest—potential right to dower—in blocks 251 and 252, before then sold on execution against the husband. True, the husband joined in the instrument releasing this interest in these blocks, but that was rendered necessary by our statute.

I have examined this question with care, and am now satisfied, that the expressions upon this subject in the opinion in Starr v. Hamilton [supra], decided in this court, are erroneous. For the purpose of that case, the conclusion then reached — that the husband had no interest in the property—was correct; but the remark that the property was a gift from the husband, because the release of dower was a consideration moving from him, was undoubtedly a mistake. On the contrary, I am now satisfied that it must be held to be a valuable consideration moving directly from the wife. It was sufficient in law to support a conveyance of property equivalent in value, directly from the husband to the wife, even against existing creditors of the former. For still stronger reasons it is sufficient consideration to support a conveyance to the wife from a stranger. Bullard v. Briggs, 7 Pick. 533; Peirce v. Thompson, 17 Pick. 394; Needham v. Sanger, Id. 509; Cord, Mar. Wom. § 31 et seq.; 3 Kent, Comm. 147. According to the facts found this release of dower was the only consideration for the conveyance, and the evidence in the case does not furnish a particle of proof to the contrary. This right was in no way subject to the control of the husband, or liable for his debts. Bullard v. Briggs, supra, was a case of conveyance by the husband to the wife, in consideration of the latter's release of right to dower. The conveyance was attempted to be impeached by existing creditors. The court sustained the conveyance, and in conclusion said—"We are quite satisfied with this principle of law, and are glad to find that it rests on authority as well as reason; for under the restrictions mentioned, creditors cannot be injured; the husband's estate, to which they may look, not having been impaired substantially by such arrangements. Whenever it shall appear, that such settlements are but pretexts to secure a beneficial property to the husband, or wife or children, the law will lay bare the transaction and defeat the contrivance, however ingeniously it may have been devised." But this transaction, being a conveyance from a stranger to the wife for a valuable consideration, moving from the wife, in which the husband had no interest or right, there can be no possible ground for presuming or suspecting that it was a mere pretext or contrivance to secure a beneficial property to the husband or any one else, to the prejudice or hindrance of his creditors. In truth, as has been already remarked, the purchase in no way diminished the husband's estate or hindered or delayed his creditors in the recovery of their debts, and therefore it could not have been made with any such intention. The husband had no interest in the property conveyed or the consideration given for it, and his creditors might as well seek to subject the dower of the wife to the payment of his debts as lot 4. Indeed, a gift of this lot from the grantors—Robertson and wife—to Christina Hamilton, might as well be considered a contrivance to defraud the creditors of Alexander Hamilton, as the conveyance in question. The expenditure made by the husband in repairing the dwelling house on this lot, and in fencing it in conjunction with 3, 5 and 6, will now be considered. The complainant maintains that this expenditure was in fact a gift to the wife by the husband, with intent to defraud existing creditors. The matter transpired in 1864, and as the husband was then insolvent and indebted to Vantine & Co., the law presumes that a gift to the wife is fraudulent as against such creditors.

An insolvent husband ought not to be allowed to put his property beyond the reach of his creditors, by investing it in improvements upon his wife's estate. But it is the duty of the husband to maintain his family. When an insolvent husband lives with his family on the property of the wife, it seems just and reasonable that he should be allowed, notwithstanding his creditors, to keep the same habitable and in repair. Within reasonable limits, this ought to be regarded as a necessary and proper means of performing his ob-

ligations to support his wife and family. 15 B. Mon. 82. I admit that there is both temptation and opportunity here to practice fraud upon creditors, and that whenever it appears, or there is reasonable ground for presuming that expenditures have been made by the husband upon the wife's estate, beyond what is absolutely necessary and proper for the shelter and maintenance of the family, that the expenditure ought to be considered a gift to the wife in fraud of the rights of creditors. What will amount to such a gift and what will not, is difficult to determine beforehand. Each case must rest upon its peculiar circumstances. Under the most rigid rule, I do not think that this expenditure can be regarded in the light of a gift to the wife. Between the time of the purchase of this property by the wife and the commencement of this suit, more than two years had elapsed, during which time the husband and family lived in the house. The husband had no other house to shelter his family in. If he had rented one, however humble, the expense would have exceeded in amount this expenditure. Yet he could have paid such rent from his earnings or from any means within his control, and when paid, the money would have been beyond the reach of his creditors. During these two years the house was plastered at a cost of $220. Two hundred dollars of this amount was a stale debt due the husband from a third person, and $20 was paid in cash by the wife. This, I suppose, was her personal earnings—the testimony says that it was paid by her—but, of course, in law, it was the money of the husband. Twenty-seven dollars was expended in raising the house and putting blocks under it. The house was built by the husband in 1858, when the property was his, and appears to have been in an unfinished condition. These repairs and additions seem to have been necessary to make it tenantable and preserve it from decay. Thirty dollars was expended for material for fencing, and the fence was built by the husband. A creditor cannot compel his debtor to labor, although in certain cases he may reach the wages of the latter; but when no wages are earned—as where the labor is given gratuitously—the debtor acquires nothing and cannot be said to dispose of his property with intent to defraud his creditors. Though an insolvent husband cannot give property to his wife, he may give her his personal services, and her estate will not be made chargeable to his creditors. 11 Ala. 386. Under all the circumstances, I am satisfied that this expenditure should not be regarded as a gift to the wife, but as a legitimate expense incurred by the husband in pursuance of his duty and obligation to support his wife and family.

In considering the matter of these expenditures, I have not included the item for painting the house. The testimony does not state what the painting cost, but that it was done by the tenant of a small house on the premises for rent. As will appear hereafter, this being the separate property of the wife, the proceeds of it—the rents and profits—are also her separate estate. The payment for this work, then, whatever it amounted to, was made by the wife from her separate property, and not by the husband in fraud of his creditors.

The purchase of lots 4, 5 and 6 in block 253, will next be considered. The apparent motive for this transaction will be best shown by a brief statement of the particular circumstances which appear to have induced it. These lots and lot 4, formed the half of block 253, originally purchased by the husband in 1858, in conjunction with blocks 251 and 252, in part, with the $700 derived from the property of the wife. On January 14, 1862, all the property was sold on execution, to Abbott, to satisfy a debt of the husband's. The dwelling house on the half of block 253, had been erected by the husband before his failure, and occupied by the family as a home. The family were still on the premises, when the property, less the contingent interest of the wife, her inchoate right to dower, was sold on execution to Abbott. In August, 1864, the family still being on the premises, and Abbott having conveyed to Robertson, the wife and the latter commenced negotiations for her release of dower on blocks 251 and 252. Robertson offered to convey lot 4 for the desired release. The dwelling house or outbuildings being partly on some of the lots other than 4, and the whole constituting as it were the family home, the wife conceived the idea of purchasing lots 3, 5 and 6 also. Being then unable to pay for them, she arranged with Young to purchase these lots for her as stated in the finding of the facts. This arrangement being accomplished, the wife accepted Robertson's offer—released her right to dower in blocks 251 and 252—and received a conveyance to her own use of lot 4. At the same time Robertson conveyed lots 3, 5 and 6 to Young for the consideration received from the latter of $700.

The conveyance by Young and wife to Christina Hamilton of lots 4, 5 and 6 on September 5, 1865, to the exclusive use of the latter, was neither in form or law a conveyance from the husband, and therefore cannot be considered as made with intent to defraud or deceive his creditors. The husband had no interest in the property, nor did the consideration for the conveyance move from him directly or indirectly. The consideration was the promissory note of the wife. So far as this consideration is concerned, the conveyance amounts to a gift from Young to the wife, because the wife in law is incapable of binding herself personally, and therefore this promissory note was invalid and without value. Her disability during coverture prevails in this state as at common law. In the El Refugio Case [Case No. 4,421], recently decided in the United States circuit court for the district of California, before

Mr. Justice Field, this subject was examined at length. The conclusion of the court in that case was that: "Except in certain special cases, to which we will presently refer, a married woman is incapable of contracting a personal obligation. Her disability arising from her coverture, prevails in all its force in this state, as at common law. By no form of acknowledgment or mode of execution can this disability be overcome. Her signature will not impart validity to the contract; nor will her uniting in its execution with her husband render it more than his personal obligation." But $550 of the note was paid to Young on September 16, 1865. The facts show that this was done by means of money borrowed on the joint note of Hamilton and wife, secured by their joint mortgage on the half of block 250. Of course this note to Catlin, so far as the wife is concerned, is a nullity. The note is nothing more than the personal obligation of the husband. The husband being insolvent at the time, the transaction must be scrutinized closely, so as to prevent him from successfully using his wife as an agent to purchase property with his means or credit, to hold in fraud of his creditors. Credit, which is the life of a commercial community, can only be maintained by rigidly subjecting the property of the debtor to the payment of his debts. It cannot be supposed that Young intended to make a gift of this property to the wife, and although he took an invalid promise as a consideration for the conveyance, it must be presumed that it was the intention and expectation of the parties that it should be paid notwithstanding. The payment of $550 to Young, leaving out of sight the mortgage for the present, was made with money borrowed on the note of the husband. This must be treated as the money of the husband, and if so, the consideration of the conveyance from Young to the wife, moved from the husband. This being so, in contemplation of law, the conveyance was a voluntary one from the husband to the wife, and therefore void as against the complainant, an existing creditor. But this is not all. The purchase money obtained from Catlin was not borrowed on the personal obligation of the husband alone. The note was secured by a mortgage on the property of the husband and wife in the half of block 250. The wife, in conjunction with her husband, was authorized to execute the mortgage to secure the payment of the note, considered as the note of the husband alone. As the husband was then insolvent, and still remains so, the presumption is that the money was in fact obtained on the security of the mortgage. And, as it appears that the note is not yet paid, it may be safely assumed that the property will be ultimately subjected to sale for its payment. Now, if it shall result that the wife's property in the half of block 250 shall be subjected to the payment of the note to Catlin, then the purchase money paid to Young would move from her. This being so, the conveyance would not be in fraud of her husband's creditors, and would be valid. At the date of the mortgage the husband had only a life estate in block 250, and it appears that this has since been taken on execution and sold to satisfy other debts of his. If the lien of the judgment on which the sale took place is older than the mortgage to Catlin, the latter would only affect the estate in remainder of the wife, and then it would be certain that her property must be taken to satisfy the note. But which is the elder does not appear. But it does appear that there are judgments against the husband, given before 1861, and still unsatisfied, to the amount of $6,525, besides the accruing interest thereon. There is no direct proof of the present value of this life estate of the husband's, but from all the circumstances shown, concerning the location, condition, and first cost of the block, it is apparent that it is not near sufficient to pay the husband's debts, which are now a lien upon it, and were so prior to the execution of this mortgage. Upon this matter, of course, I speak as to probabilities, as the proof does not enable me to speak with certainty.

Under these circumstances, to assume that the consideration for the conveyance of lots 3, 5 and 6, came from the husband, and that therefore the conveyance is fraudulent as against creditors, might work great injustice to the wife, for the strong probability is that the note to Catlin will be paid out of her estate in block 250. Indeed it does not appear whether that estate is sufficient for that purpose, but it probably is. But if it should prove insufficient for that purpose, the wife is not personally liable, and the property which she pledged by the mortgage being exhausted, the remainder of the debt would hold good against the husband and upon his personal obligation. And then, in that event and to that extent, he must be deemed to have furnished the consideration of the conveyance to the wife from Young—that is, so much of the money would prove to have been borrowed upon his personal credit and obligation, and therefore a proportional interest in the property purchased would be subject to the claims of existing creditors. If, as a matter of fact, it was apparent upon the proof, that the purchase of lots 3, 5 and 6, and the loan of the purchase money from Catlin, were the act of the husband, and that the wife only acted in the premises as his security, it might be proper to treat her accordingly, and decree the sale of these lots at once, and after paying the wife $700 with interest, for which her property is pledged, to apply the remainder of the proceeds to the debt of the complainant. But the proof shows, whatever may have been the motives of the parties, that the purchase in the first instance was made by the wife, and that the subsequent loan of the purchase money was in fact obtained by her, and that the hus-

band joined in the note and mortgage thereof, because his concurrence in the act was deemed necessary by the party making the loan. True, these facts do not modify the legal effect of the transaction. In law, the note and mortgage is the act of the husband, while by the mortgage the wife only pledges her property as a security for the debt of the other. But I think these facts furnish substantial and controlling reasons why a court of equity should so deal with the subject, as to provide if possible that the wife may realize the benefit of her scheme to secure to herself the home of the family, and also to give her the benefit of the increase in value, if any, of the property, since the time of its purchase. If the sale of her estate in block 250 will do this, it may be so applied without injustice to any one, and much probable benefit to her. At least she should have the option. Besides it is evident that the wife had the same right to dower in these lots as in blocks 251 and 252. This right was not released to Robertson in the purchase of lot 4, and in the arrangement between the parties, which resulted in Young's purchasing these lots for her from the former, the value of this contingent interest of the wife's must have been taken into consideration. It is fair to presume that it was a part of the consideration. If these lots were now sold for the benefit of the husband's creditors, the sale would be subject to such right of dower, with which the wife has never parted. The payment of $1,500 in discharge of the lien upon block 250, must be considered as a purchase of the interest of the heirs of Nancy Lownsdale in the premises. The proceedings and decree in the partition suit are very cursorily stated in the complaint, but taking the allegations on that subject in connection with the law relating to the partition of real property, and it is apparent that these heirs were tenants in common with Christina Hamilton in block 250, and that the decree was based upon the fact that their interest in the premises was deemed to be worth $1,500, and that the property should be charged with the payment of that sum, instead of being divided in proportion of the respective interests of the tenants. What proportion the interests of the heirs bore to that of Christina Hamilton does not appear, and there is nothing in the pleadings or the proofs in this case by which that fact can be ascertained. This interest of these heirs in block 250 was purchased by money borrowed of Frances Young on February 16, 1866. The money was borrowed on the joint note and mortgage of the husband and wife. The property mortgaged was block 250. This transaction is regarded in law in the same light as the prior loan from Catlin. So far as the personal obligation is concerned, it is the debt of the husband—the signature of the wife to the note being a nullity. The husband was insolvent at the time. The debt was contracted for the benefit of the property of the wife, and that property was pledged and remains pledged for the payment of the debt.

As the matter stands, it is altogether probable that the property of the wife will be taken to pay the debt. Whether it will be sufficient or not, for that purpose, does not appear. But the personal obligation of the husband was also given for the debt and he is liable to pay it, and may be compelled to do so, in whole or in part. In that event and to that extent, the purchase money for this interest would move from him, and the interest thus purchased would be subject to the claims of his creditors. But it cannot be absolutely assumed that the purchase money was obtained on the credit of the husband, or that he will ultimately repay it; and without this it would work injustice to the wife to treat this interest as purchased by the husband and subject it to sale for the benefit of his creditors—for, if the property of the wife in block 250 is ultimately subjected to the payment of the loan from Frances Young, as it probably will be, then the consideration for the purchase of the interest of the Lownsdale heirs, would come from her, and such interest would be hers, and not the husband's. Lot 4, and whatever interest the wife may be determined to have in lots 3, 5 and 6 in block 253, are the separate estate of the wife. Although this property—being in fact purchased by the wife—was not "acquired by gift, devise, or inheritance," and therefore not within the clause of the constitution (article 15, § 5), which exempts such property from "the debts or contracts of the husband," yet the nature of the conveyances from Robertson and Young to her, makes it her separate property. These conveyances studiously declare, that the grant is made to her for her own benefit, exclusive of the control of her husband. These words effectually exclude the marital rights of the husband or the claims of his creditors. Cord, Mar. Wom. § 156; 2 Story, Eq. §§ 1880-1882. It does not appear that this property was ever registered by the wife in pursuance of the act of June 4, 1859, in force when she acquired it. But that act by its terms only applies to property "acquired by gift, devise or inheritance." Code Or. 786.

As the case now stands, it satisfactorily appears that the interest in block 250 conveyed to the wife by Daniel H. Lownsdale, subject to the life estate of her husband, and lot 4 in block 253, are the absolute property of the wife, and not subject to the claims of the husband's creditors. But as to the interest in block 250, purchased from the Lownsdale heirs, and lots 3, 5 and 6 in block 253, no final decree can be safely made upon the present state of the proofs. An interlocutory decree will be therefore entered, referring the case to a master, with authority to take testimony and report to the court the present cash value of the wife's interest in block 250, derived from Daniel H. Lownsdale, and also

the present value of the interest in said block, purchased from the Lowndsdale heirs; and further, to ascertain the amount due upon the note and mortgage to Catlin, and also to Frances Young, and that the clerk of this court be appointed special master to execute this order. On January 9, 1868, upon the report of the special master, there was a final decree dismissing the bill.

Case No. 3,891.

DICK et al. v. LAIRD.

[4 Cranch, C. C. 667.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

RECEIVERS FOR PARTNERSHIP — CREDITOR'S BILL.

Upon a creditor's bill against the surviving partner of a mercantile firm, a receiver may be appointed.

This was a bill in equity by creditors against the surviving partner of the firm of John Laird & Son, for a settlement of the partnership accounts, &c., and for the appointment of a receiver.

The counsel for the plaintiffs cited Bloodgood v. Clark, 4 Paige, 576; Vann v. Barnett, 2 Brown, Ch. 158; Creuze v. Bishop of London, Id. 253; Philips v. Atkinson, Id. 272; Jenkins v. Jenkins, 1 Paige, 243; Osborn v. Heyer, 2 Paige, 342; Harding v. Glover, 18 Ves. 281.

The answer admitted all the material facts of the bill.

THE COURT (nem. con.) ordered a receiver to be appointed, and to give security in the sum of $10,000.

[NOTE. For decision on the merits of this case, see Case No. 3,892.]

Case No. 3,892.

DICK v. LAIRD.

[5 Cranch, C. C. 328.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

FACTORS—ADVANCES TO PARTNERSHIP — APPLICATION OF CONSIGNMENTS — POWER OF SURVIVING PARTNER.

1. Where, during a long period of mercantile intercourse between the principal and factor, it appeared that the principal was permitted, upon shipments of tobacco, to draw bills for the estimated value thereof, which bills the factor was in the habit of accepting and paying, whether the cargoes were, or were not sold; the factor being generally in advance, and charging interest upon his advances, and giving credit for interest upon the net proceeds of the cargoes, shipments made, after the dissolution of the firm of the principal, by the death of one of the partners, to the factor, (upon the credit of which shipments bills were drawn by the surviving partner, according to the usual course of their former dealing,) were held to have been made according to such usual course, and were not to be applied to the liquidation of the general debt due by the principal to the factor at the time of the dissolution; but were to be applied, in the first place, to meet the bills drawn upon the credit of such shipments; and the surplus only, if any, to be applied to the liquidation of the general balance due by the principal to the factor.

2. But if the bills thus drawn by the surviving partner, and paid by the factor, exceeded the net proceeds of the cargoes thus shipped after the dissolution of the firm, the excess was not chargeable to the estate of the firm, but to the survivor only; it not being competent for him to charge the estate of the firm, by drawing bills after the dissolution.

Bill in equity by Elizabeth Dick, in behalf of herself, and such other creditors of the late firm of John Laird & Son, and of John Laird, as shall choose to be made parties, and contribute to the expenses of the suit; against William Laird, surviving partner of the firm of John Laird & Son, and sole executor of the will of John Laird, deceased. The bill seeks to charge the joint effects in the hands of the surviving partner, and the separate estate of John Laird, deceased, in the hands of his executor, and for an account, and for a receiver, &c. The cause came before the court, upon an exception to the auditor's report, disallowing a claim of James Dunlop & Company, of London, for a balance of £5,020. 2s. against the effects of the late firm of John Laird & Son, in the hands of William Laird, the only surviving partner.

The case was argued by Mr. Redin, for Dunlop & Co., who cited Hammonds v. Barclay, 2 East, 227, that an acceptor has a lien on the shipments; and Hammersley v. Lambert, 2 Johns. Ch. 508, that dealing with a surviving partner does not discharge the old firm.

Mr. Marbury and Mr. Key, contra, cited Dob v. Halsey, 16 Johns. 34, Campbell v. Mathews, 6 Wend. 551, and Evernghim v. Ensworth, 7 Wend. 326, that a partner has no right to pay his private debts with partnership funds. Clayton's Case, 1 Mer. 572, 604, that if the creditor has kept a continuous account after the death of one of the debtor partners, the subsequent payments are to be applied to the extinguishment of the old debt. Simson v. Ingham, 2 Barn. & C. 65, S. P.; Pemberton v. Oakes, 4 Russ. 154, 168; Abel v. Sutton, 3 Esp. 108; Lansing v. Gaine, 2 Johns. 303; Sandford v. Mickles, 4 Johns. 227; Devaynes v. Noble, 1 Mer. 602; and Brice's Case, Id. 620, —that the surviving partner had no right to draw bills so as to create a new obligation upon the old firm. They contended, also that Dunlop & Company were bound to apply the proceeds of the joint property shipped after the dissolution of the firm, to extinguish the debt of the firm, and should have charged the bills of William Laird, drawn after the dissolution, to his separate account. The bills were not drawn specifically upon the credit of any particular shipment, but

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

generally, on the promise of shipments; nor are the acceptances charged specifically against correspondent shipments. Dunlop & Company ought not to have permitted William Laird to draw, when they knew he was trading on the partnership funds, after the death of John Laird, at the hazard of his heirs, and ought not to be permitted to resort to his estate.

Mr. Jones, in reply, cited McLeod v. Drummond, 17 Ves. 152; Keane v. Robarts, 4 Madd. 332, and Hamersley v. Lambert, 2 Johns. Ch. 508, as to the powers and duties of a surviving partner; and Sleech's Case, Palmer's Case, and Clayton's Case, 1 Mer. 538, 623, as to the application of payments. Simson v. Ingham, 2 Barn. & C. 65, S. P. See Newmarch v. Clay, 14 East, 239.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent), delivered the opinion of the court.

This cause now comes before the court upon an exception to the auditor's report disallowing a claim of James Dunlop & Company, of London, for a balance of £5,020. 2s. against the late firm of John Laird & Son in the hands of William Laird, the only surviving partner. The principal question is, what was the intent with which William Laird shipped to James Dunlop & Co. the tobacco which was on hand in Georgetown, at the death of Mr. John Laird, and which had been purchased in his lifetime with the joint funds of John Laird & Son; and with what intent it was received by Dunlop & Co.; for that intent, if ascertained, must govern the application of the proceeds of the sales of that tobacco. The intent and understanding of the parties constituted the contract between them. It appears by the bill and answer, and the accounts of James Dunlop & Co. with John Laird & Son, and of John Laird & Son with James Dunlop & Co. as kept by them respectively, that John Laird & Son were merchants residing in Georgetown in the District of Columbia, and that James Dunlop & Co. were merchants residing in London. That a long course of business had been carried on between them, for many years, which consisted of shipments of cargoes of tobacco by John Laird & Son to James Dunlop & Co. for sale, in London or elsewhere, by the latter firm, for and on account of the former. That the understanding and practice, if not the express contract, was, that John Laird & Son should be permitted, upon every shipment so made, to draw upon James Dunlop & Co. at sixty days' sight for the probable amount of the proceeds of sales of the tobacco so shipped and consigned to them; and that they would accept, and, at maturity, pay such bills, whether the tobacco should then have been sold or not, and whether they should or should not then have actually received the proceeds thereof; it being understood that interest should be charged upon their acceptances, and credited upon the proceeds of sales. It was therefore a case of principal and factor. Each consignment was a bailment for sale and remittance; not a general payment on account. It was the fund to meet the bills drawn, and to be applied in the first place solely to that object. If the proceeds of the sales exceeded the bills, the surplus, and that only, could, in good faith, be applied by James Dunlop & Co. to the extinguishment of any general balance of account which might be in their favor. If the agreement had been that James Dunlop & Co., instead of accepting the bills of John Laird & Son, should remit the proceeds of sales by bills drawn in Europe upon merchants in this country in favor of John Laird & Son, the nature of the business would have been the same. It would still have been a case of principal and factor. Dunlop & Co., it is true, had a lien on the goods of their principal for any general balance due to them; but they were not bound to resort to it; nor could they do so in good faith after so long and uniform a course of credit, as justified Laird & Son in expecting that their bills would be honored, unless Dunlop & Co. should have cause to doubt the solvency of Laird & Son. The object of Laird & Son was to receive here, as soon as possible, the proceeds of the sales so that they might invest them in other cargoes, and thus continue a business advantageous to both parties; to Laird & Son by the profit on the sales; and to Dunlop & Co., the factors, by their commissions for transacting the business. In this manner the business was regularly carried on, Dunlop & Co. being generally in advance, until the death of Mr. John Laird, on the 11th of July, 1833, when it appears by the accounts, as kept by both firms, that there was a balance due to Dunlop & Co. of £4,232. 6s. 3d. For this balance Dunlop & Co. had a right to charge the joint estate of John Laird & Son, and the separate estate of each of the partners, in case the joint estate should be insufficient; and have still a right so to do, unless that balance has been paid. But it is contended that that balance has been paid, by consignments (made by W. Laird the surviving partner) of tobacco which was on hand, in this country, at the time of Mr. John Laird's death; and which had been purchased, in his lifetime, with the joint funds; although, at the time of making those consignments, the surviving partner drew bills on Dunlop & Co. the consignees, for the full value of the tobacco thus consigned, which bills they accepted and paid before the proceeds of the sales of that tobacco came to their hands.

It is supposed in argument that when these consignments were made, no appropriation was made of the proceeds by either party, the consignor or consignees; and that, as this is a case between conflicting creditors, the consignment, or the proceeds thereof, must

be considered as payments made without application to any particular items of the account, and therefore the court must apply them to the oldest items on the debit side; which would include the whole balance due at the time of the death of Mr. John Laird; and that as the estate of Mr. John Laird is not liable for any balance due upon transactions since his death, the claim of Dunlop & Co. was properly excluded by the auditor from all participation in the funds of the firm of John Laird & Son, and in the estate of the deceased partner John Laird. This doctrine is built upon the decision of Sir William Grant, the master of the rolls, in Clayton's Case, which constitutes a part of the case of Devaynes v. Noble, 1 Mer. 585, which is a leading case upon this point, and has been confirmed by several subsequent cases. In that case, Clayton had deposited money in a banking-house consisting of Devaynes and four other partners. Devaynes died, and the other partners continued the business under the same name for several months, and then became bankrupt. At the time of the death of Devaynes, Clayton had in the bank £1,713, and before he deposited any further sums he drew out several sums, amounting to £1,260, reducing his balance to £453. From this time to the bankruptcy he both paid in and drew out considerable sums; but his payments were so much larger than his receipts, that at the time of the bankruptcy his cash balance in the hands of the surviving partners exceeded £1,713, the amount of his cash balance at Devaynes's death. It was admitted that the £1,260 which he drew out after Devaynes's death, and before he made any new deposits, extinguished so much of the old balance, and the contest was only as to the £453. As to which it was contended by the representatives of the deceased partner, Devaynes, and so decided by the master of the rolls, that although Clayton subsequently deposited more money than he drew out, so that his balance at the time of the bankruptcy was larger than it was at Devaynes's death; yet as he had, after his new deposits, drawn more than £453, without applying his drafts to any particular sums deposited, his drafts were to be applied to the oldest debits in his account; and therefore the whole balance due at Devaynes's death was extinguished before the bankruptcy. In order to make that case applicable to the present, it must be shown that the consignments of the tobacco which was on hand at the death of Mr. John Laird were payments upon general account without any particular appropriation or application of the proceeds of the sales. We think they were not. The former consignments, in the life time of Mr. John Laird, were never considered, by either of the firms, as payments, but as consignments by the principal to his factor, or agent, for sale and remittance; for which services the factor was to receive his wages, by way of commission. It appears by the accounts of the parties with each other, that Laird & Son, when they made their consignments, drew bills for the estimated proceeds of the sales, which bills were accepted and paid by Dunlop & Co., who appear, during the lifetime of Mr. Laird, to have been content to await the contingency of the proceeds of the sales exceeding the amount of the bills drawn upon them, so as thereby to liquidate the balance of their general account, which, however, was, in the mean time, bearing interest. That the bills were thus drawn upon the shipments, appears not only by the accounts of the parties with each other, as exhibited and proved, but by the averments of the plaintiff in her bill, and by the supplemental answer of the defendant, which is directly responsive to the allegations of the bill, and drawn out by exceptions to his first answer upon this very point.

The plaintiff, in her bill, avers "that large quantities of tobacco, or the proceeds of sale thereof, were in the hands of the said J. Dunlop & Co., of London, at the death of the said John Laird; and large quantities of tobacco, on hand at the death of the said John Laird, were further shipped to them after the said John Laird's death, by the defendant as surviving partner, to be sold and disposed of on account of the firm. A statement, in detail, of all these tobaccoes, and the proceeds of sale thereof, the defendant is called on to produce." And the plaintiff, in her bill, prays that the defendant "may state what tobacco, and the cost and value thereof, belonging to the said concern, was in Europe and in this country (distinguishing respectively) at the death of the said John Laird, not then sold, or the account of sales of which were not then received; when the said tobacco was shipped; how disposed of; when the same was sold, and by whom; and to whom the same was shipped; and what were the proceeds of such sales; and when, by whom, and how received and applied." And she further in her bill prays that the defendant "may state and show an account of all drafts and bills drawn by him, since the death of his father, on James Dunlop, or James Dunlop & Co., of London, or any other person or persons, for the proceeds of tobacco sold or shipped, with the dates and amounts of the said bills, and what they produced, and how he applied the proceeds thereof."

The plaintiff took many exceptions to the defendant's first answer; one of which (the sixth) was, "Because the defendant has failed to state and show, as called for by the complainant, an account of all drafts and bills drawn by him since the death of John Laird, on James Dunlop, or James Dunlop & Co., of London, or any other person or persons, for the proceeds of tobacco sold or shipped, with the dates and amounts of said bills, and what they produced, and how he applied the proceeds thereof." And another exception (the fourth) was, "Because the defendant has failed to exhibit a statement, in

detail, of the tobaccoes, and the cost thereof, and the proceeds of sale thereof, in the hands of J. Dunlop & Co., at John Laird's death, the property of the said late concern of John Laird & Son; and also the quantities and cost of the tobaccoes shipped to the said Dunlop & Co., of London, after John Laird's death, the property of the said late concern, and the proceeds of sale of all said tobaccoes."

In answer to these averments and calls for information and exceptions, the defendant, in his supplemental answer, among other things, says, that "James Dunlop & Co. had no funds of the partnership estate in their hands at John Laird's death. On the contrary, when the tobacco in their hands at that time, and the bills of exchange drawn thereon, at John Laird's death, together with interest, were respectively brought to account, James Dunlop & Co. were creditors of John Laird & Son, at John Laird's death, £4,232. 6s. 3d. sterling." And again he says, in answer to the fourth exception, "that the tobacco and the cost thereof, and the proceeds of the sale thereof in the hands of James Dunlop & Co. at John Laird's death, and the amount drawn thereon, were as follows," &c. He then gives a particular statement of the several cargoes in the hands of J. Dunlop & Co. and the proceeds thereof, and says: "Amount of the bills drawn in John Laird's life upon such shipments, (the amount and date of each being shown in the partnership books, and in the account of James Dunlop & Co., marked 'A,' of the 1st of August, 1835, filed in this cause with the auditor, and which are hereby referred to as part hereof,) £40,114. 15s. 2d., to which add interest and several small payments, as stated in said books and account, and the balance due James Dunlop & Co. at the death of the said J. Laird was £4,232. 6s. 3d." Again he says, "that the quantities and cost of the tobacco shipped to James Dunlop & Co. by this defendant, as surviving partner after the said John Laird's death, and the proceeds of sale thereof, and the amount of bills drawn upon those shipments, by this defendant, as surviving partner, were as follows:—

		Cost.	Proceeds.
Brig Zior.	331 hhds.	$38,088.63	£6,095. 3s. 9d.
Ganges, third voyage,	301 "	10,593.07	2,484. 0 0
To France, per Cazenove and Utica,	84 "	8,360.00	2,516. 3 2

and the amount of bills drawn by this defendant as surviving partner, upon such last-mentioned shipments, (the amount and date of each are also shown in the partnership books, and in the account of the said James Dunlop & Co., marked 'B,' of the said 1st of August, 1835, filed with the auditor in this cause, and which are hereby referred to as part hereof,) £10,908. 6s. 8d., to which add interest and some small payments stated in said books and accounts, and the balance due James Dunlop & Co. on these last-named shipments and drafts, was and is £787. 15s. 9d." At the foot of the accounts of James Dunlop & Co., marked "A" and "B," and referred to by William Laird, the surviving partner, as part of his answer, is the following certificate signed by him: "These accounts are correct. The account A shows the shipments prior to John Laird's death, to James Dunlop & Co., and the tobacco then in their hands, or for which accounts of sales had not been rendered; and all the drafts drawn prior to his death, and the balance due James Dunlop & Co. after realizing the proceeds of those shipments. This account B, shows all the shipments made by me to them, as surviving partner, of all the tobacco here at John Laird's death, and the drafts which I drew, as surviving partner, on those shipments. William Laird." These accounts show the dates of the several bills drawn by the surviving partner, after the death of John Laird; and the books of John Laird & Son, as kept by the surviving partner, show the times of the shipments of the tobacco on hand; and by comparing the dates of the bills with the times of shipment, a strong presumption arises independent of all other evidence, that the bills were drawn upon the consignments, and accepted on the faith that the proceeds of the sales should come to the hands of the acceptors, to meet or reimburse their acceptances.

Taking the whole evidence together, that fact seems to be proved beyond all doubt. The fact, that Dunlop & Co. accepted the bills upon the faith of the consignments, is, to our minds, conclusive evidence that the acceptances and the consignments were intended, by both parties, to meet and to be set against each other, and that the proceeds of the consignments were in the first place to be appropriated and applied to the acceptances. This, we think, was clearly the case during the lifetime of Mr. Laird. It is stated in the answer of Mr. W. Laird, and admitted in argument, "that at the death of the late John Laird, the late concern of John Laird & Son had a considerable amount of tobacco on hand here, destined for shipment in like manner; and for the conveyance of a great portion of which a vessel had been chartered, and was engaged in loading; and James Dunlop & Co., of London, advised of the intended consignment of her cargo to them; all previous to the death of John Laird; and that the concern were on the look-out for another vessel to take another cargo over and above the one last-mentioned."

It appears by the accounts of the parties, and is admitted in argument, that the tobacco thus on hand at the death of Mr. Laird, was immediately shipped and consigned, by the surviving partner, to Dunlop & Co., agreeably to the advice which had been forwarded to them in the lifetime of Mr. Laird; and that shipment, it seems, was destined to be, and was, made "in like manner;" that is, in the same manner as the former shipments had been made, namely, for sale and remit-

tance; or to meet the acceptances of the bill drawn upon it. The engagement thus made in the lifetime of Mr. Laird, was promptly and honorably fulfilled by the surviving partner. It was an engagement as binding in honor and conscience upon the survivor as any other contract made in the lifetime of his partner; and Dunlop & Co., being as much bound by the long and uniform course of business between the two houses, to accept the bills drawn by the surviving partner upon the tobacco of the firm shipped by the surviving partner, as they would have been to accept the bills drawn by the firm upon tobacco shipped by the firm in the lifetime of Mr. Laird, accepted the bills drawn by the surviving partner upon the tobacco thus shipped. By accepting these bills, Dunlop & Co. admitted that this shipment was not a general payment on account; and could not, in good faith, have applied the proceeds of the sales of this tobacco to the general balance due to them by Laird & Son; nor could they, in good faith, after the long and uniform course of dealing between the two firms, have refused to accept the bills of the surviving partner, after advice of the shipment, unless, after being advised of the intended consignment, they had given notice to the surviving partner, before the bills were drawn, that they would not accept them; or unless they had reason to believe the firm of Laird & Son to be insolvent, or in doubtful circumstances. The drawing and acceptance of the bills drawn upon this shipment is evidence that both parties considered the proceeds of sales as appropriated to the payment of the acceptances in the first instance, and not as a general payment, the appropriation and application of which has not been made by either party. Mr. Laird, the surviving partner, had no other fund in the hands of Dunlop & Co. upon which he could draw, than the tobacco thus shipped. It would seem, therefore, that nothing could be more evident, than that the proceeds of the shipment were appropriated, in the first place, to the discharge of the bills thus drawn thereupon. Such being the case, and there being no general payments on account made by Laird & Son to Dunlop & Co. which can be applied to the general balance due to them at the time of the death of Mr. Laird, that balance has never been paid, and they have a right to look to the estate of the deceased partner, if there be a deficiency of joint assets.

Thus far we have been considering only the liability of the joint estate of Laird & Son for the balance due by them to Dunlop & Co. at the time of the death of Mr. John Laird. But Dunlop & Co. claim against the same joint estate, a further sum of £787. 15s. 9d., being the amount overdrawn by W. Laird, the surviving partner, upon the shipments of the tobacco which was part of the joint estate, and which was shipped, after the death of Mr. John Laird, and consigned to Dunlop & Co. in like manner as the former shipments had been. It is contended that the estate of John Laird & Son ought not to be charged with the amount thus overdrawn. Mr. W. Laird, the surviving partner, had certainly a right to sell the tobacco of the firm, remaining on hand at the time of the death of Mr. John Laird; and to sell it here, or in Europe, according to his discretion. Deeming it, no doubt, best to sell it in Europe, he shipped it to Dunlop & Co. for sale, and as the means of getting the proceeds into his hands, in order that he might pay the joint debts and sell the estate, he had a right to draw bills upon the shipments; but he could not, by drawing those bills, create a new responsibility upon the joint estate. In settlement of the partnership he could be charged only with the net proceeds of the sales of the tobacco. If he drew for more and his factor accepted and paid the bills, the acceptor could look only to William Laird, the drawer, for the amount overdrawn. By the death of Mr. John Laird, the partnership was dissolved. The survivor could not, by drawing bills in the name of the firm, bind the joint estate in any new obligations. If he had shipped the tobacco to a factor with whom Laird & Son had not had any previous dealings, and had drawn bills for more than the net proceeds, and the factor had accepted and paid those bills, he could have had no pretence to charge the balance upon the joint estate of Laird & Son; nor could Dunlop & Co., when they knew, at the time of accepting these bills, that the partnership of John Laird & Son had been dissolved by the death of one of the partners. They could only have accepted the bills upon the faith of the consignments, and the personal credit of William Laird, the drawer. If Mr. W. Laird sold these bills and applied the whole proceeds of the sales thereof to the discharge of partnership debts, he will, in the settlement of the partnership account, have credit for the full amount thus applied; that is, to the full extent of the proceeds of the sales of the bills. If Dunlop & Co. should recover from W. Laird the amount which he has overdrawn, he would have no credit therefor in the partnership account, because he would already have had credit for the whole amount of sales of his bills. If, instead of paying partnership debts with the proceeds of the sales of his bills, he applied them to his own use, and Dunlop & Co. should recover from him the amount thus overdrawn, he could have no pretence for charging it in the partnership account, because the partnership never derived any benefit from the bills. Thus, in whatever way the subject is considered, we think it very clear that the joint estate of Laird & Son cannot be charged with the £787. 15s. 9d. overdrawn by Mr. W. Laird upon the tobacco of Laird & Son, shipped to Dunlop & Co. after the dissolution of the partnership by the death of Mr. John Laird. Upon the whole, then, we are of opinion that the balance of £4,232. 6s. 3d. sterling, due by John Laird & Son to

James Dunlop & Co. at the time of the dissolution of the firm of John Laird & Son, is properly chargeable upon the joint estate of that firm; and that, if the joint effects are insufficient, James Dunlop & Co. may resort to the separate estates of the surviving, and of the deceased, partner; and that the exception to the auditor's report, to that extent, is supported; and as to the £787. 15s. 9d., being the amount overdrawn by Mr. W. Laird upon the tobacco of John Laird & Son, shipped after the death of Mr. John Laird, the exception is overruled; and the auditor will reform his report and statement of the accounts accordingly.

DICK (LAIRD v.). See Case No. 7,990.

DICK (UNITED STATES v.). See Case No. 14,937.

Case No. 3,893.

DICKENSON v. The GORE.

[Newb. 45.][1]

District Court, D. Michigan. 1855.

COLLISION—STEAM AND SAIL—RIGHTS OF STEAMER—EVIDENCE—DEMEANOR OF WITNESS.

1. The manner and demeanor of witnesses, in giving testimony, will be considered where they conflict in their statements.

2. In a case of collision between a steamer and a sail vessel the former is not to be presumed to be in fault merely because, as a steamer, she has control over her own movements.

3. Steamers are to be treated as sailing with a fair wind and bound to give way to a vessel close hauled.

4. Where a collision has occurred between a steamer and a sail vessel, and the evidence shows that the steamer was in her regular course and adopted all the usual precautions to avoid the collision, the sail vessel having a fair wind, and the facts proved being inconsistent with the supposition of requisite care on the part of the vessel, the court will presume the latter to have been in fault.

This was a libel in rem for a collision, promoted by Charles Dickenson, owner of the scow Petrel, against the steamboat Gore. The libel alleges that in the month of October, 1853, the scow Petrel, a vessel of more than sixty tons burthen, enrolled and licensed for the coasting trade, &c., being in good condition, sailed from the port of Cleveland, Ohio, for the port of Detroit, Michigan: that while on the voyage, about 10 o'clock in the evening of the 3d of October, 1853, as the Petrel was sailing up the Detroit river, within a short distance of Detroit, with the wind up the river, and having a good white light, properly placed on her jib-boom, she was carelessly and negligently run into by a vessel which the steamboat Gore had in tow: that by reason thereof the foresail, mainmast, stanchions, bulwarks and rigging of the Petrel were damaged to the amount of one hundred and fifty dollars: that the collision was occasioned by the carelessness and negligence of the officers and men on the Gore; and that the Petrel, being in her proper channel, and having good lights displayed, was in no fault. The answer of John Sloan, claimant and owner of the Gore, admits the collision, but denies that it was occasioned by carelessness on the part of the officers and men of the steamboat, and alleges that it was entirely the result of gross carelessness on the part of the men on the Petrel, stating the following facts in support of said allegations: That on the night in question the Gore left Detroit, on her way down the river, with the bark Pomona and the schooner White Squall in tow: that the night was clear: that the Gore had all her lights displayed and in good order: that the captain of the steamer was on deck with the captains of the vessels in tow: that they saw the Petrel coming up the river about three-quarters of a mile off, with a free wind: that when the Petrel was about half a mile distant, the captain of the steamer ordered her helm a-port: that the steamer was then close in towards the American shore, that being the shore usually taken by vessels descending the river: that the more the steamer ported her helm the more the Petrel put her helm to starboard and continued to advance towards the steamer's centre light: that when the vessel was about four hundred yards off the captain of the steamer rang his bell and checked the steamer's headway: that the captain of the bark in tow called out from the steamer to the Petrel and asked her master which vessel he was going to run into, so that preparation might be made for him: that when the Petrel was yet three hundred yards off the steamer was backing and had hauled as far to port as it was safe to go: that the former still continued to approach the latter, until she came within a very few yards of her: that the Petrel then suddenly ported her helm, but only just in time to cause her to come in collision with the jib-boom of the bark which the steamer had in tow, whereby some comparatively trivial damage was occasioned to the Petrel.

Alfred Russell, for libelant.

George V. N. Lothrop, for claimant.

WILKINS, District Judge. The suit was brought to recover the damages occasioned to the libelant, the owner of the scow Petrel, which was slightly injured by coming in collision with the steamer Gore, in the Detroit river, on the 3d of October last. The scow was coming up the river at night, before and with a fair wind, at the rate of two miles an hour, and according to the testimony of her captain, close to the Canada shore, and nearly opposite the village of Sandwich. The night was starlight. The steamer having two vessels in tow, was first discovered about half a mile off descending

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

the river. The collision took place close in by the American shore, almost directly opposite Fort Wayne. The proofs were taken in open court, and the manner as well as the statements of the witnesses, under the immediate personal observation of the court. This was of some consequence, as the testimony in relation to the leading facts is wholly irreconcilable; and when such is the case, the demeanor of the witness will frequently give the preponderance to one side or the other. The two witnesses brought to sustain the claim of the libelant, are the master and the mate. Their statements do not altogether agree. While the clear, consecutive and circumstantial narrative of Captain Sloan, is fully sustained by Botswood, the wheelsman, and Leonard, the mate of the White Squall, one of the vessels had in tow. They unitedly contradict Boyle, the master of the scow, as to the course of the scow, and the place of collision. They unitedly testify to the course of the steamtug being direct for the fort, keeping close to the American shore. Whereas, Boyle and his mate differed somewhat as to this, and also as to the course of the scow; the latter testifying, that the scow kept near the centre of the river, on the Canada side of the channel. John Campbell, the wheelsman, was not brought forward as a witness.

Now, where it has been clearly established, that the respondent's vessel was not in fault in any respect, where her course was proper, and not such as to endanger an ascending vessel, that was on the look-out and careful; where she had a proper watch, and proper lights, gave the alarm signal in time, ported in time, kept ported, reversed her engine, and backed, and did all in her power to avoid the scow; all of which facts appear in this case, and are inconsistent with requisite care on the other side; the court cannot attribute the collision to unavoidable accident, but must presume from the testimony, that the fault was in the scow, either that of inexcusable ignorance or recklessness in the master; and I think the latter. The rule as cited in The Leopard [Case No. 8,264], from the Shannon, that the vessel which has it most in her power to vary her course and keep out of the way, must do so, is not infracted under the circumstances, by the satisfactory proof of the steamer's course and the conduct of her master. It is certainly not to be presumed when a collision takes place between a steamer and a sail vessel, that the former must be in fault, regardless of the course taken, merely because as a steamer she has ever the control over her own motions. It is the old rule applied to steam navigation, treating steamers as sailing with a fair wind, and therefore bound to give way to a vessel close hauled. And here she did give way. She hugged the American shore as closely as possible, keeping as far off as she could, rang the signal bell, to give the scow, which was ascending with a fair wind, notice of danger, and let off steam. Yet, notwithstanding all her precautions, with a recklessness unexplained by the libelant, the scow shot directly across from Sandwich, and collided with the bark in tow. I can do no otherwise than decree a dismissal of the libel, with costs. Decree entered accordingly.

DICKERSON (BOSWELL v.). See Case No. 1,683.

DICKERSON (LONG v.). See Case No. 8,480.

DICKEY (CLEMENT'S EX'RS v.). See Case No. 2,883.

DICKEY (FENNER v.). See Case No. 4,729.

Case No. 3,894.

DICKEY et al. v. HARMON et al.

[1 Cranch, C. C. 201.][1]

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

BANKRUPTCY—DRAFT DRAWN BY BANKRUPT—RIGHTS OF HOLDER.

A draft drawn by a bankrupt, not payable out of any particular fund, is not such an assignment of the money in the hands of the drawee as will give the holder a right to the money before the acceptance of the draft. It is, at most, only a security, and does not entitle the holder to be relieved for more than his ratable part of his debt.

[Cited in Re Smith, Case No. 12,990.]

Bill in equity in the nature of an attachment by the assignees of bankrupts in New York, against the absent bankrupts, and R. B. Jameson, the garnishee, and certain attaching creditors, and one Sackett, who claimed, by virtue of a draft from Harmon & Davis, the bankrupts, on R. B. Jameson, the garnishee, dated, as it was alleged, before the act of bankruptcy committed. The bill alleged that the act of bankruptcy was committed by Harmon & Davis, on the 17th of August, 1802. The draft given by the bankrupts to Sackett upon Jameson, was dated on the 18th of August, 1802, and presented to Jameson for acceptance, on the 23d of August, 1802. Jameson admitted himself to be indebted to the bankrupts in the sum of $867.48, but refused to accept the draft because the money had, on the same day, been attached in his hands by Scott & Co., creditors of the bankrupts. There were several other subsequent attachments, but the only question was, whether the complainants, the assignees of the bankrupts, or Sackett should have the money in the hands of Jameson. The commission of bankruptcy issued on the 18th of September, 1802, and the act of bankruptcy was admitted to have been committed subsequent to the attachments, and consequently subsequent to the presentation of the draft to Jameson.

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

Mr. Swann, for Sackett, contended that the draft was an assignment of the fund in the hands of Jameson, fairly made for valuable consideration before bankruptcy, and gave him an equitable right to receive and recover the money, and that it was not revoked by the subsequent bankruptcy. Master v. Miller, 4 Term R. 343; Row v. Dawson, 1 Ves. Sr. 331.

Mr. Simms, contra, for the assignees of the bankrupts, contended that the draft was not an assignment of the fund, and could at most amount to no more than a security, which, by the 31st section of the bankrupt law [of 1800 (2 Stat. 30)] gave the creditor no priority or preference.

THE COURT took time to consider; and at June term, 1805, were of opinion that the complainants, Dickey & Tom, assignees of the bankrupts, were entitled to the money in the hands of Jameson.

CRANCH, Chief Judge, concurred, because he considered the draft in favor of Sackett, as a security only, and not an assignment of the fund, and that by the 31st section of the bankrupt law he could not be relieved for more than a ratable part of his debt.

DICKEY (ROBERTS v.). See Case No. 11,-899.

Case No. 3,895.

In re DICKINSON.

[18 N. B. R. 514;[1] 26 Pittsb. Leg. J. 143.]

District Court, W. D. Tennessee. Nov. 27, 1878.

BANKRUPTCY — POWERS OF REGISTER — ADJOURNMENT OF CREDITORS' MEETING.

1. The register has no power to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling.

2. The warrant in this case was returnable on September 15th, but the register was prevented from attending at said time by the prevalence of yellow fever. Being absent from the city, and a portion of the time from the state, he made orders of adjournment, and forwarded them to his assistant. *Held*, that the meeting wholly failed, and that a new warrant should issue, appointing another meeting, to be served as if no warrant had ever been issued.

In the above case the warrant was issued by the undersigned in June, returnable 15th day of September, 1878. The register, being prevented from attending at said time by prevalence of yellow fever, and being absent from the city, and a portion of the time absent from the state, made and forwarded to his assistant orders of adjournment, first to October 15th, then to November 15th, and then to November 25th. In the meantime, viz. since November 15th, the bankrupt and such creditors as have filed claims have been notified that this November 25th was the day to which the matter was adjourned for election of assignee. On this, the 25th of November, 1878, said bankrupt, by attorney, and the only creditors whose claims are filed,—two in number,—appear, and ask that the case be proceeded with, without further adjournment. The warrant was duly executed, both as to notices on all the creditors and by publication; so that, although on the day first appointed they were prevented by the epidemic from attending, they have full knowledge of the pendency of these proceedings, and have had reasonable time since the removal of all cause for delay in filing claims, for the purpose of participating in the choice of an assignee. For all other purposes they can still file claims. More than five months have elapsed since they were duly notified by the marshal. In the opinion of the register there is no objection to complying with the joint petition of the bankrupt and the only creditors whose claims are filed, but the question is respectfully submitted for such order as your honor deems proper. T. J. Latham, Register.

John P. Edmondson, for bankrupt.

HAMMOND, Judge. I do not concur with the register in the foregoing opinion certified by him. General order in bankruptcy, No. 5, limits the power of the register to the time and place fixed by the court in the special order under which he acts, or to the time and place fixed by him, acting under the authority of a general order of the court. There is nothing in the statutes or any general order of the court, or the rules prescribed by the supreme court, authorizing a register to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling. During the epidemic just closing, the courts were virtually closed, and the meeting of creditors appointed in this case has wholly failed, without any fault on the part of the creditors. Their right to choose an assignee cannot be prejudiced by a failure, under the circumstances of this case, to attend a meeting appointed at a time and place when and where a deadly disease was prevailing to such an extent that it was dangerous to hold it. Let a new warrant issue, appointing another meeting, to be served as if no warrant had ever issued. The clerk will certify this opinion to the register.

[1] [Reprinted from 18 N. B. R. 514, by permission.]

Case No. 3,896.

DICKINSON v. ADAMS.

[4 Sawy. 257;[1] 17 N. B. R. 380.]

District Court, D. California. May 22, 1877.

BANKRUPTCY—FRAUDULENT TRANSFER—KNOWLEDGE OF VENDEE.

To entitle an assignee to recover of the vendee goods sold on the eve of bankruptcy, it must be shown, not only that the bankrupt intended to dispose of his property in fraud of the act [of 1867 (14 Stat. 517)], but that the defendant knew such to be his intention, and guiltily combined and colluded with him to carry it into effect.

J. H. Dickinson, in pro. per.

E. Moore, for defendant.

HOFFMAN, District Judge. Notwithstanding the very careful and elaborate argument made by the assignee in his own behalf, I have not been able to arrive at the conclusion which he so zealously contends should be drawn from the testimony. To maintain this action, he must show not only the insolvency of the bankrupts at the time of the sale in question, and that the defendant had reasonable cause to believe that such was their condition, but also that he knew that a fraud on the act was intended. He must, in the language of the supreme court, prove a "guilty collusion" between the parties. Clark v. Iselin, 21 Wall. [(88 U. S.) 360].

The counsel for the defendant has argued, that at the time of the transaction in question the bankrupts were not in point of fact insolvent. This conclusion he bases upon a comparison of the value of their assets with the amount of their individual and firm debts.

As intimated at the hearing, I am unable to assent to this conclusion. The sale to defendant was made after an attachment had been levied on a considerable part of their property. They were apprehensive of other attachments, and the avowed object of the sale was to obtain a sum in cash with which, as they hoped, they could make an arrangement with their creditors by paying fifty per cent. of their debts, and giving their notes for the balance.

They were disappointed in their expectations, but the fact that this was the best proposition they could offer seems to me to establish beyond question the condition of insolvency. That the bankrupts really intended to make and carry out, if accepted, this arrangement may be open to controversy. The circumstance that on the morning of the day on which the sale to the defendant was concluded, one of them paid to a creditor named Levy the whole amount of his debt, by transferring to him property sufficient to cover it, seems hardly consistent with their account on the stand of their motives and intentions.

But admitting that the proofs show that the debtors were insolvent, and even that a fraud on the act was intended by them, it must further be shown that the defendant knew of this fraudulent intent; in other words, that there was a guilty collusion between the parties to evade and defeat the operation of the act.

They were in no way indebted to the defendant. He was not related to them, and had had but slight business connection with them previously, and, so far as appears, no very intimate associations. He seems to have accidentally observed strangers in charge of their property, and, on inquiry, ascertained that it had been attached. They thereupon offered to sell him other property in their possession, fearing, as they said, other attachments, and in order to procure means to arrange their affairs in the manner which has been mentioned; the defendant swears that this was what he understood and believed to be the object of the sale, and the bankrupts testify that they so stated to him, and that such was their real intention.

If this was the real character of the transaction, it seems to me wholly unobjectionable. The bankruptcy law was not intended to prevent an embarrassed, or even an insolvent, debtor from converting a portion of his property into cash, in order to obtain means to appease his creditors by partial payments, and to procure a respite for the balance.

If a person to whom the property is offered under such circumstances cannot safely buy without becoming liable to restore it to the assignee, if bankruptcy supervenes, the mere fact of a present, and it may be a temporary, inability to meet his engagements, would practically deprive the struggling debtor of all power of extrication, would render his property virtually unavailable, and a temporary embarrassment might be converted into irremediable ruin. I think, therefore, that before calling upon the purchaser of the insolvent's property, under such circumstances, to restore it or its value, the proofs ought to be clear that there was a fraudulent design on the part of the debtor, and that this was known to and connived at by the purchaser.

The assignee has dwelt with great force and, I think, justice, on the conduct of the bankrupts, both before and after the sale to defendant, as indicating a design to put their property beyond the reach of their creditors. Within a very few days after the attachment they seem, by sales and fraudulent preferences, to have divested themselves of all their property not exempt from execution, and their design appears to have been to place themselves in this condition and then force from their remaining creditors an assent to any arrangement they might propose. But I cannot find any, or, at least, sufficient proofs that the defendant was aware of any such design. He was told by the bankrupts that the attachment was wholly unexpected

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

by them; that they had placed in the hands of the attaching creditors $6,000 worth of wheat, more than sufficient to cover their whole indebtedness; that if it had been sold at the proper time, a balance in their favor would have resulted; that they did not know it had been sold, as no account had been rendered by the pledgees, and that they did not believe they owed the latter anything.

They further stated that they had property enough to pay all their debts; and this statement the defendant swears he fully credited, not merely on the strength of their assurances, but from the knowledge he had of their property. He does not seem, however, to have had any very definite idea of the amount of their indebtedness.

The statement made by the bankrupts may very possibly have been true. The counsel for defendant has made a computation, by which he shows that on comparing the total amount of the joint and separate property of the bankrupts, with the aggregate of their joint and separate debts, the former was sufficient to satisfy the latter.

I have not thought it necessary to examine critically this computation. I refer to it merely to show that there is nothing preposterous, or even improbable, in the idea that both the bankrupts and the defendant may have believed that they had the means to satisfy all their creditors. I think it almost certain they could have done so, if they had been permitted to wait for the rise in the price of wheat which occurred in the fall of the same year.

The defendant had no knowledge of the previous payments by the bankrupts to certain of their smaller creditors, nor was he aware of the intention of Garrett Pierce to pay Levy in full by a sale of his separate property to him. So far as the proofs disclose, he may have supposed, as he swears he did, that the bankrupts having been unexpectedly attached for a debt of the existence of which they were not aware, and having property enough to meet their liabilities, were desirous of obtaining cash to raise the attachment already levied, and to avoid others, and thus save costs and expenses; that believing this to be the true state of the case, he consented to purchase the property they offered to sell him, and thus furnish them the money they required.

I am aware that the case is not free from suspicious circumstances; the chief of which is the statement by the defendant that the bankrupts owed him a small balance, when in fact he was then holding, subject to their order, a considerable portion of the purchase-money for the property bought by him. His explanation of this statement is by no means satisfactory. He states that he considered himself at liberty, when annoyed by impertinent inquiries, to give an untruthful, or to use his own milder euphemism, an "optional" answer.

The previous and subsequent disposition of their property by the bankrupts, and especially the sale to Levy, suggests, as already intimated, the suspicion that their design at least was to put all their property out of their hands, and beyond the reach of their creditors, and thus force the latter to accept such terms as they might offer. I have given to these circumstances the most careful consideration, and have endeavored to form a just appreciation of their significance. I have come, on the whole, to the conclusion that they are insufficient to show what must be established by a preponderance of proofs, viz.: that not only the bankrupts intended to dispose of their property in fraud of the act, but that the defendant knew such to be their intention, and guiltily combined and colluded with them to carry it into effect. I feel some confidence that such would be the verdict of a jury under the proofs in this case, and under instructions from the court that the burden of proof was on the plaintiff.

Case No. 3,897.

DICKINSON v. The CATHARINE.

[29 Hunt, Mer. Mag. 458.]

District Court, S. D. New York. June 13, 1853.[1]

DAMAGES OCCASIONED BY COLLISION AT SEA.

[Schooner sailing free at night on the larboard tack without a lookout *held* solely in fault for failure to keep out of the way of a schooner approaching closehauled on the starboard tack.]

[See note at end of case.]

[This was a libel by Noah Dickinson and others. owners of the schooner San Louis, against the schooner Catharine (Starks W. Lewis and others, claimants), to recover damages for a collision between the two vessels.]

D. D. Field, for libelant.

Betts & Donohue, for claimants.

Before NELSON, Circuit Justice.

This was a suit to recover damages occasioned by a collision between the libelant's vessel, the schooner San Louis, and the schooner Catharine, which occurred on the evening of April 21, 1852. about 25 miles south of Sandy Hook. The San Louis was bound from New York to Philadelphia with a cargo of stone, and was closehauled on her starboard tack, steering S. or S. by W., and about four or five miles from shore, the wind being about S. W. by W., and the night clear enough to distinguish vessels at about a mile distant. She had a look-out and a man at the wheel, but no light. The Catharine was bound into New York on her larboard tack, with a free wind. with no look-out, but with a light, and just before the collision there had been no one at the wheel; and she did not discover the San Louis till she was within half a mile. Held, that under these circumstances, and under the rules

[1] [Reversed in 17 How. (58 U. S.) 170.]

of navigation laid down by the United States supreme court, in the case of St. John v. Pain, 10 How. [51 U. S.] 557, it was the duty of the Catharine to have avoided the collision, and that no fault was discoverable on the part of the San Louis. Decree for the libelants, with a reference to ascertain their damages.

[NOTE. The decree was affirmed by the circuit court, on claimant's appeal. They then took an appeal to the supreme court, where the decree was reversed. The supreme court found on the evidence that the San Louis luffed on first seeing the Catharine, thus violating her duty to hold her course, and placing herself in fault; but that the Catharine was also in fault for failing to keep a lookout; and that the damages should be divided between them. The Catharine v. Dickinson, 17 How. (58 U. S.) 170.]

DICKINSON (FUZZARD WADDING MAN-UF'G CO. v.). See Case No. 5,165.

DICKINSON (UNITED STATES v.). See Case No. 14,958.

Case No. 3,898.

The DICK KEYS.

[1 Biss. 408.][1]

Circuit Court, S. D. Ohio. Oct., 1863.[2]

BARGES SUBJECT TO RULES OF NAVIGATION.

1. The use of barges having been found indispensable to a profitable navigation of the Ohio and Mississippi rivers in certain stages of the water, they are subject to the rules of navigation.

[Cited in The Murphy Tugs, 28 Fed. 431.]

2. When the articles transported are the same, governed by the same transporting power, whether steam, wind, or the natural forces of the current, the rules of navigation apply respectively to the modes used.

3. Goods, whether conveyed in the body of a steamboat or in a barge attached thereto, are subject to the same guaranties and protection There is nothing in the addition of a barge connected with a steamboat which changes the character of transportation.

[Cited in The Ida Meyer, 31 Fed. 89.]

4. A contract for the use of a barge at a stipulated rate, is cognizable in admiralty, and a libel may be maintained against the steamboat using it.

[Cited in The Florence, Case No. 4,880.]

5. The parties having intended to bind the steamer, the court will not restrict the meaning of the words used in the contract, as they tend to the advancement of commerce.

Appeal from district court of the United States for the southern district of Ohio.

In admiralty. These were cross actions brought in the admiralty court, which, by the order of that court, were consolidated.

The libellants, [John] Scott & [John A.] Duble, allege that they are the owners of the steamboat Yorktown No. 2, and of the barge No. 2, which, on the 2d of December, 1854, were lying at the port of Cincinnati, in the district aforesaid, and that by the usages of navigation on the Ohio and Mississippi rivers, barges are used by steamboats, as appurtenant thereto, for towing up and down said rivers, in the transportation of freight, and also for lightering over the bars in said rivers, at a low stage of water. That the steamboat Dick Keys, on the second of December, 1854, was a vessel of more than twenty-two tons burden, enrolled, &c., and was employed with barges on the same rivers, between Cincinnati and New Orleans, and that [John C.] Riley, as master of the steamboat Dick Keys, and on behalf of said steamboat, did, by contract in writing, obligate himself and said boat, to pay to libellants twenty dollars per day for the use of the said barge, commencing on the second of December, 1854, and continuing until said Riley, as master, should deliver to the libellants either of the two barges, Damon or Pythias, which were owned by the steamboat Dick Keys, in thorough repair for business, and that after delivery the steamboat Yorktown No. 2, and the steamboat Dick Keys, should have the use of each other's barges until such time as they could meet and exchange them without injury or loss to either party; and should the libellants not make use of the barge belonging to the steamboat Dick Keys, a fair compensation should be paid by the Yorktown No. 2, until it should be returned to the libellants in as good order as when received. That on the day aforesaid, the said Riley, as master, took possession of the Yorktown barge No. 2, under the contract, and used the same until after the thirty-first of December, 1854, on which day the barge Damon was delivered to the libellants. And it is claimed under the contract, that the sum of five hundred and eighty dollars are due under the contract by the steamboat Dick Keys, her master and owners. The district court allowed a small set-off against the claim of libellants, and entered a decree in their favor for the sum of $556, with interest thereon from time of demand. [Case No. 12,528.]

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for respondent.

McLEAN, Circuit Justice. It is contended that this is not a maritime contract, or one of which a court in admiralty can take jurisdiction.

This is admitted to be a proceeding in rem, in which the steamer Dick Keys is sought to be made responsible, on the ground of a maritime lien. I am not aware that a question similar to this has at any time been raised. Had the contract been made for the mere towage of one or more barges, for hire, it could not be considered as a maritime contract. But this was not the nature or effect of the contract.

In certain stages of the water in the Ohio and Mississippi rivers, barges have been found indispensable to a profitable naviga-

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

[2] [Affirming Case No. 12,528.]

tion. It is sometimes necessary to lighten the steamboat, by placing the heaviest articles in barges. These are so connected with the boat and with its transportation, as to require but one agency. The propelling power is the same, and the rules of navigation apply. Some additional care may be required in the passage of boats on the river, but the governing principle is the same. Should two steamboats unite in ascending or descending the above rivers, there could be no objection, unless greater caution should be required in passing narrow channels.

In Pars. Mar. Law, 497, it is said, "If a barge is necessary to a steamboat, its hire to it will be regarded as a material furnished for its equipment." Amis v. The Louisa, 9 Mo. 629; Gleim v. The Belmont, 11 Mo. 112; The Kentucky v. Brooks, 1 G. Greene (Iowa) 398.

Whether the term "equipment" be the most appropriate one, to designate the use of the barge, when engaged in transporting a part of the cargo of a steamboat, it may not be necessary to inquire; but when the articles transported are the same, or substantially the same, governed by the same propelling power, whether of steam, wind, or the natural force of the current, the rules of navigation apply respectively, to the modes used. And it is proper here to say that the goods, whether conveyed in the body of the steamboat, or in the barge, are subject to the same guaranties and protection. This, it appears to me, is an important principle, especially in regard to steam navigation on our western rivers.

Steam tugs are used in difficult places on our rivers, and in entering our harbors. In such cases, the governing power being in the tug, it is made responsible for the safety of the charge.

I see nothing in the addition of a barge, connected with a steamboat, which necessarily changes the character of a transportation. On the contrary, I see additional security in such a transportation, from the laws which govern it.

No one can fail to see, from the language used in the libel, and the contract, that the parties intended to bind the steamboat Dick Keys and her owners. And this construction is necessary to give effect to the intention of the parties. And where such is manifestly the object, the court will not restrict the meaning of the words used, as they tend to the advancement of commerce.

There is no pretence that in this case any lien arises from supplies or necessaries furnished the Dick Keys. The contract between the parties covers the liabilities for which the boat may be made responsible, and these do not appear to have consisted in what is appropriately called supplies.

In regard to the terms of the contract for the barges, and the time each was used by the respective boats, and the compensation allowed by the district judge, I see nothing which requires a correction in the decree of the court; it is therefore affirmed.

NOTE. That coal barges and flat boats are not "boats or vessels" subject to admiralty jurisdiction, was held in Jones v. Coal Barges [Case No. 7,458]. Steamboats and lighters employed on tide waters are within the admiralty jurisdiction, but not ferry-boats, or those engaged in ordinary traffic along the shores. Thackeray v. The Farmer [Id. 13,852]. Ferry-boats running between different states are subject to admiralty jurisdiction and subjects of salvage. The Cheeseman v. Two Ferry-Boats [Id. 2,633].

DICK KEYES, The (SCOTT v.). See Case No. 12,528.

DICKSON (BURROW v.). See Case No. 2,-203.

Case No. 3,898a.

DICKSON v. MATHERS.

[Hempst. 65.][1]

Superior Court, Territory Arkansas. Oct., 1828.

REPLEVIN LIES, WHEN — SPECIAL PLEAS — NEW TRIAL—EVIDENCE NOT PRODUCED.

1. Where evidence is within the control of a party, who omits to use it at the trial, because he was not advised of its importance, a new trial will not be granted to enable him to bring it forward.

2. Possession by the plaintiff, and an actual wrongful taking by the defendant, are necessary to support the action of replevin.

3. Property in the defendant must be specially pleaded, and cannot be given in evidence under non cepit.

Appeal from Conway circuit court.

Before ESKRIDGE and BATES, Judges.

OPINION OF THE COURT. This was an action of replevin, brought by the appellant [James S. Dickson] against the appellee [Thomas Mathers], in the Conway circuit court, for unlawfully taking and detaining a negro, and comes here by appeal.

Several points have been relied on for reversing the judgment. First, that the judgment was rendered upon an immaterial issue. From the record it appears that the defendant plead the general issue, non cepit, and property in himself. By the first plea, he says he has not taken the property in such a manner as to entitle the plaintiff to an action of replevin; and by the second, that the property is his own, in order to entitle himself to a return of it. These were the only pleas which the defendant could plead; he could not avow, because it would be inconsistent with the general issue, and property must be pleaded in bar or abatement, and cannot be given in evidence under the general issue. 1 Chit. Pl. 481; 5 Mass. 285; 1 Johns. 380; 2 Selwyn, N. P. tit. "Replevin," 367; Shearick v. Huber, 6 Bin. 3; Hempstead v. Bird, 2 Day, 299; 1 Com. Dig. "Action," M. 6. In Pangburn v. Patridge, 7 Johns.

[1] [Reported by Samuel H. Hempstead, Esq.]

140, the pleas of non cepit and property were plead together. The pleas, then, were not inconsistent.

The second question presented by the record arises out of an application for a new trial. In the affidavit upon which the application for a new trial is founded, it is stated that there is a written contract for the hire of the negro, from George Bentley to the plaintiff, the importance of which contract he did not know at the time he consented to go to trial. The contract referred to was within the control of the plaintiff. Dickson, at the time of the trial, and that it was not used must be ascribed to his own negligence, of which he cannot avail himself as a ground for a new trial.

The third point grows out of the bill of exceptions taken to the instructions of the court to the jury. These instructions were, that the jury ought not to find for the plaintiff unless there was an unlawful taking of the negro by the defendant from the possession of the plaintiff, or that he enticed the negro from the possession of the plaintiff into his own possession, in which latter case there would be an unlawful taking. Possession by the plaintiff, and an actual wrongful taking by the defendant, are requisites to support the action of replevin. The taking must be from the actual possession of the plaintiff, and it must be tortious. Pangburn v. Patridge, 7 Johns. 140; Clark v. Skinner, 20 Johns. 465; Thompson v. Button, 14 Johns. 84. Judgment affirmed.

DICKSON (MILLIGAN v.). See Cases Nos. 9,603 and 9,604.

DICKSON (PEISCH v.). See Case No. 10,911.

DICKSON (SIMMS v.). See Case No. 12,869.

Case No. 3,899.

DIDLAKE v. ROBB.

[1 Woods, 680.] [1]

Circuit Court, N. D. Mississippi. Nov. Term, 1874.

PROMISSORY NOTE—RENEWAL BY HEIR—COMMON-LAW LIMITATION.

1. A promissory note given by the heir, in renewal of a note made by his ancestor which was barred by limitation at the death of the ancestor, is void for want of consideration.

2. At common law, after the lapse of sixteen years, there arises the legal presumption that the debt has been paid; and, after the expiration of twenty years, this presumption becomes conclusive.

The legal questions in the case were presented by a demurrer to one of the defendants' pleas. The substance of the plea is stated in the opinion of the court.

Johnson & Johnson, for plaintiff.

Nugent & Yerger, for defendants.

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

HILL, District Judge. This action is brought by the plaintiff against the defendants to recover the amount of five promissory notes, each for the sum of $3,189.27, due and payable as follows: February 1, 1868, 1869, 1870, 1871 and 1872, and each bearing interest from the first day of February, 1867, the day upon which, it is to be presumed, they were executed, no date being stated. Among other pleas interposed by the defendants is one stated as the second, which avers a want of a sufficient consideration, alleging that the notes were given in renewal of four notes executed by John H. Robb, the late husband of said Ann L. Robb, and the father of the other defendants, payable to the ancestor of said Nannie W. Didlake, dated September 12, 1839, and due and payable as follows: One for $2,613, February 1, 1843; one for $2,474, February 1, 1842; one for $2,333, February 1, 1841; and one for $500, dated September 24, 1849, and due four months after date. On all these notes there were credits, except the last mentioned. John H. Robb, the ancestor of defendants, died intestate in the year 1852, and letters of administration were granted upon his estate, by the probate court of Washington county, in May, 1853. All of these notes, except the note for $500, upon which $300 had been paid in 1850, were barred by the statute of limitations before the death of the said John H. Robb; and all of them were barred long before the execution of the notes sued upon. It is also averred that these notes were executed under a mistake as to their binding obligation upon the estate of the said John H. Robb. To this plea the plaintiffs have filed their demurrer, which raises the question as to whether the matters alleged in the plea constitute a good defense to the plaintiff's action. It is admitted that there must have been a sufficient legal consideration upon which the promises were made, to enable the plaintiff to recover; that is, some benefit to the promisor, or some injury to the promisee; but, it is insisted by plaintiff's counsel, that the giving up of the old notes was a satisfaction of them, and hence a good consideration.

The authorities hold that where a party has owed a valid debt which has become barred by the statute of limitations, or from which he has been discharged by a decree in bankruptcy, a new promise to pay the debt will be binding, both defenses being personal and only available upon plea; but in such cases the debt from which the promisor may upon his plea discharge himself must once have been a valid one and one for which he would have been liable but for the plea; otherwise, the promise is entirely voluntary and of no binding force. The heirs at law and distributees are not liable to pay the debt of the ancestor, whilst the estate, both real and personal, is liable if proceeded against in the proper manner, and within the prescribed time. This the holders of these notes executed by the ancestor neglected to do until this liabil-

ity was extinguished by lapse of time and the statute of limitations. It is now well settled in this state that a debt barred by limitation at the death of the decedent cannot be revived by a promise made by his personal representative, and upon principle, a judgment rendered against the representative upon a debt so barred would not be binding upon creditors holding subsisting debts, or upon the legatees or distributees. The heir at law immediately becomes vested with the title to the real estate, subject only to the debts of the ancestor for such balance as may remain after the exhaustion of the personal assets; and upon principle, if the personal estate is not liable, the real estate so descended cannot be reached.

But aside from the statute of limitations, there were other defenses against a portion of these notes, at the death of John H. Robb, as they are stated in the plea. The rule is well settled that after a debt has remained due and payable for sixteen years, the law holds such lapse of time as prima facie evidence of payment, which prima facie evidence may be rebutted by proof of a subsequent promise to pay, or some reasons why suit was not brought; and after the lapse of twenty years the presumption of payment become conclusive. Let us apply these rules to the notes as stated in the plea. The note falling due February 1, 1841, was due for more than twenty years before the death of the maker. The only credit was entered September 25, 1844, about eighteen years before his death. The note falling due February 1, 1842, has no credit, and was due more than twenty years before maker's death. The note falling due February 1, 1843, had no credit upon it at the death of the maker, and had been due for nineteen years, or about that length of time; leaving only the note for $500, and upon which a credit of $300 was entered within about six months after the same became due and payable. As to all but the balance due on this note there was prima facie a good defense, without invoking the statute of limitations at the death of said Robb, and a conclusive defense as to the note for $2,474. The payments made after this time were made by the administrator, it is presumed, who could not revive the debt by such payment, and thereby create a binding obligation upon herself or any one else.

From a careful consideration of the matters stated in the plea, and the principles of law involved, I am convinced that the promises made by the defendants could not by any possibility secure to them any benefit whatever; promises which they were under no legal or moral obligation to make, and which the plaintiffs had no legal or moral right to exact, and for the nonperformance of which they have no right to complain, and consequently in law there was no sufficient consideration to sustain the promises made; that the plea presents a good defense to the action, and the demurrer thereto must be overruled. To hold otherwise would be to hold that the defendants were liable for the sum of $21,787.02 for a debt of their ancestor of only $206 at the time of his death, then binding upon his estate, and which last sum had long ceased to have any binding force against his estate before those promises were made, and none of which debts ever did have any binding obligation upon either of the defendants personally. Demurrer overruled.

Case No. 3,900.

The DIDO.

[Cited in The Warren, Case No. 17,193. Nowhere reported; opinion not now accessible.]

DIDO, The (HOPE v.). See Case No. 6,679.

DIDO, The (TRASK v.). See Case No. 14,-142.

Case No. 3,901.

DIEDMAN v. The JOSEPH HUME.

[N. Y. Times, Aug. 15, 1862.]

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

SHIPPING—PART OWNERS—RIGHT OF POSSESSION.

[The owner of three-fourths of a foreign vessel may recover possession against the alien master, who owns the other one-fourth, although the accounts of the voyage are still unsettled, and the vessel has merely stopped in an American port on the way to her home port.]

[Libel by William K. Diedman against the brigantine Joseph Hume (Henry Kenely, claimant), for possession.]

Beebe, Dean & Donohue, for libelant.
Charles Edwards, for master.

Before SHIPMAN, District Judge.

This was an action for the possession of the brigantine Joseph Hume, an English vessel. The libel alleged that the libelant was owner of three-fourths of the vessel, and the defendant, Henry Kenely, owner of one-fourth, and master; that the vessel had recently arrived in this port incumbered with a bottomry bond for some $5,500; that the master brought with him the sum of $1,-000 in gold, which fact he had concealed from the libelant; that this money must have been part of the earnings of the ship, or from the bottomry; that the master had rendered incorrect accounts, and refused to deliver up the vessel, although demanded. The answer admitted that the libelant was owner of three-fourths of the vessel, but set up that the vessel was a British vessel and the master an alien and British subject; that the majority owner had no right to the possession of the vessel while in a foreign port, and while the accounts of the voyage were still unsettled. The answer also denied making any false accounts, and set forth in detail certain transactions and personal ventures of

the master. which it was claimed would account for the $1,000. It was also alleged that the vessel was bound to her home port, and in bond to proceed at once to her destination and there deliver her. The cause was heard upon the pleadings alone, and a decree of possession rendered in favor of the libelant, with costs.

Case No. 3,902.

Ex parte DIETZ.

[3 App. Com'r Pat. 358.]

Circuit Court, District of Columbia. Aug. 20, 1860.

PATENTS—EQUIVALENTS—REISSUES—LAMPS.

[1. A device for admitting air to the lower part of the flame of a lamp through many small holes is a mechanical equivalent of one admitting it through larger apertures, one on each side of the wick-chamber.]

[2. The inventor of the first device applying a certain principle is entitled to a reissue covering a mechanical equivalent of the invention secured by his original patent.]

[This was an appeal by Michael Dietz from the decision of the commissioner of patents, refusing a reissue of a patent for an improvement in lamp-burners.]

MORSELL, Circuit Judge. In his specification, Dietz says: "Having thus described my invention. what I claim as new in flat wick lamps, and desire to secure by letters patent is, an air-chamber in combination with the chamber formed by the concavity of the deflector of a lamp top, substantially as described. I also claim the combination of an air-chamber for supplying air to the interior of the cone for openings for the admission of air on the outside of the cone, between the latter and the inside of the chimney substantially as set forth."

The commissioner, in his decision, dated March 16, 1860, adopts the report of the examiners, dated March 5, 1860, which, in substance, states: "That said Dietz has failed to show either that the point taken by the examiner as to the introduction of new matter, or as to the sufficiency of the references, was not justified by the facts, and therefore [not] well taken. Is there in the records of applicant's invention, as patented, anything suggesting the alternative or variant forms of construction he now describes, and seeks to claim as his own, in the manufacturing of lamps? An inspection of them clearly shows there is not, and that is conclusive of the question; for the law, as we understand it, alike with the rules of this office and its uniform practice, prohibits a reissue of a patent for anything save the invention which was described or shown in the patent; that is to say, described in the specification annexed thereto, or shown in the model or drawings; and in neither of these records, we repeat, are there to be found any data authorizing the expansion of the invention into the proportions applicant now seeks to make it assume; hence the first and second claims he now presents are certainly—we are not sure the third is not, also—inadmissible, because based upon the introduction of new matter, for which there is no warrant." The subsequent part of the report is not recited, for the reasons which will hereafter appear.

Reasons of appeal have been filed, sufficient to cover all the points of error supposed to exist in the decision of the commissioner. The report of the commissioner in reply to the reasons is in substance the same as just recited. With this state of the case, the commissioner, according to previous notice, laid before me all the original papers relating to the case, together with the depositions of witnesses, submitted to him by the appellant, the reasons of appeal, and his report, and the case was submitted upon the written argument of the appellant's counsel. On a hearing before me previous to the filing said argument, Mr. Clark, the examiner, was present, and, after an examination and comparison of the Dyott lamp, which the appellant's counsel had made, with the drawing of the rejected application, said that he was satisfied that he was mistaken with regard to the Dyott lamp, and the same was not an anticipation of the lamp which is the subject of this case. The only point, therefore, open for my consideration, is whether the case shown by the appellant is within the statutes authorizing reissue in the absence of all fraudulent or deceptive intention.

The commissioner's objection is that there are no data to be found in the record of applicant's invention, as patented, authorizing the expansion of the invention by the alternative or variant forms of construction into the proportions applicant now makes it assume; or according to the official letters referred to by him, more definitely stated: "The new matter introduced into your (applicant's) application for the reissue of the patent granted you March 8, 1859, as indicated by the pencil marks on the 8th page, amounts to the substitution of a new invention not contemplated in your original application. The patent covers, not only the apertures in the plate between the two chambers, but those apertures in a certain relative position, viz. at the sides of the wick-tube. A special advantage was claimed for that particular arrangement, and it is evident that apertures in that situation will not admit of the same operation as if made elsewhere in the plate, or the same as if the plate was wholly dispensed with." The part of applicant's description above alluded to states that: "Instead of their being but two apertures formed in the upper plate communicating with the air-chamber, d, and the chamber, O, as many small apertures may be formed as may be deemed advisable, in which event, the lower series of holes, y, may be omitted altogether without materially affecting the burning of

the lamps, care being taken to make the openings in the upper plate of a sufficient size and number to supply the requisite amount of oxygen to the flame, or the whole upper plate may be removed entirely, in which case the size of the openings of the air-chamber communicating with the open air should be lessened and their number increased so as to steady and regulate the supply, and the depth of the chamber, if anything, increased, so as to give time to the air to diffuse itself throughout the chamber previous to its passage upwards into the cone chamber above; it would thus enter in a diffused state, cooling the wick-tube in its ascent, and in a measure acquiring the requisite degree of heat before mixing with the flame to promote combustion."

To be enabled to determine what is the extent of the improved patented invention which has been surrendered, it will be necessary to consider the import of the specification which accompanies it. It states that the patentee's "improvement relates more especially to that class of lamps with flat wicks which are provided with a deflector, as now in common use for burning coal or carbon oil, and other such fluids. These lamps, as heretofore constructed, are in so far defective as that the flame is not perfectly steady and regular, and the light not always so clear and brilliant as might be desired; which in a great measure is to be attributed to the manner in which the air is supplied to the flame. The fresh air from the outside, as it enters at the sides through a series of apertures provided for this purpose in the chimney-band, being repulsed at first by the heated air of the inside, rises up along the sides of the deflector, thus establishing a continuous current, which flows only along the boundaries of the inner space under the deflector, thus only coming in contact and commingling with the gaseous products at the upper part of the flame above the wick; no air, or at least a very small portion, flowing in at the bottom of the flame, close to the wick. Again, by the peculiar shape of the deflector or cone which encloses the wick tube, a large portion of the caloric produced by the flame is absorbed and retained by the burner; the wick-tube becomes so highly heated that it causes the burning fluid to evaporate more rapidly than is necessary for the regular supply of the flame. To obviate which defects is the object of my present improvement, and it consists in forming the lower part of the top into an air chamber, near the bottom of which a series of holes are pierced for the admission of fresh air, at the upper part of which a narrow aperture is left on each side of the wick-tube for the passage upwards of the air from the air-chamber beneath, by means of which a continuous current is established, running upwards along the wick-tube, cooling the latter as it passes up, and bringing the air to a proper temperature previous to its being brought in contact with the gaseous products of the oil at the lower part of the flame, which materially assists in providing a brilliant, steady and regular light." The summary of this claim is in these words: "The arrangement of an air-chamber, a, in the top of a lamp having a flat wick, when said lamp is provided with a cone or deflector, B, for feeding air to the flame, and the air-chamber, D, with a series of holes for the admission of fresh air, and openings, f, for its passage upwards along the sides of the wick-tube, or their, or either of their, equivalents, in the manner and for the purposes substantially as set forth."

Upon taking a careful view of the invention as set forth in the patent as at first recited, and compared with the particularly objectionable part as set forth in the official letter referred to, and the application in this case, it really seems to me that the question is narrowed down to a very small compass. As understood, it is because of a substituted number of perforated holes in lieu of the openings immediately on each of the sides of the wick-tube for the admission of the external air to pass up to the flame at certain points thereof as stated, in a better modified, regulated and directed form, from the air chamber, D, &c., that this is said to be a different mechanical arrangement and a new invention. It is true they are not made immediately on each side of the wick-tube, but they are on the same plate, almost as near, and operate for the like purpose and to effect a like object. Are they not then to be considered as equivalents? If so, it is expressly provided that they may be used if deemed proper by the patentee. That such an arrangement ought to be considered an equivalent, I shall state Circuit Justice Washington's idea, expressed in the case of Gray v. James [Case No. 5,718]. The judge says: "But we think it may be safely laid down as a general rule that where the machines are substantially the same, and operate in the same manner to produce the same result, they must be in principle the same. I say 'substantially' in order to exclude all formal difference; and when I speak of the same result I must be understood as meaning the same kind of result, though it may differ in extent; so that the result is the same, according to this definition, whether the one produce more nails, for instance, in a given space of time, than the other, if the operation is to make nails."

This case, I think, shows that although the holes or arranged device may not be of the same form, number or precise place, if the operation be of the like kind, the admission of external air for a like object and purpose, though it may be, to perfect that purpose, they are to be considered equivalents.

But again the invention is not for a particular arrangement of openings for the admission of air through the upper plate, for I think it has been fully shown that if the

plate were entirely removed the object sought could be attained by other means of a like kind. The real truth is that the patent, as well as the reissue applied for in this case, is for the application of a principle, not naked, but a patentable principle, and of course the rule laid down by the commissioner does not apply. See Curt. Pat. § 239.

The principle in the reissue applied for is nothing more than a more full development of the same principle that has been patented. The operation, purpose and object in both are of the same kind. [As to] the method or mode of attaining the object, the rule, as laid down in Curt. Pat. § 229, is "that, whenever the real subject covered by the patent is the application of a principle in arts or manufactures, the question of an infringement will be as to the substantial identity of the principle and of the application of the principle, and consequently the means, machinery, forms or modifications of matter made use of will be material only so far as they affect the identity of the application."

I think there is error in the commissioner's decision, upon both points, and the same is therefore hereby reversed, and a direction given to grant a patent to the appellant for the reissue, as prayed.

DIETZ (PAYSON v.). See Case No. 10,861.

Case No. 3,903.

DIETZ v. WADE et al.

[3 App. Com'r Pat. 142.]

Circuit Court, District of Columbia. April 12, 1859.

CREDIBILITY OF WITNESSES — RECONCILING DISCREPANCIES — PATENTS — DATE OF INVENTION — REDUCTION TO PRACTICE — VERBAL DESCRIPTION.

[1. Inconsistencies and incongruities in the testimony of witnesses whose general character for veracity has not been impeached should be reconciled, when it can be done without violence, especially when there is no extrinsic reason for suspecting error or fraud. And, if the testimony cannot be reconciled, the presumption of reason, as well as of law, will impute the variance to an innocent misconception, rather than to a willful and corrupt misrepresentation, especially when the witnesses are compelled to make their answers to an ingenious and artful examination through the medium of an interpreter.]

[Cited in Gibbs v. Johnson, Case No. 5,384.]

[2. Under the act of 1836, § 15, a verbal description of an invention to a workman, such as will enable him to construct the same, together with an order to do so, which is accordingly proceeded in by him, is sufficient to entitle the inventor to a reasonable time for making experiments to perfect his invention; and where such experiments are successful, and the invention is embodied in a machine, the inventor is entitled to claim his invention as of the date of such description and order, as against a subsequent inventor who first perfected the machine and has obtained a patent therefor.]

[Cited in Appleton v. Chambers, Case No. 497a.]

[This was an appeal by Michael A. Dietz from a decision of the commissioner of patents, in an interference proceeding between the appellant and W. W. Wade and Charles Burnham, in respect to an improvement in lamps. The decision appealed from awarded priority of invention to the appellees, who had already procured a patent, and refused to grant a patent to the appellant.]

MORSELL, Circuit Judge. An interference in the matter of this case was declared by the commissioner on the 3d of July, 1858, between the patent, granted to Wade and Burnham, April 6, 1858, and the application of the above named M. A. Dietz filed on 22d of June last for the above mentioned improvement, and upon hearing before him he decided priority of invention to said Wade and Burnham, the said patentees, and the application of said Dietz was rejected. From this decision, Dietz has appealed, and the question is now submitted to me by the parties upon written arguments. Mr. Dietz has filed his reason of appeal, which is general, upon the grounds of error both as to the law and fact. As the commissioner has made no objection to this irregularity, it will be passed over. He has laid before me all the original papers and evidence in the case, together with the grounds of his decision and the reasons of appeal.

The issue between the parties being the question of priority only, the decision now to be made must depend upon a correct view of the evidence to be drawn from the testimony offered by the parties, with a due application of the rules of law thereto. The substance of the testimony on the part of the appellant, I proceed to state:

Auguste Kaistner: He worked with a Dietz as a lamp manufacturer ten years. Commenced working on flat wick lamps May, 1857. The deflector was soldered to the chimney band. It did not answer the purpose. The soldering melted, and deflector fell down, and destroyed the lamp. Mr. Dietz gave him an idea, and an order, that the deflector must be fastened to the chimney band without being soldered; told witness to make a roller by which the deflector would be fastened to the chimney band by pressure. The chimney band is fixed together with the deflector by the roller. The roller presses the chimney band down, and at the same time makes a groove in which the deflector is fixed. Dietz told him that the deflector must be fastened to the groove in the chimney band. The groove in the chimney band was to be formed first before the deflector was fitted or placed. The groove was formed by fixing them together at the same time. Witness understood the description or plan sufficiently well to have made one. This communication was made in the beginning of September, 1857. In assigning his reason for stating that as the date at which Mr. Dietz first communicated to him this plan, he says that

he fixes the date because his father lost his employment at that time. In answer to cross interrogatories, he states the particular date at which his father lost his employment, which he says was on Saturday, sometime in September. An almanac being shown to him he then states "I believe it was the 5th. I know it was the first Saturday in the month." This was the 5th. Witness gives a full and minute description of the roller, and its operation, as given to him by Dietz, and states that experiments were made for the purpose of getting up the machine for carrying this plan into operation, which Dietz thought would be best for the purpose, and to be so made as to suit the purpose; that at the request of Mr. Dietz he worked upon a roller formed with a groove to be used for the purpose of making a groove in the chimney band; that he worked on it upon the 15th of October last, or thereabouts; that Mr. Dietz gave him the order to do it, and that he, having charge of the shop, put his brother Henry at it; that it was perfect and complete, so as to operate in the present form, between the 10th and 15th of November last. The lamp top A being shown to him, he says it is identically similar to that testified to by him on the first day of May, 1857. The lamp top B being shown to him, he says that it does embody the plan communicated to him by Mr. Dietz for the purpose of securing the deflector to the chimney band by a groove in the latter. In answer to a question in which he is asked whether Mr. Dietz has in any way changed that mode of securing the deflector to the chimney band since he (Dietz) first communicated it to him, and, if so, in what respects, he says that it is the same, always was the same; nothing changed, with the exception of the milling around the groove. In answer to cross interrogatory, "Were any lamp tops made by Mr. Dietz without solder before that machine was completed?" he answers none were made; that they were prepared to manufacture them about the 15th of November; that they made experiments in or about the middle of October. On his cross-examination as to his knowledge that it was on the 5th of September when the description of the improvement was made to him by Dietz, he answers that he knows that it was the first Saturday in the month; that he went out with his brother on the 21st September on a target excursion. His father was anxious to go with him, but he having left his employment a fortnight previous, and no living, he had not the means. On further cross-examination he says he knows it was a fortnight, because there were two days between. In answer to a direct interrogatory he says, on experimenting, they found the roller was not perfected the first time; they could not get the deflector to stay tight; but there was no other alteration, than a little change in the groove.

Henry Kaistner: He says, in September, his brother and himself commenced to alter the burners. "I commenced in September to work on these new (machines) burners, on the alteration for the glass holders. The alteration consisted so that the heaters (deflector) should not be soldered." He proceeds to give a description of the machine by which the groove was formed; gives a rough sketch marked "Exhibit C," and of its operation. He says he fixes the time to be in September by the circumstance that he turned out on a target excursion on the 21st September. At that time his brother and himself spoke about these things. His brother first spoke to him about it. That the machine spoken of by him was completed so as to turn out perfect work about the middle of October. He finished it.

Charles H. Dietz: He says that he was acquainted with an improved mode of attaching the deflector to the chimney band claimed to have been invented by M. A. Dietz. It consists in fastening the cone to the chimney band without solder by means of a groove in the chimney band. The lamp top Exhibit 1 is shown to him. He says it embodies the improvement first described. He became acquainted with said improvement about the middle of August, 1857. It was described to witness by Michael A. Dietz. His means of determining the time, "that he started for the western country about the 1st of September (the 5th of September, not later), and some three weeks previous to that he described to him (witness) the mode of putting the cone into the chimney band without solder by means of a groove." Says he has no interest; that M. A. Dietz has no connection with the firm of Dietz & Co. "When the first improved lamp tops were got up, it was with the groove turned in plain, which in some instances allowed the cone or deflector to turn on the chimney band, which was objectionable; and M. A. Dietz then milled them or made a roughness in the groove, to prevent that turning. The lamp top marked 'Exhibit No. 2' (now shown to him) embodies and shows the milling or roughness just described." On cross-examination he says: "I meant to say that we commenced to manufacture the flat wick lamp in spring of '57; commenced manufacturing the lamp top with the improved attachment by means of a groove in the fall of 1857. Have manufactured them ever since." Early in the fall of 1857, he said, he had improved the lamp top, to fix the cone in the chimney band. To a cross interrogatory, "How long since the improved lamp tops have been made by M. A. Dietz?" Answer: "I can't say. We had them early in the fall of 1857, as nearly as I can recollect;" thinks he had made some sales of the smooth grooved lamp top, before they were made grooved or milled. He came back about the last of September from the west.

The evidence on the part of the appellees, it is contended, shows the discovery for

which the patent issued was made about the 11th of September, 1857, and the completion of the machine embodying it the 1st of November following. As it relates to the testimony on the part of the appellees, it is negative in its character, and presenting some grounds for unfavorable presumptions against the claim of the appellant. Without giving it in detail, suffice it to say, the weight it is entitled to will be considered.

The first part of the commissioner's report is taken up in the discussion of the legal position contended for by the counsel for the appellant, "that the device in itself is one of such a character, and so simple in its nature, as that the mere conception or suggestion of the idea constitutes, itself, the invention." Contrary to the position assumed, the examiner regards it as safer to rest upon what have been hitherto deemed the certain tests of invention. If with this view we turn to the legislation of the country we find, by the Acts of 1790, and 1793 and 1836 [1 Stat. 109; 318; 5 Stat. 117],—the leading acts defining the requisites for the patentability of an invention,—they in all cases practicable require, in order to the issuing of a patent, that a drawing and model of the invention shall be furnished. This undoubtedly proceeds on the supposition that any evidence of the fact less decisive would be extremely deceptive and unreliable. Some visible or tangible result is necessary to show that the invention is not a vague conception, —impracticable it may be, or in a shape in which it is incapable of any use to the public,—but that it has been actually realized. The well-settled doctrine of the courts is also to the same purpose. Thus it is laid down broadly by Story, Circuit Justice, in the case of Reed v. Cutter [Case No. 11,645], "that under our patent laws no person who is not at once the first as well as the original inventor, by whom the invention has been perfected, and put into actual use, is entitled to a patent." See, also, a fuller recognition of the doctrine at page 599 in which it is distinctly asserted "that where a patent has been granted to a patentee who did not surreptitiously obtain his knowledge from a prior inventor who was using reasonable diligence to perfect and adapt the invention, in order to defeat it on the ground that the patentee was not the first inventor, some previous inventor must not only have had the idea, but must also have carried the idea into practical operation."

In the case of Washburn v. Gould [Id. 17,214], the same doctrine is again asserted, the court holding the following language: "Although others may have previously had the idea of a machine and made some experiments towards putting it in practice, the person who first brought the machine to perfection and made it capable of useful operation is the inventor, and is entitled to a patent." For further authority see the case of Woodcock v. Parker [Id. 17,971], as cited by Curt. Pat. § 43, note. The generality of the doctrine thus laid down is indeed qualified by section 15 of the act of July 4, 1836, protecting an inventor who was "using reasonable diligence in adapting and perfecting" his machine "(and whose invention was therefore of a kind which had not been brought into practical operation), as against a patentee who has surreptitiously or unjustly obtained the patent." But the case thus contemplated is not the case before us, for there is no evidence to show that Wade or Burnham had seen any other lamp top of Dietz's than that seen in exhibits, and we cannot conclude from the testimony of Austin and Church that Dietz received the idea of the new burner from Wade's. That provision of the law is therefore inapplicable here. The case before us, we are willing to believe, is that of two independent and honest inventors, and our concern is therefore solely with the question of priority.

The commissioner then proceeds to consider the testimony. He says: "On a careful examination and comparison of the testimony submitted on the part of Dietz, I do indeed find that Dietz had in his mind something of the same method of securing the deflector which constitutes the invention in contest. It is uncertain whether this was communicated by him to Auguste Kaistner in the first conversation held in the beginning of September. But he is so far clear that experiments were made with a 'roller' with which it was the object to fix the deflector to the band by pressure, and, further, it is clear that this was to be done by a groove on the roller forming a corresponding groove in the band around the flange of the deflector. But the great difficulty which appears in the case is that there is no satisfactory evidence, either in the testimony of this or of any other witness, that the conception of effecting the object had been brought to any patentable degree of perfection before the 15th of November, for unless the invention had been so perfected it is clear that the applicant has no right under the law to a preference to an original inventor who has already obtained a patent."

The commissioner then proceeds to state his objections to the testimony for the purpose of making a machine adapted to the embodiment of the improved invention, upon the ground of disparity of statement between Henry and Auguste Kaistner, etc. He says Henry Kaistner's testimony is that he worked on such a roller before the 21st September, while Auguste says that he himself worked on a grooved roller the 15th of October; that, having charge of the shop (as foreman), he put his brother Henry upon it; and that he finished it about the 15th November. Now, this disparity of statement between two witnesses, who seem to have had the same opportunity of knowing the facts, it is somewhat difficult to reconcile. If Henry also worked on the roller in September, it is strange that

Auguste did not mention it, and it is incompatible with the distinct conception of the invention which is contended for that he should have been from that time until the middle of November in bringing it into practical operation; for Auguste swears explicitly that none of the burners made by the roller before that time answered the purpose; they were all loose on the chimney-band.

The commissioner proceeds then, as he states, to look a little more closely at the testimony of these two witnesses, which he does; but, as I have already stated this testimony in detail, it is deemed unnecessary to copy what the commissioner has said more particularly. He says of the testimony of Charles A. Dietz: "Charles A. Dietz does indeed swear that his cousin M. A. Dietz described to him the proposed attachment before the 5th of September, and explains the delay in producing them of that kind by the fact that the hands were engaged in filling orders, and that it would not do to put them back. If we could rely on this witness' memory, which yet as to other particulars is very defective, and feel assured that the conception of the improvement was then complete, there would still exist strong doubts whether an inventor who from such a cause delays to follow up his invention, to perfect it, and place it in possession of the public, exhibits that diligence which entitles him to a preference to a patentee."

The testimony of Auguste Kaistner, taken in connection with the fact that the two Dietzes, though apparently being so situated as to know, could not depose with more particularity as to the time when the invention was perfected, saying nothing as to the time when a burner was made without solder leads us to the conclusion that Henry was mistaken as to his dates; that, until between the 10th and 15th of November last, Dietz was still engaged in tightening his burner in the chimney band; and that there is no satisfactory evidence that he had before that time succeeded in perfecting his invention. The Hon. Commissioner Holt says: "The conclusions arrived at by the aforegoing very elaborate report are, I am well satisfied, fully sustained by the law and by the testimony in the case. That the existence of an invention cannot be recognized by this office until it has been established by competent proof. That the maxim of 'de non apparentibus et de non existentibus eadem est lex' disposes of the case, where the testimony in kind or degree falls short of the measure uniformly required by the highest legal authorities. An invention, before it can claim the recognition or protection of law, must have been reduced to practice and embodied in some distinct form, which result can only be evidenced by either a written description, drawing, or model. Parol testimony alone will not, for obvious reasons, suffice. This doctrine has been constantly held by the courts, and has guided the administration of this office. I am aware of no decision or dictum to the contrary. The case cited from 14 Pet. [39 U. S.] 448 [Philadelphia & T. R. Co. v. Stimpson] by the counsel of Dietz, instead of assailing this principle, directly supports it. The parol declarations were there received because coupled with two drawings and a model (page 455), and without such association they would doubtless have been rejected as insufficient. I find no authority which would justify a relaxation of the rule because of the simplicity of the invention. There seems to have been neither written description, drawing, nor model of this invention prepared either by the patentees or applicant. It assumed its first tangible and practical form when they began the manufacture of the improved lamp tops. Until then it existed only in the minds of the inventors, or in the loose parol statements which they had made in regard to it." The commissioner supposes from the evidence that the date of the appellee's invention must be considered to be the latter part of October, 1857, and that of Dietz between the 10th and 15th of November, and awards priority of invention to the appellees accordingly.

Before considering the propositions of law thus laid down, I prefer an examination of the objections made by the commissioner to the credit due to the testimony of appellant's witnesses. As to the general character of the witnesses for veracity, there has been no proof offered to impeach it, nor does it appear that there was any sufficient extrinsic reason to suspect their honesty and integrity or fairness. They had been manufacturers of lamp tops for many years, and therefore acquainted with the subject, and their opportunities of knowing and understanding the subject ample. As to the objections of the commissioner on account of disparity of statement and inconsistencies between the two witnesses (Kaistner) as it respects the making and completion of the machine and of the time of making the lamp tops, and the defectiveness of the memory of another witness (Charles H. Dietz), and for which reasons the commissioner has thought proper to reject their testimony, to those points I remark: The rule in all such cases is to consider whether any such apparent inconsistencies and incongruities may not, without violence, be reconciled, especially where there is no extrinsic reason for suspecting error or fraud. If their statements upon examination be found to be irreconcilable, it becomes an important duty to distinguish between the misconception of an innocent witness, which may not affect his general testimony, and wilful and corrupt misrepresentations. The presumption of reason as well as of law, in favor of innocence, will attribute a variance in testimony to the former rather than the latter origin, more especially when the witnesses were unacquainted with our language, and obliged to make their answers to a very ingenious and artful exam-

ination through the medium of an interpreter. The testimony of the three witnesses who testify to the same matter should be taken together. I observe that the commissioner (through inadvertence, no doubt) takes no notice of the part of the testimony of Charles H. Dietz in which he proves that the Kaistners first worked on a machine to produce the fastening of the deflector to the chimney band by a plain groove. This is his answer to the 12th direct interrogatory. He is asked, "What difference, if any, exists in the mode of securing the deflector to the chimney band without solder, between the lamp tops as at first made and those now manufactured by you?" to which he answers: "When we first got them up, we got them up with the groove turned in plain, which in some instances allowed the cone or deflector to turn in the chimney band, which was objectionable, and Michael A. Dietz then milled them or made a roughness in the groove to prevent their turning." On his cross-examination he was asked: "Are you pretty certain that you had made any sales of the smooth grooved lamp tops at all, before they were made with the groove milled?" He answered: "I think we did. I am pretty sure we did. We sold some." He fixes the time of the transaction first alluded to as being early in the fall, and is assisted in his recollection from the circumstance of the time when he went to and returned from the western country; that Henry Kaistner and his brother Auguste commenced and worked for adapting a machine according to the description of the improved invention as just before given to him with an order so to do in September, and experimented thereon until it resulted in the plain grooved lamp top, which Henry thought in October was perfect, because it was sufficient to prevent the burner from falling down, and of which some were sold. I think the testimony of the three witnesses together is reasonably certain; and also that the machine being found imperfect in some instances, by suffering the deflector to turn around, not being sufficiently tight, was worked on and completed by milling, as stated by the witness, and perfected as now shown by Exhibit B. By taking the testimony together, I think it is also certainly enough proved, the witnesses being corroborative of each other. The commissioner himself says that Auguste Kaistner is so "far clear that experiments were made with a roller with which it was the object to fix the deflector to the band by pressure, and further it is clear that this was to be done by a groove on the roller forming a corresponding groove in the band around the flange of the deflector," and in which they were engaged in perfecting the embodiment of the invention. By this course of considering the testimony, I think the apparent discrepancies may be reconciled and the truth attained.

Thus it will be perceived, from the aforegoing view which I have taken of the testimony, that I think there is satisfactory evidence that M. A. Dietz, as early as the 5th of September, if not earlier, had discovered the invention claimed by him in this issue, and determined to reduce it to practical use by embodying it in a suitably adapted machine; and he described it fully in detail, and explained its operations, to an experienced skilful workman, with orders to him to proceed accordingly, and to do the necessary work; that the workman understood, and would be able to perform it; that, in the same month of September, the workman, together with another equally skilled in such kind of work, commenced their operations and continued the same, with which object in view experiments were made, and this purpose partially accomplished, with the groove turned in plain, and some of the lamp tops according to this plan sold before or by the middle of October following. About this period it was thought necessary that an alteration should be made by some enlargement of the groove, or by milling or roughing it and the flange of the deflector. This work was accordingly done and completed by the 10th or 15th of November following as it appears by Exhibit B, and now before the patent office.

The case of the patentees appears to be of a similar discovery sometime in the month of September of the same year, subsequent to that of the appellant, and his perfected invention about the 1st of November following, which latter he contends was before the perfected invention of the appellants. This then being the case before me on the evidence, the next step will be to consider what are the proper rules of law which ought to govern and be applied.

The position which I set out with is this: that (if as in this issue of interference) where the only question is that of priority of invention, an inventor intending to embody his invention in a suitably adapted machine for that purpose describes it to a skilful mechanic, fully and clearly, so as to enable the workman from that description to construct it, with an order to him so to do, and which is accordingly proceeded in by the workman, the inventor will be entitled to a reasonable time for making experiments in order to perfect his invention, which description and experiments, if successful, must be received and considered as sufficient evidence of an assertion of his right at that time of so making them, although orally made, and although a subsequent independent inventor of the same invention may be so fortunate as to succeed in perfecting the invention and obtaining a patent therefor before him; yet nevertheless priority of invention ought to be awarded to such prior inventor, as the first and original inventor, (and having complied with all the other requisites of the statute), has a right to a patent. This conflicts with the rule laid down (as understood) by the commissioner,

which in substance is that, in the case of independent inventors, he who first perfected his invention though a subsequent inventor, is entitled to the patent. The principal feature in this conflict seems to be as to the nature of the proof; that proof of the origin of the invention by verbal declarations or descriptions was incompetent, though for the purpose merely of ascertaining the time, and made before any controversy had arisen. It is difficult to understand the force of this objection. From the nature of the case it is the best evidence that can be expected. It is the expression of a new principle conceived in the mind, and can only be made known by expression; and, whether that be oral or in writing, it would still be testimony of the same nature. The one might be more certain than the other, but would not be sufficient to reject it, as it might still be sufficiently certain, by giving it form and shape; and, if this is done in a reasonable time, does it not become a part of the res gestae? The expression of it, whether verbal or written, for the purpose of showing the time, is the very thing manifested as existing. For practical purposes, it must, it is true, be reduced to form and shape. All this, I think, is clearly settled in the case of Philadelphia & T. R. Co. v. Stimpson, supra. Justice Story, in delivering the opinion of the court, says: "The invention itself is an intellectual process or operation, and, like all other expressions of thought, can in many cases scarcely be made known except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words, a month, or even a year, before it can be embodied in any visible form, machine, or composition of matter," etc. Again: "The conversations and declarations of a patentee, stating that he had made an invention, and describing its details, and explaining its operations, are properly to be deemed an assertion of his right at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an antecedent time." How makes known? The judge does not say by writing or a machine; he means by words. But the force of this authority for this purpose is supposed to be overcome by the supposed fact that these declarations were accompanied by two drawings and a model. Now, I have carefully looked through the whole case, and I cannot find one word of the kind in any part of the record, either in the statement of the case, in the bill of exceptions, or in the opinion of the court. I have reason, therefore, to suppose they were not in the case. The judge certainly does not place his opinion upon any such fact; and, if they were in the case, it could not materially affect the principle, because the declarations giving the description, etc., are of a higher character, being the thing itself. This case establishes another principle,—that necessary time used for the embodiment of the invention ought to be allowed without detriment to its origin as prior in time. The commissioner has already stated "that the existence of an invention cannot be recognized by the patent office until it has been established by competent proof, which he defines to be something more than parol testimony alone, such as a written description, drawing, or model, or, in other words (if intended to meet the point before him), something more than a full and clear verbal description, with the commencement of the work on a machine to reduce it to practical use and with a successful result." The conclusion to be drawn from that position is that, as between inventors as in this case, on an issue of priority, he who first perfects the invention by a practical use is entitled to a patent. With all due respect, I cannot think so. Such a rule, I think, would operate unequally, unjustly, and oppressively, and subversive of the good old rule, "qui prior est in tempore potior est in jure." No just value would be placed upon the incipient rights of the party, in which, although the inventor has no exclusive property at the time, the law regards as an interest which he may perfect, and such as is within the provisions of the act of congress of 1836, respecting assignments. This principle is decided by the supreme court in the case of Gaylor v. Wilder [10 How. (51 U. S.) 477], in which case Judge Taney says: "The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute, by proceeding in the manner which the law requires." I wish not to be understood that this case is referred to by me to show that the invention, whilst in a merely intellectual stage, is assignable, but to show that it is recognized by the patent law whilst it is in being practically prepared to obtain the patent.

Several authorities of decided cases have been referred to and relied on by the commissioner to support the grounds taken by him, which I think are very much misunderstood. The first case I notice is that of Reed v. Cutter [Case No. 11,645]. In his quotations from this decision of the judge (as before recited by me) the commissioner omits to state the very next sentence following the one he did state, and I think states more fully the meaning of the judge. It is this: "A subsequent inventor, although an original inventor, is not entitled to any patent if the invention is perfected and put into actual use by the first and original inventor." So as to the other passage. The commissioner seems to consider the judge as deciding the application of the qualification contained in section 15 of the act of 1836 was solely confined to the case of a second inventor who had surreptitiously or unjustly obtained the patent. And, as this was not a case of that kind, the first inventor in this case could not avail himself of the fact of due diligence, etc.

I think it is clear that no such conclusion can be drawn. At page 599, noticing the reference to the passage in Philips on the subject of this section 15, the judge says: "These latter words 'was using reasonable diligence in adapting and perfecting the same' are copied from the 15th section of the act of 1836, c. 357, and constitute a qualification of the preceding language of that section, so that an inventor who has first actually perfected his invention will not be deemed to have surreptitiously or unjustly obtained a patent for that which was in fact first invented by another, unless the latter was at the time using reasonable diligence in adapting and perfecting the same; and this I take to be clearly law." The construction given by the commissioner would in effect be to give a greater immunity to a dishonest inventor than to an innocent independent one. The following part also of the same opinion makes it clear that the judge had no such meaning. On page 600 he says that in a race of diligence between two independent inventors, he who first reduces his invention to a fixed, positive and practical form would seem to be entitled to a priority of right to a patent. Therefore, the clause of section 15 now under consideration seems to qualify that right by providing, in such cases, he who invents first shall have the prior right if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact first perfected the same, and reduced the same to practice in a positive form. It thus gives full effect to the well-known maxim, "that he has the better right who is prior in point of time," namely, in making the discovery or invention. But if, as the argument of the learned counsel insists, the text of Mr. Philips means to affirm (what I think it does not) that he who is the original and first inventor of an invention so perfected and reduced to practice will be deprived of his right to a patent in favor of a second and subsequent inventor simply because the first invention was not then known or used by other persons than the inventor, or not known or used to such an extent as to give the public full knowledge of its existence, I cannot agree to the doctrine, for, in my judgment, our patent acts justify no such construction. It is hardly possible to conceive a stronger decision in favor of the position laid down by me in the first part of the discussion than the one just recited. It may not be amiss to state the construction of this section 15 of the act of 1836 given by Philips on Patents, at page 395. He says: "By looking at the former part of the section, we find that the patentee must be the 'original and first inventor.' The construction of the two parts of the section, taken together, is, then, that if the patentee was the original inventor of the thing patented, his patent shall not be defeated by proof that another person had anticipated him in making the invention, unless it also be shown that such person was adapting and perfecting his invention; or, in other words, if the patentee was an inventor of the thing patented, he shall not in such case be considered as having surreptitiously or unjustly taken out a patent for what was invented by another." The next is the case of Washburn v. Gould [Case No. 17,214], which the commissioner truly says asserts the same doctrine, and I think nothing more. And the next case is that of Woodcock v. Parker [Id. 17,971]. The judge says: "In the present case, as the defendants claim their right to use the machine in controversy by a good derivative title from Samuel Parker, if the jury are satisfied that said Parker was the first and original inventor of the machine, the plaintiff cannot, under all the circumstances, maintain his action, notwithstanding he may have been subsequent inventor, without any knowledge of the prior existence of the machine, or communication with the first inventor. It is not necessary to consider whether, if the first inventor should wholly abandon his invention, and never reduce it to practice, so as to produce useful effects, a second inventor might not be entitled to the benefit of the statute patent, because there is not the slightest evidence of such abandonment." It is difficult to conceive what of this decision the commissioner can think supports his proposition. There certainly has been no proof of abandonment; on the contrary, as before said, a following up ever since the discovery of efforts to adapt it to practical use, and perfect and prepare it for patentable application, according to the requirements of the statute, and which efforts have been completely successful. With respect to the question of diligence each case must depend upon its own circumstances. There is certainly no sufficient evidence that Dietz, the inventor, had wholly abandoned his invention; that he suffered his invention to rest in mere theory or in intellectual notion or in uncertain experiments, but in due time reduced it to practice, and embodiment. The discovery was in September, and the invention perfected early in the November following. The similar work occupied the appellees nearly the same length of time. I cannot say it was unreasonable. In support of his case the appellant's counsel referred to a great number of authorities, and some were referred to on the part of the appellees; but I have chosen to rest my opinion alone on those cited by the examiner and commissioner as entirely sufficient, and therefore shall not take a particular notice of others.

In conclusion, I am satisfied that the appellant has made out his case both upon the law and the facts, and that he is entitled to a patent accordingly.

Case No. 3,904.

DIGGES v. ELIASON.

[4 Cranch, C. C. 619.][1]

Circuit Court, District of Columbia. Nov. Term, 1835.

REVIVOR OF JUDGMENTS — LIMITATION — RUNNING OF STATUTE.

1. The limitation of twelve years in the Maryland statute of limitations, of 1715, c. 23, § 6, does not continue to run from the date of the original judgment if it has been revived by scire facias within the twelve years. The expression "twelve years' standing," means, twelve years' standing without any proceeding towards enforcing payment.

2. The plea is not supported unless twelve years have elapsed since the revival of the judgment by scire facias.

This was a scire facias [by Norah Digges, administrator of William D. Digges, against E. E. Eliason, administrator de bonis non of John Eliason] to revive a judgment obtained by William D. Digges, in his lifetime, on the first Monday of June, 1820, and which had been revived by an award of execution thereupon, on the first Monday of December. 1826. The defendant pleaded the Maryland act of limitations of April, 1715, c. 23, § 6, and averred that "the debt, or thing in action," in the scire facias mentioned, was above twelve years' standing at the time of the impetration of the writ. The plaintiff replied that the original judgment was revived by an award of execution thereupon on the first Monday of December, 1826, and that twelve years had not elapsed since the said award of execution to the day of the impetration of this writ of scire facias, namely, the 14th of March, 1838. To this replication there was a general demurrer.

Mr. Marbury, for defendant, contended that a scire facias and fiat thereupon, is not a new judgment, and does not in any manner affect the original judgment. It stands unaltered as it stood before, and continues to stand until the expiration of the twelve years from the rendition thereof, when it becomes "a debt, or thing in action above twelve years' standing," and "not good or pleadable;" and cannot "be admitted in evidence." The language of the 6th section, is different from that in the 2d section, which merely declares that the actions therein mentioned shall be commenced or sued within the time and limitation therein expressed, and not after. It is a limitation of the action only; but in the 6th section the language applies to the cause of action; and declares it shall not be good or pleadable, or admitted in evidence. It destroys the cause of action itself, not merely the remedy. A promise to pay a judgment, will not support an action upon the judgment barred by limitation. The action must be upon the new promise.

Mr. Key, contra, contended that the judgment was revived and redintigrated by the scire facias, so as to become a new judgment. and its standing begins with the revival.

CRANCH, Chief Judge, delivered the opinion of the court.

The question arising upon this demurrer is, whether the judgment for the recovery of damages and costs is a debt, or thing in action above twelve years' standing, within the meaning of the 6th section of the act of assembly of Maryland of April, 1715, c. 23, if the court has, within twelve years next before the issuing of the scire facias, awarded an execution thereon. The words of the act are, "That no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign lord the king, his heirs or successors, shall be good or pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years' standing." It is entitled "An act for limitation of certain actions, for avoiding suits at law." Although the previous sections contain provisions analogous to some of those of the English statute of 21 Jac. I. c. 16, yet this 6th section seems to have been original, and intended to limit actions not limited by the statute of James; namely, actions upon single bills, bonds, judgments, recognizances, statutes merchant, and of the staple, and other specialties. Although the language of limitation in this 6th section is different from that of the former sections, its object seems to be the same. Instead of saying that the actions upon these specialties shall be brought within a certain time "after the cause of such action accruing," as in the second section, it says that no such judgment or specialty "shall be good or pleadable, or admitted in evidence, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years' standing." The 2d section forbids the action; the 6th destroys the evidence. The object is the same in both. Both are equally effectual; both have an exception in favor of those who are under a temporary incapacity to sue; and both should receive the same construction. What would save the right of action in one, should save it in the other. It cannot be supposed that the legislature intended that a creditor who recovered judgment and took out his fieri facias within the first year thereafter, and so from year to year for twelve years, and upon each writ made a small part of the debt, say one twentieth, should not have another fieri facias in the thirteenth year for the balance due upon the judgment. This would be contrary to all analogy in other cases. A creditor who diligently pursues all his lawful remedies in due season, cannot lose his debt by lapse of time. It is evident, therefore, that the leg-

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

islature by using the terms "twelve years' standing," did not mean merely twelve years from the date of the judgment. The statute must have a reasonable construction so as to effect its intention without depriving the diligent plaintiff of his rights. Thus by the 2d section actions must be commenced or sued within three years from the time of the cause of action accruing; yet the capias ad respondendum, upon which the defendant is taken for a single contract debt, and which is strictly the commencement of the action, may be dated long after the term of limitation has expired, provided the plaintiff has issued a previous capias within the term of limitation, and has continued to issue subsequent writs from term to term until the defendant is taken. So, at common law, a plaintiff could never have an execution upon his judgment in a personal action unless he took it out within a year and a day after the rendition of the judgment; for no scire facias was given by the common law in such a case; and the plaintiff was driven to his action of debt on the judgment. But when the scire facias was given by the statute of 13 Edw. I. c. 45, the plaintiff might, at any time after judgment, have execution by means of a scire facias; and after the return of the execution unsatisfied he might renew it from term to term until he obtained satisfaction. In process of time this renewal of the execution from term to term became a mere matter of form, and the courts permitted them to be entered upon the roll as if issued and continued, (when in fact they were not) from the return of the first writ until the actual issuing of another. A judgment revived by scire facias has no greater vigor, nor longer life, than it had when it was originally rendered. By the award of execution, it is revived for one year, and if the plaintiff did not issue his execution upon that award, the judgment again expired. Hence it was necessary not only to take out the execution within the year after the award, but to continue it from term to term, or at least from year to year. If he did this, he used all necessary diligence, and was not affected by the limitation of a year and a day. The limitation created by the act of Maryland, is not limitation of execution, but of the right of action, and is not for a year and a day, but for twelve years; yet the same principle applies to both, namely, that he who uses due diligence in pursuing his right, shall not lose it by lapse of time. As the plaintiff saves his execution from the common-law limitation of a year and a day, by taking out his execution within the year, so it would seem to follow, by analogy, that he should save his right of action by scire facias on his judgment, from the statute limitation of twelve years, by issuing it within the term of limitation. It has been before shown that the expression, "twelve years' standing," cannot mean simply twelve years' date. What then does it mean? We think it means twelve years' standing, without any proceeding towards enforcing payment. It was an expression in common use in 1715, when the act was passed, and was familiar to the lawyers of that day, as it is to be found in many of the old reporters. Thus in the case of Hardisty v. Barny, 2 Salk. 598, it is said, "If a judgment be above ten years' standing, the plaintiff cannot sue a scire facias without motion in court; if under ten, but over seven, he cannot have a scire facias without a motion at side-bar. Note, if after such motion, and judgment revived by scire facias, the defendant dies before execution, the plaintiff must sue a new scire facias; but may have it without motion, for the judgment was revived before. Per Curiam." Here it is evident that by the words "ten years' standing," the court meant ten years' standing without execution or scire facias; for the court says further, "If after such motion, and judgment revived by scire facias, the defendant dies before execution," (that is, before the expiration of the year and a day,) "the plaintiff must sue a new scire facias, but may have it without motion;" and they gave the reason, "for the judgment was revived before," and therefore was neither of ten nor seven years' standing; so that a judgment revived by scire facias within twelve years, is not a judgment of twelve years' standing. Whether the judgment on the scire facias is to be considered as a new judgment for the original debt, is not material, as, according to the long-established practice in the English courts, before the passing of the Maryland act of 1715, the revival by scire facias prevented the original judgments from being considered as standing, within the meaning of that word, in the expression, "ten years' standing." The opinion in the case of Hardisty v. Barny, was givèn in 1695, and was a declaration of the then long-established practice of the court. The Maryland act was passed twenty years after that case, and probably with full knowledge of that practice. The English authorities, also, generally consider and speak of an award of execution upon scire facias as reviving the original judgment, and such also has been the general understanding and language in this country. Upon these considerations, the court is of opinion, that as twelve years had not elapsed between the revival of the judgment by scire facias in 1826, and the suing out of the present scire facias, the judgment is not barred by the statute. Judgment upon the demurrer for the plaintiff.

Case No. 3,905.

In re DIGGLES et al.

[8 Ben. 36.][1]

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

BANKRUPTCY—PRACTICE ON PETITION TO SET ASIDE COMPOSITION.

On a petition to set aside a composition, by reason of an alleged payment, on behalf of the bankrupts, to certain creditors, of a greater percentage than was offered under the composition, for the purpose of inducing them to vote for the composition, which allegations were contested, the court ordered the clerk to call a meeting of all the creditors described in the statement produced at the meeting at which the resolution for composition was passed, for the purpose of taking testimony as to the facts alleged, on ten days' notice, to be given as the notice for the first meeting was given, and stating the object of the meeting, the notice to be also served on the debtors, and on the person by whom the payment was alleged to have been made, the petitioners to have the affirmative in putting in such testimony, the clerk to report the testimony to the court, and the matter then to be brought on for hearing on notice, on the petition, affidavits and testimony.

In this case, after a composition offered by the bankrupts [James H. Diggles and Thomas D. Mason] had been confirmed by the court, certain of the creditors presented to the court a petition, accompanied by affidavits, asking to have the composition set aside and vacated, on allegations that, prior to the acceptance of the composition, certain creditors had received from one Nichols, who was acting for the bankrupts, forty cents on the dollar of their claims, and were thereby induced to vote to accept the proposed composition of twenty-five cents on the dollar, and that those facts were unknown at the time to the rest of the creditors. On this petition, an order to show was made, on the return to which affidavits were presented in opposition to the allegations of the petition.

BLATCHFORD, District Judge. In this case let an order be entered reciting the filing of the petition of Marshall P. Wilder and others, and the issuing of the order to show cause thereon, and the hearing on the same, and on the affidavits in support of and in opposition to the same, and referring it to the clerk of this court, to call a meeting before him of all the creditors whose names and addresses and the amounts of the debts due to them are shown in the statement of the debtors produced at the meeting at which the resolution for composition was passed, by a notice of ten days, to be given in the manner set forth in the form of order calling a first meeting for composition, such notice to state that the object of the meeting is to take testimony as to whether the composition of twenty-five cents on the dollar set forth in the resolution passed at a meeting of creditors, held November 9th, 1874, cannot, for any cause set forth in said petition and affidavits, proceed without injustice or undue delay to the creditors or to the debtors, or ought, for any such cause, to be set aside, for the reason that E. R. Mudge, Sawyer & Co., Wheelwright, Anderson & Co., Converse, Stanton & Davis, and Fitzsimmons, Clark & Co., creditors of said debtors, received from George B. Nichols, prior to the confirmation of said composition by the court, forty cents on the dollar for their claims against said debtors, as an inducement to them to withdraw their opposition to such confirmation, without the knowledge of such fact being communicated to the other creditors, or to the court, prior to such confirmation, and assigned their claims to said Nichols. The order will also provide that such notice shall also be served on said debtors and on said Nichols; that the said clerk shall, at such meeting, take such testimony on the matters aforesaid, as shall be produced by any of the said parties on whom notice is to be served, the said petitioners to have the affirmative in putting in such testimony; and that the clerk shall report such testimony to the court, and the matter shall then be brought on for hearing, on notice, on said petition, affidavits and testimony.

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

DIGGS (GUSTY v.). See Case No. 5,878.

DIGNUM (PHOEBE, The, v.). See Case No. 11,110.

Case No. 3,906.

DIKE et al. v. HOWE.

[4 Cliff. 132.][1]

Circuit Court, D. Massachusetts. May Term, 1870.

INTERNAL REVENUE TAX—BOOTS AND SHOES—REMOVAL "FOR DELIVERY" — AGENTS OF MANUFACTURER.

1. In June and July, 1866, the plaintiffs received orders for certain cases of boots and shoes, and manufactured the same prior to the passage of the act of July 13, 1866 [14 Stat. 128, 132], which went into operation August 1, following. This act reduced the rate of internal revenue duties on these articles from twenty-five to two per cent. The orders were accepted, and the goods sent forward prior to the passage of the amendatory act. When the orders were given and accepted, it was expected that the duties would be reduced. It was agreed, between the parties to the sales, that the purchase and sale of the goods should not take effect until August 1, next succeeding the acceptance of the orders and the forwarding of the goods. It was also agreed that the persons to whom the goods were sent should store the same for the plaintiffs until August 1, the goods to remain at the risk of the plaintiffs, but without any charge for storage, and that the bargainers should have the benefit of the reduction in the rate of duties, if any was made within that period. After the goods were sent, the parties to whom they were sent gave storehouse receipts. Freight was paid by the parties to whom the goods were sent. *Held*, the goods were subject to the rate of duty required by law prior to the passage of the act of July 13, 1866.

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

2. Removal for delivery to others than the agents of the manufacturer or producer, renders the manufacturer or producer liable for the tax provided by section 30 of the act of June 30, 1864 [13 Stat. 264, 269].

3. The persons to whom the goods were sent, in this case, were not the agents of the manufacturer or producer, as intended by the section of the act referred to in the preceding note.

[This was a bill by Lyman Dike and others against Church Howe.]

Manufacturers of boots and shoes were, with certain exceptions, required by section 24 of the act of June 30, 1864, to pay a duty of five per cent. ad valorem upon the articles "produced or manufactured," if the same were produced or sold, or if manufactured or made and sold, or if consumed or used by the manufacturer or producer, or if removed for consumption or for delivery, within the United States, to others than agents of the manufacturer or producer. 13 Stat. 264, 269. Provision was also made by section 5 of the amendatory act passed March 3, 1865, that "in addition to the duties imposed by the prior act, there should be levied, collected, and paid, upon certain articles enumerated in the prior act, including boots and shoes," an increase of one fifth, or twenty per cent. of the duties or rates of duty now provided in said section, whether ad valorem or specific. Id. 483. Eight hundred and twenty-six cases of boots, of the taxable value of $29,847, were, during the months of June and July, 1866, manufactured by the plaintiffs, at their place of business in the city of Worcester, in this judicial district. By force of the act of July 13, 1866, which went into operation on the first day of the succeeding month, the duty or tax on boots and shoes was reduced to two per cent. ad valorem, to be paid by every person making, manufacturing, or producing for sale boots or shoes, or furnishing the materials thereof, and employing others to make, manufacture, or produce the same. 14 Stat. 128, 132. Orders, oral or written, for the goods in question, were received by the plaintiffs from the several parties mentioned in the record, in the months of June and July, prior to the passage of the aforesaid amendatory act, reducing the rates of internal revenue duties, and they accepted the orders and sent forward the goods before the amendatory act was passed. Expectations were entertained at the time the orders were given and accepted, that the rates of internal revenue duties would be reduced, as a bill to that effect was pending in congress, and in consideration of that fact, it was agreed between the parties that the purchase and sale of the goods should not take effect until August 1st, next succeeding the acceptance of the orders and the forwarding of the goods; and it was subsequently agreed that the persons to whom the goods were sent should store the same for the plaintiffs, at their respective places of business, until that time, the goods to remain at the risk of the plaintiffs, but without any charge for storage; and that the bargainer should have the benefit of the reduction in the rate of duty, if any was made within that period by the legislation of congress. Pursuant to that arrangement the goods in question were sent, as ordered, to parties resident in Iowa, New York, Massachusetts, Ohio, Wisconsin, and Illinois, as more fully explained in the record. Most or all of the goods so ordered and sent remained on storage until the time agreed, and were then appropriated by the bargainers as their own property, without other delivery or further agreement. Difficulty being apprehended by the plaintiffs in relation to the taxes on the goods, the parties to whom they were forwarded, subsequently, at the request of the plaintiffs, gave them storehouse receipts; but none such were given or required when the goods were forwarded. On the contrary, they forwarded the goods without exacting any promise for their return, and without insurance, and with the express understanding that the freight should be paid by the persons to whom the goods were sent. Under the circumstances, the goods were assessed at six per cent., and the defendant, as the collector for the eighth collection district in this commonwealth, collected the whole amount. The plaintiffs protested, and brought an action of assumpsit to recover back the excess beyond two per cent., insisting that the goods were not taxable under the primary act.

A. Hemenway, for plaintiffs.

J. C. Ropes, Asst. U. S. Atty., for defendant.

CLIFFORD, Circuit Justice. Unless the goods were manufactured and sold prior to the passage of the amendatory act, or were removed for consumption or for delivery to others than agents of the manufacturers antecedent to that time, the plaintiffs are entitled to judgment, as it is clear that the goods were not used or consumed by the manufacturers within the meaning of those words, as employed in the section imposing the higher rate of duty exacted by the defendant. Goods of the kind were taxable under that provision when they were made and sold by the manufacturer, or when they were removed, either for consumption or for delivery to others than agents of the manufacturer, and the defendant contends that his doings in exacting the whole amount of the tax, as assessed, are justified upon each of those grounds, as appears by the language of the section under which the tax was levied and collected. Stated in other words, the propositions of the defendant are as follows: 1. That the evidence shows that the goods were sold when the orders were accepted, and the goods were forwarded at the expense of the persons who gave the orders. 2. That the evidence shows that the goods were removed for consumption when they were forwarded, as the removal was made in pursuance of a contract of sale, to take effect on a given day in the future, especially as the

freight was paid by the persons to whom the goods were sent; and also for the reason that the goods, by the terms of the contract, were not, in any event, to be returned to the custody of the manufacturers. 3. That the evidence shows that the goods were removed for delivery to others than agents of the manufacturers within the meaning of the act of congress under which the duties were assessed and collected. Extended discussion of the first and second propositions is unnecessary, as the court is of the opinion that the defendant must prevail upon the third ground assumed, to wit, that the persons to whom the goods were forwarded were not the agents of the plaintiffs, within the true meaning of that word as employed in the section under consideration. Mere depositaries are not agents of the manufacturer or producer, within the meaning of that word as there employed, as is evident from the fact that there may be a removal for delivery to others than agents of the manufacturer or producer; and in that event the language employed shows just as plainly that it was the intention of congress that the manufacturer or producer should pay the tax, as if it had been so declared in express terms.

Removal for delivery to others than agents of the manufacturer or producer renders the manufacturer or producer as clearly liable to the tax, under the language of that provision, as the actual sale or consumption of the article, or the removal of the same for consumption; but the removal of the goods for delivery to the commission merchant, or other regular selling agent of the manufacturer or producer, creates no such liability, as the intention of congress, in that event, was that the goods should not be liable to taxation until they were sold or consumed. Circular No. 34, 2 Int. Rev. Rec. 52; Circular to Manufacturers, Id. 130; Letter, Commissioner to Assessor, Id. 156. Large manufacturing establishments usually employ commission merchants, or other regular selling agents, to dispose of their manufactured products, and it is quite obvious, from the language of the provision, that congress did not intend to forbid or embarrass that agency in the transaction of that kind of business, nor is there any necessity for such legislation, as the intervention of such regular agents in disposing of the manufactured product, is rather a check than a facility to any fraud upon that branch of the public revenue, and does not occasion any embarrassment to the officers entrusted with the execution of the laws providing for the assessment and collection of the internal revenue duties. Manufactured products may be removed for delivery to such agents, without the goods becoming liable to taxation under that provision, any more than they would, if they had remained in the building where the articles were manufactured; but the removal for delivery in this case was made under very different circumstances, and for a very different purpose, as the persons to whom the goods were sent were not the regular agents of the plaintiff, to sell their manufactured products, nor had they authority in any event to sell the goods in question for the benefit of the manufacturers. Such a theory finds no support in the evidence, as the persons who gave the orders received the goods, if not as actual purchasers, certainly under a contract of sale and purchase to take effect on a given day in the future, and with the distinct understanding of both parties that nothing was wanting to perfect the sale but the stipulated lapse of time. They ordered the goods as in case of purchase, paid the freight on the receipt of the goods without any pretence of claim upon any one for the same, and agreed to store the goods until the stipulated time elapsed, without charge to the plaintiffs.

Ultimate sale and purchase of the goods were intended by both parties, but there was a difference of opinion as to the price to be paid and received for the same, and to obviate that difficulty the plaintiffs agreed, if the duties were reduced on or before the time stipulated, that a corresponding reduction should be made in the price of the goods, and as the object in view would be defeated by operation of law if the sale was actually made before the reduction took place, it was agreed that the goods should remain, during that period, in the storehouses of the persons to whom they were sent, or until it was settled whether congress would or would not reduce the duties. Viewed in the light of those circumstances, it might well be contended that the reservation was colorable, and that the property in the goods passed to the depositaries; but inasmuch as it is clear that the defendant must proceed upon the ground that the goods were removed for delivery to others than agents of the manufacturers, no decided opinion will be given on that point. Suppose the sale was not completed as between the parties, still the court is of the opinion that the goods were removed for consumption within the meaning of that provision, as it is clear that neither party contemplated that they would in any event be returned to the custody of the manufacturers. Nothing remained open but the price, and nothing was wanting to fix the price but the lapse of a given period of time. Attempt is made in argument to establish the proposition that storage was, in fact, paid by the plaintiffs for the two hundred and eighteen cases deposited with the firm doing business in the place where the boots were manufactured, but the evidence fails to satisfy the court that the goods were removed and stored with any such definite understanding between the parties. Orders for the goods were given in May, prior to the passage of the amendatory act, under "the same precautions as in the other cases," which is understood to mean that the sale

and purchase should not take effect until August 1, following the date of the transaction, and that a corresponding reduction in the price named by the sellers should be made, if the duties were reduced on or before that time. Confirmation of that view is derived from the testimony of the senior partner of the purchasing firm. He states, in substance and effect, that the plaintiffs preferred to name a definite price at that time, with the understanding that the proper deduction should be made if the duties were reduced, and he adds that they had a "difference" as to thirty cases, and that in the adjustment of that matter the plaintiffs took off $15.00 "to pay for storage," which is the sum expressed in the receipt exhibited in evidence. Allowed, as the sum was, as matter of compromise, the circumstance is not sufficient to take that portion of the tax out of the operation of the rule applied to the residue. Judgment for the defendant.

Case No. 3,907.

DIKE v. KUHNS et ux.

[5 Pittsb. Leg. J. 239.]

Circuit Court, W. D. Pennsylvania. Nov. 18, 1857.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—REPUBLICATION OF WILL BY PAROL DECLARATIONS.

[1. It is the duty of a federal circuit court, in cases where the state decisions are controlling, as in the construction of a state statute of wills, to take the law as last decided by the highest state court, without attempting to determine on the merits between it and a previous contrary decision by the same court.]

[2. Under the Pennsylvania statute of 1833 a will may be republished by the testator's verbal declarations, so as to include property acquired after its original execution.]

[This was an action of ejectment brought by Nathaniel P. Dyke against Joseph H. Kuhns and wife to recover a tract of land in Westmoreland county.]

The plaintiff claimed under Mrs. Mary Cust, who was a sister, and one of the heirs at law, of Matthew Jack, deceased. The defendants claimed under the will of the said Matthew Jack, dated in 1828, and devising all his property to his brother William. It was admitted on the trial, that the property in dispute was purchased in 1837, and long after the date of the will, and it was accordingly claimed by the plaintiff, that, as after-acquired property, it did not pass, and that Matthew Jack, the decedent, of course died intestate, as to this and other property, to a large amount, acquired about the same time. The defendants, however, admitting the law to be so, contended and offered to prove that after the acquisition of all this property, the will of Matthew Jack had been republished by his verbal declarations, so as to make it include the property afterwards acquired. The plaintiff objected that although a will might have been so republished under the act of 1705, the law was so changed by the present statute of wills, passed in 1833, as to preclude evidence of this kind. The case was originally tried in the court of common pleas of Westmoreland county, before Judge Knox, now of the supreme court, who was then the president judge of that district. Judge Knox admitted the evidence, and there was a verdict for the defendants. The plaintiff then carried the case to the supreme court of this state, where it was reversed upon an opinion delivered by the then chief justice (Gibson) deciding that since the passage of the act of 1833 a will could not be republished by parol, and that the evidence offered for that purpose was, of course, improperly received. The case was accordingly remanded to Westmoreland county, tried over, and a verdict rendered in favor of the plaintiff, under the decision of the supreme court. It was then brought up again by the defendants to the same court. In the meanwhile, however, by the decease of Judge Gibson in 1853, Judge Knox himself succeeded to his place, and when the case came on for argument the previous decision was reversed by a bare majority of the supreme court, including the new incumbent; Chief Justice Black and Justice Lowrie dissenting. In this state of the law, the plaintiff had recourse to the circuit court of the United States, by bringing the action there, and one of the great questions in the cause was, which of the two decisions of the supreme court of this state was to be considered as the law.

Hon. Thomas Williams and R. C. G. Sproul, for plaintiff.

Gen. H. D. Foster and William A. Stokes, for the defense.

GRIER, Circuit Justice, although intimating that if the question had been a new one, he might have ruled it otherwise, declined the comparison of the merits of the two opinions, on the ground that, sitting here in Pennsylvania, it was his duty, in order to avoid a conflict of opinion, to take the law as he found it last decided, but without expressing an opinion as to what might be his course in case the question should be carried elsewhere. This is about the substance of what he was understood to say. Admitting the evidence, therefore, which was offered to show a parol republication, he instructed the jury that it must be of two witnesses, proving the intention to republish and establishing the identity of the will beyond all question.

Case No. 3,908.

DIKE et al. v. The ST. JOSEPH.

[6 McLean, 573.] [1]

Circuit Court, N. D. Illinois. July Term, 1855.

GENERAL AVERAGE—ADMIRALTY JURISDICTION—LIEN FOLLOWS PROCEEDS.

1. Where a part of the cargo is thrown overboard for the safety of the vessel, and the lives of the passengers, a contribution may be required from the owner of the vessel, and the cargo saved. This is given in the exercise of a maritime jurisdiction and on the principle of a general average.

[Cited in Oologaardt v. The Anna, Case No. 10,545; Coast Wrecking Co. v. Phoenix Ins. Co., 7 Fed. 242; The San Fernando v. Jackson, 12 Fed. 342; Heye v. North German Lloyd, 33 Fed. 70.]

2. Though there may be a remedy at law, on bonds given, yet that does not take away the jurisdiction in admiralty.

[Cited in The Eclipse, Case No. 4,268.]

3. Where a lien in admiralty attaches, it follows the proceeds into the hands of assignees.

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

Mr. Wate, for libellants.

Mr. Hayne, for the respondent.

OPINION OF THE COURT. This is an appeal in admiralty. On a voyage from Buffalo to Chicago, in the fall of 1851, the propeller St. Joseph being laden with a cargo of merchandise, by stress of weather was driven on the Michigan shore of Lake Huron, at half past seven o'clock in the evening. It was found impossible to back or heave the vessel off. All hands were immediately employed to construct a temporary dock on which to convey the cargo to the shore. The next morning, the hands commenced carrying the goods on shore, and continued the same during the day; but in the evening the wind hauled to east south east, blowing a gale, and causing the boat to strike heavily and leak badly. The temporary dock was broken up by the heavy sea. The danger of the loss of the vessel and cargo became imminent, unless she was speedily lightened and got off. And to accomplish this, large quantities of merchandise were thrown overboard, by means whereof, the remainder of the cargo, and the vessel, were saved. A libel was filed claiming contribution from the vessel on a general average.

The answer admits the allegations of the libel, but the lien on the vessel is denied; and it is alleged, that when the goods were delivered to the consignee, an average bond was entered into, in which the owners agreed to pay the balance of the average, and that thereby the lien on the vessel and cargo saved, were waived. The district court entered a decree against the defendant.

In returning the answer the counsel rely on the case of Cutler v. Rae, 7 How. [(48 U. S.) 729.] That was a case where a vessel on a voyage from New Orleans to Boston, was run ashore in a storm in Massachusetts bay, by which the vessel was lost, but the cargo and the lives of the passengers were saved, the amount of the cargo being of the value of five thousand four hundred dollars, which was delivered to the consignee at Boston. The court in that case held, that the goods having been delivered to the consignee, the lien under the general average was terminated. Average contribution is the creation of the maritime law, and is founded in the great principles of equity. This principle is fully recognized in the Rhodian laws, and is sanctioned by all civilians, who have either spoken or written on the subject. It is nothing more or less than the sacrifice of the cargo or a part of it, to preserve the lives of the passengers under the greatest emergencies. Or to strand the vessel to save the lives of the passengers and the cargo. In such cases those who have suffered loss to save the cargo or vessel, shall have a general average of the property saved, whether vessel or cargo, or a part of the cargo, in proportion to the loss sustained. No subject can be more purely maritime than this. And it is said the contribution may be recovered in equity and in law. If the demand be a lien upon any property within the reach of the court, the proceedings may be in rem. And if any individual within the process of the court is liable, the proceedings may be against him in personam. The lien still continues on the property in the hands of assignees. This doctrine is laid down in Sheppard v. Taylor, 6 Pet. [31 U. S.] 675. And it has been the rule of decisions in the courts of the United States.

A maritime lien adheres to the proceeds of the thing into whose hands soever it may go; and the owner becomes personally liable, and may be proceeded against in personam. This lien upon proceeds often extends to judicial sales. It is argued that there is no jurisdiction in this case, as appears from the decision of Cutler v. Rae, above cited; from the remarks of the court in that case, it does seem to have turned upon a question of jurisdiction. The court say, "We think the case is not within the admiralty jurisdiction." On this ground the judgment was reversed and the cause was remanded to the circuit court, with orders to dismiss the libel. In the Case of Cutler, the libel was filed in personam, by the owner of the vessel, against the consignee, claiming contribution from the part of the cargo saved, for his lost vessel. The court say, in general average, "the party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute. The captain has a right to retain them until the general average with which they are charged has been paid or secured. This right of retainer is a qualified lien, to which the party is entitled by the maritime law. But it depends upon the pos-

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

session of the goods by the master or ship owner, and ceases when they are delivered to the owner or consignee. It does not follow them into their hands, nor adhere to the proceeds." This would not seem to be a decision of want of jurisdiction, but on the merits. It might be a matter of doubt whether the defendant being consignee and not owner, having received the property as damaged and saved property, not having undertaken by bond or otherwise to pay an average contribution, was personally liable to pay it. But the libel in the present case was a proceeding in rem against the vessel, on a general average; so that there is an important difference between the case in 7 How. [48 U. S.], and the one before the court. The decision, however, in the Case of Cutler, was by a divided court, and it has not been satisfactory to the profession, nor was it a decision in accordance with the prior decisions of the supreme court. I should conform to it in a case that could not be distinguished from its principles.

It seems to be a settled principle, that where the maritime jurisdiction attaches, the demand may be recovered in rem or in personam. It does not follow that where an action may be maintained on the contract, as in this case, the maritime jurisdiction may not be exercised. The jurisdiction of our court of admiralty, is not limited by that of the English admiralty. The decree of the district court [case unreported] in this case is affirmed.

Case No. 3,909.

DIKE et al. v. The VON LEFFERL LAHSEN.

[N. Y. Times, June 28, 1865.]

District Court, S. D. New York. 1865.

SHIPPING—DELIVERY OF CARGO—LOSS ON PIER.

[Actual receipt by the consignees of all the cargo shipped to them, and their verification thereof by weighing, discharge the carrier from liability for a part which is thereafter lost while on the pier.]

[This was a libel by James P. Dike and others against the bark Von Lefferl Lahsen for loss of cargo.]

Mr. Van Santvoord, for libelants.
Mr. Hill, for claimants.

BETTS, District Judge. This was an action upon a bill of lading executed in London on December 18, 1863, for the carriage of thirty-one bales of wool to be delivered to the libelants as consignees. One bale of wool was lost, and it was for that loss that the action was brought. Notice was given to the consignees by the ship on her arrival of the time and place of delivery of cargo, and the consignees came to the place with an inspector and weighmaster, and proceeded with the actual receipt and storage of the wool from the 22nd of April to May 4. The whole number of thirty-one bales were actually landed on the pier and weighed. Two bales were left on the pier till the 4th of May, and on that day one was abstracted, and only thirty bales were secured by the consignees.

HELD BY THE COURT: That the method in which the ship was bound to make perfect delivery of her lading at this port, according to the legal import of her contract of affreightment, was to land it on the dock, on reasonable previous notice to the consignees of the time and place of the unlading. The Grafton [Case No. 5,656]; Richardson v. Goddard, 23 How. [64 U. S.] 28; Pars. Mar. Law, 158. That on the law and the facts the delivery of the entire cargo was legally perfected to the consignees in fulfilment of the obligation of the bill of lading, and the parties libelants are solely chargeable with the value of the bale of wool, whether tortiously abstracted or accidentally lost whilst left by them on the pier, after being discharged from the ship. It was thereafter, in intendment of law, as fully in the possession of the consignees or their assigns as if actually stored within their warehouse. Libel dismissed with costs.

Case No. 3,910.

DILL v. The BERTRAM.[1]

District Court, S. D. New York. June 30, 1857.

SHIPPING—RECEIPT OF CARGO—LOSS ON WHARF.

[1. Cargo delivered on a wharf into the charge of the officers of a vessel is "shipped" so as to free the shipowners, under Act March 3, 1853, § 1 (9 Stat. 635, c. 43), from liability for loss by a fire occurring without their design or neglect, although the loss was caused by the negligence of the ship's officers in not promptly putting the goods on board.]

[2. Distinguished in 2 Pars. Ship. & Adm. 122, as to the proposition that vessel owners are liable for a loss by fire while the goods were being conveyed in lighters to the ship for the purpose of transportation, on the ground that in this case the goods had been delivered to the vessel, and were on the wharf at the time.]

[Libel by Dill against the ship John Bertram for loss of cargo.]

Stoughton and Harrington, for libelants.
Beebe, Dean, and Donohue, for claimants.

Before BETTS, District Judge.

The libel in this case states that in April, 1855, the libellants, having purchased 879 bags of saltpetre to be delivered to them in Boston, agreed with the owners of the ship, then lying in Boston, to carry it from that port to Harrisburg, the vessel to touch at New York; that the vessel having given notice of readiness to receive the saltpetre, it was delivered on the wharf and taken charge of by the vessel's officers; that 214 bags of it were taken on board, but the balance was destroyed by a fire originating on land, and the loss of it

[1] [Not previously reported.]

was occasioned by the negligence of the officers of the ship in not taking it sooner on board; that the vessel afterwards left Boston and came to New York, where she then was, but her owners had refused to give bills of lading for more than 214 bags, or to admit any liability for the balance, the value of which, being upwards of $7,000, they claimed to recover of the ship. All the allegations of the libel were put in issue by the answer.

HELD BY THE COURT: That heretofore such a delivery and acceptance has been regarded as sufficient to establish a lien upon the vessel for the goods, but that doctrine must be regarded as rescinded by the express adjudications of our courts. [The Freeman v. Buckingham] 18 How. [59 U. S.] 188; The Young Mechanic [Case No. 18,180]; The Kearsarge [Case No. 7,633]; [Vandewater v. Mills] 19 How. [60 U. S.] 88. But if the saltpetre, under the facts, is to be regarded as laden on board the ship, then it is brought under the provisions of the act of congress of March 3, 1851 [9 Stat. 635, c. 43, § 1], and the loss and damage to it by fire alongside the ship, must be regarded as happening to goods "shipped, taken in, or put on board" the ship, and the owners are therefore exempt from responsibility. Libel dismissed, with costs.

Case No. 3,910a.

DILL v. The COLOMBO.

[Betts' Scr. Bk., 533.]

District Court, S. D. New York. March 6, 1856.[1]

SHIPPING—DAMAGE TO CARGO—BILL OF LADING—"RECEIVED IN GOOD CONDITION."

[A clause in a bill of lading acknowledging goods to have been in good condition when shipped raises an inference that an injury to the goods subsequently discovered arose from a cause for which the vessel is responsible.]

[In admiralty. Libel by Otto Dill and others against the bark Colombo for damage to cargo.]

A. Nash, for libelants.
Beebe & Donohue, for claimants.

BETTS, District Judge. The master of the bark signed a bill of lading for shipment of thirteen casks of bristles, at Hamburg, consigned to the libelants. On discharging cargo at this port, one cask of bristles was found broken, and the contents largely damaged. The claimants defend the action brought to recover those damages, on the ground that there is no proof the injury was owing to neglect or fault of the vessel. The court held that the bill of lading, acknowledging the cask to have been in good order when shipped, is sufficient to charge the loss on the vessel, unless the claimant proves that the injury arose from some cause for which the vessel is not responsible. Decree for damage, and reference.

[1] [Reversed in Case No. 3,040.]

[NOTE. The decree in this case was subsequently reversed by the circuit court in Case No. 3,040.]

Case No. 3,911.

DILL v. ELLICOTT et al.

[Taney, 233.][1]

Circuit Court, D. Maryland. Nov. Term, 1854.

USURY—CONSTITUTIONAL PROVISION—CONTRACT VOID—PENALTIES AND FORFEITURES.

1. The constitution of Maryland (article 3, § 49), declares, "that the rate of interest in this state, shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury:" *Held*, that under this provision, a contract by which a higher rate of interest than six per cent. is taken or demanded, is void, not only for the excess, but for the whole amount; and cannot be enforced in a court of justice.

2. A contract to do an act forbidden by law, is void, and cannot be enforced in a court of justice.

3. There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal.

[Cited in Tiffany v. Boatman's Sav. Inst., 18 Wall. (85 U. S.) 385.]

4. It is true, no penalty or forfeiture is incurred by reason of the usurious contract, until the legislature shall prescribe it; but the incapacity to maintain an action upon such contract is no forfeiture or penalty, for no right of action is acquired under it, and therefore, there is nothing to forfeit.

[This was an action at law by Adolph Dill against Jonathan H. Ellicott and Benjamin H. Ellicott.]

J. Mason Campbell and St. George W. Teackle, for plaintiff.
G. L. Dulaney, for defendants.

TANEY, Circuit Justice. This action is brought by the endorsee of a bill of exchange, drawn upon the defendants, and accepted by them, for $1000. The defendants plead, that the bill was given to secure the payment of money loaned, by the plaintiff, o the payee of the bill, upon which an interest exceeding six per cent. was reserved; and that such contract was usurious, and the plaintiff not entitled to maintain an action upon it. To this plea the plaintiff has demurred; and the question submitted to the court on these pleadings is, whether, under the constitution of Maryland, adopted in 1851, an action can be maintained upon a contract for the loan of money, where an interest of more than six per cent. is reserved or received. The clause of the constitution is in the following words: "That the rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary for-

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

feitures and penalties against usury." This provision is contained in article 3, § 49, under the head of "Legislative Department." And by the third article of the declaration of rights, all acts of assembly in force on the first Monday in November 1850, which had not expired at the adoption of the constitution, and were not altered by it, were continued in force, subject, nevertheless, to the revision of, and amendment and repeal by, the legislature of the state.

The acts of assembly, material to this question, which were passed previously to the adoption of the constitution, were those of 1704 and 1845. The first section of the act of 1704, declared that no person should exact or take above the rate of six per cent. per annum, upon the loan of any moneys, goods, or merchandise or other commodities, to be paid in money; the second section declares, that all contracts, by which a higher rate of interest was received, should be void; and the third section inflicted penalties for taking or receiving more than the rate of interest limited by that act. The provisions of this law were materially changed by the act of 1845; by that act the lender was entitled to recover the amount actually loaned with six per cent. interest upon it, although the contract was usurious, and stipulated for a higher interest, and it repealed altogether the third section of the act of 1704.

The act of 1845 was still in force when the constitution was adopted, and the point in issue between the parties, upon the demurrer, is, whether the provisions of this act are inconsistent with the clause of the constitution before recited, and therefore repealed by it. In determining this question, the wisdom or policy of usury laws, is not a subject for the consideration of the court; that was a question for the people of Maryland when they adopted the constitution. It is the duty of the court to carry into effect the provisions of that instrument, according to its true intent, to be gathered from its own words; and referring to the previous legislation of the state only so far as it may contribute to illustrate the meaning of doubtful or ambiguous language, if any such be found in the constitution; and to ascertain what previous acts of assembly are still in force.

It would be difficult, we think, to raise a doubt as to the meaning of the prohibitory part of the section of which we are speaking. It declares "that the rate of interest shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded." These words are free from all ambiguity; they prohibit in plain, positive and direct terms the taking or demanding of more than six per cent. interest; and on this point it refers nothing to future legislation. The constitution itself makes the prohibition, and all future legislation must be subordinate and conformable to this provision. Whoever takes or demands more than six per cent. while this constitution is in force, does an unlawful act; an act forbidden by the constitution of the state. Nor do the words which follow qualify or restrain, in any degree, the meaning of the words above quoted; they declare that "the legislature shall provide by law all necessary forfeitures and penalties against usury." Now, usury consists in taking an interest for money above that allowed by law; the taking of more than six per cent. is therefore usury; and the words last quoted treat it as an offence, and direct the legislature to punish it with penalties and forfeitures. The words do not merely give the power to punish, they are mandatory, and make it the duty of the legislature to punish disobedience to that provision, by forfeitures and penalties. Certainly, if the taking or demanding of more than six per cent. was not intended to be absolutely prohibited by the preceding part of the section, there would be no propriety in commanding it to be punished.

The words last quoted, therefore, do not qualify or restrict the meaning of the preceding words; on the contrary, they show that the framers of the constitution, after fixing the amount of interest which a party might lawfully take or demand, proceeded to make that provision more effectual, by requiring the legislature to enforce it, and to inflict forfeitures and penalties upon any one who should thereafter take or demand an amount of interest exceeding that prescribed by the constitution.

This being the evident meaning of the language of this section, can a contract, by which a higher interest is taken or demanded, be enforced in a court of justice? It is true, the constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it; for it is well settled, by a multitude of decisions, in this country and in England, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice—we do not stop at present to refer to judicial decisions to support this proposition; many cases to that effect, are cited in the opinion delivered, by the supreme court of the United States, in Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 527; and we are not aware of any decisions, in any court, in which a contrary doctrine has been held. Indeed, in a state where the legislative, executive and judicial departments are separated, it would render all law uncertain and ineffectual, if the judicial power enforced, in whole or in part, the performance of a contract to do an act, which is altogether forbidden to be done by the constitution or laws of the state. And as the constitution has forbidden the taking or demanding of more than six per cent., no contract, made in this state, can be enforced, where a higher rate of interest is taken or demanded by the contract.

This view of the subject is fully supported by the decision of the supreme court, in the case of the Bank of U. S. v. Owens, herein-

before referred to. The charter of the bank contained a provision in the following words: "It (the bank) shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per cent. per annum for or upon its loans or discounts." And in an action brought by the bank upon a promissory note, the defendant pleaded that it was discounted upon an agreement to pay the bank a higher rate of interest than six per cent.; to this plea the bank demurred, thus bringing the question before the court in the same mode of pleading adopted by the counsel in this case; and Mr. Sergeant, who argued the case for the bank, contended (as the counsel for the plaintiff have done here), that a mere prohibition to take more than six per cent., did not avoid a contract to take more; and that when an agreement is avoided, it is always in consequence of an express provision by law to that effect. 2 Pet. [27 U. S.] 531. But the court held otherwise; and the language of the supreme court in deciding that question is so appropriate and directly applicable to the case before us, that we give it in the words of the court: "Some doubts have been thrown out whether, as the charter speaks only of 'taking,' it can apply to a case in which the interest has been only reserved, not received; but on that point, the majority of the court are clearly of opinion that 'reserving' must be implied in the word 'taking;' since it cannot be permitted, by law, to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C. 620. In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence; but when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule, that it is unlawful to contract to do that which it is unlawful to do."

After deciding this point and remarking briefly on the manner in which it came before the court, they proceed to say: "To understand the gist of the question it is necessary to observe that, although the act of incorporation forbids the taking of greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, of the acts passed in England, and in the states, on the same subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law, upon general principles. The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the hand-maid of iniquity; courts are instituted to carry into effect the laws of a country. How can they then become auxiliary to the consummation of a violation of law? To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade; there can be no civil right where there is no legal remedy; and there can be no legal remedy for that which is itself illegal."

We forbear to quote further from the language of the supreme court; and it is sufficient to say, that after having stated the principles of law in the manner set forth in the foregoing extract from the opinion, it proceeds to refer to many adjudged cases in support of the doctrine, showing that it applied to all cases where the act was prohibited by statute, although there was nothing morally wrong in the transaction; and upon this ground decided that the bank could not maintain an action on the note, as the demurrer admitted that it had been discounted upon an agreement to take more than six per cent. interest. We do not see how the case before us can be distinguished from the one decided by the supreme court; they present precisely the same question; and the established principles of law which decided the one in favor of the defendant, must decide the other in like manner.

It will be observed also, that the opinion we have quoted, points out clearly the distinction between a statute merely forbidding an act to be done, and one imposing a forfeiture or penalty for doing it; and is, in effect, an answer to that part of the argument on the part of the plaintiff which relied on the last words in the section of the constitution, requiring the legislature to impose forfeitures and penalties against usury. The absence of any provision inflicting a penalty (say the supreme court) does not give the party a right to maintain an action on the contract, if the law forbids the contract to be made; and the reason of the rule thus laid down is, that the contract being forbidden, the party can acquire no legal right under it, and consequently cannot maintain an action in a court of justice to enforce it. His incapacity to maintain an action upon it is no forfeiture or penalty, for he acquires no right under it, and therefore there is nothing to forfeit; the money he loans is not forfeited; for if he chooses to rely on the promise of the borrower, and the borrower repays him the money, he may lawfully keep it. It is not forfeited to the state, nor to any one else. But a court of justice cannot lend its aid to recover it, because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids. The absence of any penalty, therefore, is no argument in support of this action.

But in this case there is something more than the absence of penalties and forfeitures. It is made the duty of the legislature to inflict them; and the prohibitory

clause of the constitution must be construed now in the same manner, and have the same effect, as if the legislature had performed the duty enjoined upon it. It is true, no penalty or forfeiture is incurred, until the legislature shall prescribe it; but when that duty shall have been performed (be the penalty more or less), nobody, we presume, would contend that an action could still be maintained on the contract, upon payment of the penalty. The act of no future legislature can alter the meaning of the words used in the constitution; they remain the same, and must always be construed and administered in courts of justice, according to their legal import, as they stand in that instrument, whether future legislatures do or do not obey its mandates, and pass laws to enforce its provisions.

It follows from what we have said, that the first four sections of the act of 1845 are no longer in force. These sections made an usurious contract legal for the amount actually loaned, and authorized the lender to recover the amount, with six per cent. interest; it made it void only so far as the usurious interest was concerned; and, as a necessary consequence of this provision, it repealed expressly the third section of the act of 1704. The act of 1845 does not, therefore, prohibit an usurious contract, but sanctions and supports it, to the extent above mentioned. The constitution, on the contrary, by the prohibitory words used in it, makes the whole contract illegal, and, thereby, incapacitates the party from maintaining a suit upon it, for the money he actually loaned, or any part of it; and moreover, treats the taking or demanding more than six per cent. as an offence, and commands the legislature to provide forfeitures and penalties against it. The provisions of this act of assembly, and those contained in the constitution, are consequently inconsistent with each other, and the former is repealed.

In relation to the act of 1704, the plaintiff claims nothing under it; but inasmuch as the first section of that act, like the constitution, prohibits the taking of more than six per cent., and the second section contains an express provision, making void the contract where more is taken; the plaintiff contends that the omission of the second provision in the constitution, proves that it was not intended to make void the contract, but to leave it as provided for and legalized in the act of 1845.

But it is evident that the second section of the act of 1704, like similar provisions in the English statutes againt usury, was introduced to remove any doubt which might be raised upon the words "exact or take," and to show that the prohibition was intended to apply to contracts in which usurious interest was reserved, to be paid at a future day, as well as to cases in which it was actually exacted and taken or received at the time of the loan. It was introduced for greater caution, and to prevent nice distinctions upon the words used. This is constantly done in acts of legislation. And the omission in the constitution of a provision of this description, contained in a previous act of assembly, would hardly justify the court in inferring that it was intended to authorize an action on a contract which the constitution itself prohibited.

In expounding an instrument so solemn and deliberate as a constitution, containing the fundamental law of the state, we are hardly at liberty to suppose that either those who framed it, or those who adopted it, intended to recognise or sanction the principle, that an action might be maintained upon a contract to do an act which the law forbade. On the contrary, a comparison between the language of the act of 1704 and the constitution tends strongly to support the construction we have given to the latter. The prohibition in the act of assembly is to "exact or take," and the second section, as we have said, was introduced for greater caution, in order to show more clearly that, while the penalties by that law were confined to the actual receiving, the prohibition extended further, and embraced contracts in which usurious interest was reserved, although payable at a future time. But the constitution does not use the prohibitory words of the first section, but provides that no higher rate shall be "taken or demanded." Now these words clearly embrace a contract by which usurious interest is to be paid at a future day, as well as contracts in which it is taken and received. It does not mean usurious interest demanded in the negotiation previous to the loan, but demanded by the contract itself, when actually made; and if so demanded, it is evidently included in the constitutional prohibition, even although the words "exacted and taken" should be regarded as confined to the actual receipt.

In an instrument like this, we are bound to presume that every word was deliberately weighed and considered before it was inserted; and with the act of 1704 before them, and about to establish, under a constitutional sanction, the principle contained in its first section, it ought not to be supposed, that its words were lightly and carelessly changed, or the word "demand" substituted in the place of the word "exact," without an object. A natural and proper object would be to condense in a few words the substantial provisions spread out in the first and second sections of the act of 1704; and we think they have used words sufficient to accomplish their purpose. A comparison between the words of this act of assembly and of the constitution of 1851, tends to confirm the construction we have placed upon the latter, and which its language naturally and legally imports. Upon the whole, the court is of opinion that the demurrer of the plaintiff to

the plea of usury cannot be maintained, and judgment must be entered accordingly.

After this opinion was given, the pleadings were amended, and the court being of opinion that the facts proved by the defendants did not show that usurious interest was taken or reserved, a verdict and judgment was entered for the full amount of principal and interest due on the bill of exchange.

DILL (INTERNATIONAL GRAIN CEILING CO. v.). See Case No. 7,053.

Case No. 3,912.

In re DILLARD.

[2 Hughes, 190; 9 N. B. R. 8; 6 Am. Law T. Rep. 490; 21 Pittsb. Leg. J. 82.][1]

Circuit Court, E. D. Virginia. Oct., 1873.

BANKRUPTCY—EXEMPTIONS—JURISDICTION—PROPERTY INCUMBERED BEYOND VALUE—VOLUNTARY BANKRUPTCY.

1. The amendment of March 3, 1873 [17 Stat. 577], construed, and *held* to only allow the exemptions granted by state laws in 1871, as against judgments of state courts when such judgments are rendered after the passage of the amendment of 1873. In re Kean [Case No. 7,630], by Rives, J., reversed. A construction of the amendment of 1873, as giving the exemption of 1871 against liens of force prior to the adoption of the state laws granting the exemptions, *held* to be "contrary to reason and justice, and the fundamental principles of the social compact," on the authority of Gunn v. Barry [15 Wall. (82 U. S.) 610]. The amendment of March, 1873, so far as it is declaratory of the meaning of the act of June, 1872 [17 Stat. 334], *held* null and void.

[Cited in Re Kerr, Case No. 7,729; Re Duerson, Id. 4,117; Re Martin, Id. 9,552; Re Shipman, Id. 12,791.]

2. A court of bankruptcy has the power to take possession of the property of the bankrupt, subject to valid liens exceeding the value of the property, and to dispose of it for the purpose of satisfying, as far as possible, these liens. But, as a matter of discretion, under such circumstances, the power ought never to be exercised.

[Cited in Hudson v. Schwab, Case No. 6,535.]

3. An order directing the sale of property so incumbered is not void for want of jurisdiction in the court granting it, but will be set aside on petition for review as an improper exercise of the discretion granted the district court.

4. In voluntary petitions in bankruptcy, the rights of the bankrupt to the disposition of his property cease on the filing of the petition. In involuntary petitions, such right ceases upon the adjudication.

Certain creditors of the bankrupt [George W. Dillard,] have made application to the supervisory jurisdiction of the circuit court in this case, for a reversal of a decree of the district court sitting in bankruptcy, allowing a homestead exemption to the bankrupt. [Case unreported.] There are several cases submitted, the facts agreed upon being the same, or nearly so, in all of them. The opinion of the court is expected to decide all the questions which arise in the cases submitted, whether they are to be found in the case immediately at bar or not.

The agreed statement of facts is as follows:

Upon the petition of Israel M. Parr, surviving partner of McConkey & Parr, and others, to revise and set aside certain orders entered by the district court of the United States for the eastern district of Virginia, entered on the 11th day of February, 1873, March 1st, 1873, and July 31st, 1872. On the —— day of ——, Israel M. Parr, surviving partner of the firm of McConkey & Parr, filed his bill in the circuit court of Essex county, Virginia, against George W. Dillard and others, setting forth that he was a creditor, by judgment duly docketed, for one thousand four hundred and eighty-five dollars and seventy-seven cents, of the said George W. Dillard; that thereafter, to wit, on the 10th day of November, 1869, the said Dillard had executed two deeds of trust conveying away all his real estate; that the said deeds were fraudulent and void as against the creditors of the said Dillard, and praying that the said deeds should be set aside, and the real estate of the said Dillard subjected to the payment of the debt due to the plaintiff, and such other debts as should be liens upon the same. The suit proceeded regularly. An account was directed to be taken by a commissioner of the court, of the liens and their respective priorities, and of the fee simple and annual value of the real estate. Such account was regularly taken and reported to the court, and on the 14th day of November, 1871, there being no exception to the report, the same was confirmed by the court and a decree entered declaring the said deeds fraudulent and void, as to the creditors having prior liens, and decreeing that unless the said George W. Dillard should within four months pay off the judgments reported as liens upon the said real estate, James M. Matthews and Thomas Croxton, as commissioners of the court, should proceed to sell the same. The account of the liens and of the value of the land as reported by the commissioner and confirmed by the court, showed the amount of the liens to be twelve thousand five hundred and sixty-eight dollars and fifty cents, and the fee simple value of the real estate to be, in November. 1871, three thousand and ninety-six dollars, and in May, 1867, seven thousand seven hundred and forty dollars, but subject to the contingent right of dower of the wife of the said Dillard. On the 26th March, 1872, George W. Dillard filed his petition and was adjudicated a bankrupt, claiming to have a homestead exempted to him according to the laws of Virginia. On the 11th April, 1872, an injunction was awarded by the bankrupt court to restrain the commissioners of the circuit court of Es-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 21 Pittsb. Leg. J. 82, contains only a partial report.]

sex from selling the real estate under the decree of November 14th, 1871. On the 23d April, 1872, a rule was entered that the creditors show cause why the real estate of the said Dillard should not be sold free from incumbrance. Before any action was taken under that rule, to wit, on the 20th May, 1872, McConkey & Parr, Thomas Croxton, executor of Mace Clements, Christopher Newbill, executor of Wm. Newbill and Nathan Parker, all creditors of the said George W. Dillard, having judgment liens upon his real estate, filed objections to such sale, for the reason in part that the circuit court of Essex has already decreed the said lands to be sold to pay their debts, which were liens, and because the judgment liens exceeded the value of the real estate. All filed with their application proofs of the action of the circuit court of Essex. On the 28th May, 1872, they, with other judgment lien creditors, proved their debts before the register in bankruptcy, not waiving, but expressly reserving their liens and claiming the benefit of them, and of the said decree of Essex circuit court, as fully as they existed before the filing of the petition in bankruptcy of the said George W. Dillard. The amount of such debts exceeded seven thousand dollars, besides interests and costs. No action has since been taken under the said rule. On the 31st July, 1872, upon the application of the bankrupt, and the recommendation of the register, that "two thousand dollars in addition to the exemptions heretofore granted" should be allowed, and with the assent of the assignee, without any notice whatever to any of the creditors, the following order was entered by the judge of the district court in bankruptcy: "The two thousand dollars recommended by the register will be allowed in any bid made by the bankrupt." On the 11th February, 1873, after due notice to the assignee of the bankrupt, the petitioners applied to the judge in bankruptcy to enter such an order as would enable the circuit court of Essex to enforce its decree of 14th November, 1871, by selling the lands and distributing the proceeds according to law. The court refused to enter such an order, but in lieu thereof entered an order directing the assignee to unite with the commissioner of the circuit court of Essex in making the sale directed by the said decree. On the 1st March, 1873, the judge, upon the application of the assignee, entered an order suspending the order of February 11th, to enable the assignee to invoke the supervisory jurisdiction of this court. The assignee declined doing so, and then your petitioners filed their petition for that purpose.

We, C. G. Griswold, attorney for the petitioners, and James M. Matthews, assignee in bankruptcy of the said George W. Dillard, agree to the foregoing statement of facts as being the facts appearing in and by the record of the proceedings in the cause, and that the same may be received and acted upon by the honorable judge of this court, in considering and deciding upon the said petition.

C. G. Griswold, for petitioners.
James M. Matthews, for assignee.

BOND, Circuit Judge. Upon this statement of facts the circuit court is asked to reverse the decree of the district court allowing the bankrupt a homestead exemption. 1st. Because the bankrupt court has no jurisdiction over the real estate of the bankrupt, which at the time of his application or of the petition in involuntary bankruptcy, was decreed to be sold by a state court for the benefit of the creditors holding liens upon it. With this view we do not agree. It is the right of the bankrupt court, by reason of its exclusive jurisdiction in matters of bankruptcy, to take possession of the whole estate of the bankrupt wherever and however situated or incumbered. In this respect a decree for the sale of the bankrupt's estate is not of any higher dignity and stands in no better position than the judgment of a court which gives the creditor a lien in the first place. It has never been questioned that the bankrupt court could take possession of the property of a bankrupt incumbered by the liens of judgment creditors, and the fact that process has been had to enforce those liens can make no difference. It is not a question of jurisdiction or of right, but of discretion. The fact which determines the exercise of this discretion is whether or not the general creditors of the bankrupt have any interest to be promoted by it. If it appear to the court that the liens are valid, and that they exceed in value the real estate incumbered by them, there can be no reason for the exercise of the powers of the bankrupt court. To take possession of the property in such case and sell it through the assignee, so far from benefiting the creditors of the bankrupt himself, would only add to the costs, and would diminish the dividends of the one, without adding to the possible surplus of the other. If any fraud were alleged on the part of the persons appointed to sell the estate by the state court, or any want of good faith on the part of the creditors seeking its jurisdiction, or if in any way it could be made to appear to the bankrupt court that the general creditors would be benefited by sale through the assignee in bankruptcy rather than by the persons named in the decree of the state court, the bankrupt court, which is the guardian both of the interest of the creditors and of the bankrupt, ought to exercise its power and maintain its jurisdiction. But if these reasons are wanting, and the facts appear to the contrary, it seems to the court that the general creditors have no interest in the proceedings in the state court. Whatever becomes of the property, whether it be sold for less or more, can make no difference in their dividends of the bankrupt's estate.

It seems to the court that in the case at

bar, and in the other cases submitted, where similar proceedings in state courts have been had by lien creditors, prior to the adjudication in bankruptcy, to sell the estate of an insolvent debtor which was incumbered beyond its value, the bankrupt court ought not to have interfered. It should have allowed the lien creditors to have pursued their remedy. The assignee in bankruptcy took only such estate in his realty as the bankrupt himself had. In this case confessedly this was of no value. The bankrupt's estate was incumbered by liens admitted to be valid, greatly beyond its value, and without paying them off the assignee had nothing of value in the estate. Neither he nor the general creditors propose to do this. But in the case at bar, and others submitted with it, the bankrupt, by his assignee, claims that his real estate ought to be administered in the bankrupt court, because it is there only he can have the benefit of the homestead exemption which is supposed to be allowed by the act of March 3, 1873, amendatory of the bankrupt act [of 1867 (14 Stat. 517)]. It appears in this case, from the agreed statement of facts, that not only was the real estate of the bankrupt encumbered by valid liens far beyond its value, prior to his application for the benefit of the bankrupt law, but that on the 10th day of November, 1869, nearly two years and a half before his application in bankruptcy, the bankrupt had executed two deeds of trust, conveying all his estate in this property to the parties mentioned therein. These deeds, indeed, were subsequently, by the state court, declared fraudulent and void as to creditors, but they are valid as to him; and he is not to be heard in a bankrupt court to ask that an estate, the value of which he has received once in the debts represented by judgment liens upon it, and again by the consideration expressed in the deed which conveyed all his estate to another, shall be assigned to him. nevertheless, as a homestead. The homestead exemption was a bounty to unfortunate but honest debtors. It was not intended for the benefit of fraudulent bankrupts.

In some of the cases submitted with the one at bar, where the liens of judgment creditors, matured before adjudications in bankruptcy, are greater in value than the real estate, there has been no subsequent conveyance by deed of trust, as in this case. The claim is, that under the provisions of the act of March 3, 1873, the bankrupt is entitled to the exemption allowed by the act of assembly of Virginia, commonly known as the homestead exemption, passed June 27, 1870, and that this homestead exemption has precedence of, and is paramount to, the liens of the judgment creditors. The bankrupt in this case, and in the other cases submitted, were adjudicated bankrupts prior to the passage of the act of March 3, 1873. In our opinion, the relation of the bankrupt to his property is fixed the moment he files his petition in voluntary bankruptcy; and in involuntary bankruptcy so soon as he is adjudicated a bankrupt. The rights of his creditors to his estate are determined at the same time. What the homestead exemptions are at these times, both the bankrupt and his creditors are presumed to know. He petitions and they resist, or they petition and he resists, in the bankrupt court, with a full knowledge of the then existing law of bankruptcy. To repeal all exemptions after the bankrupt had petitioned and was entitled to an exemption by law, would be an injustice to him. To give him an exemption not allowed by law at the time of his application when too late for his creditors to resist his adjudication as a bankrupt, would be equally unjust to them. Every bankrupt, then, and his creditors, it seems to us, ought to be and are concluded, as to his and their interest in the bankrupt's estate, by the law of bankruptcy existing at the time of his application or adjudication as a bankrupt. The bankrupt, if he has acted in good faith, is entitled to a discharge from all his debts. His creditors are entitled to the proceeds of all his property except that which the then existing law exempts from their claims. By filing his petition he asks that this may be so. By proving their debts the creditors assent also. By the 14th section of the bankrupt act, all the estate of the bankrupt is conveyed to the assignee. It is provided, also, that such assignment shall relate back to the commencement of proceedings in bankruptcy. Section 27 provides that such property (meaning that property which, by the then existing law of the state, was not exempted from levy upon execution, and which, by force of the bankrupt law, had come into the hands of the assignee) shall be divided amongst the creditors whose claims shall have been proved and allowed. It seems evident from these two sections that what is surrendered by the bankrupt at the time of bankruptcy shall be distributed to his creditors, and that what is then exempt by law he shall retain. The exemption allowed is not a matter in the discretion of the court. It is a matter of right so far as both the creditors and bankrupt are concerned, and the amount of the exemption, the property out of which it shall come, and the description of person who may claim it, are all to be determined by the law existing when the bankruptcy is adjudicated. Under this view, therefore, all bankrupts who have been adjudicated such since the passage of the act of the general assembly of Virginia, passed June 27, 1870, commonly known as the "Homestead Act," are to be allowed the exemption provided therein against all claims of creditors created subsequent to its passage. The supreme court of the state has determined there is no property in Virginia exempt from levy and execution upon debts created

antecedent to the passage of that statute, and therefore there can be none under the bankrupt law, which follows the exemption laws of the states. So far this court has held heretofore. It is insisted now, however, that the act of March 3d, 1873, has modified the bankrupt law in this respect. It is argued that since the passage of that act the exemption allowed by law is that exemption which was provided by state laws of 1871, and that this exemption shall take precedence of and be paramount to all liens by judgment or decree of any state court. So far as this act of March 3d, 1873, is declaratory of the meaning of the bankrupt law, of which it is an amendment, it is void. If it declare the law to mean what the courts have already construed it to mean, then it is useless. If it undertake to construe the bankrupt act and its amendment differently from the courts, it is void. To declare what the law is, or has been, is a judicial function. To declare what it shall be hereafter is legislative. Cooley, Const. Lim. 94. There have already been numerous decisions of the United States courts construing these exemption clauses in the bankrupt act. To test the soundness of these decisions, the appeal is to the appellate courts of the United States, but not to congress. Prior to the act of 8th June, 1872, the exemption allowed a bankrupt both as to amount and the estate out of which it was to be taken, and the description of person to whom it was to be allowed was fixed by state laws in force in 1864. The bankrupt act was decided to be uniform by reason of this characteristic. Such state laws as were in force in 1864, governed, in these three respects, the allowance of exemption in bankrupt courts. The act of 1872 merely changed the date to embrace state laws of exemption in force in 1871. But who was to have exemption, out of what property, and to what extent, remained unaltered, the declaratory part of the act of 1873 to the contrary notwithstanding.

It is contended at bar that the act of March 3, 1873, is not an act which gives wider scope or more force to the state exemption laws, which heretofore have been the only authority for homestead exemption in the bankruptcy courts, but that it, itself, provides a statutory exemption paramount to all liens of judgments and decrees of whatever date, and is only limited in amount by the provision of the state statute. If the act of March 3, 1873, intends to give the state exemption laws quo state laws a force and power which the state could not give them, then it is void, because it has been decided by the supreme court in Gunn v. Barry [15 Wall. (82 U. S.) 610], that to give a bankrupt an exemption from debts or liens created antecedent to the passage of the exemption law is to impair the obligation of a contract. This the states are forbidden to do by the constitution of the United States. No act of congress can enable them to do it, in the face of this constitutional provision, by declaring that state statutes shall have this force. If it be maintained, on the other hand, that the act of March 3, 1873, although it refers to the act of 1872, itself an amendment to the bankrupt act, which had always been construed as directing the bankrupt court to look to the exemption law of the states for the description of person who might claim exemption, and for the amount and species of property to be exempted, provided a direct statutory exemption of so much property in value as was exempted by state laws, and that this exemption was to override and be paramount to all antecedent liens of judgments and decrees, we meet this difficulty. The supreme court of the United States, in Gunn v. Barry [supra], speaking of a law of Georgia to which was given this construction, says: "It (meaning the statute of Georgia) withdraws the land from the lien of the judgment and thus destroys a vested right of property which the creditor had acquired in the pursuit of his remedy. It is, in effect, taking a person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact." We must not, if we can avoid it, give to the act of congress such a construction as would be contrary to reason and justice. We must not suppose they intended to violate the fundamental principles of the social compact. Yet, to say congress has provided, by the act of March 3, 1873, that every bankrupt shall have his property restored to him, freed from the liens vested in his creditors prior to the passage of that act, is to hold that they have done as the legislature of Georgia had done, i. e., enacted a law contrary to reason and justice, and, in the view of the supreme court, subversive of the fundamental principles of the social compact. Gunn v. Barry [supra]. Such a view cannot be entertained. There is but one other construction to be given to the statute, and that is, that like all statutes it is prospective. The statute itself, after declaring what "should" or ought to be the exemption, declares that such it "shall be" in future, i. e. after the passage of that act; that it is intended to provide that no judgment or decree of any state court, rendered after the passage of that act, shall debar a bankrupt of his exemption to the extent allowed him under the statutes of the state where he resides. This can be promotive of no hardship. Every creditor will know what, in future, is the effect of his judgment lien acquired since the passage of the act of March 3, 1873. Every decree of a state court to enforce the payment of a debt, or the obligation of a contract, created or entered into since the passage of that act, will be made in view of the supreme law. The statute of Virginia gives an exemption out of the property of the bankrupt. It does not give it to him out of other people's

property. Where his property is incumbered by a lien, it is only the bankrupt's sub modo. The lien creditor, in the language of the supreme court, has a vested interest in it also, and the bankrupt can only be allowed an exemption out of such estate as remains to him after the vested interests of others have been satisfied. With these views we do not think the bankrupts in these cases are entitled to the homesteads claimed, and will sign an order reversing the decree of the district court which allowed them.

DILLIN (HAMILTON v.). See Case No. 5,-979.

Case No. 3,912a.

DILLINGHAM v. SKEIN.

[Hempst. 181.] [1]

Superior Court, Territory of Arkansas. July, 1832.

ACTION OF DEBT—WHEN LIES—ACCOUNT—APPEAL—LACK OF APPEAL BOND—WAIVER—RECORD RECITALS.

1. Debt will lie upon an open account for goods sold and delivered, as well as assumpsit.

2. Debt will lie on a contract, express or implied, for a sum certain, or capable of being ascertained.

3. The expressions, "account," "open account," and "book account" convey the same idea, and express an amount due otherwise than by written contract.

4. Where a party appears and does not object for want of an appeal bond, he thereby waives it, and the want of it does not affect the jurisdiction of the court. Jurisdiction is acquired by the appeal, not by giving the bond.

5. Where the record states that the jury were sworn, it will be presumed that the proper oath was administered, to try the case before the court.

Error to Washington circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. This suit was commenced on the following writ, before a justice of the peace: "Territory of Arkansas, County of Washington. To the Constable of the Prairie Township, County of Washington, Greeting: Summons Arthur Dillingham to appear before me, a justice of the peace, on the 3d day of June, 1831, at my dwelling-house, between the hours of ten in the forenoon and three o'clock in the afternoon of said day, to answer Jacob Skein in an action of debt on an open account under one hundred dollars. Given under my hand, this 26th of May, 1831. (Signed) Henry Tollett, J. P." On the 3d day of June, 1831, the parties appeared, and, after hearing the evidence, the justice rendered judgment against the defendant Dillingham, in favor of the plaintiff Skein, for seventy dollars and costs of suit. From this judgment Dillingham prayed an appeal, and the December term of Washington circuit court, the parties appeared by their attorneys, and the case was tried by a jury, who found for the plaintiff Skein, now defendant in error, seventy-one dollars and seventy-five cents, for which the court rendered judgment, to which judgment this writ of error is prosecuted.

Among the numerous assignments of error relied upon by the counsel for the plaintiff, three of them only will be considered by the court; the remainder being frivolous and untenable. It is assigned for error, "that there is no cause for action set forth or mentioned in the summons." We think a sufficient cause of action is set out in the summons of the justice. It is stated to be "an action of debt on an open account under one hundred dollars." Our statute (Dig. 283) requires the writ of summons to state that the defendant is "to answer the plaintiff in action on bill, bond, note, book account, or promise, as the case may be." It is true, the summons does not literally pursue the forms set out in the statute; but this, we do not apprehend, is necessary. A substantial compliance is all that is requisite.

It is objected that debt will not lie upon an open account, and that therefore the writ of summons is erroneous and void. Admitting that a mistake in naming the appropriate form of action in the writ of summons would be a fatal error, on which we give no opinion, still we think there is nothing in the objection. Debt will lie upon an open account for goods sold and delivered, as well as an action of assumpsit. In the case of Hughes v. Maryland Ins. Co., 8 Wheat. [21 U. S.] 311, Append., note (2) 17, Judge Washington says: "Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid more than he had recovered and in a variety of other cases, where the law, by implication, raises a contract to pay. So an action of debt may be brought for goods sold to defendant, for so much as they were worth. In Emery v. Fell, 2 Term R. 28, in which there was a declaration in debt, containing a number of counts, for goods sold and delivered, work and labor, money laid out and expended, and money had and received; the court, on a special demurrer, sustained the action, although it was objected, that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. This case proves that debt may be maintained upon an implied, as well as upon an express, contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield, in the case of Walker v. Witter, 1 Doug. 6, is conclusive up-

[1] [Reported by Samuel H. Hempstead, Esq.]

on this point. He lays it down that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say, that wherever indebitatus assumpsit is maintainable, debt is also." U. S. v. Colt [Case No. 14,839]. The action then, as described in the writ of summons, was not, in our judgment, misconceived, but was just as appropriate as indebitatus assumpsit. The omission to insert the word "book" before the word "account," we do not deem material. We know no distinction between an open account and a book account; and each expression conveys the same idea.

Another ground of error relied on is, that the circuit court has no jurisdiction of the case. It appeared from the justice's record, that an appeal was prayed, and a bond executed; which, however, does not appear in the record. It is sufficient to remark, that, one of the parties having appealed, the circuit court thereby acquired jurisdiction. The parties having appeared before that court, and the appellee making no objection that an appeal bond had not been given, thereby waived it; and the absence of an appeal bond in no manner affected the jurisdiction of the court.

The remaining objection we shall notice is, that it does not appear for what the jury were sworn. It appears from the record, that the jury were sworn, and, having heard the evidence, rendered their verdict. Although the entry is not in the regular technical form, we think it substantially good. If the jury were sworn, this court is bound to presume that the proper oath was administered to them. No pleadings were filed by the parties, and the court will presume the jury were sworn to try the cause then before the court. Judgment affirmed.

Case No. 3,913.

DILLINGHAM v. UNITED STATES.

[2 Wash. C. C. 422.][1]

Circuit Court, D. Pennsylvania. April Term, 1810.

RECOGNISANCE—FORM AND CONDITIONS—BREACH—ACTION FOR—VARIANCE.

1. An action of debt was instituted in the district court, upon a recognisance entered into before an alderman of the city of Philadelphia, in a case in which a party was charged with having beaten a boy so as to cause his death, on board a merchant vessel of the United States, in the harbour of Flushing. The recognisance was in these words and figures: "July 22nd. United States vs. Jasper. Ja. Jasper and S. Dillingham, each tent in $300. for the appearance of said Jasper. * * * Taken by me, R. Wharton," and signed by the parties. The United States had judgment below, and the cause was brought by writ of error, into the circuit court.

2. In a recognisance the material parts of the obligation and the condition, should be set forth in the body of it, so as to admit of extension, consistently with the terms of it.

[Cited in U. S. v. Stevens, 16 Fed. 106.]

3. It is essential to a breach of the condition of a recognisance, that the party who is to appear, should be solemnly called before his default is entered, and in an action on the recognisance, it should be clearly proved that the party was called and warned, and neglected to appear.

[Cited in U. S. v. Rundlett, Case No. 16,208.]

4. Query, if the non-appearance of the recognisor can be proved by parol evidence.

5. A material variance between the warrant and the recognisance set forth in the declaration, and that given in evidence, is fatal.

This was a writ of error from the district court. [Case unreported.] It was an action of debt, brought there upon a recognisance entered into before an alderman of the city of Philadelphia, by James Jasper, and Samuel Dillingham, for the appearance of the former, before the said alderman, the morning afterwards, to answer. The words of the recognisance, as it appears upon oyer, are as follows: "July 22d, United States vs. Jasper. Ja. Jasper and S. Dillingham, each tent in 300 dollars for the appearance of said Jasper before me, to-morrow morning at ten o'clock, to answer the within charge, &c., and not depart, &c. Taken by me, R. Wharton." Signed by the parties bound. This recognisance was endorsed upon the warrant issued by the said Wharton, in which the charge was for beating and abusing and cruelly treating a little black boy, called James, of which cruel treatment the said child languished, and shortly after died; the same having happened on board a vessel lying at or near the harbour of Flushing, and sailing under the United States flag. The writ, which appears in the record, is in debt for three hundred dollars. The declaration states, that S. Dillingham was attached to answer on a plea that he render to the United States the sum of six hundred dollars; and then proceeds as upon a recognisance fully drawn out, supplying all the chasms with the forms which were omitted. In setting out the condition of the recognisance, it states it to be, "If one J. Jasper should be and appear before the said Robert Wharton, on the morning of the morrow, then following, at his office, to answer a charge of the said United States, for an offence against the United States, in cruelly, improperly, and illegally beating a little black boy, and abide the order of the said Robert Wharton." The breach is the non-appearance of J. Jasper on the day; whereby action, &c., to demand three hundred dollars. Pleas nil debit and nul. tiel. record.

At the trial, the counsel for the United States offered in evidence the aforesaid warrant, with the recognisance thereon endorsed, and also the evidence of Robert Wharton, the magistrate who took the recognisance, to prove that the said J. Jasper did not appear

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

before him, the said Robert Wharton, at the time for that purpose appointed by the said paper; upon which evidence the judge charged the jury, that if they, as a matter of fact, were of opinion that the said paper so produced in evidence, was the recognisance and condition mentioned in the declaration, then, that the said several matters so produced in evidence, and proved on the part of the United States were sufficient to maintain the issue on behalf of the United States: to the admission of which evidence and charge, the defendant took a bill of exceptions. The jury found for the United States, and judgment was given on the verdict.

Reed and Sergeant made the following objections to the judgment below: First; variance between the writ appearing in the record, which is for three hundred dollars, and that set out in the declaration, which is for six hundred dollars. Cro. Eliz. 198, 829; 6 Term R. 633. Cro. Jac. 108. Tidd, Pr. 112. Secondly; variance between the recognisance and the declaration; the former stating the charge to be murder, and the latter battery only. Thirdly; the recognisance declared on, is with condition to answer for an offence against the laws of the United States, whereas, the recognisance does not so describe it. On the subject of variance, were cited 1 Ld. Raym. 84; 2 Ld. Raym. 756; [Mandeville v. Riddle] 1 Cranch [5 U. S.] 290; 2 Ld. Raym. 966; [Grant v. Naylor] 3 Cranch [7 U. S.] 229. Fourthly; the magistrate had no right to take bail, to appear before himself de die in diem, but should have committed him until the examination was closed, or given him into the custody of the officer, who might have retained him a reasonable time. Even if in a bailable case, such a recognisance could be taken, still, a state magistrate could not take it in a case where the charge was murder. Section 33, Jud. Law, passed 24th September, 1789 [1 Stat. 91]. Fifthly; it does not appear that the accused was called, or his default entered by the magistrate; and parol evidence, to fix the forfeiture, was improper. Cases cited in support of the fourth objection, 2 Hawk. P. C. 140; 2 Hale, P. C. c. 14, 120; Cro. Eliz. 829.

Dallas, for defendant, cited the case of Com. v. Emery [2 Binn. 431], in the supreme court of this state, to show that recognisances, taken like the present, are good. The warrant is to answer the United States, and this is referred to by the recognisance: besides which, the latter, in the caption, is "The United States v. J. Jasper." The warrant states an assault and battery, as is stated in the declaration; and the consequent death, stated in the former, is no part of the charge. As to the nature of the offence, it might have turned out to be manslaughter, and of course, until the examination, the magistrate could not say that the punishment might be death; and, therefore, he was, in that stage of inquiry, authorized to bail. But, at all events, the law is but directory to the magistrate, and though he take bail where he should not, the recognisance is good. As to the right of the magistrate to take bail, to appear from day to day, this was done in Burr's Case. See his trial, page 3. Cases cited, as to taking bail, 2 Hawk. 164, bk. 2, c. 15, § 63; Id. 156, bk. 2, c. 15, § 46.

In reply, was cited 4 Bl. Comm. 200, 201, to show that all homicide is presumed to be malicious, until the contrary appears.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

Many objections have been stated to the judgment of the district court, of which two only will be noticed. It is contended, that an examining magistrate cannot take bail to appear before himself from day to day, and that if he can, still the recognisance must be in regular form, and must be proceeded in as other recognisances are. But in this case, it is said a state magistrate could not take bail for the appearance of the party, either at the court to which the recognisance was to be returned, or before himself, for the purpose of further inquiry into the nature of the offence; because the warrant contains a charge of murder, the punishment of which is capital. On the other side, it is insisted that practice, as well as the reason of the case, sanctions the liberation of the accused, upon bail, until the magistrate shall have decided upon the character of the offence; and that, at all events, the prohibition to the magistrate to take bail, in a capital case, is but directory to him, and that his error in judgment cannot have the effect to avoid the recognisance which he has taken. That the recognisance need not be taken in regular form, but it is sufficient to make a minute of the undertaking, which may extend, and the chasms in form, supplied by the declaration.

Admit the correctness of this argument upon the part of the United States, as to which no opinion is meant to be given, it may safely be laid down, that to avoid rendering a recognisance to appear before the examining magistrate, an anomaly in judicial proceedings, as close an analogy between such a recognisance and the common one to appear at the court to which it is returned, should be observed, as the nature of the case will admit. The material parts of the obligation and of the condition, should be so set forth in the body of it, as to admit of extension, consistently with the terms of it, and the proceedings to establish and to recover for a breach of the condition, should be substantially the same as if it had been a recognisance in common form, to appear before the court where the trial is to be had.

Considering the recognisance in this light, and thus qualified, the judgment in this case is exposed to at least one of the objections taken to it by the plaintiff's counsel, which has not, and we think cannot be obviated, which is, that the forfeiture was not even

proved at the trial to have been legally incurred. For we hold it to be essential to a breach of the condition, upon which the forfeiture is to arise, that the party who is recognised to appear, should be solemnly called before his default is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, and neglected to appear. This is far from being a matter of form only, but, on the contrary, it is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused; and if, by the regular proceedings in courts of justice, it has been deemed right to call such person, and to warn him and his sureties of the consequence of his nonappearance, it will not be an easy matter to suggest a reason why this solemnity should be dispensed with by the magistrate, in a case precisely analogous. Mr. Wharton, the magistrate who took this recognisance, proved only that J. Jasper did not appear before him on the day mentioned, and yet, for aught that appeared to the contrary, he might have been present at the office of the magistrate on that day, and failed to make it known from an ignorance of the time and manner of doing it. We understand the meaning of the undertaking to be, that his appearance shall be a legal one, that is, to appear when he is called. We think, therefore, that the district court erred, in the opinion which was delivered to the jury.

It is also the opinion of this court, that there is a material and fatal variance between the warrant and recognisance given in evidence, and the recognisance set forth in the declaration. Connecting those two papers together, which the reference in one to the other renders necessary, the charge which the accused bound himself to appear and answer to, was a cruel battery inflicted upon the boy, of which he languished, and shortly after died; a charge which, if proved, and not palliated by exculpatory evidence, would have amounted to the crime of murder; whereas, the offence stated in the declaration, could not amount to any thing beyond a trespass. The evidence, therefore, being altogether different from the allegation, it ought not to have been received. The judgment, therefore, must be reversed.

Case No. 3,914.

In re DILLON.

[7 Sawy. 561.][1]

District Court, N. D. California. April 27, 1854.

CONSULS NOT AMENABLE TO SUBPOENA—SUBPOENA DUCES TECUM—OFFICIAL DOCUMENTS.

1. The provision of the constitution, which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors, who by public law or consuls, who by express treaty, are not amenable to the process of the courts.

[Cited in U. S. v. Trumbull, 48 Fed. 96.]

2. Where a subpoena duces tecum, directed to a consul of France, is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure.

S. W. Inge, U. S. Atty.

C. Temple Emmett, for Del Valle.

HOFFMAN, District Judge. In this case the counsel of Senor Del Valle, a defendant now on trial on an indictment found against him in this court, obtained a subpoena duces tecum, directed to M. Dillon, commanding him to appear in court and produce a document said to be in his possession, and deemel material for the defence of the accused. The subpoena was returned served, but no return was made to the subpoena by M. Dillon, stating his consular privileges or other exemption from the process of the court. The witness having failed to appear, an attachment to compel his appearance was moved for and obtained. On being brought into court, M. Dillon, who is the consul of France at this port, protested against the compulsory process which had been issued, and while he disavowed any disrespect to the court, he claimed the immunity from compulsory process, requiring him to appear as a witness, secured to the consuls of France and America, by the second article of the convention ratified April 1, 1853. He was informed by the court that it was ready to hear the question whether the provisions of the convention applied to the present case fully discussed; the argument was fixed for the succeeding day, and M. Dillon was discharged. The discussion that has since taken place, would perhaps more regularly have arisen on the return of the process, or on that of a rule to show cause why an attachment should not issue. The counsel of M. Dillon were invited, however, by the court, to argue the subject as fully as if on motion for an attachment; and the whole question has been ably and elaborately discussed by him as well as by the counsel for the defendant on the trial.

The question presented to the court is, whether it has the power, on the motion of the defendant, accused of a crime against the laws of the United States, to issue and enforce compulsory process to the consul of France, requiring him to appear in court and testify in behalf of the defendant, notwithstanding the provisions of the article of the convention, before cited. By the terms of that article, it is stipulated between the United States and France that their consuls shall never be compelled to appear in court as witnesses. They may, however, be invited to attend, and if unable to do so, the article provides, that they may be examined

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

orally at their houses, or their disposition taken. By the sixth amendment of the constitution of the United States, it is provided that the accused in all criminal prosecution shall enjoy the right to have compulsory process for obtaining witnesses in his favor. It is urged by the counsel for the accused that this right is sacred, and secured to him by the constitution of the United States, that it is comprehensive and without exception, and that neither by law nor treaty can he be deprived of the right of compelling the attendance of any person whose testimony may be material to his defence. It was admitted by the counsel of M. Dillon, that if the constitution secures to the accused this right in the present case, he can not be deprived of it by any treaty stipulation; and that if the court is called upon to choose between allowing a constitutional right to a prisoner and disregarding a treaty stipulation, or denying the constitutional right and respecting the treaty, its highest allegiance is due to the constitution, and the rights therein guarantied must be maintained.

The question then to be determined is: Is the treaty stipulation alluded to irreconcilably in conflict with the constitutional provision cited? In approaching the consideration of this question, it is impossible for the court not to be profoundly impressed with a sense of its importance—not merely abstractly, but on account of consequences its decision may involve. On the one hand, it is asked to deny the accused a right claimed to be secured under the fundamental law of the land. On the other, it is urged not merely to hold a law of congress void for unconstitutionality,—a duty at all times the most delicate and important an American court of justice is called upon to perform,—but to declare a solemn treaty stipulation, entered into between the United States and a foreign country, to the faithful observance of which the honor of the nation is pledged, inoperative and void, because those by whom it was made had no power to enter into such engagements. By the constitutional provision referred to, the accused has the right to compulsory process to obtain witnesses in his favor. Does, then, this provision extend to every person within our territory, whether or not he be an ambassador or other public minister, and whether or not he be, by treaty stipulation or express law, exempted from the duty of obedience to a subpoena? And can the court, on his disobeying the writ, compel his obedience by fine and imprisonment? If the accused, by virtue of the constitutional provision in this case, can compel the attendance of the consul of France, it seems necessarily to follow that the attendance of an ambassador could in like manner be enforced. The immunity afforded to, and personal inviolability of, ambassadors now universally recognized by the laws of nations, has been deemed one of the most striking instances of the advance of civilization and the progress of enlightened and liberal ideas. Though resident in a foreign country, they are, says Mr. Chancellor Kent, exempted absolutely from all allegiance and from all responsibility to the laws of the country to which they are deputed. 1 Kent, Comm. 45. Their persons have, by the consent of all nations, been deemed inviolable; nor can they, says the same high authority, be made amenable to the civil or criminal jurisdiction of the country. By fiction of law the ambassador is considered as if he were out of the territory, of the foreign power, and though he resides within the foreign state he is considered a member of his own country, retaining his original domicile, and the government he represents has exclusive cognizance of his conduct and control over his person. Id. 46. Does, then, the constitution of the United States, by the provision in favor of persons accused of crime, intend to subject these high functionaries to the process of the courts, and does it authorize and require the courts, in case of disobedience, to violate their persons and disregard immunities universally conceded to them by the laws of nations, by imprisoning them? If, as the received doctrine, the ambassador cannot, even in the case of a high crime committed by himself, be proceeded against, it is obvious that for a lesser offence of a contempt or disobedience to an order of a court, he would a fortiori not be amenable to the law. The only ground upon which the right of a court to compel the appearance of an ambassador by its process, and to punish him if he disobey it, can be placed, is that the constitution is, in this case, in conflict with and paramount to the laws of nations, and the immunity usually conceded to ambassadors is by the provision in favor of the accused in criminal cases taken away. But the privilege of ambassadors from arrest, under any circumstances, has been declared by congress by special legislation. By the twenty-fifth section of the act of congress of April 30, 1790 [1 Stat. 118], it is enacted that, "if any writ or process sued out of any of the courts of the United States, or of a particular state, or by any judge or justice therein respectively, whereby the person of an ambassador may be arrested or imprisoned, or his goods distrained, seized, or attached, such writ and process shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatever." Under this act it is apparent that no attachment can issue against an ambassador, whether to compel his appearance as a witness, or for any other purpose. But if the construction of the constitutional provision contended for by the accused be sound, this enactment must be disregarded, and the ambassador, like any other person, must be attached. It is clear that the framers of the enactment above cited had no idea that in exempting ambassadors from all process against their persons, they were depriving parties accused of a

right to compulsory process to obtain the attendance of witnesses, secured to them by the constitution. One of two things is evident: either that the constitutional provision has a less comprehensive operation than is claimed for it, or that this enactment, prohibiting any process for the arrest of an ambassador, in any case, is unconstitutional. The legislative interpretation of the constitutional provision is the more significant, as the framers of that act must have had their attention particularly directed to that provision, for by the twenty-ninth section the right of the accused to compel the attendance of his witnesses, is expressly declared, and placed upon a constitutional basis. If, then, the provision of the constitution does not authorize the courts to compel the attendance of ambassadors, because they are exempt from their jurisdiction on general principles of public law, a law which derives its authority from the supposed assent of all civilized nations, a like exception must exist in favor of other public agents, on whom a nation has expressly and by solemn treaty agreed to confer a similar exemption. What, then, is the operation and effect of the constitutional provision referred to? In determining this question, its nature and object, and the evil it was intended to remedy, must be considered.

By the ancient rules of the common law, the party accused in capital cases had no right to exculpate himself by the testimony of any witnesses. The injustice of so unreasonable and oppressive a rule induced the courts to relax it, and the practice was gradually introduced of examining witnesses for the accused, but not upon oath. Sir Edward Coke denounces this practice as tyrannical and unjust, and contended that in criminal cases the accused was entitled to have witnesses sworn for him. It is now in England, by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance. The analogous right of the accused to have the assistance of counsel, does not to this day, or did not very recently, exist in England in any criminal cases except indictments for treason. Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendances of his witnesses, and the right to have the assistance of counsel, were incorporated into the constitution. They were obviously intended to abrogate the harsh and tyrannical rules of the common law which have been referred to, and to place the accused in a position to make his defence and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt. If, then, the accused, by virtue of these provisions, enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing with the government, it would seem that the object of the constitution is accomplished. Such seems to have been the construction given by congress to this provision of the constitution. By section 29 of the crimes act of April 30, 1790, it is provided, "that every person accused or indicted under that act shall have the like process of the court where he shall be tried, to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on the prosecution against them." The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance. If, then, the object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them, it follows that if by general principles of the laws of nations, as in the case of an ambassador, or by positive treaty stipulations, as in the case of the consul of France, the person sought to be made a witness be beyond the process of the court, neither the accused nor the prosecution is entitled to process against him. The ambassador is, as we have seen, not amenable in any respect to the laws of the country to which he is sent. The consul is by a treaty, which is the supreme law, placed beyond the reach of the process of the court. The cases seem not distinguishable in principle; for in each the accused, as well as the prosecution, is unable to secure the attendance of the witness, because he is beyond the reach of the court. The hardship to the accused is in no respect greater than if the witness were in a district or in a foreign country into which the process of the court could not run.

From all the provisions of the consular convention, it is obvious that it was intended to clothe the consul with some, at least, of the privileges of ambassadors, and so far as compelling his attendance as a witness is concerned, to place him beyond the reach of the process of the courts. He is, therefore, out of the jurisdiction to the same extent and in the same manner as the ambassador, who is regarded, by a fiction of law, as retaining his domicile in his own country, and beyond the jurisdiction of the county in which he actually resides. It is urged that it was decided by Mr. Chief Justice Marshall, on Burr's trial, that the constitutional provision extends to all persons whatever. But in that case, the point to be determined by the chief justice, was whether the accused possessed the right to compulsory process to obtain the production, by the president of the United States, of papers in his possession, deemed material for the defence. Chief Justice Marshall held that the subpoena duces

tecum should issue; but in treating of the question whether it could issue to the president of the United States, the attention of the court was exclusively directed to the point whether by law the president was exempt from such process. The case of an ambassador, exempted by national law from amenability to all process, or of a consul, exempted by express treaty, was not before the court. "If an exception exists," says the chief justice, "to the general principle that all persons may be compelled to testify for the accused, it must be looked for in the law of evidence." Such an exception does exist in that law in favor of the king; but not, he decides, in favor of the president. If, however, by treaty stipulation, which is the supreme law, an exception exists in the case of an agent of a foreign government, expressly placing him beyond the reach of compulsory process, the chief justice nowhere intimates that in such a case the process could issue.

It is urged that if this exemption by treaty is recognized, whole classes of residents might be in like manner placed beyond the reach of the process, and the accused might be deprived in many cases of all means of making his defence. But it is admitted that, if the testimony of the witness cannot be received, or if from infamy or other reasons he is incompetent to testify, compulsory process cannot issue. The same evil apprehended in the hypothetical case, just mentioned, would arise were congress to declare a class of residents incompetent to testify; and that they have the power to do so as far as relates to proceedings in the federal courts is undeniable. But it seems to me that the accused cannot justly complain of any hardship. He has allowed to him compulsory process to obtain the attendance of all persons within the jurisdiction, and amenable to the process of the court. If any person whose attendance he desires is not subject to the process of the court, and quoad hoc, out of the jurisdiction, the accused is in the same position as if his witness had left the country, or were dead, or if, when placed on the stand, he had availed himself of his privilege of not criminating himself, or other similar right, and thus withheld testimony of importance.

On a careful consideration of the whole subject, I have come to the conclusion that this court has no power to issue process to compel the attendance of the consul of France in this case. But, on another ground, it is clear to me that this court ought not to compel obedience to the subpoena in this case. The writ issued was a subpoena duces tecum, commanding M. Dillon to produce in court a certain document, said to be in his possession. It has not been disputed that the right of the accused, under the constitution, to obtain a subpoena duces tecum, rests on the same ground as his right to process to compel the attendance of witnesses to testify orally in his favor. The very letter of the constitution embraces, it is true, only the latter case, but it is declared by Mr. Chief Justice Marshall (1 Burr's Trial, p. 173 [Case No. 14,693]), "that the constitutional and legal right of an accused to obtain process to compel the attendance of his witnesses, extends to their bringing with them such papers as may be material for the defence." "The literal distinction," observes the chief justice, "which exists between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation." But in determining, in the first instance, whether the subpoena to produce the required document shall issue, or, as in this case, the subpoena having issued, in deciding whether the witness shall be compelled to produce it, the court is required to exercise a discretion. "Not," says Mr. Chief Justice Marshall, "that an overstrained rigor should be used with respect to his right to apply for papers deemed by him to be material, but in order to see that the papers in question are relevant to the case, and such as could be introduced into the defence." It was for these reasons that the court, on the argument, required the defendant to disclose by affidavit the nature of the document he sought to have produced. That affidavit the counsel for the defendant have declined to furnish. The court is therefore wholly uninformed whether the document is such as could be received in evidence if produced, or whether it is of such a character as that the court ought to compel its production. If the document be wholly irrelevant or inadmissible in testimony, it is clear, from the observations of Mr. Chief Justice Marshall, that the court will not compel its production. And if, as there is reason to suppose, it is one of the official documents of the French consulate, by the very terms of the treaty its production cannot be compelled. From the tenor of Mr. Chief Justice Marshall's observations on Burr's trial, it is apparent that the right of the accused to compel the production of a document, is not coextensive with his right to compel the attendance of a witness to testify orally. In considering the nature of the discretion the court will exercise in awarding a subpoena duces tecum, he observes: "If it be apparent that for state reasons the papers cannot be introduced into the defence, the subpoena will not issue." And he afterwards says, "that there may be matter, the production of which the court will not require, is certain." It seems, then, from the observations of the chief justice, that though a subpoena may go even to the president of the United States, to obtain his testimony, the accused does not enjoy a coextensive right to obtain the production of any paper he may require for his defence. Whatever hardship to the accused this rule may occasionally work, the evil does not seem greater than arises in ordinary cases

where a witness on a stand is excused for special reasons from testifying the facts within his knowledge, no matter how important to the prisoner the evidence of those facts may be.

By the third article of the consular convention between the United States and France, it is stipulated that the authorities shall in no case examine or seize the papers deposited in consular offices. If a court can compel their production, it is obvious that the protection intended to be given, is gone. If, then, the court will not require the production of papers which, for state reasons, ought not to be produced, it would seem that in a case like the present, an indictment for a misdemeanor, it will not, even if it has the power, violate the immunity and disregard the privileges secured by treaty to the agents of a foreign government. In a capital case, that the accused ought, in some form, says Mr. Chief Justice Marshall, to have the benefit of papers which the court will not require the production of, is a position which the court would very reluctantly deny. What ought to be done under such circumstances, presents, he observes, a delicate question. But he does not intimate that in a case of misdemeanor, papers which by the supreme law cannot be siezed or examined, shall be required to be produced. The most obvious course in such a case, is to admit secondary evidence of their contents. If the accused is unable to furnish such evidence, he is in no worse position than the ordinary case where accident or misfortune has put out of his reach material testimony. I think it clear, therefore, that in a case like the present, where the party subpoenaed is the consul of France, who is required to produce a document in his possession, it is not only the right, but the duty, of the court to require the defendant to show that the document is not an official paper protected by law from examination and seizure, and that on the failure of the accused to furnish the required information, the subpoena duces tecum will not be allowed, or, if issued, will not be enforced. I therefore think that, on this ground alone, compulsory process ought to be refused.

Case No. 3,915.

DILLON v. BARNARD et al.

[1 Holmes, 386.][1]

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

EQUITY PLEADING—DEMURRER—RAILROAD MORTGAGES—CONSTRUCTION.

1. A demurrer to a bill in equity admits only facts well pleaded in the bill; not averments of conclusions of law, nor as to construction of documents or parol agreements inconsistent with written agreements alleged in the bill.

2. A provision in a mortgage of the property and franchises of a railroad corporation to trustees, made to secure certain mortgage bonds to be issued thereunder for the purpose of providing for and retiring the then existing mortgage debt and prior liens on the railroad, and completing and equipping the road; that the expenditure of all sums realized from the sale of the oonds "shall be made with the approval of at least one of the trustees, whose assent in writing shall be necessary to all contracts made by the" corporation "before the same shall be a charge upon any of the sums received from said sales," does not create a charge upon the proceeds of the sales of the mortgage bonds, in favor of one who afterwards built a portion of the road under a written contract with the corporation, which contract did not itself impose such charge.

[See note at end of case.]

Bill in equity by a creditor of the Boston, Hartford, and Erie Railroad Company [Sydney Dillon], against the assignees in bankruptcy of that company [George M. Barnard and others], and the trustees under a mortgage of the property and franchises of the corporation, made to secure certain mortgage bonds issued for the purpose of paying the existing mortgage debt of the railroad and discharging prior liens thereon. A large amount of money was due the complainant from the company for the construction of a portion of its road under a written contract, and his claim was, in substance, that, according to the terms of the mortgage and his contract with the company, assented to by the trustees under the mortgage, a charge was created in his favor upon the proceeds of the sales of the bonds issued under the mortgage; which proceeds had not been applied to payment of his debt. The defendants demurred to the bill. The material parts of the mortgage and the complainant's contract with the company, and the facts, are stated in the opinion.

S. Bartlett and J. J. Storrow, for complainant.

C. S. Bradley, W. G. Russell, and Lothrop & Bishop, for defendants.

SHEPLEY, Circuit Judge. This case is presented on a demurrer to the bill in equity. The material averments of fact which the demurrer admits are as follows: That the Boston, Hartford, and Erie Railroad Company, a corporation duly existing under the laws of Massachusetts, Rhode Island, Connecticut, and New York, was, prior to the first day of March, 1866, authorized to construct, maintain, and operate a railroad in each of said states, and owned the railroad and franchises described in the bill; that, for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the railroad of said corporation, and for the purpose of completing and equipping its railroad, then only partly constructed, the corporation, by a mortgage deed or

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

[2] [Affirmed in 21 Wall. (88 U. S.) 430.]

indenture in trust, on the nineteenth day of March, 1866, conveyed to Robert H. Berdell and others, trustees, all its property, then owned and after to be acquired, in trust, upon the terms and for the purposes set forth in the mortgage deed, which indenture in trust or mortgage was ratified and validated by the legislation of the several states of Massachusetts, Rhode Island, Connecticut, and New York.

The bill alleges that, among other things, it was provided in the indenture that certain bonds or evidences of debt, to an amount named in said indenture, should be issued, sold, and disposed of, as the means and for the purpose of raising money to complete and equip the road; that such bonds, attested by the trustees, should be secured by said indenture, and become a lien upon the property therein described and conveyed, and also upon all the property afterwards purchased, and on the increase of value in the railroad given to it by the expenditure of the money raised by the sale of the bonds. It is also alleged that it was agreed by said indenture, and was a part of the trusts and terms under which the trustees held and were to hold the trust estate, that the expenditure of all sums of money realized from the sale of the bonds issued under the mortgage should be made with the approval of at least one of the trustees, whose assent in writing should be necessary to all contracts made by the railroad corporation for the purposes aforesaid, before the same should be a charge upon any of the sums received from such sales; and also alleges "that such contracts, to be assented to, should and would be a charge upon such sums so received and realized by or from such sales." This last averment must be understood as the allegation of what complainant claims to be the legal inference resulting from the terms of the contract, as no such provision is anywhere expressed in terms in the mortgage, which is made part of the bill and the record in the case.

Afterwards, on the 24th of October, 1867, the complainant, Dillon, entered into a contract with the corporation, in writing, which was approved and assented to in writing by the trustees, for the construction of a certain portion of said road. It is alleged to have been the purpose, object, and intention of the corporation, the trustees, and the complainant, that the sums becoming due under the construction contract should be a charge on the sums to be received from sales of the bonds; that the complainant performed work and expended large sums of money under the contract, relying for his compensation on the sums of money to be derived from sales of bonds, and upon a lien thereon, by virtue of the premises, and that his reliance thereon was well known to the corporation and the trustees; that his work under the contract was performed and accepted, and approved in accordance with the stipulations in the contract; and that a balance is due to him of $1,030,693.29, with interest. The bill alleges that, instead of devoting the proceeds of the sale of the bonds to the payment of complainant, the corporation and the trustees suffered the money to be expended in acquiring new property to be held under the indenture, and in improving and increasing the value of the property already held under it; and that the value of the new property acquired and the increased value of the old property held under the indenture greatly exceeded the amount due to the complainant. The defendants, Hart, Oliphant, and Clark, became legally the successors of Berdell and others, as trustees under the mortgage, and, before the filing of the bill, entered into possession under the mortgage of all the property covered by it, and commenced proceedings to foreclose the same. The corporation is alleged to be insolvent and without means, except the property covered by the mortgage, and in bankruptcy, and the assignees in bankruptcy are made defendants.

In substance, the claim of the complainant is, that the money received from the sales of the Berdell bonds was to be expended in building and equipping the railroad, which was to be held by the trustees in mortgage as security for the bondholders; that a part of the money due to the complainant for building the railroad, which has passed into the possession of the trustees under the mortgage, has been withheld from him and applied to the purchase of other property, which the contract did not contemplate should be bought and conveyed to the trustees, but which has been conveyed to them; and the complainant seeks to follow this property, upon the ground, as he claims, that the contract between him and the corporation, in connection with the terms and conditions of the mortgage, constituted in equity a charge upon the sums received from the sales of the bonds. As far as possible, the averments of matters of legal inference and of conclusions of law, and of the construction of documents, have been omitted in the statement of the allegations in the bill of complaint. The demurrer does not admit the truth of such allegations, but only such facts as are well pleaded. 2 Mitf. Eq. Pl. 227; Story, Eq. Pl. § 452; Daniell, Ch. Pl. 560; Commercial Bank of Manchester v. Buckner, 20 How. [61 U. S.] 108; Ford v. Peering, 1 Ves. Jr. 72. So far as the allegations in the bill are concerned which set up what are alleged as understandings between the parties, whether they refer to matters contained in the written agreement or indenture, and may be taken to be averments of conclusions of law from the agreements, or whether they refer to parol agreements incompatible with the written agreements, the questions as to the correctness of the legal conclusions in the one case, or the

admissibility of the parol evidence in the other, are open to the defendants on demurrer. Lea v. Robeson, 12 Gray, 280.

The mortgage in trust, after reciting the authority given to the directors of the company to make a mortgage upon the whole or any portion of the road, and to issue and dispose of their mortgage bonds to the amount of twenty millions of dollars, payable in New York, excepting such portion as the directors should authorize to be payable in London in sterling currency, declares the purpose of the mortgage to be to secure the "bonds to be issued, for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road, and of laying down a third rail, so as to form an additional track corresponding with the gauge of the Erie Railway of New York." The form of the bonds to be secured by the mortgage was recited in the mortgage deed. Each bond to be issued contained a statement on its face that it was one of a series of twenty thousand bonds issued for the purpose of paying the existing debt of the company, and of completing and equipping their road. The bond also on its face purported to be secured by a mortgage of the railroad and franchises, furniture, and equipment of the company to the trustees, "which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees."

Again, the indenture itself declares "that the parties of the first part, for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them, according to the tenor thereof," . . . have granted, &c., to the parties of the second part (i. e. the trustees) all and singular the railways, &c. (describing the railways and lands of the corporation), with all the personal property, and privileges, franchises, leases, and charters, "also, all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by the party of the first part." The indenture then witnesseth that it is made, and the mortgage bonds and obligations intended to be secured by it are made, executed, and delivered, upon the terms, conditions, and agreements following, the most important of which, and the one upon which the complainant principally relies, is the sixth condition in the indenture, which is: "That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales."

The allegation in the bill is, that it was agreed by the indenture "that such contracts so assented to should and would be a charge upon such sums so received and realized from such sales." There are no such words in the indenture. The allegation, therefore, is one of those allegations of conclusions of law or legal construction of a document which are not admitted by, but are open on, the demurrer. Upon a careful consideration of the whole indenture, its scope, intent, and purpose, and especially of the sixth clause, in which alone the word "charge" is used, it must be determined whether that word was used in its strict and technical sense, or only in a more general sense, in a covenant that the corporation itself would make no expenditures of any money realized from the sale of the bonds, or any contract calling for such expenditure, without the approval of one of the trustees. This sixth clause in the indenture is a covenant on the part of the corporation, party of the first part, with the trustees for the bondholders, party of the second part; a covenant the intent and purpose of which was in aid of what is declared to be the purpose of the indenture itself, "for the better securing and more sure payment of the sums of money mentioned in said mortgage bonds, and each of them, according to its tenor."

Therefore, as the money from the sale of the bonds was to be raised for the purpose of retiring existing mortgage debts and prior liens on the mortgaged property, and for the purpose of completing and equipping the road and laying down a third rail, the corporation provided for the application of a portion of the bonds to the retiring of existing prior incumbrances, by the provision in the indenture for placing the bonds requisite for that purpose in the control of the trustees, thus adding to the security by the extinguishment of prior liens, and requiring the assent of the trustees to expenditures and contracts for expenditures, that they might have the power so to control them that the proceeds of the bonds should be expended in such a manner as to further the purpose of the mortgage by adding to the security of the bondholders. The trustees were bound to see that the expenditure would tend to "the better securing and more sure payment of the mortgage debt," and also that it was for one of the purposes declared in the mortgage. There is no allegation that the expenditures approved by the trustees were for purposes other than those declared to be the purposes of the indenture, or that they did not tend to "the better securing and more sure payment of the sums of money mentioned in said mortgage bonds."

It is not charged that the expenditures were

for purposes other than those "of completing and equipping the road and laying down a third rail," or that they impaired the security of the bondholders. On the contrary, the averment is that they "caused the same to be expended in acquiring new property to be held under said indenture, and in improving and increasing the value of property already and since always held by said trustees under said indenture." This was the very purpose of requiring the assent of the trustees to the contracts and expenditures, that they should be devoted to acquiring new property and adding new values to the old property held and to be held under the mortgage.

Examining the question, therefore, first in the light given in relation to the duties of the trustees by the terms of the trust indenture itself, their full duty would seem to have been faithfully discharged when they approved only such expenditures or contracts as extinguished prior incumbrances, or otherwise bettered the security of the bondholders, by such "completing and equipping their railroad" as added to the value of the old or resulted in the acquisition of new property to be held under the mortgage. The mortgage itself clearly does not contemplate that if the trustees approved several distinct contracts for the completion of distinct portions of the road, and also others for equipping the road, that either the trustees or the bondholders were to see that the assets were marshalled and the sums realized from the sales of the bonds ratably apportioned among the several contractors, or paid to them in the order in which their contracts were executed, or in the succession in which they became due and payable; or that the trustees were to receive or have control of the bonds or the proceeds of the sales of the bonds, so as to be able to make such appropriation, except, perhaps, in the case of the bonds set apart for the retiring of the then existing mortgage debt and debts which constituted a lien on the property. The corporation itself only covenanted that it would so expend the moneys received from the sale of the mortgage bonds as to add to the security. This is the substance of their covenant; and it is not the subject of complaint in this bill that the mortgage security has been diminished, but that it has been added to and increased, (as complainants claim, wrongfully increased), not, however, to the injury of any parties to the indenture, but of one of the persons who, subsequently to the trust mortgage, contracted with the mortgagor.

The sixth condition in the mortgage does not of itself create any charge upon the money proceeds of the sales of the bonds. If the word "charge," in this proviso, is to be construed as used in its strict and technical sense, then it is simply a covenant on the part of the corporation that it will not create such a charge upon the money proceeds without the assent of the trustees. It is not a creation of a charge by the assent of the trustees, but a covenant not to create a charge by the act of the corporation without the assent of the trustees. The corporation had the power, by taking the requisite steps, to create a charge upon the money proceeds. The money was to be expended by the corporation, not by the trustees. It was in the power of the corporation to expend the money for any contract it should choose to make, approved by the trustees, for equipping and completing the road. It was in its power to create, by agreement between all the parties, a charge upon the moneys in favor of any one or of all the contractors; but, under the limitation of the sixth clause, it could not do so without the assent of the trustees. But, even with the assent of the trustees, to create such a charge upon so fugitive a subject of charge as money, which has no earmark, would require evidence of the most unmistakable language in whatever agreement or indenture is relied upon to establish the charge. There certainly is no such agreement in this indenture. It is not enough to create such a charge that the property may have been acquired or the fund created through the efforts or outlays of the party claiming the lien. Wright v. Ellison, 1 Wall. [68 U. S.] 16. Where, then, are we to look for the evidence that the corporation itself has agreed to create such a charge, and that the trustees have assented to such agreement?

The complainant was not a party to the indenture, and, prior to the filing of the bill, does not claim to have asserted any rights under it. The contract of the complainant with the corporation for the construction of a portion of the road does not undertake to create, and does not create, any charge upon the money proceeds of the bonds. No agreement is therein made for any such charge or lien, nor can it be seriously contended that any such charge or lien is created by any necessary implication from the terms or scope of the contract. The assent of the trustees to the contract, therefore, was no assent to an agreement for a charge on the funds, there being no such agreement in the contract. Nor was it in the power of the corporation and the trustees combined to create a charge or lien on the property covered by the mortgage, which would take precedence of that of the trustees of the bondholders, which, by the express declaration in the indenture itself, was to be "the first and only lien on the property and franchises of the company." The bondholders advanced their money upon the faith of the security on the existing property and value of the road and its appurtenances, and the property and value to be added by the expenditure of the money advanced by them. The mortgage assumed to secure them on "the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be con-

trolled by" the corporation. These several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459; Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. [68 U. S.] 254; Pennock v. Coe, 23 How. [64 U. S.] 117.

As no property has been acquired under the mortgage, except such as by its terms was to be subject to the first and only lien under the mortgage in favor of the bondholders, the "charge" in favor of complainant, if any agreement for such charge had been made, and if such agreement had been assented to by the trustees, would have been subordinate to the first lien created by the indenture. The advances made by the bondholders were made upon the faith of such security, and the fact that complainant's labors had added to the security of the bondholders would not subordinate their lien to his, if he had one. Mason v. York & C. R. Co., 52 Me. 82; Willink v. Morris Canal & Banking Co., 3 H. W. Green, Ch. [4 N. J. Eq.] 377; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459; Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. [68 U. S.] 254. Demurrer sustained. Bill dismissed, with costs

[NOTE. Complainant took an appeal to the supreme court, where the decree was affirmed. Dillon v. Barnard, 21 Wall. (88 U. S.) 430 That court, speaking through Mr. Justice Field, said, among other things: "The instrument was executed to secure the payment of the mortgage bonds. It so declares on its face. It nowhere indicates any design to secure the contractors. Its language is 'that for the better securing and more sure payment of the sums of money mentioned in the said mortgage bonds, and each of them,' the indenture is executed. And the clause in question was intended to increase this security by preventing a wasteful expenditure of the funds of the corporation. It is, in fact, an agreement on its part that the funds received from the bonds shall only be used with the approval of one of the trustees, and without his written assent no contracts shall be payable out of those funds. The term 'charge' is not used in any technical sense, as importing a lien upon the funds, but in the general acceptation of a claim that may be payable out of them. The contractors are not parties to the indenture, and are not entitled to claim, as against those parties, any benefit under its provisions, except that, upon the assent being given to their contracts, the use of the moneys for their payment is permissible. They are, so far as the agreement is concerned, strangers to the instrument. The written assent to contracts on the part of one of the trustees was not required for their protection, but as an additional safeguard to the bondholders against an improvident use of the funds by the corporation. The clause is one of a series of covenants on the part of the corporation with the trustees, intended to secure the application of the funds received to the purposes contemplated at the time the indenture was executed,—the retirement of the existing indebtedness of the corporation, the completion of its road, and the laying of a third rail. The full effect is given to the language of the clause in question by this interpretation."]

DILLON (FOWLER v.). See Case No. 5,000.

Case No. 3,916.

DILLON v. UNION PAC. R. CO.

[3 Dill. 319.][1]

Circuit Court, D. Nebraska. 1874.

MASTER AND SERVANT — "FELLOW-SERVANTS" — DUTY OF MASTER AS REGARDS COMPETENT SERVANTS AND SAFE MACHINERY — EFFECT OF SERVANT'S KNOWLEDGE OF MASTER'S FAILURE IN THIS RESPECT.

1. The courts of Great Britain and America have established the general doctrine of the non-liability of the employer for an injury of one servant caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no federal question, is no more open to judicial denial in the federal courts than in the state courts, or the ordinary common law tribunals.

2. But the employer, though he may act through others, is bound to use ordinary care in providing competent servants and safe materials and structures, and is responsible to any servant who is injured by negligence in this respect; the rule as to "fellow-servants" does not extend to such a case.

[Cited in King v. Ohio, etc., R. Co., 14 Fed. 280; Thompson v. Chicago, M. & St. P. Ry. Co., Id. 567.]

3. A servant by voluntarily continuing in the employ of the master with knowledge of the incompetency of the fellow-servant, or of defective machinery and the danger to which this may expose him, waives (unless upon some special ground) the right to recover for injuries thereby caused.

4. These principles applied to the case in judgment—(an action by a locomotive engineer, who sued for an injury which happened in consequence of the want of a signal bell in the cab of his engine which was known to him from the time he entered the defendant's employ)—and it was *held* on demurrer that the petition did not set forth a case showing that the defendant was liable.

This case came before the court on demurrer to the petition. The action is brought [by John Dillon against the Union Pacific Railroad Company] to recover for personal injuries to the plaintiff while serving the defendant. It appears from the allegations of the petition, that in August, 1869, the plaintiff was employed by the defendant as a locomotive engineer, to run between Wasatch, Utah, and Bryan, Wyoming, a distance of about 115 miles, and was put in charge of engine No. 63, which was without a signal bell in the cab; that plaintiff continued to use the engine in this condition in hauling freight trains until about November 25th, 1869, when by order of his superior officer at Wasatch the plaintiff was directed to haul with said engine a train of passenger cars from Wasatch to Bryan. The engine was still without a signal bell in the cab, but had a bell over the boiler with a rope handle hanging down in front of the window in the cab. By order of the conductor, the rope designed to be attached to the signal bell was connected with the bell over the boiler by tying the two ropes together in the cab,

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

the knot thereby made being immediately in front of one of the panes of glass in the window of the cab. This was done before the train started. When the train had proceeded about twenty-five miles, the bell rope was pulled violently by the conductor whereby the knot uniting the ropes came in contact with a pane of glass in front of where the engineer had to stand, shattering the same. The weather was intensely cold. The plaintiff was thus exposed to the severe weather for about four hours, whereby he was very severely frozen in the lower part of the body. No allegation is made in the petition that the plaintiff complained of the want of a signal bell, or requested to have one put into the cab, or that he for this reason objected or refused to serve the defendant. Nor does the plaintiff allege that he notified the conductor of the accident to the pane of glass or made any request for time or materials with which to repair it; but he does allege that he could get nothing with which to close the opening. Nor does he allege that he notified the conductor that he was freezing, but on the other hand, avers, that he "did not know that he was freezing in any part of his body while said trip lasted, and that the first he learned of it was after he had arrived at Bryan." The injuries are minutely described and the damages placed at $25,000.

John D. Howe, for plaintiff. A. J. Poppleton and E. Wakely, for defendant.

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

DILLON, Circuit Judge. In determining this demurrer, it will be assumed without extended discussion that the established doctrine of the law, in the absence of statute regulation, is, that the servant assumes all the ordinary risks of the service upon which he enters, including those risks which arise from the negligence of other servants of the same master in the same employment. The extent of this rule and the scope of its operation we shall notice presently, so far as the allegations of the petition and the argument in support of its sufficiency make it necessary. But the general rule that ordinarily the common master is not liable to one servant for the consequences of the negligence of another servant in the same service, is so thoroughly settled by adjudication, as in our opinion to be no longer open to judicial question. Every court in Great Britain has concurred in the doctrine, including the courts of error; and finally, it was declared sound by the house of lords, upon full debate by eminent counsel, and upon the most deliberate consideration. Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266.

The current reports show that the rule is unquestioned in that country, and constantly applied without the numerous exceptions which some of the American courts are inclined to engraft upon it. And in this country the general rule itself is everywhere recognized, the only dispute being as to cases to which it properly applies. The cases will be found cited in Shearman & Redfield's work on Negligence, and in Dr. Wharton's treatise on the same subject. The doctrine is one pertaining to general jurisprudence; it involves no question of federal law, and therefore this court is not at liberty, any more than a state court, to disregard the uniform and settled course of judicial decision. The evils which would certainly arise from a holding by the federal courts of a doctrine in conflict with that held by the courts elsewhere upon a question which so frequently arises and of so much practical importance may easily be anticipated.

After a careful consideration of the allegations of the petition as to the negligence of the conductor in violently pulling the rope, etc., etc., we are of opinion that the case made therein falls within the general rule which exempts the master from liability, except it may be in respect to the defect in the engine in not being provided with a signal bell in the cab. In discussing the questions which arise in this view, we admit that the rule is settled both in Great Britain and America, that the master is bound to use ordinary care to employ and retain competent servants, and to furnish and maintain suitable and safe machinery and structures. We consider that view to be correct, also, which holds that this duty of the master is so far personal and inalienable that responsibility for damages caused by the negligent discharge of it exists, although the master in discharging it may, for his own convenience, act through other servants. Tarrant v. Webb, 18 C. B. 797; Gilman v. Eastern R. Co., 13 Allen, 433; Id., 10 Allen, 233, and cases cited by Mr. Justice Gray, page 238.

And just here it is that the plaintiff maintains that this rule gives him a cause of action, since his employer failed to use care in providing him with a suitable and safe engine in this, that the engine furnished him was without a usual and proper appliance, namely, a signal bell in the cab, and that it was this omission that caused the injury for which a recovery is sought. Upon the allegations of the petition it must be taken as true that the engine was defective in this respect, and it may be conceded that it is sufficiently averred that this was the proximate cause of the injury to the plaintiff. We say this may be conceded in disposing of the demurrer, though there is ground to contend that the proximate cause of the injury was not the want of a signal bell or the breaking of the pane of glass, but the plaintiff's failure to notify the conductor thereof, so that it might be closed, or to discover and report his danger. But if it be conceded that the want of the signal bell was the direct cause of the injury, the immediate question is, does the petition, notwithstanding, set out a cause of action, or rather does it contain other aver-

ments which, if true, defeat a right of recovery?

It will be observed that in the view we are now considering the case the complaint is that there was no signal bell in the cab. The plaintiff was an engineer and the defect of the engine in this respect was known to him, and it appears from the petition that it had been known to him ever since he commenced to use it, the preceding August. He knew, of course, the condition of the engine in this respect before starting out with it on the trip in question. It is not necessary to lay down a rule concerning the effect of knowledge on the part of the servant of the incompetency of a fellow-servant, or of the defective character of the machinery or structures furnished by the employer, broader than the facts of the case require.

The defect in engine was one of the existence and nature of which the engineer had full knowledge; it was peculiarly within his department, and if he voluntarily continued the use of the engine, presumptively he assumed the risk of so doing, and cannot visit it upon the employer. There may be exceptions to this rule as in the case of Clarke v. Holmes, 7 Hurl. & N. 937, in which the exchequer chamber affirmed the judgment below (6 Hurl. & N. 349), where the servant injured had complained of the dangerous state of the machinery and the master had promised to remedy the defect; or in cases, perhaps, where the servant injured did not know or have reason to apprehend the danger to which the defect of the machinery or structure exposed him. Huddleston v. Lowell Mach. Shop (1871) 106 Mass. 282; Jones v. Yeager [Case No. 7,510]; Union Pac. R. Co. v. Fort, 17 Wall. [84 U. S.] 553.

The allegations of the petition do not bring the case within the principle of the exceptions, and it falls within the general doctrine expressed by Pollock, C. B., "that a servant cannot continue to use a machine he knows to be dangerous at the risk of his employer." Dynen v. Leach, 26 Law J. Exch. 221; Id., 40 Eng. Law & Eq. 491. Strong instances of the application of the same general principle will be found in Senior v. Ward, 102 E. C. L. (1 El. & El.) 385; Griffiths v. Gidlow, 3 Hurl. & N. 648; Assop v. Yates, 2 Hurl. & N. 768; Watling v. Oastler, L. R. 6 Exch. 73; Clarke v. Holmes, supra; Paterson v. Wallace, 28 Eng. Law & Eq. 48; Buzzell v. Laconia Manuf'g Co., 48 Me. 113; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 111; Davis v. Detroit & M. R. Co. (1870) 20 Mich. 105, 127, approving Mad River & L. E. R. R. Co. v. Barber, 5 Ohio St. 564; Hayden v. Smithville Manuf'g Co., 29 Conn. 548; Laning v. New York Cent. R. Co. (1872) 49 N. Y. 521.

Assuming it to be true as some of these cases hold (see Laning v. New York Cent. R. Co., Watling v. Oastler, Senior v. Ward, Clarke v. Holmes, above cited), that the servant's knowledge of defective materials and structures or of incompetent fellow servants defeats a recovery by him on the ground of "contributory negligence," and that it is not needful for the pleader to negative contributory negligence in the declaration (Railroad Co. v. Gladman, 16 Wall. [83 U. S.] 402), still if the facts are, as in this case, set forth, fully detailing the manner in which the injury happened, and if they show a state of case which defeats a right of recovery, a demurrer to the petition will lie. Upon the whole our judgment is that the petition does not set forth such a case as shows the defendant to be liable for the injury to the plaintiff. Accordingly judgment will be entered for the defendant on the demurrer. Judgment accordingly.

NOTE. Concerning the the liability of masters to servants, see Union Pacific Railroad v. Fort, 17 Wall. [84 U. S.] 553, affirming Fort v. Union Pac. R. Co. [Case No. 4,952], and Northwestern Union Packet Co. v. McCue, 17 Wall. [84 U. S.] 508. The courts of Great Britain and America have concurred in the general doctrine of the non-liability of the employer for an injury to one servant caused by the negligence of another servant in the same common employment. In England this doctrine has been affirmed time and time again by every court in Westminster Hall, and finally by the house of lords. Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266. The first case was Priestley v. Fowler, 3 Mees. & W. 1. In Clarke v. Holmes (1862) 7 Hurl. & N. 937, 947, itself an important case on this subject, Mr. Justice Byles, remarks: "The case of Priestley v. Fowler introduced a new chapter into the law, but that case has since been recognized by all the courts, including the court of error and the house of lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land." In a very recent case this rule is said to be "conclusively settled." Feltham v. England, L. R. (1866) 2 Q. B. 33. In this case Mellor, J., says that "this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey." In another case it is said: "A foreman is a servant as much as the other servants whose work he superintends." Per Willes, J., in Gallagher v. Piper (1864) 111 E. C. L. 669. Further, as to who are "fellow-servants" within the rule, see Whart. Neg. § 229; Wigmore v. Jay (1850) 5 Welsby, H. & G. [Exch.] 354; Skipp v. Eastern Counties Ry. Co., 9 Welsby, H. & G. [Exch.] 221; Wiggett v. Fox, 11 Welsby H. & G. [Exch.] 832; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Waller v. Southeastern Ry. Co., 2 Hurl. & C. 102; Gallagher v. Piper, 111 E. C. L. 669; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570, 736; Tunney v. Midland Ry. Co., L. R. 1 C. P. 291; Lovegrove v. London, B. & S. C. Ry. Co., 16 C. B. (N. S.) 669. See Murphy v. Smith, 19 C. B. (N. S.) 361, as to servant being considered as the master's representative in the establishment. On this last point see, also, remarks of Mr. Justice Davis in Fort's Case, supra, to the effect that Collett, who had been entrusted by the railroad company with the care and management of dangerous machinery was the representative of the company, which was liable "either upon the maxim of respondeat superior or upon the obligations arising out of the contract of service" for Collett's wrongful order to the plaintiff—that order relating to a duty within the scope of Collett's employment and outside the scope of the plaintiff's engagement, and wholly disconnected with it.

In this country the general rule is recognized

as the law by the courts of, perhaps, every state which has passed on the question, except where it is changed by statute. The only dispute is as to the extent of the rule, or rather as to the cases to which it is justly applicable. We do not recollect any case in the supreme court of the United States either directly sustaining or rejecting the general doctrine. It is noticeable, however, that in the case of the Northwestern Packet Co. v. McCue [supra], Mr. Justice Davis, delivering the opinion of the court, remarks: "It is insisted on the part of the plaintiff in error, that a master is not responsible to a servant for injuries caused by the negligence or misconduct of fellow-servant in the same general business;" but "whether this general proposition be true or not, it is not necessary to determine in the state of record." And in Fort's Case the same learned justice observes: "It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case." This language would lead to the inference that the supreme court may entertain doubts as to the soundness of the rule under discussion. But as the general doctrine is so firmly rooted by judicial decision in Great Britain and in the different state courts of this country, as it is one which pertains to general jurisprudence, and involves no question of federal law, it would seem that it is no more open to re-agitation in a federal court than in any other court of common law powers.

We may mention some exceptions to the rule, or cases which are not considered as falling within its reasons, and to which, therefore, it does not apply. It is settled, both in England and America, that the master is bound to use ordinary care to employ, or to retain in his employment, none but competent servants, and to use like care to furnish and maintain suitable and safe machinery and structures. Bartonshill Coal Co. v. Reid, supra; Tarrant v. Webb, 18 C. B. 797; Weems v. Mathieson, 4 Macq. H. L. Cas. 215; Clarke v. Holmes, supra; and see cases next cited. It is also settled by the courts, that this duty of the master is so far personal that responsibility for injuries directly caused by the negligent discharge of it exists, although the master may for his own convenience act through other servants. On this subject see the following very recent cases in addition to those last cited: Brothers v. Cartter (1873) 52 Mo. 372, and cases cited by Wagner, J.; Gilman v. Eastern R. Corp., 10 Allen, 233, 13 Allen, 433, and cases cited by Gray, J.; Laning v. New York Cent. R. Co. (1872) 49 N. Y. 521. And the reason is that this duty of the master is direct and personal, and must be discharged in person or by others for him, for whose negligent acts and omissions he is responsible where these are the immediate cause of injury to his servants.

On this point we call attention to the following observations of Mr. Justice Davis in Fort's Case: "It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employe in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employe, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employe in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employes of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

In this connection an important practical question may be adverted to, and that is, as to the effect of knowledge on the part of the servant injured that the master had not discharged his duty in providing competent fellow servants or fit and safe materials or machinery. The following are the more important cases on this point: Watling v. Oastler (1871) L. R. 6 Exch. 73; Senior v. Ward, 1 El. & El. (102 E. C. L.) 385; Dynen v. Leach, 26 Law J. Exch. 221; Id., 40 Eng. Law & Eq. 491; Assop v. Yates, 2 Hurl. & N. 768; Griffiths v. Gidlow, 3 Hurl. & N. 648; Smith v. Dowell, 3 Fost. & F. 238; Laning v. New York Cent. R. Co. (1872) 49 N. Y. 521 (full discussion); Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Davis v. Detroit & M. R. Co. (1870) 20 Mich. 105, 127, where the cases are referred to and the subject fully examined by Cooley, J.; Hayden v. Smithville Manuf'g Co. (1861) 29 Conn. 548; Buzzell v. Laconia Manuf'g Co., 48 Me. 113; Jones v. Yeager [Case No. 7,510.] They authorize the deduction of the general rule that if the plaintiff voluntarily continue in the master's service with full knowledge of the incompetency of the co-servant, or of the unfit and defective machinery, and of the danger thereby occasioned, this will be considered such "contributory negligence" on his part as to defeat his right to recover unless upon some special ground, as in Clarke v. Holmes, 6 Hurl. & N. 349, affirmed 7 Hurl. & N. 937, where the servant made complaint, and the master thereupon promised that the grounds of it should be removed. This rule, that knowledge by the servant injured of the danger will disentitle him to recover if he voluntarily remains in the service without complaint, clearly applies to a case where it is the duty of the servant himself to inform the master or superior of the co-servant's unfitness, or the unfitness of the materials or structures. See particularly on this point, Patterson v. Pittsburg & C. R. Co., Sup. Ct. Pa. 1874 [76 Pa. St. 389]; Snow v. Housatonic R. Co., 8 Allen, 441. The reason for this exemption of the master from responsibility, would not seem to apply where the servant injured could not reasonably be held to know the danger to which the master's neglect of duty exposed him. It seems to us that some of the cases have asserted rather too rigid a rule against the servant arising out of his knowledge of the neglect of personal duty of the master as respects co-servants and materials, and his supposed acquiescence in it; and there are aspects of this subject that need to be further discussed and decided before the law can be regarded as settled. See Whart. Neg. § 214, and cases cited.

What is necessary to constitute relation of master and servant, see Mr. Hilliard's article, 1 Cent. Law J. 396, citing Brady v. Giles, 1 Moody & R. 494; Lackawanna & B. R. Co. v. Chenewith, 52 Pa. St. 382; Flinn v. Philadelphia, U. & B. R. Co., 1 Houst. 469; Williamson v. Wadsworth, 49 Barb. 294; Wood v. Cobb, 13 Allen, 58; Fay v. Davidson, 13 Minn. 523

[Gil. 491]; Stone v. Western Transp. Co., 38 N. Y. 240; Hall v. Warner, 60 Barb. 198; Sykes v. Bates, 26 Iowa, 521; Chicago Ry. Co. v. Volk, 45 Ill. 175; Whart. Neg. c. 5, § 202 et seq.; Shear. & R. Neg. §§ 60, 73.

Wilful Tort of Servant. While the liability of the master, says Mr. Hilliard (1 Cent. Law J. 398), "for the mere negligence of his servant seems perfectly well settled, the cases are not entirely reconcilable with reference to his liability for wilful wrongs of the servant, though done in connection with the master's business. The strong tendency, however, of the more recent decisions is, to hold the master equally responsible for both classes of injury. The question has of late been most frequently raised in actions against railroad companies for acts of force, unjustifiable in kind or excessive in degree, committed by their conductors or other officers from violation of the rules of the company. In Seymour v. Greenwood, 30 Law J. Exch. 189, 7 Hurl. & N. 358, Williams, J., well expresses the principle of liability upon which the most recent cases seem to proceed. 'It is argued that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibus, generally, and that that authority must include an authority to turn out any passenger who misconducts himself, yet that it gives no authority to turn out an unoffending passenger. But by giving the guard authority to turn out an offending passenger, the defendant necessarily gave him also authority to judge for himself who should be considered an offending passenger.' Acc. Goff v. Great Northern Ry. Co., 3 El. & El. 672, where the act complained of was the arrest of the plaintiff for the benefit of the company, there being authority to arrest a passenger for traveling without payment of his fare, and the court held that the station master and the policeman had implied authority to arrest those whom he believed to be guilty, and if there was a mistake, it was a mistake made within the scope of their authority. But in the late case of Poulton v. London & S. W. Ry. Co., L. R. 2 Q. B. 534, the important distinction was made that when a railroad company would itself have no right to arrest, a wrongful arrest by one of its employes would not render the company liable, as where the plaintiff was detained in custody by two policemen, under the orders of the station master, for non-payment of the freight of a horse, the company would have a right to detain the horse, but not to arrest the owner, and therefore the action for false imprisonment did not lie." Mr. Hilliard refers to the following cases as showing the course of authority on this subject: Gilmartin v. New York, 55 Barb. 239; Luttrell v. Hazen, 3 Sneed, 20; Althof v. Wolf, 2 Hilt. 344; Seymour v. Greenwood, 7 Hurl. & N. 356. See Shear. & R. Neg. §§ 65, 67.

"And the general rule," says Mr. Hilliard (1 Cent. Law J. 398), "has been laid down that a master is not responsible for the wilful or criminal wrong or trespass of his servant. Jones v. Hart, 2 Salk. 441; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330. Or that the injury must arise in the execution of some service, lawful in itself, but negligently or unskilfully performed, and not be a wanton violation of law by the servant, though occupied about the master's business. Moore v. Sanborne, 2 Mich. 519. This was the point decided in the leading case of McManus v. Crickett, 1 East, 109, where the court of king's bench went into an examination of all the authorities, and after much discussion and great consideration, held that, by committing a wilful wrong, the servant virtually abandoned his master's business, who, therefore, was not liable to the party injured. And text books of authority have favored this view. See 2 Greenl. Ev. §§ 52, 168; 2 Kent, Comm. (5th Ed.) 258; 1 Shars. Bl. Comm. 431." See Coleman v. Riches, 16 C. B. 104 (leading case), as to liability of master for fraud of his servant. Grant v. Norway, 10 C. B. 665; Hubbersty v. Ward, 8 Exch. 330.

DILLON (WICKHAM v.). See Case No. 17,612.

DIMICK (STOUGHTON v.). See Case No. 13,500.

DIMMICK, The JOHN L. See Case No. 7,355.

Case No. 3,917.

The DIMON.

[2 Gall. 306.][3]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

PRIZE—PLEADING.

A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute.

The information in this case alleged: 1. That at some port or place unknown, in some one of the colonies or dependencies of Great Britain, goods, &c. of the growth, produce, or manufacture of Great Britain, were laden on board with intent to import the same into the United States, and that the same were accordingly imported. 2. That the ship, being owned by citizens of the United States, sailed under a British license or pass. 3. The third count charged a trading with the enemy, and concluded with a prize allegation.

STORY, Circuit Justice. It is improper to join a general prize allegation with an information for the infringement of a statute, the proceedings being very different in their nature.

Case No. 3,918.

DIMPFEL v. OHIO & M. RY. CO. et al.

[9 Biss. 127; 8 Reporter, 641; 12 Chi. Leg. News, 50.][1]

Circuit Court, S. D. Illinois. Sept., 1879.[2]

CONSOLIDATION OF COMPANIES — ULTRA VIRES — INNOCENT BONDHOLDERS—ESTOPPEL—LACHES.

1. In view of the legislation in Illinois great liberality should be exercised in regard to contracts for consolidation between different railroad companies. By the general language of the statutes relating to the union and consolidation of different lines of road, the means by which the result is to be or has been obtained, have not been clearly designated, but that has been left to be adjusted by contracts between the parties.

[Cited in Hervey v. Illinois Midland Ry. Co., 28 Fed. 173; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 963, 6 Sup. Ct. 809.]

[3] [Reported by John Gallison, Esq.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 641, contains only a partial report.]

[2] [Affirmed in 110 U. S. 209, 3 Sup. Ct. 573.]

2. Where a corporation has acted under a contract and received the benefits arising under it, it is not competent for it to deny its validity as being "ultra vires."

3. After the lapse of several years from the time of the contracts of consolidation, and a mortgage having been made, bonds issued, and sold to bona fide purchasers on the faith of such contracts, it is not competent for the stockholders any more than for the company itself to question the authority under which the contracts and mortgage were executed.

[Cited in Moulton v. Chafee, 22 Fed. 27.]

[See note at end of case.]

[This was a bill in equity by Frederick P. Dimpfel against the Ohio & Mississippi Railway Company.]

Chas. W. Hassler and Perry Belmont, for complainant.

Henry Crawford and Perry H. Smith, Jr., for demurrants.

DRUMMOND, Circuit Judge. This is a bill filed by the plaintiff, as a stockholder of the Ohio and Mississippi Railway Company, on behalf of himself and such other stockholders as might join him in the bill (no one of whom, however, has so done), asking the court to declare a certain contract made by the company, and by which it acquired a portion of its railway called "The Springfield Division," and the bonds that were issued under a mortgage given by the company upon that division, null and void. To the bill a demurrer has been put in by some of the defendants, claiming under the contract and mortgage, and the question in the case is, whether the bill is maintainable in equity, and whether the contract and mortgage referred to were invalid as being "ultra vires." In 1851 an act was passed by the legislature of Illinois incorporating the Ohio and Mississippi Railway Company, the object of which was the construction of a railroad from Illinoistown, opposite St. Louis, to Vincennes, in Indiana. This company mortgaged its road to secure certain bonds, and a foreclosure took place and the road was sold; and under the sale, the Ohio and Mississippi Railway Company has become the representative and owner of the rights and equities of the original company. There were also various acts and amendments thereto, from time to time passed by the legislatures of Indiana and Ohio, for the construction of a railroad from Vincennes to Cincinnati; and by virtue of certain laws of Illinois, Indiana and Ohio, a consolidated company was created for the construction and operation of a railroad from Illinoistown to Cincinnati.

Under the original charter, the Ohio and Mississippi Railway Company had power to unite its railroad with any other railroad then, or thereafter to be constructed, either in Illinois or Indiana, and was authorized to execute all such contracts as were necessary to secure that object. By general laws of the state of Illinois, railroad corporations were authorized to consolidate their property and stock with domestic or foreign connecting companies, and to make contracts with railroad companies in other states to lease and operate their roads.

At the time of the acquisition of the Springfield Division, it was called "The Springfield and Illinois Southeastern Railroad Company," and it had been constructed and operated under a special act, as well as under the general laws of the state applicable to such companies, and it had been sold in foreclosure proceedings, and had been acquired by parties who had made the transfer to the Ohio and Mississippi Railway Company. This division of the road was then considered a valuable auxiliary of the Ohio and Mississippi Railway Company, and this, it is to be presumed, was the cause of the purchase which was made by the latter.

It is to be observed, that in view of the legislation of the state of Illinois upon this subject, great liberality should be exercised as to the contract in controversy in this case. Both by the legislation of the state, and by the construction of the same by its highest court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management; the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system. For example, nothing is more common now than the union of different lines of railroad by means of leases of one to the other, the authority for which is given, not so much under particular, as under general, laws of the state. It should be further observed, that in authorizing, by the general language which has been referred to in the legislation of this state, the union and consolidation of different lines of road, the means by which the result is to be, or has been, obtained, have not been clearly designated—but that has been left to be adjusted by contracts mutually executed between the parties.

There can be no doubt, I think, that it was competent for the Ohio and Mississippi Railway Company, under the laws of this state, to acquire the right of operating the Springfield Division, and whether the operation of the road was under the special act creating the Springfield and Illinois Southeastern Railroad Company, or under that which authorized the original and consolidated railway between Illinoistown and Vincennes, may not be very material in this case; neither can it be material whether this result was accomplished by virtue of a special contract of lease or otherwise, made with the Springfield and Illinois Southeastern Company or by virtue of a contract of purchase of that railroad.

Again, it must be borne in mind that the courts in recent times have been extremely

liberal in the construction of powers of railroad corporations to accomplish the general scope and objects of their creation, and that the question of ultra vires has not been, of late years, construed with that strictness that existed in former times; so that in view of these and other considerations that might be mentioned, I think it is a fair inference from the legislation on the subject, and the decisions of the courts, as well those of Illinois, as of the supreme court of the United States, that the contract by which the Springfield Division was purchased by the Ohio and Mississippi Railway Company, could not be considered as ultra vires, but was, on the contrary, a valid contract, and this independent of the legislation of the state of Indiana, by which in great part, this consolidated line of railroad running through the three states has been constructed and operated.

Again, one of the principles which now seems to be established by the adjudication of the courts as to powers of corporations, is that where a corporation has acted under a contract and received the benefits arising from it, it is not competent for it to deny its validity as being ultra vires. Under the contract made in this case, and from the money which was raised from the bonds that were issued on the Springfield Division, the Ohio and Mississippi Railway Company has received benefits, in which the whole consolidated company has participated.

The contract of purchase was made by the Ohio and Mississippi Railway Company in January, 1875. From that time up to the date of filing the bill in this case, the Springfield Division was operated as an integral part of the Ohio and Mississippi Railway Company, and in fact was merged in the consolidated company. This was an act public in its character, and must be presumed to have been known to all the stockholders of the Ohio and Mississippi Railway Company, and, so far as we know, no objection was interposed to their action until the filing of the bill in this case, on the 12th of September, 1878. Nearly four years therefore had passed since the acquisition of the Springfield Division, and its continued operation as a part of the consolidated company, before objection was made by any stockholder. During that time the relations of the various parties became changed in consequence of this action of the railway company. The mortgage had been made, and bonds issued. They had passed into the hands of bona fide purchasers on the faith of the contracts made, and which had been enforced without objection for several years. It would seem that if there was any serious question as to the power of the railway company to make this contract, execute this mortgage and issue these bonds, it ought to have been made at an earlier day, and that it is not competent now, either for the railway company, or for its stockholders, to object that what was done was beyond the power of the company.

It is impossible, in the nature of things, to place all parties as they were before this contract and mortgage were executed, and that consideration has always had great weight in the decision of questions of this kind.

So that on the whole my opinion is: In the first place, that the railway company had the right to acquire the Springfield Division, and to execute the mortgage and issue the bonds referred to, by virtue of the legislation of the state of Illinois; and in the second place, even if the right did not clearly exist by virtue of the laws of Illinois, that after the lapse of so long a time, and after so many rights and equities have been acquired by different parties under the action of the railway company, it is not competent for the plaintiff, or the other stockholders of the Ohio and Mississippi Railway Company, any more than for the company itself to question the authority under which the contract and mortgage were executed. The only power that could do that would be the state itself. The demurrer must therefore be sustained.

[NOTE. Complainant having appealed to the supreme court, the decree of dismissal was there affirmed for want of equity in the bill. The ground stated by that court (per Mr. Justice Field) was that, even assuming that complainant was a stockholder at the time of the transactions in question, his omission to object to the purchase of the road or the issuance of the bonds, and his failure to seek relief through the officers and directors of the corporation itself, was such acquiescence as would prevent him from obtaining any relief in equity. See Dimpfell v. Ohio & M. Ry. Co., 110 U. S. 209, 3 Sup. Ct. 573.]

Case No. 3,919.

DINGEE v. BECKER.

[9 N. B. R. 503.][1]

District Court, W. D. Pennsylvania. May, 1874.

BANKRUPTCY—EFFECT OF PROVING DEBT.

Proving a debt in bankruptcy does not of itself operate as an absolute extinguishment or satisfaction of the debt. If the bankrupt's discharge is refused, the creditor who has proved his debt is remitted to his former rights and remedies.

[Cited in Re Sweet, 36 Fed. 762.]

[See note at end of case.]

THAYER, District Judge. The plaintiff obtained a judgment against the defendant in the year 1862. The defendant was adjudged a bankrupt on September 3d, 1869. The plaintiff proved his debt in bankruptcy. The defendant has never obtained any discharge and there seems to have been unreasonable delay on his part in endeavoring to obtain it. Under these circumstances the plaintiff issued the present execution, and the defendant has moved to set it aside. Upon the argument it was strenuously maintained by the

[1] [Reprinted from 9 N. B. R. 508, by permission.]

defendant's counsel, that the plaintiff having proved his debt in bankruptcy, is forever precluded by section 21 of the bankrupt act [of 1867 (14 Stat. 526)] from pursuing the defendant at law. Proof of the debt, it was argued, operates under the statute as a complete satisfaction and discharge of the debt, whether the bankrupt be discharged or not. The section referred to enacts that, "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." If this section of the act stood alone it would be difficult to avoid the conclusion insisted upon by the defendant, viz., that the creditors who prove their debts are thereby absolutely and forever precluded from making any further claim claim upon the bankrupt for the same cause, and from maintaining any suit at law against him for it, or issuing any execution against him to collect it. And that result would follow without regard to the issue of the proceedings in bankruptcy. Whether the defendant obtained his discharge or not the claim of the proving creditor would be absolutely extinguished, and he could, under no circumstances, demand anything but his dividend out of the bankrupt's estate. But in interpreting a statute we are to examine the whole of it in order to determine its meaning and effect, and not a particular part of it. We are to collect its meaning, not from one section, but from the whole instrument—"ex antecedentibus et consequentibus." Every part of it is to be brought into action in order to collect from the whole one uniform and consistent sense.

Applying this fundamental rule of interpretation to the bankrupt law, it is quite impossible to give to the twenty-first section the unqualified effect which the defendant's counsel attributes to it. By the twenty-ninth section, which regulates the bankrupt's discharge, notice is required to be given of the bankrupt's application for a discharge to all creditors who have proved their debts. They are to be required to appear on a day appointed for the purpose and show cause why a discharge should not be granted to the bankrupt. If they can show the bankrupt has been guilty of either of the disqualifying acts therein mentioned his discharge is to be refused. By the thirty-first section such creditors may have an issue awarded to try the facts upon which their opposition to the discharge is based. By the thirty-fourth section creditors who have proved their debts, or whose debts were provable, may contest the validity of a discharge which has been already granted, on the ground that it was fraudulently obtained, and if, upon the hearing, the fraud is found, judgment shall be given in favor of said creditors, and the discharge of the bankrupt shall be set aside and annulled. Now for what purpose are creditors who have proved their debts to be notified of the bankrupt's application for a discharge, and given an opportunity to oppose it, if their claims upon the bankrupt are not to be affected by his discharge? If their claims are barred by having proved their debts, whether the bankrupt be discharged or not, of what avail is it to oppose his discharge? And why are they permitted to apply to the court to annul a discharge obtained by fraud, if they are not to be affected by the result? And what kind of a judgment is that which is to be given in favor of such creditors if it be a judgment which leaves their claims satisfied and extinguished, while it annuls the discharge? Such an interpretation of the act is altogether inconsistent with its provisions. That which extinguishes the bankrupt's debts, whether they be proved or only provable, is his discharge. His release is entirely dependent upon that. This results not only from a comparison of the various provisions of the act, but is the necessary conclusion from the language of that portion of it which declares the effect of the proceedings in bankruptcy upon the bankrupt's debts. "A discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands, which were, or might have been, proved against his estate in bankruptcy." Section 34. It is the discharge which he is to plead. Id. And it is the certificate of discharge which is to be "conclusive evidence in favor of such bankrupt." Id. The whole scheme of the law and its several provisions examined in detail show conclusively that if the bankrupt's application for a discharge is refused, all the creditors, as well those who have proved their debts as those who have not, are remitted to their former rights and remedies.

What, then, is the meaning of the strong language used in the twenty-first section of the act, relative to creditors who have proved their debts? Taking the whole act together and collecting its meaning from all its parts, the only construction which will reconcile the

several parts, and which will bring the whole into unity and conformity is, that creditors who have proved their claims are temporarily barred during the pendency of the proceedings in bankruptcy from pursuing their claims against the bankrupt in any other forum. We do not now consider the creditors' rights in regard to the enforcement of specific lien, but so far as concerns their personal claims against the bankrupt they are conditionally discharged and surrendered. By submitting themselves to the jurisdiction and becoming parties to the proceedings they have precluded themselves from proceeding against the bankrupt in any other manner without the leave of the court which has acquired jurisdiction of their claims. They must await the result of the bankrupt's application for his discharge. If it is refused they are then free to pursue their claims by other means and in other tribunals. If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt is still incapable of proceeding elsewhere without the permission of the court of bankruptcy. In such a case he must speed the proceedings in bankruptcy himself, and obtain a decision of the bankrupt's application, or if the bankrupt refuses to make it, or is negligent in prosecuting it, the proving creditor must obtain leave of that court to proceed to collect his debt by due course of law. Until the question of the bankrupt's discharge is determined, he cannot, without the permission of the court of bankruptcy, seek redress in another jurisdiction. If he has obtained a judgment against the bankrupt, it is, so far as the other creditors are concerned, discharged and surrendered, and he can come in on the bankrupt's estate only pro rata with them. But so far as the bankrupt himself is concerned it remains in abeyance to await the result of his application for a discharge.

On the other hand, the creditor who has not proved his debt has no status in the court of bankruptcy. He has never submitted himself to its jurisdiction, and his right to proceed is no further affected than it is affected by the restraining words of the statute. But this restraint is, by the very terms of the statute, subject to a condition, and that condition is, that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." Section 21. But the suit can only be stayed by the court in which it is pending, and only upon the condition that there has been no unreasonable delay on the part of the bankrupt. In the case, therefore, of a creditor who has not proved his debt, there is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed which he has not surrendered by any act of his, and which the law has not taken away from him. Indeed, it is very doubtful whether he could be heard at all in the court of bankruptcy upon any such application until he had proved his debt. In such a case, therefore, the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditors' action is pending, the court which is called upon to stay the suit. In the present case the plaintiff, having made himself a party to the proceedings in bankruptcy by proving his debt there, could not lawfully pursue the bankrupt by an execution from this court for the same debt while the defendant's application for a discharge was pending there. If there has been unreasonable delay his remedy is in the court of bankruptcy, which, by his own act, has acquired complete and exclusive jurisdiction of his rights. He must go there to remove the impediment which he has placed in his own path before he can proceed here. Rule absolute.

[This case, reported as above in 9 N. B. R. 508, was a state decision in the district court, county of Philadelphia. See 31 Leg. Int. 156.]

DINGEE (CUTTER v.). See Case No. 3,518.

DINIKE v. ROURKE. See Case No. 3,787.

DINSMORE (BERRY v.). See Case No. 1,-355.

Case No. 3,920.

DINSMORE v. MARONEY.

[4 Blatchf. 416;[1] 4 Wkly. Law Gaz. 283.]

Circuit Court, S. D. New York. Dec. 15, 1859.

TAKING DEPOSITIONS—WAIVER OF NOTICE—NOTARY—CERTIFICATE.

1. Where the requirements of section 30 of the judiciary act of September 24, 1789 (1 Stat. 88), in regard to giving previous notice of the taking of a deposition de bene esse, are not complied with, if a notice is in fact served, and the adverse party appears by counsel and cross-examines the witness, the deposition is admissible in evidence.

[Cited in Re Thomas, 35 Fed. 823.]

2. A deposition under section 30 of the said act of September 24, 1789, may, under the provisions of the act of July 29, 1854 (10 Stat. 315), be taken before a notary public.

3. Where the certificate of the notary states the existence of facts which, under the act of 1789, make it unnecessary to give any notice, it is not necessary that the certificate of the notary should state that those facts were the reason why no notice was given.

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

4. The certificate and seal of the notary are sufficient proof of his authority to act as such.

[5. Cited in Dinsmore v. Philadelphia & R. R. Co., Case No. 3,921, to the point that corporations may sue and be sued as citizens.]

This was an action of trover [by William B. Dinsmore, president of the Adams Express Company, against Nathan J. Maroney]. At the trial, before INGERSOLL, District Judge, and a jury, the plaintiff offered in evidence the deposition of one Moses, taken de bene esse, under section 30 of the judiciary act of September 24, 1789 (1 Stat. 88). The defendant objected to the admissibility of the deposition, on the ground that the requirements of the act, in regard to giving previous notice of the taking of the deposition, had not been complied with. But, it appearing that a notice had in fact been served, and that counsel for the defendant had attended and cross-examined the witness, the court overruled the objection, and admitted the deposition in evidence. The plaintiff also offered in evidence the deposition of one Agnew, taken de bene esse, under said act, but before a notary public, and claimed that, by virtue of the provisions of the act of July 29, 1854 (10 Stat. 315), a notary public was authorized to take a deposition de bene esse under the act of 1789. The defendant objected to the admissibility of the deposition, because it could not be lawfully taken before a notary public, and because there was no evidence of the official character of that officer, except his own certificate and seal, and because, it not appearing, by the notary's certificate, that any notice was given of the taking of the deposition, the certificate of the notary did not state the reason why no notice was given. The court held, that the act of July 29, 1854, authorized the taking of the deposition, before a notary public; that as the certificate of the notary stated the existence of facts which, under the act of 1789, made it unnecessary to give any notice, it was not necessary that the certificate of the notary should state that those facts were the reason why no notice was given; and that the certificate and seal of the notary were sufficient proof of his authority to act as such. The deposition was, therefore, admitted in evidence.

Charles O'Conor, Francis B. Cutting, Samuel Blatchford, and Clarence A. Seward, for plaintiffs.

John W. Ashmead and Philip J. Joachimssen, for defendant.

Case No. 3,920a.

DINSMORE v. NASHVILLE, ETC., R. CO.

[See 2 Fed. 465.]

DINSMORE (PETTINGILL v.). See Case No. 11,045.

Case No. 3,921.

DINSMORE v. PHILADELPHIA & R. R. CO.

[32 Leg. Int. 388; 11 Phila. 483; 1 Law & Eq. Rep. 351; 3 Cent. Law J. 157; 2 Wkly. Notes Cas. 275; 1 La. Law J. 108; 7 Am. Law Rev. 765; 23 Pittsb. Leg. J. 112.][1]

Circuit Court, E. D. Pennsylvania. Oct. 25, 1875.

FEDERAL JURISDICTION — CITIZENSHIP OF CORPORATIONS—DEFECTIVE AVERMENT.

The averment that the complainant is "a joint stock association * * * formed in the state of New York * * * under the laws of the state of New York," neither imports that it is a corporation created by another state, nor that its members are citizens of another state; the bill is therefore dismissed by the United States circuit court for want of jurisdiction.

[Criticised in Maltz v. American Exp. Co., Case No. 9,002. Cited in Imperial Refining Co. v. Wyman, 38 Fed. 579; Sanford v. Gregg, 58 Fed. 623.]

[This was a suit in equity by William B. Dinsmore, president of the Adams Express Company, and the Express Company against the Philadelphia and Reading Railroad Company. On demurrer to the bill.]

George L. Crawford and B. H. Brewster, for complainants.

James E. Gowen, for respondent.

McKENNAN, Circuit Judge. This suit is brought in the name of William B. Dinsmore, president of the Adams Express Company, and the Adams Express Company, which the bill, as amended, avers "are a joint stock association, composed of more than seven shareholders, formed July 1, 1854, in the state of New York, by certain written articles, a copy whereof is hereto annexed, marked 'A,' and then duly executed by the parties thereto, under the laws of the state of New York, and having the legal entity, powers and immunities in said laws provided." The defendant challenges the jurisdiction of the court, and has demurred to the bill on the ground that "it neither avers that the joint stock company or association, styled therein 'The Adams Express Company,' was, at the date of the filing of said bill, a corporation, nor that the members thereof were citizens of the state of New York, or of some other state than Pennsylvania."

Whether a corporation, expressly created by the laws of a state, could be treated as a citizen of the state, by which it was chartered, within the meaning of the constitution and the 11th section of the judiciary act [1 Stat. 78], so that it might sue or be sued in a federal court, has been the subject of frequent and earnest contention in the supreme court. In the earlier cases, jurisdiction of a suit brought by a corporation, was denied, unless it was averred in the pleadings, not

[1] [Reported from 32 Leg. Int. 388, by permission. 1 Law & Eq. Rep. 351, 7 Am. Law Rev. 765 and 23 Pittsb. Leg. J. 112, contain only partial reports.]

only that the litigant was a corporation created by a law of a state, and located and established within it, but also that its members were citizens of such state. Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61. In more recent cases, it has been determined that no express averment need be made of the citizenship of the members of a corporation suitor, but that they shall be conclusively presumed to be citizens of the state by the laws of which the corporation is averred to have been created, and in which it is located. Louisville R. Co. v. Letson, 2 How. [43 U. S.] 497; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 233; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 297; Paul v. Virginia, 8 Wall. [75 U. S.] 168. But to warrant this presumption and so to give jurisdiction to the court, it has, in these cases been deemed essential to aver that the corporate body suing as such was distinctively a corporation, so created by law. This precision of averment was expressly required in Pennsylvania v. Quicksilver Min. Co., 10 Wall. [77 U. S.] 553, where the declaration described the defendant as "a body politic in the law of, and doing business in, the state of California;" and the court say: "And the question in this case is, whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California; and this turns upon another question, and that is, whether the averment there imports that the defendant is a corporation created by the laws of that state; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on that subject," and the averment was held to be insufficient. It is true that Liverpool Ins. Co. v. Massachusetts, 10 Wall. [77 U. S.] 566, may be regarded as advancing beyond the line of preceding decisions in reference to the kind of association which may be treated as a body politic. But the only contested question in the case was, whether the plaintiff in error, an association formed in England under a deed of settlement, and endowed by several acts of parliament with various corporate faculties, was a foreign corporation, and so subject to a tax imposed upon its business by a law of the state of Massachusetts. The court, regarding it as endowed by law with all the essential faculties of a corporation, hold that it must be treated as such within the meaning of the Massachusetts statute, notwithstanding a provision in the acts of parliament conferring special powers upon it, that they shall not be construed to incorporate it. But the suit was brought in a state court, and it was admitted that all the members of the company were citizens of Great Britain and New York, and there was no question in the case touching the sufficiency of any jurisdictional averment in the pleadings. The logical sequence of the decision, perhaps, is, that a joint stock association, upon which the laws of a state have impressed the essential character of a corporation, may sue and be sued, as such, in the federal courts, but it does not change the rule, established by a long series of decisions, requiring proper averments in the pleadings to show the jurisdiction of the court. Now it must be manifest in some form that the members of the association, in whose behalf the suit is brought, are citizens of another state than the state of Pennsylvania. There is no express averment in the bill to this effect. Can it be presumed from the averment that the association suing was "formed in the state of New York, by certain written articles, duly executed by the parties thereto, under the laws of the state of New York, and having the legal entity, powers and immunities in said laws provided"? There is certainly no authoritative warrant for such a presumption. Observing the rule established by all the cases, this presumption could result only from the corporate character of the litigant, indicated by appropriate averments, or shown to be its distinctive condition by a public law of a state, which the court is bound to notice. The fundamental reason of the rule is, that the creation of a body politic by the law of a state fixes its habitancy exclusively in that state, and that, as it can have no exterior existence or recognition except by mere comity, the real parties to the controversy—its stockholders, described under their collective name—may, for purposes of jurisdiction, be presumed to have the same residence. The original organization of a voluntary association in the state of New York and this is all that the averment imports—which prescribes and defines its own powers, manifestly to be exercised in other states as well as in it, does not denote that state as its permanent and exclusive domicil. Nor is the averment helped by any public law of the state of New York to which our attention has been called. There does not appear to be any statute authorizing or providing for the creation and organization of such associations, while there are several which confer upon joint stock associations some of the faculties of a corporation. But from all that does appear, the association complainant is a mere collective body, so constituted by articles framed and adopted by the persons who compose it, and of which the public have not necessarily any knowledge whatever. For us to treat such a body as a judicial person, an averment of whose existence, and of the place of its original formation, however full, would furnish the basis of a conclusive presumption as to the citizenship of its constituent members, would carry us beyond the point which any decision of the supreme court has yet reached. We ought not, however, to be forgetful that that court, in considering this jurisdictional question, and while following its own previous decisions on the mere ground of authority, have expressed regret that these decisions

were made, and have declared that the line which they establish ought not to be overstepped. Louisville R. Co. v. Letson, 2 How. [43 U. S.] 555. Thus admonished, we ought not to take the advance step which we would be required to take to uphold the sufficiency of this averment to give this court jurisdiction of the bill, but await the guidance of the tribunal whose rightful province it is to prescribe a new rule for our government. The demurrer must, therefore, be sustained for the first cause assigned in it, and the bill of complaint be dismissed.

DINSMORE v. PHILADELPHIA, ETC., R. CO. See Case No. 2,331.

DINSMORE (WOODWARD v.). See Case No. 18,003.

DINWIDDIE (BASS v.). See Case No. 1,092.

DIRECTORS OF CITY SCHOOLS (BERTONNEAU v.). See Case No. 1,361.

Case No. 3,922.

The DISCO.

[2 Sawy. 474;[1] 6 Chi. Leg. News, 102.]

District Court, D. Oregon. Nov. 15, 1873.

SHIPPING ARTICLES—AMBIGUITY.

1. Articles describing a voyage from England to the United States and back, *held* not to include ports on the Pacific coast.

2. Ambiguity in shipping articles ought to be resolved in favor of seaman, it being the duty of the master or owner to have such contracts couched in plain language.

DEADY, District Judge. This suit is brought by Frederick Small and seven others, against the British bark Disco, to recover a balance of wages alleged to be due them. It is admitted that the libellants are American citizens, and that they shipped on the Disco at Cardiff, Wales, in March, 1873, for the monthly wages of £3. That the bark sailed to Montevideo with a cargo of coals, and thence to Portland, Oregon, where she arrived October 31. The libellants allege that the master, in bringing them around Cape Horn, departed from the voyage agreed upon and described in the shipping articles, and therefore they are entitled to their discharge and wages.

The decision of the question at issue turns upon the construction to be given to the shipping articles. They describe the voyage as follows: "From the port of Cardiff, Wales, to any ports and places in the United States and British and foreign West Indies, and east side of South America and Gulf of Mexico, and back to a final port of discharge in the United Kingdom of Great Britain and British provinces. Term not to exceed twelve calendar months."

Subsequently the words "twelve calendar months" were crossed out with scarlet-colored ink, and the words "two years and west coast of North or South America, and back to United Kingdom or continent of Europe," written thereafter in the same ink. This clause, if valid, justifies the voyage to Portland. But under section 163 of the shipping act of 17 & 18 Vict. it is void. That section provides: "That every erasure, interlineation or alteration in any such agreement (shipping articles) with seamen, * * * shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in such erasure, interlineation or alteration, by the written attestation of some shipping master, justice, officer of customs," etc.

There is no attestation upon these articles by any one upon this subject. The alteration stands unexplained, and, in the language of the act, is wholly inoperative. Do the articles, without the addition of these words, justify the voyage? For the libellants it is maintained that they do not, when fairly construed, while the contrary is urged on behalf of the claimant. Literally the voyage to Portland, Oregon, is within the language of the articles. This port is a place within the United States. But I do not think that an agreement made in England to make a voyage to the United States would, ordinarily, be understood as including a voyage around Cape Horn to the ports of the United States on the Pacific coast. Two circumstances tend strongly to show that such was the light in which these articles were understood by the parties to them, when entered into, at Cardiff, Wales. All the places mentioned, except the United States, lie wholly on the east side of the American continent. If it was understood that the vessel might make a voyage to San Francisco or Portland, as ports within the United States, why take the trouble to mention the east coast of South America, and thereby exclude the west coast of that country, when both coasts would lie in the line of a voyage to any port in the United States on the Pacific coast?

Whoever made this alteration in the articles is properly presumed to represent the owners. They have been in the custody of the ship. Now the very making of the alteration admits that the articles were insufficient to warrant the taking of the crew on a voyage to a port in the United States on the Pacific coast. Had it been otherwise, there was no necessity for making the alteration. The vessel was up for Montevideo when the crew shipped, and taking all the circumstances into consideration, I am well satisfied that the agreement was understood to limit the voyage of the ship to the eastern coast of the continent of America. See The Ada [Case No. 38].

Shipmasters and owners have ample means and facilities for putting their contracts with seamen in plain language; and

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

so the law of both Great Britain and America intends and requires. If, through negligence or design, they fail to do so, and allow or procure articles to be signed which are indefinite or ambiguous upon a matter of so much importance to the seamen, as the difference between a voyage across the Atlantic and around Cape Horn in the dead of an Antarctic winter, this court will resolve the matter in favor of the seamen and against the party in fault.

An order will be entered referring the case to a commissioner to hear the evidence, and state an account between the libellants and the vessel.

DISPATCH, The (KIMBALL v.). See Case No. 7,773.

Case No. 3,923.

ALL THE DISTILLED SPIRITS, ETC., FOUND AT THE DISTILLERY OF ENGLAND & EVANS.

[2 Ben. 486;[1] Am. Law T. Rep. U. S. Cts. 103; 8 Int. Rev. Rec. 81; 15 Pittsb. Leg. J. 605.]

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

INTERNAL REVENUE—FORFEITURE—MORTGAGOR AND MORTGAGEE.

1. Where property was seized as forfeited for an alleged violation of the internal revenue law [13 Stat. 223], and, in the suit brought to enforce the forfeiture, a motion had been made to bond the property, which had been denied, and thereupon a mortgagee intervened, and made an application on his own behalf to bond the property: *Held*, that the mortgagee stood in no better position, in relation to the alleged forfeiture, than the mortgagor.

[Cited in U. S. v. Two Horses, Case No. 16,578; Heidritter v. Elizabeth Oilcloth Co., 6 Fed. 141.]

2. That it was the thing itself which was forfeited by the statute in question, and not the right, title, and interest of the mortgagor. That the motion must, therefore, be denied.

[Cited in U. S. v. Two Horses, Case No. 16,578; Heidritter v. Elizabeth Oilcloth Co., 6 Fed. 141.]

This was a motion made by Archer & Brother, as claimants, to be allowed to bond certain property in the custody of the marshal under the process in this case. The property was under seizure for alleged violations of the internal revenue laws of the United States. Archer & Brother had intervened and filed a claim and answer, claiming, as mortgagees, the possession of a part of the property so seized. Their claim was founded on a chattel mortgage, executed to them, November 20th, 1866, to secure a debt previously contracted, and conditioned for the payment thereof in four months from that date. The seizure was made February 3d, 1868, for a forfeiture incurred subsequently to the giving of the mortgage. The information was filed February 6th, 1868. A motion had been previously made, on the part of the mortgagors, or parties holding under them, as claimants in the case, to bond the same property, which motion was denied by the court.

D. McMahon, for the motion.

E. Allen, Asst. Dist. Atty., in opposition.

BLATCHFORD, District Judge. The ground on which the present motion is urged is, that, as the mortgage to Archer & Brother was made in good faith, as security for a debt incurred for merchandise sold to the mortgagors by the mortgagees before the forfeiture was incurred, and as there is no collusion between the mortgagees and the parties concerned in the acts out of which the forfeiture arose, and as the mortgagees did not participate in such acts, the lien of the mortgage is superior to the claim of the United States under the forfeiture, and the latter cannot override the former. It is insisted that nothing more is forfeited to the United States than the right of property of the offender who violates the law, in the property mortgaged, and that the United States take the property subject to the lien of the mortgage. I cannot assent to this view. By the various sections of the internal revenue act that are counted on in the information, it is the offending thing that is forfeited, the entire right of property of all the world in the thing is cut off, the proceeding is in rem, and it is not the right of property therein of the mortgagor, any more than the right of the mortgagee, that is cut off. The thing is the offender, and the mortgagee, by suffering the thing to be in such a position that the offence can be committed in respect of it, is just as much, in a legal sense, a participant in the offence, so far as the thing is concerned, as the mortgagor, who actively uses the thing to commit the offence.

The mortgagees in this case stand, therefore, in the same position as the mortgagors, and as those who hold under the mortgagors, so far as this motion is concerned. Nothing is shown to vary the facts on which the court denied the previous motion to bond. The present motion is, therefore, denied.

DISTILLED SPIRITS (UNITED STATES v.). See Case No. 14,959.

DISTILLERY (UNITED STATES v.). See Case No. 14,960.

DISTILLERY, ETC., OF J. C. McCOY (UNITED STATES v.). See Case No. 14,964.

DISTILLERY AT PETERSBURG (UNITED STATES v.). See Case No. 14,961.

DISTILLERY AT SPRING VALLEY (UNITED STATES v.). See Cases Nos. 14,962 and 14,963.

DISTILLERY IN WEST FRONT STREET (UNITED STATES v.). See Case No. 14,965.

DISTILLERY NO. 28 (UNITED STATES v.). See Case No. 14,966.

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

Case No. 3,924.

Case of DISTRICT ATTORNEY OF UNITED STATES.

[25 Leg. Int. 348; 7 Am. Law Reg. (N. S.) 786; 8 Int. Rev. Rec. 137-145; 3 Am. Law Rev. 387.][1]

District Court, E. D. Pennsylvania. Oct. 8, 1868.

OFFICERS OF THE UNITED STATES—APPOINTMENT IN RECESS OF SENATE—TENURE OF OFFICE ACT.

1. The term for which the incumbent of an office, whose duration was limited by law, had been appointed by the president with the concurrence of the senate, expired when the senate was in session. No appointment in which the senate concurred was made at that session, and the president, in the ensuing recess, appointed another person to the office by a commission to expire at the end of the next session of the senate.

[Cited in Re Marshalship for Southern Dists. of Alabama, 20 Fed. 382.]

2. It seems that the former incumbent's term was not extended by the tenure of office act of March 2, 1867 [14 Stat. 430]; and that the subsequent appointment could not constitutionally take effect, the vacancy not having happened during a recess of the senate.

[Proceedings upon the question of incumbency of the office of attorney for the United States in the eastern district of Pennsylvania.][2] The question depended principally upon the effect of two clauses of the constitution. One of them provides that the president shall nominate, and, by and with the advice and consent of the senate, shall appoint all officers whose appointments are not otherwise provided for in the constitution, and which shall be established by law. The other clause provides that the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session. The 1st section of the act of congress of the 2d of March, 1867, known as the "Tenure of Office Act," is in the words—"Every person holding any civil office to which he has been appointed by and with the advice and consent of the senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided." The provision of the section which follows applies only to the heads of the executive departments of the government. The 2d section authorizes the president, during the senate's recess, to suspend for reasons and upon evidence to be reported by him to the senate, within twenty days after the commencement of their next session, all officers except judges of the courts of the United States; and to designate a suitable person to perform, temporarily, the duties of any such officer until the senate's next meeting, and their action upon the case; but does not authorize the removal of the former incumbent, unless the senate concur in the suspension and removal. The 3d section enacts—"That the president shall have power to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment by and with the advice and consent of the senate shall be made to such office so vacant or temporarily filled as aforesaid, during such next session of the senate, such office shall remain in abeyance without any salary, fees, or emoluments attached thereto until the same shall be filled by appointment thereto by and with the advice and consent of the senate; and, during such time, all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office." The words of the 4th section are—"That nothing in this act contained shall be construed to extend the term of any office, the duration of which is limited by law."

The office of attorney for the United States was established in every judicial district by the judiciary act of 24th September, 1789 [1 Stat. 73]. By the act of 15th May, 1820 [3 Stat. 582], the duration of the term of the office was limited to four years. By an act of 2d August, 1861 [12 Stat. 285], the attorney-general was charged with the general superintendence and direction of the attorneys and marshals of all the districts, as to the manner of discharging their respective duties; and they were required to report to him an account of their official proceedings, &c., as he might direct. By the same act the attorney-general was empowered, whenever in his opinion the public interest might require it, to employ and retain, in the name of the United States, such attorneys and counsellors at law as he might think necessary to assist the district attorneys in the discharge of their duties. Before the tenure of office act Charles Gilpin, Esq., was, during a session of the senate, appointed to the office of attorney for the United States in this district by the president, with the advice and consent of the senate, for a term of four years, which expired when the senate was in session, on 15th March, 1868. For more than five months after this expiration of Mr. Gilpin's term he acted constantly, in and out of court, as the incumbent of the office, and was constantly recognised as such incumbent in correspondence and in other modes by the attorney-general and the officers of other executive departments of the government. On 20th April, 1868, however, the president, during the same session in which Mr. Gilpin's term of office expired, had nominated John P. O'Neill, Esq., to the office. On the 27th July, 1868, the senate ad-

[1] [Reprinted from 25 Leg. Int. 348, by permission. 3 Am. Law Rev. 387, contains only a condensed report.]

[2] [From 7 Am. Law Reg. (N. S.) 786.]

journed without having acted upon this nomination. [This adjournment was under a joint resolution, of 22d July, that the president of the senate and speaker of the house of representatives should, on the 27th of that month, at noon, adjourn their respective houses until 21st September, and on that day, unless it should be then otherwise ordered by the two houses, should further adjourn their respective houses until the first Monday of December.] [2] On Saturday, 22d August, 1868, in the recess of the senate the president appointed Mr. O'Neill to the office by a commission to expire at the end of the next session of the senate. On Monday, 24th August, 1868, Mr. O'Neill saw the judge at chambers. He was desirous that the judge should administer the oath of office to him, and that it should be filed in the clerk's office of this court. Mr. Gilpin was not present, the state of his health not admitting of his absence from his own house. But he sent a message that he did not recognise any right in Mr. O'Neill to the office. The judge doubted whether either of the gentlemen was a rightful incumbent. The judge said that he would not then administer the oath to Mr. O'Neill, or permit the filing of it in the clerk's office, because to do so might seem to prejudge the question of incumbency, and might perhaps have a tendency to make Mr. O'Neill the apparent incumbent of the office in fact whether he were such of right or not. The judge suggested that the oath could be as well taken before any other magistrate qualified to administer it, and that it might, with equal effect, be filed in the office of the law department, at Washington. It was accordingly filed there, having been taken before a commissioner.

The court was in session from 1st to 24th of September, and on every succeeding day. On Monday, 21st September, 1868, the senate sat and adjourned. In the meantime, Mr. O'Neill had not been in court; and the business of the United States in court had been transacted by Mr. Gilpin, or by Mr. Valentine who had been previously retained by the attorney general to assist in the discharge of the duties of the office. For several days, comprising the latter part of this period, the state of Mr. Gilpin's health had been such as to confine him to his house, and the business had been transacted by Mr. Valentine. On Saturday, 19th of September, Mr. Gilpin received from the attorney general a written direction to transfer the business of the office to Mr. O'Neill. On the 21st, 22d and 23d of September, Mr. Gilpin was confined to his house, and Mr. Valentine was in court transacting business of the United States which required attention. On the 24th neither of them was in court, Mr. Valentine having left Philadelphia to be absent until the 28th. On the 24th a clerk in the office of the district attorney handed to the clerk of the court a written order to issue process at the suit of the United States, subscribed with the name of Mr. Gilpin as the district attorney. The clerk of the court thereupon consulted the judge, who was informed of the instructions received by Mr. Gilpin on the 19th of September from the attorney general. The judge postponed the consideration of the question till the next morning, saying, that although he had doubted Mr. O'Neill's right, he had also doubted whether Mr. Gilpin was a rightful incumbent; and that he doubted whether, independently of any question of right, Mr. Gilpin could any longer be considered as the incumbent in fact. The judge added that as there might be temporary public inconvenience from uncertainty whether the government was regularly represented in its local court of ordinary criminal and fiscal jurisdiction, he would not refuse to hear, at the request of either Mr. Gilpin or Mr. O'Neill, with due notice to the other, an argument upon the right of either of them to a provisional recognition of him as the incumbent of the office. How far such provisional recognition of either might affect the legal question of incumbency in fact, the judge said that he did not know; but he said that certainly such a provisional recognition could not affect the question of incumbency of right. This question of right to the office, he said, could not be thus decided collaterally and informally.

The judge added that, although such an argument were not desired on either side of the question, yet, if he should, without hearing one, be able, upon reflection, to form an opinion favorable to either side, it would, he thought, be his duty to act upon such opinion till the question of right should be adjudicated.

In the afternoon of the same day the judge, at chambers, was informed by the counsel of Mr. Gilpin, that he was desirous of being heard upon the question asked by the clerk. The judge suggested the propriety of giving notice to Mr. O'Neill or to his counsel.

On 25th September, Mr. Brightly, counsel for Mr. Gilpin, and Mr. O'Neill and his counsel, Mr. Hirst, were in court.

Mr. Hirst produced a letter from the attorney-general, dated 22d September, recognising Mr. O'Neill as the attorney for the United States in this district, and renewing the direction to him to proceed in the discharge of the duties of the office.

The judge said that this letter having been written after the adjournment of the senate on 21st September, there appeared to be a question whether the meeting of the senate on that day was a session at the end of which Mr. O'Neill's commission, if otherwise valid, had expired. The adjournment and re-assembling of congress, were under a joint resolution, of 22d July last, that the president of the senate and speaker of the

[2] [From 7 Am. Law Reg. (N. S.) 786.]

house of representatives should, on the 27th of that month, at noon, adjourn their respective houses until 21st September, and on that day, unless it should be then otherwise ordered by the two houses, until the first Monday in December. The only proceedings of congress on 21st September, consisted in an adjournment under a joint resolution that the president of the senate and speaker of the house of representatives adjourn their respective houses until noon on the 16th day of October, 1868, and that they then, unless otherwise ordered by the two houses, further adjourn their respective houses until the 10th day of November, 1868, at noon, and then, unless otherwise ordered by the two houses, they further adjourn their respective houses until the first Monday of December, 1868, at noon.

Mr. Hirst asked that the hearing upon Mr. Brightly's application should be postponed until Monday, 30th September, to give an opportunity for other counsel of Mr. O'Neill to be present. This was agreed to.

On 30th September, the case, having been partially argued, again stood over at the request of counsel till 2d October, when the argument was closed.

In consequence of these suggestions of the judge, there was, at the instance of Mr. Gilpin's counsel, an argument on 30th September and 2d October, by

Mr. Brightly and George D. Budd, for Mr. Gilpin, and

Mr. Hirst, for Mr. O'Neill.

CADWALADER, District Judge. The act of congress of 13th July, 1866 [14 Stat. 92], prohibits the dismissal of any officer from the military or naval service in time of peace, except in pursuance or in commutation of the sentence of a court-martial. The act of 2d March 1867, known as the "Tenure of Office Act," applies to civil offices whose tenure is not constitutionally defined, and to which appointments cannot be made, when the senate is in session, without the advice and consent of the senate. In what follows, the general word "offices" will be understood as designating such offices. Their tenure is defined by the act in such a manner as to prevent the removal of their incumbents by the president without the senate's concurrence, and also to prevent vacancies from occurring in a recess of the senate, otherwise than by death or by resignation. To this intent the tenure is in general continued by the act until the senate's concurrence in the president's appointment of successors. Of two exceptions of certain classes of officers from the general enactments. one which is at the close of the 1st section has of late been much considered. It does not concern any present question. The other exception is in the enactment of the 4th section that nothing contained in the act shall be construed to extend the term of any office the duration of which is limited by law. A previous act of congress had limited the duration of the term of the office in question to four years. Mr. Gilpin's term expired on 15th March last. The office then became vacant, if the words of the 4th section of the tenure of office act are to be understood according to their unqualified literal import. If this literal construction would, in any great measure, frustrate the general purposes of the act, any other interpretation comporting with the words and the motives of legislation, and with the constitution, would be preferable. But of the offices under the government at the date of the act, the greater number by far were held for an indefinite period. See the Tabular Analysis. Report of Impeachment of the President, I., 548-554. The words of the 4th section may therefore be understood and applied according to their simple and literal import, without frustrating, in any material degree, the general purposes of the act.

If another meaning, not so simple but more consistent with any apparent general motives of legislation, might be attributable to the words, it could not be reconciled in every respect, nor for all the purposes of this case, with constitutional definitions of the powers of congress. The general enactments of the 1st section expressly apply alike to offices held under appointments prior to the act, and to those held under subsequent appointments. As to the latter, there is no doubt of the power of congress to prolong conditionally or provisionally the tenure of an office like that in question beyond the expiration of any certain term in it formerly limited by statute. The prolongation might have been absolute, and there is no reason that it may not be contingent, qualified, or conditional. In any such case the original appointment of the future incumbent is for the prolonged period. By "future" incumbent I mean of course one appointed after the enactment conditionally prolonging the tenure. But the present case of a person who at the time of the enactment was already in office for a limited term, is different. Congress can, it is true, abrogate offices established by legislation, and can abridge the term or tenure of an existing office like this. But the constitution does not confer any power on congress to extend an existing term in such an office in such a manner as to prolong absolutely or conditionally the tenure of a present incumbent. This cannot be done otherwise than by a renomination or new appointment by the president, and concurrence of the senate, as to the additional period. If the constitutional power to do this by mere legislation did not exist, Mr. Gilpin's term or tenure cannot have been enlarged. I perceived from the first this difficulty in his case, but was not disposed to assume that any part of an enactment by congress was unconstitutional without hearing an argument of the question. In arguing it his counsel have

relied on the authority given by the constitution to make all laws necessary and proper for carrying into execution the specified powers of congress, and all other powers vested by the constitution in the government, or in any of its departments or officers. If the aid of this power of incidental legislation could be thus invoked without first establishing the existence of an appropriate principal power, indefinite usurpation of authority by the legislative organ of the government would be promoted. Congress has no power thus indirectly to determine who shall be the incumbent of an office. Consequently Mr. Gilpin could not, under any interpretation of the act, be in office. The existence of this constitutional difficulty may assist in explaining the intent and purpose of the 4th section of the act. The difficulty did not indeed apply to future incumbents of offices whose terms are of limited duration. But without looking outside of the act itself, we can see that political motives may have induced its framers to consider principally the case of present incumbents; and that if their tenure could not be prolonged, the distinction as to future incumbents may have been disregarded as comparatively unimportant. The unqualified exception of all offices held or to be held for limited terms may thus become intelligible. Therefore, whether the constitutional power of congress, or the simple meaning of the act, is to be considered, Mr. Gilpin is not of right in office. Whatever may have been the state of the question of incumbency in fact until 19th September, when he received the attorney-general's letter of the previous day, the effect of this letter was to terminate the relations on which incumbency, independently of the question of right, depended. If this were otherwise doubtful, it would be necessary to consider essential peculiarities of the office which require the continuance of a relation of attorney or counsel to client. If unquestionable right in such an office might carry with it a constructive incumbency in fact where no adverse occupation of the office existed, or if actual occupation of it continuing under the assertion of a questionable right could constitute incumbency in fact, it would not follow that there could, without right, be a merely constructive incumbency in fact.

The questions upon which Mr. O'Neill's right depends are, 1. Whether the president can, during a recess of the senate, make a temporary appointment to fill a vacancy in office in a case in which the senate has been in session either when or since the vacancy first occurred. 2. Whether there was a recess of the senate upon the adjournment of congress on 27th July last. 3. Whether the subsequent meeting of the senate on 21st September, was such a session that their adjournment on the same day terminated a commission granted in the recess to expire at the end of their next session.

In the statement of the first question the phrase "temporary appointment" has been used. There is no such expression in the provision of the constitution which confers on the president power to fill up vacancies that may happen during the recess of the senate. This provision authorizes him to fill them by granting commissions which shall expire at the end of the senate's next session. Such appointments have, nevertheless, ordinarily been designated as "temporary." The expression is borrowed from the provision of the constitution, that if vacancies in the senate happen, by resignation or otherwise, during the recess of the legislature of a state, the executive of such state may make temporary appointments until the next meeting of her legislature which shall then fill such vacancies. Here the context of the phrase "next meeting" necessarily imports an extension of time in order that the vacancies may be duly filled. For this reason, and in order to harmonize the provision with that empowering the president to fill vacancies happening during the recess of the senate, this phrase "next meeting" has been uniformly understood by the senate, in determining the qualifications of its members, to be of equivalent import with "next session," and to include the whole session.[3] There is thus a very close analogy between the two provisions of the constitution; and the phrase "temporary appointment" may properly be understood as of like import in each. The phrase "permanent appointment" has, by contrast, a meaning which cannot be misunderstood in its application to an appointment by the president, concurred in by the senate.

The question will first be considered solely upon the effect of the provision of the constitution as to the power of the president. Those on the affirmative side contend that the provision must be understood as enabling him to grant a temporary commission whenever there may happen to be a vacancy during a recess of the senate, whether the senate was or was not in session when the vacancy occurred, or has or has not been since in session. The argument is that the words "may happen" upon whose effect the question depends, can be understood as meaning, not "happen to occur," but "happen to exist," and that this construction must be adopted because the opposite one would be less conformable to the reason, spirit and purpose of the constitution, which, according to the argument, were only to prevent embarrassments of the government, and occasional dangers, from the existence of vacancies in office when the senate might not be in session. The public inconvenience or danger to public interests, from the continuance of a vacancy after a session of the senate, is quite as great as from the occurrence of a vacancy during a recess. It is contended that the exigencies of the gov-

[3] The decision of General Smith's Case, in 1809, to this effect, has been acted upon uniformly in a great number of cases.

ernment required, therefore, a like remedy of the evil in each case; and examples have been adduced of cases in which it may be "nearly or quite impossible" for the president to send in a nomination before the adjournment of the senate, or for the senate to act upon his nominations though made in season for their action.

There are serious objections to so broad an extension of the presidential power in question. Such an extension of it, if established, would enable the president to do indirectly, what the constitution does not allow him to do directly. His appointments during recesses of the senate might be so made and renewed that they could not properly be called temporary. They might, moreover, be withdrawn from the consideration of the senate. Thus he might, though the senate were in session when the vacancy first occurred, or had sat since it thus occurred, appoint, in the recess, an officer who would be objectionable to the senate if in session,—and might, in disregard or defiance of the senate, continue him in office indefinitely. This might be done by successive appointments and re-appointments of him at the commencement of every recess until the end of the next ensuing session of the senate. There is nothing in the political experience of our country to warrant her security against such temporary appointments being thus made again and again with such results. The senate, where vacancies existed, would thus be unable to oppose any effectual check to the president's power of appointment. To avoid the danger of impeachment of a president, the appearance of defiance of the senate might be avoided by not making nominations during the session, or abstaining in the recess from the re-appointment of rejected persons, but substituting other appointees, who, if the senate were sitting, would be not less objectionable. This would be no visionary danger where the president and a majority of the senate are of different political opinions. If it had been intended to give such an amplitude of power to the president, his authority to fill vacancies in office would not have been limited to those happening during a recess, nor limited to grants of commissions to expire at the end of the senate's next session. He would have been expressly authorized, in every case of a vacancy existing during a recess, to grant commissions to continue until a new appointment by him with the advice and consent of the senate. The general question has from time to time arisen, as will be seen hereafter, in different specific forms. In some of these forms of it, the words of the constitution might, without straining them, be accommodated to either an affirmative or a negative answer. But, in other forms of it, those persons who, in argument, support the affirmative, must, in candor, admit that their construction is not conformable to either the literal or the ordinary import of the words "may happen." If the purpose of the constitution had been demonstrable to confer, as the argument assumes, an unqualified executive power to prevent at all times the continuance of any vacancies during recesses of the senate, the latitude of construction contended for might be less objectionable, though there is always great political danger from enlarged constructions of the constitution upon such reasons. The danger from them may be unseen until too late to avoid it. But was the purpose of the constitutional provision thus unlimited? According to Judge Story (Const. § 1551), the purpose was, "that the president should be authorized to make temporary apopintments during the recess, which should expire when the senate should have had an opportunity to act on the subject." According to the construction contended for, it is, on the contrary, unimportant whether the senate has had such an opportunity to act or not. The purpose attributed by Judge Story is thus disregarded in the argument on the affirmative side of the question. Before the adoption of the constitution, opinions differed, as they now may differ in the abstract, whether the president's power of making appointments to office, ought to be unchecked. In the opinion of some persons, he should have had the whole power without restraint or qualification. Others were appalled with various reasonable apprehensions of enormous and frightful dangers from uncontrolled power of appointment in a single magistrate. The reasons urged on the latter side prevailed. The constitution has, accordingly, opposed in the senate a barrier against uncontrolled executive power of the president in this respect. The constitutional policy having been established, it must be carried into effect without the influence of any abstract prejudice in favor of the opposite political theory. Fundamental opposing reasons of constitutional policy outweigh the argument which has been urged in favor of adopting the latitudinarian construction. The occasional evils which might be avoided through such a construction are more or less inseparable from any system of government of a free people. Under a complicated political system of mutually counteracting checks, like the government of the United States, the continuance of our freedom could not be maintained without incessant caution to guard against both executive and legislative encroachments. Either of them tends towards usurpations of despotic power, and the tendency may be so gradual as to be almost imperceptible. The dangers from such encroachments would be more serious than from the occasional suspension or inefficiency of governmental functions through temporary vacancies in office. More serious evils may occur through inaction of the legislative department of the government. A partial failure of the necessary annual appropriations by congress has occurred more than once; and, but for the call of an extra session, had once occurred on a large scale. Such a failure to legislate might suspend the

functions of the government. This, if it occurred, would not justify the executive in a violation of the constitutional provision that no money shall be paid out of the treasury without a legislative appropriation. Every extension of executive powers under any such emergency would, as I have said, be a step towards despotism; or, as may be added, might establish it at once. All evils to be apprehended from administrative inefficiency, are minor as compared with inevitable or probable consequences of the extension of legislative or executive power beyond the strict warrant of the constitution. It has been truly said that the dangers from extension of executive, may be less than are to be apprehended from that of legislative, power, because the president may, but congress cannot, be impeached for wilful abuse of constitutional power, though its limits be not exceeded. But the suggestion, however true, affords no sufficient answer to the objection against latitude in construing constitutional grants of executive power. If the general form of the present question were different, if the literal import of the constitution were in favor of the extended power, the argument might indeed be a fair one against excluding a construction which would conform to the import. We have seen already that if the existence of the power in question were admitted, it might be exercised most injuriously without any liability to impeachment. But the suggestion of the liability to impeachment may be disposed of on more general grounds. If such a suggestion were an answer to the objection against a constructive extension of the meaning of the constitution beyond the ordinary import of its words, the constitutional barriers against undue expansions of executive power would soon be burst asunder.

The constitution requires the president to take care that the laws be faithfully executed. It has been truly said that his duty therefore is to fill vacancies in office wherever the constitution confers on him the power to do so. This cannot imply that where the constitution does not expressly authorize him to fill vacancies, they can be temporarily filled by him under the provision of the constitution which requires him to take care that the laws be faithfully executed. There is no executive power conferred by the constitution which it would be more dangerous to enlarge through a loose construction upon suggested reasons of expediency, or of relative necessity. But this provision of the constitution has, if I am not mistaken, been sometimes invoked to aid the constructive enlargement of the provision authorizing him to fill vacancies that may happen during a recess of the senate. This cannot be a right view of the question. In some cases in which offices are vacant, the existence of the vacancies may render it impossible for the president to see to the execution of the laws. In such cases the laws cannot be executed while the vacancies continue. In other cases there may be no such impossibility, or the temporary impossibility may not be a total one. In the latter cases, he may temporarily see, as far as possible, to the execution of the laws. But he does not thereby temporarily fill the vacant offices. They continue vacant, though functions corresponding more or less to their duties may thus be executed. This difference between filling a vacancy in office, and seeing that the vacancy occasions no failure in the execution of the laws, might be well exemplified in the present case of the office of attorney of the United States for a judicial district. If the office is vacant the greater part of its business, if not the whole of it, may nevertheless be transacted. The gentleman whom the attorney-general has employed under the act of 1861, as an attorney and counsellor, may represent the United States in their suits and prosecutions, and may otherwise discharge the duties, in the performance of which he would have assisted the district attorney if no vacancy had occurred. Should the existence of a temporary vacancy in the principal office be established, the circuit judge may, under an act of 3d March, 1863 [12 Stat. 768], temporarily fill the vacancy. His appointee will, under the constitution, be an officer of the court. If neither of these acts of 1861 and 1863 had been passed, the president might, through the attorney-general, as the head of the law department of the government, have retained an attorney or counsellor, not so permanently as the act of 1861 authorizes, but for the occasional purposes of the exigency. Such a lawyer's temporary representation of the United States in the legal business of the district would essentially differ from the temporary incumbency of an office. He would not be an officer of the United States.

For the reasons which have been stated, my opinion upon the first question, if considered as an open one, would be that the president cannot make the temporary appointment in a recess, if the senate was in session when, or since, the vacancy first occurred, and consequently that Mr. O'Neill is no more in office of right, than he would have been if commissioned by the president during a session of the senate without their advice and consent.

It is said, however, that the question is not open. I believe that it has never been judicially considered. But it is said that the existence of the power in question has been established by an administrative usage of forty-five years. during which appointments made in exercise of the power by successive presidents have been acquiesced in by the senate, and that this executive usage has, in this period, been founded on, or supported by, unvarying opinions of successive attorney-generals. Where an executive usage has been of long continuance, with constantly recurring opportunities for judicial contestation,

and the parties who might have contested have never complained, judicial tribunals may consider a truly doubtful question as to the constitutionality of the usage less open to forensic dispute than it would otherwise have been. The effect thus attributable to such a usage, may, in the absence of judicial contestation, be greater if legislative acquiescence has been evinced or may be implied. Any remaining doubt may be removed, or lessened, if uniformly concurring opinions of experienced statesmen, and of learned lawyers, in accordance with such a political usage, can be traced from an early period, more especially where such period was contemporaneous, or almost so, with the adoption of the constitution. Where all such conditions have been apparently fulfilled, a conclusion should not, however, be judicially reached upon such grounds alone, without caution. Have all or any and which of these conditions been fulfilled? In the outset of this inquiry it may be repeated that if the presidential power in question had been assumed and exercised with effect, where sufficient opportunities for judicial contestation were afforded, and no person had ever availed himself of any such opportunity, the inference of general acquiescence in the constitutionality of the asserted power might have been to some extent warranted. But there never was any such opportunity of contestation. Indirect contestation was impossible (see [U. S. v. Guthrie] 17 How. [58 U. S.] 284) and the president's power of removal would have precluded any direct contestation, if it had otherwise been practicable when the attorney-general was not a contestant. Until the acts of 1866 and 1867, which have been mentioned, the power of congress to define tenures of office in such a manner as to prevent removals at the mere will of the president had scarcely ever been exercised, though the legislative power to do so as to all offices whose tenure is not constitutionally defined was never doubtful. The recently-created office of comptroller of the currency was, I believe, the only one of which, at the dates of those acts, the incumbent was not removable by the president without any concurrence of the senate, and without any statement of reasons.[4] The president's general power of arbitrary removal where the tenure had not been otherwise defined by the constitution or by act of congress, was beyond question established. See [Ex parte Hennen] 13 Pet. [38 U. S.] 259. Of this power the former existence and validity are not impliedly questioned by the acts of 1866 and 1867. The omission to litigate the question before the act of 1867, therefore, warrants no just inference of acquiescence in the alleged administrative usage. Even under this act judicial contestation may not readily occur.

In approaching the inquiry whether, and how far, any of the other conditions have been fulfilled, it may be remarked that from the distinguished eminence of some of the attorney-generals whose opinions will be mentioned, judicial deference might almost be due to their expositions of constitutional law, even where practical concurrence in them has not extended beyond the limits of executive administration. This may certainly be said of Mr. Taney, afterwards the venerated chief justice of the supreme court of the United States, and of Mr. Cushing, previously a judge of the supreme court of Massachusetts, whose opinions, while he was attorney-general, are, through the combination of doctrinal with practical instruction which distinguishes them, more useful perhaps than the writings of any publicist since Bynkershoek. Of course, I do not mean to intimate that through deference to any such extra-judicial opinions, I should surrender the judgment which it is my duty to exercise. But my judgment cannot be uninfluenced by the deference most justly due to them. Except in one respect, however, opinions of attorney-generals are, in themselves, of no more weight than those of as many private lawyers of equal abilities and acquirements. The exception, which may be an important one, is that the official opinions of attorney-generals may, for a long time, have been so uniformly acted upon by executive and legislative organs of the national government as to have become the unquestioned foundation of a system of legislation, or of administration. Such legislative and executive usages, when uniformly acquiesced in, especially where they have been open to judicial contestation, are, as I have already said, in themselves, more or less authoritative expositions of the true meaning and effect of the constitution. The opinion of a former law officer of the government, when it has been the foundation of such expositions, may be an important part of their legal history, and may therefore be cited in explanation of them, or even as having in itself, for this reason, a certain weight, perhaps, of authority. But the number of concurring official

[4] The acts of 1863 and 1864 made the comptroller of the currency appointable by the president on the nomination of the secretary of the treasury, and by and with the advice and consent of the senate. The comptroller thus appointed was, according to the act of 1863, to hold the office for a certain term, unless sooner removed by the president by and with the advice and consent of the senate, and according to the act of 1864, to hold for such term unless sooner removed by the president upon reasons to be communicated by him to the senate. Two prior acts, no longer in force, one of them passed in 1789, organizing the government of the Northwestern Territory, and the other passed in 1836, organizing the government of that part of this territory which afterwards became the state of Wisconsin, were intended to execute the provision of the ordinance of 1787, that the tenure of judicial offices in the territory should be during good behavior. In the opinion of many persons, there was an honorary obligation of the constitutional government of the United States thus to execute this provision of the ordinance of the previous confederation. The judicial tenure in other territories of the United States has not been during good behavior.

opinions of attorney-generals on the same point adds very little to their weight, because, in the absence of judicial decision, these law officers of the government sometimes attribute to the opinion of an official predecessor an effect not much unlike that of an authoritative precedent. In one respect, indeed, the number of such official opinions may even detract from their weight, because, if the same question has been repeatedly stated anew, and renewals of the former opinions of attorney-generals upon it have been obtained from their successors, this may indicate that no settled administrative usage had been understood to be established under the former opinions.

In this connection I will state and explain what induced me to refer counsel, in the course of their arguments, to the opinions of commentators on the constitution who were either ignorant of these official opinions of the attorney-generals, or entertained opinions of a seeming opposite tendency. My purpose was to show that there had not been such a distinct prevalence of uniform opinions on the question as the counsel on one side had assumed. In his argument he had, as I thought, attributed an inherent force of authority to the official opinions which they did not possess. My reference to the commentators was intended merely as a suggestion that their opinions might be weighed in the opposing scale of his own balance. Among them was Judge Story, whose Commentaries have been cited occasionally, even by the supreme court, as elucidating questions of constitutional law, and Mr. Sergeant, afterwards a judge of the supreme court of Pennsylvania, who was often followed by Judge Story, and was not less learned and wise than cautious and accurate. Such references, whether to commentators, however eminent, or to attorney-generals, however distinguished, are outside of the ordinary proper line of argument in a judicial tribunal. But they are, when due caution is observed, not absolutely improper in excepted cases; and the present case, I think, is one. The question arose in 1823, in the same form in which it is presented in this case. The official term of a navy agent at New York expired when the senate was in session. During the same session another person was nominated by the president; but this appointment was not concurred in by the senate. The vacancy continuing to exist in the recess of the senate, Mr. Wirt, then attorney-general, was of opinion that the president could fill the vacancy by a temporary appointment. Mr. Wirt thought that the phrase of the constitution "happen during the recess" might be understood as meaning "happen to exist in a recess," whether the senate had or had not been in session when or since the vacancy first occurred. He supported this opinion upon reasons of convenience to prevent vacancies in office; and upon these reasons considered his interpretation the most accordant with the spirit and purpose of the constitution, though the opposite interpretation would, as he conceived, be the most accordant with the literal sense and natural import of the words. In the form of the question in which it was next presented to an attorney-general, the possible dangerous political consequences of an affirmative answer were, in part, discernible. This was in 1832. A vacancy had occurred in a recess of the senate, by the expiration of the term of office of a register of the land office. During the same recess, a temporary appointment in his place had been made by a commission which was in force until the end of the next session of the senate. During this next session, the person thus appointed had been nominated by the president for the permanent appointment, and had been rejected by the senate. During the same session the same person had been nominated again. The latter nomination had been laid by the senate on its table. The senate had adjourned without having further acted upon the case. The opinion of the attorney-general, Mr. Taney, was asked by the president upon the question whether, during the recess of the senate, he could appoint the same person, or any one else, to the office. Mr. Taney was of opinion that the president could.

In accommodating this opinion to the letter of the constitution, there was less difficulty than in either of the two cases of the navy agents. The commission granted in the recess did not expire until the end of the next session, during which, no appointment was concurred in by the senate. The incumbency had thus continued until the commencement of the recess. As there had not been any vacancy during the session, the new vacancy might, even according to an almost literal import of the constitution, be understood as occurring, if not happening in the recess. But the difficulty in the way of accommodating such a construction to the spirit and purpose of the constitution was much greater than in the case which had been considered by Mr. Wirt. This difficulty I have explained. How the objection was overcome, without unduly slighting it, is not easily perceivable. The answer that the president might be impeached was the only one suggested. This answer is insufficient for the reasons which have been stated. The extent of the executive power to fill vacancies which these two opinions asserted does not appear to have been afterwards conceded. The previous tendency of Mr. Sergeant's views in an opposite direction will be mentioned hereafter. It may be remarked here that he published a revised edition of his treatise on Constitutional Law in 1830, seven years after the opinion of Mr. Wirt, without any adoption of Mr. Wirt's views, and without any material alteration of his own former text on this point. Judge Story, in his Commentaries, published in 1833, a year after Mr. Taney's opinion, did not cite it, nor that of Mr. Wirt,

nor express any such opinion; but on the contrary followed closely the text of Mr. Sergeant. In the editions of Chancellor Kent's Commentaries prior to 1841, when the opinions of the attorney-generals first appeared in print, he quoted the provision of the constitution authorizing the president to fill vacancies happening during the recess of the senate, but did not mention the point now in question in any form of the proposition. In subsequent editions the text is unchanged; but in a note he refers to Mr. Wirt's opinion without mentioning that of Mr. Taney, who was already chief justice. The opinion of Mr. Wirt was quoted by Chancellor Kent, but with a reserve which by no means indicates his adoption of it. In 1841 the question was referred anew to the attorney-general, Mr. Legare, in the broad general form of a proposition whether the clause of the constitution authorizing the president to fill up all vacancies that may happen during the recess of the senate, authorizes him to fill a vacancy so occurring after a session of the senate shall have intervened. The attorney-general objected to considering the question in so abstract a form; and restated the proposition so as to make it applicable in the case of a vacancy which had occurred during a recess, and had been filled by a temporary appointment, after which, the president, during a session of the senate, had made another nomination which was not acted upon by the senate; and so, the office being vacant in the ensuing recess, the restated question was whether the president had power to fill it again by granting a commission which should expire at the end of the next session of the senate. In this form of the question the attorney-general answered it affirmatively with reference to the words of the constitution, and to considerations of necessity or expediency. It has already been suggested that in such a special form of the question, the answer thus given could be accommodated to the words of the constitution. That these official opinions were not followed without scruple or hesitation appears from the constant recurrence of the question submitted, as it was, in different forms, to successive attorney-generals, Mr. Mason in 1846, Mr. Cushing in 1885,[5] and afterwards to others who concurred in the views of their predecessors. In October, 1862, however, Attorney-General Bates was consulted by the president as to "his power to fill a vacancy on the bench of the supreme court, then existing in the recess of the senate, which vacancy existed during and before the session of the senate." Mr. Bates, in his letter of reply, says: "If the question were new, and now for the first time to be considered, I might have serious doubts of your constitutional power to fill the vacancy by temporary appointment in the recess of the senate. But the question is not new. It is settled in favor of the power to fill up the vacancy as far at least as a constitutional question can be settled by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, so far as I know or believe, by the unbroken acquiescence of the senate. Referring to the practice and to these authorities," he gave his opinion that the power was exercisable. Conformably to these views, Judge Davis was temporarily commissioned on 17th October, 1862, during the recess of the senate.[6] I believe that he did not take a seat upon the bench of the supreme court under this commission. The next session of that court began on 1st December, 1862. His permanent appointment was, I believe, sent into the senate on 3d December, and confirmed by the senate on or before 8th December, 1862, on which day his permanent commission bears date. He took his seat, as I am informed, on 10th December, 1862. In considering the effect of the opinions of the official predecessors of Mr. Bates,[7] it becomes important to correct the statement, in his opinion, that the exercise of the asserted presidential power had been "sanctioned by the unbroken acquiescence of the senate." The statement was founded on a mistake. The supposed foundation was in the fact, of which the truth may be here assumed, that in all the cases of permanent reappointment of temporary appointees which had occurred since 1823, the senate, in acting upon the permanent appointments, had not rejected any one merely because his temporary appointment had been made after a session in or before which the vacancy had first occurred; nor had in any wise discriminated unfavorably to any such appointee for such a reason. It is to be observed that in such a case the senate acts upon the permanent appointment only, and not upon the previous temporary appointment. This temporary appointment cannot possibly be submitted to them for their advice and consent. The mistake was in overlooking this impossibility, and supposing that the senate's approval of such a person's permanent appointment was a confirmation of his former temporary one. The senate's concurrence in any appointment by the president is properly called a confirma-

[5] The question was not directly involved in the subject of Mr. Cushing's opinion; but was considered by him incidentally in the course of an inquiry mentioned hereafter as to the president's power to appoint ambassadors and other diplomatic ministers.

[6] In the argument at the bar, it was erroneously supposed that Judge Miller of the supreme court, had in like manner been commissioned by the president during a recess, and Judge Field in a manner somewhat similar. Judge Miller was, however, commissioned on 16th July, 1862, when congress was in session, and Judge Field on 10th March, 1863, during an extra session of the senate. Each appointment was of course with the advice and consent of the senate.

[7] For a reason, which will appear when we come hereafter to consider an act of congress of 9th February, 1863 [12 Stat. 642], it is not necessary to mention any opinions of attorney-generals subsequent to that of Mr. Bates.

tion of it, whether the appointee had received a previous temporary appointment or not. But when the same person who was temporarily appointed in a recess of the senate is permanently appointed, at the next session the permanent appointment only can be confirmed. The word "confirmation" is misapplied when the senate's concurrence in this appointment is called a confirmation of the former temporary one. The temporary appointment indeed merges in the permanent one when the latter is confirmed and accepted. But this neither makes the permanent appointment itself, nor makes the confirmation of it, a confirmation of the temporary one. If the senate rejects the appointee, or does not act upon his nomination for the permanent appointment, he nevertheless continues until the end of the session, to be in office under the former temporary appointment if it was a valid one.

The mistake originated I believe in official or semi-official language of persons employed in executive departments of the government, and from thence found its way into popular phraseology, and to some extent into that of legislation. Thus an act of congress of 1st May, 1810 [2 Stat. 608], prohibiting the payment of compensation to any chargé des affaires or secretary of legation, unless appointed by the president by and with the advice and consent of the senate, authorized him in the recess of the senate to make appointments to such offices which appointments should be submitted to the senate at their next session thereafter for their advice and consent. If diplomatic offices only had been the subjects of such legislation, it might have been explained for special reasons of peculiar applicability which will be mentioned hereafter. But there have been other subjects. The army appropriation bill of February, 1863, prohibits the payment of any money as salary to any person appointed during a recess of the senate to fill a vacancy in any existing office which vacancy existed when the senate was in session, and is by law required to be filled by and with the advice and consent of the senate until such appointee shall have been confirmed by the senate. And an act of 3d March, 1863, authorized the appointment of officers of the military signal corps; and, in order to allow time for a thorough examination of them, enabled the president to appoint them during the recess, requiring, in like manner, that the appointments should be submitted to the senate at their next meeting for their advice and consent. The advice and consent of the senate was in these acts treated as a confirmation of the previous temporary appointment. Notwithstanding this mistake, the acts of course took effect as intended, according to the popular but legally incorrect meaning of the words. Such a use of them by congress was not the less a mistake. The like mistake was not always made in congressional enactments. The act of 2d March, 1799 [1 Stat. 710], regulating the collection of duties on imports (section 17), and the act of 22d July, 1813, for the assessment and collection of direct taxes and internal duties (section 2 [3 Stat. 22]), each of which established collection districts or authorized their establishment, and provided for the appointment of collectors in every district, empowered the president, in case the appointment of the several collectors for the respective new districts should not be made during the existing session of congress, to make them during the recess of the senate by granting commissions which should expire at the end of their next session.[3] There have, I believe, been other acts of congress in which, as in the two latter enactments, the mistake was avoided. But it was not avoided in official parlance; and this may explain its occurrence in the opinion of Attorney-General Bates. If he had not made the mistake, his own doubts probably would not have been so readily resolved.

The mistake was corrected by the supreme court in 1824, in a case in which the court below had decided that, in point of law, both commissions of an appointee, the latter permanent, the former temporary, "constituted but one continuing appointment, the second commission operating only as a confirmation of the first;" and Mr. Wirt, then attorney-general, said in argument, in the supreme court, as to the two commissions, that "the practice of the government had been to consider them as one continuing commission." In the opinion of the supreme court "the decision of the court below was founded in mistake." The supreme court said that the two commissions could "not be considered as one continuing appointment without manifest repugnancy," that they were "not only different in date, and given under different authorities and sureties, but were of different natures" and durations. It was decided accordingly that the responsibility of a surety in the official bond of a temporary appointee terminated on his acceptance of the commission under his permanent appointment after it had been confirmed. [U. S. v. Kirkpatrick] 9 Wheat. [22 U. S.] 634, 735. This judicial correction of the mistake is important. The mistake should be viewed in the same light with reference to the political, practical. and moral, as with reference to the legal aspect of the question. The senate could not, even before the decision of the supreme court, much less could they afterwards, without mere causeless vindictiveness, discriminate in the matter in question by rejecting persons who had been temporarily appointed to fill vacancies which had existed when the senate was in session. The question of constitutional power was doubtful, or had been so considered. The temporary appointees were

[3] Commissions under the act of 1813 appear to have been granted by the president until the end of the next session of the senate, and no longer.

therefore morally blameless. After the decision of the supreme court, acquiescence in the president's assumption of the power in question could not be reasonably implied from the confirmation of an appointment which, according to the decision, was a new and different one, and was neither a continuation, nor a confirmation, of the questionable one. Thus rejection for this reason alone would have been wanton, arbitrary, and unjust, and, as excluding the inference of acquiescence, would have been useless. The supposition of acquiescence by the senate from their not having rejected the permanent appointees appears therefore to have been founded in a political as well as a legal mistake.

That it was such a mistake will appear more clearly when the views in which the senate has regarded the question are elucidated from positive sources. We may consider, first, decisions by the senate as to the qualifications of its members, and afterwards, proceedings of the senate as a co-ordinate branch of the executive government. The cases of Mr. Johns, in 1794, and of Mr. Phelps and Mr. Williams, in 1854, depended upon the effect of the above-mentioned provision of the constitution as to the power of the executive of a state to fill vacancies in the senate, happening during the recess of the legislature. The senate, in these cases, decided that when a vacancy thus occurred in a recess, the governor could not fill it during a subsequent recess, the legislature having sat in the interval,—that where he had properly filled a vacancy during the recess in which it occurred, the seat, unless filled by the legislature of the state, became vacant at the end of their next session,—and that although the vacancy afterwards continued, it could not be filled by the governor of the state. The vote excluding Mr. Johns from a seat was twenty to seven, when a full senate was composed of only thirty members. In the case of Mr. Phelps the whole subject was thoroughly considered and the vote was twenty-six to twelve. The case of Mr. Williams was decided without a division. It was urged in these cases with great earnestness, but in vain, that according to the reason, spirit, and purpose of the constitution, a state should not be unrepresented in the senate, that the evil resulting from a vacancy did not depend upon its cause, and that the provision of the constitution must have been intended to prevent vacancies by enabling the governor of a state to fill them temporarily so long as the legislature might be unable, or might fail, to do so. Such arguments closely resemble those which have been urged upon the present question. It would seem incongruous that the word "happen" upon whose application the question depends should not have a similar import in the two provisions of the constitution. We find, accordingly, that a broader meaning has not been attributed by the senate, as a co-ordinate branch of the executive, to the provision of the constitution which confers on the president power to fill vacancies in office that may happen during a recess. The question was first considered by the senate, acting in its latter capacity, with reference to the case of an office newly created by congress, and not filled before their adjournment. If the words of the constitution, "vacancies that may happen during the recess of the senate," instead of being referred to the first occurrence only of a vacancy, are to be understood as referable to any existence, or continuance of a vacancy, the constitution gives to the president power, during the recess, to fill temporarily such newly-created offices. But if the provision of the constitution applies only to a recess in which the vacancy first occurs, he cannot thus fill them. There is, therefore, in principle, no difference between this form of the question and those other specific forms in which we have already considered it. Acts of congress purporting to enable the president to fill such newly-created offices during the recess, by temporary appointments, have already been mentioned. Such enactments have an independent effect, as legislative expositions, which will be considered hereafter, under a distinct head. In the mean time, it may be remarked here that the effect attributable to them has been considered by the senate, in its executive capacity, incidentally to inquiries how far the president may have an occasional power to appoint, without the senate's concurrence, commissioners to negotiate a treaty with a foreign state. An apparent digression will be necessary in order to explain how this inquiry arose. Congress may, through the power to regulate the compensation of diplomatic functionaries, and in some other modes, exercise indirectly more or less control over the intercourse of the government of the United States with foreign governments. But the president and senate, if the question of compensation could be excluded, would under the constitution have, in their executive capacity, almost unlimited control over such intercourse. The subject has been fully examined by Attorney-General Cushing, in a very lucid and instructive opinion of 25th May, 1855, upon the effect of the act of that year remodelling the diplomatic system of the government. In this opinion, in which, in most respects, I concur, the prior legislation, and prior executive usages, are historically investigated. The question, as between the president and the senate, of his power to negotiate primarily, without their participation, a treaty, though it cannot afterwards become binding until ratified by them, is a distinct proposition which, within certain limits, involves no difficulty. The question may, within, or beyond such limits, involve an inquiry as to his independent power to select and send the

negotiator. An ambassador,[9] or other public minister, whether designated as a commissioner, or by any other official title, cannot, except for purposes of mere occasional exigency, be constitutionally sent abroad otherwise than under such an appointment as that of any other officer of the government. But the president primarily represents the United States in the intercourse of their foreign relations, including the negotiation of treaties. He is by the constitution expressly authorized to receive ambassadors; and it has been supposed that a power inherent in his office may enable him to send special diplomatic representatives abroad whenever it may be necessary to do so for occasional public exigencies, whether the senate is in session or not. That even the occasional exercise of such an inherent or incidental power was jealously watched appears from the act of 1st May, 1810, which has been cited. The question of the existence of such a power, and the present question, are different, arising as they do, in part, under different provisions of the constitution. But with reference to the legislation as to newly-created offices, the present question was incidentally considered when an occasional diplomatic appointment was made in a recess of the senate. Our present inquiry is not whether the senate's views of the question as to an occasional diplomatic mission were right or wrong. That is here unimportant. The inquiry to be elucidated is whether the senate, in considering that question, admitted or denied the power of the president which is now in question. Upon this point Mr. Sergeant and Judge Story have referred to certain proceedings of the senate. In the year 1813, President Madison, during a recess of the senate, appointed commissioners to negotiate the treaty of peace afterwards concluded with Great Britain. Mr. Sergeant, after stating that the principle acted upon in this case was not acquiesced in, but was protested against at the succeeding session of the senate, says that, afterwards, in 1822, "during the pendency of the bill for an appropriation to defray the expenses of missions to the South American states, it seemed distinctly understood to be the sense of the senate, that it is only in offices that become vacant during the recess that the president is authorized to exercise the right of appointing to office, and that in original vacancies, where there has not been an incumbent of the office, such a power does not attach to the executive." He also quotes the coincident report of a committee of the senate made a few days later, in which it was declared that in the provision of the constitution as to vacancies that may happen during the recess of the senate, "the word 'happen' has reference to some casualty not provided for by law," and that "if the senate be in session when offices are created by law, which were not before filled, and nominations be not then made to them by the president, the president cannot appoint after the adjournment of the senate, because in such case the vacancy does not happen during the recess." It was added that in many instances, where offices were created by law, special power was given to the president to fill them in the recess of the senate, and that, in no instance, had the president filled such vacancies without special authority of law. Mr. Sergeant and Judge Story quote these proceedings of the senate, and subsequent remarks of the committee of the senate, in such a manner as to imply that their own opinions coincided. The proceedings of the senate were in the year next before that of Mr. Wirt's opinion. We have seen that in 1824, the year next after his opinion, the decision of the supreme court that the senate's confirmation of a permanent appointment was not a continuance of a previous temporary commission of the appointee, removed any reason which there might previously have been for formal or informal protests by the senate in such of the cases of previous temporary appointment as might involve the present question. In 1825, a case occurred which, I think, shows that upon this question, in its general form, there was a contrariety of opinion between the president and the senate. This was the case of Amos Binney, whose commission as navy agent at Boston expired on 15th February, 1825, during the session of congress. Three days after, he was nominated to the senate for the same office. The session closed on 3d March, 1825, the senate adjourning without having acted on the nomination. The senate was convened for, and was in session on, the next day, 4th March, 1825. On the 7th of the same month Mr. Binney was renominated by the president. Two days later, the senate adjourned, having first postponed this nomination till the commencement of their next regular session, on the first Monday of December. During the recess, on 22d March, 1825, Mr. Binney was temporarily appointed to the office by President John Quincy Adams, in opposition, as it would seem, to the opinion of the senate. The postponement of the nomination by the senate, however it may have exceeded their legitimate power, indicated their dissent from Mr. Wirt's then recent opinion. If they supposed that the president would have the power to make the temporary appointment after their session, it does not seem at all probable that they would have passed the resolution to postpone.

Legislative expositions by congress will next be considered, not as decisive, in themselves, of any question, but as indicating concurrence or contrariety of opinion as to the existence of the power in question. Acts

[9] In the general sense in which the word is used in the constitution.

of 2d March, 1799, 1st May, 1810, 22d July, 1813, 9th February, 1863, and 3d March, 1863, have already been mentioned. How many more such enactments might be found upon searching the statute book, I do not know. They may be numerous. Those which have been cited are sufficient, as examples. It should be recollected that they did not all apply to newly created offices. The act of 9th February, 1863, on the contrary, applies to the question in its general form. These acts import a discrimination between cases in which the president has, and those in which he has not, the constitutional power to make temporary appointments, the difference being between the senate's having, or not having, been in session when, or since, the vacancy first occurred, —the very difference which the argument on the affirmative side of the present question supposes to have been constantly disregarded. If the acts of 1st May, 1810, and 9th February, 1863, were the only legislation to be considered, there might perhaps be dispute whether they should be understood as affirming the power of the president, and only checking its undue exercise, or as implying denial or doubt of the existence of such a power. To the act of 1810, the former motive might, upon reasons already explained as applicable peculiarly to diplomatic appointments, be imputed less objectionably than to the act of 1863. But such a construction even of the former act, and much more of the latter one, would impute motives of legislation which perhaps are not properly attributable to congress, because, if the president had the constitutional power, congress had not the power directly to prevent its exercise, and, in that case, perhaps ought not to have done so indirectly. Upon the other acts there can be no such dispute. In them, the question whether congress could vest the power in the president if it had not been conferred on him by the constitution, may indeed have been overlooked. But, however this may have been, it is quite certain, that the question of the existence of the president's power was legislatively considered. The express grant of power by these enactments implies that, in the opinion of congress, the constitution had not given the power to him, or, to say the least, indicates the constant doubt of congress on the subject. The counsel has, in argument, cited copiously the debate in the senate on the passage of the enactment of 9th February, 1863. The purposes for which such citations in a judicial tribunal are admissible must be very limited. One of them, under certain cautions, may, however, be to show on what points, and how, at the date of a statute, opinions differed as to what was the previous law. This debate shows that, upon the point of constitutional law now in question, two senators, each of whom had been a judge of the supreme court of his own state, differed in opinion whether the president had the power under the constitution. The question cannot have been overlooked by those who framed the tenure of office act of 1867. They knew that constitutional doubts could not be resolved by legislation, and that if the presidential power in question existed under the constitution, legislation could not abridge it, otherwise than by so defining the tenure of offices as to diminish the frequency of occasions for its exercise. Aware of this, they seem to have discriminated between different specific forms of the general question, and to have intended to legislate for those cases only in which there would have been least difficulty in reconciling the president's assumption of the power with the literal import of the constitution. We have seen that the difficulty in this respect was greatest in cases like the present one of Mr. O'Neill, where the senate was in session when the vacancy first occurred. There is, accordingly, no provision for such cases in the act. In cases in which vacancies first occur during a recess, the presidential power is, during the same recess, unquestionable. But in such cases, according to the argument on the affirmative side of the present question, the temporary appointments of the same or other persons to fill the same vacancies, might be constitutionally repeated in recurring recesses. We have seen that such repeated temporary appointments, if they had not been repugnant to the spirit of the constitution, might perhaps, without much difficulty, have been accommodated to its letter. The 3d section of the act seems to have therefore been a legislative endeavor so to define the tenure as to prevent such repeated appointments, whether they would, if the tenure had not been so defined, have been constitutional or not. The section was, in short, a legislative effort to prevent the question, in this form of it, from arising. The first sentence of the section is a transcript of the constitutional provision with an insertion of the words "by reason of death or resignation," and an addition of the word "thereafter" at the close. The purpose of introducing the words "by reason of death or resignation" has already been explained. It was to prevent as much as possible the occurrence, during recesses of the senate, of any vacancies otherwise than by death or by resignation. The word "thereafter" was added in order to prevent the repetition of the temporary appointments to fill such vacancies. We are not at liberty to understand the word as a mere pleonasm. Congress, in making the addition to the words of the constitution, cannot have intended to deal so lightly with its language. If this word "thereafter" is to be referred grammatically to the nearest antecedent, which is "death or resignation," the apparent intent of congress to restrain the exercise of presidential power without the senate's concurrence, to the narrowest limit possible, is fulfilled. If the word "thereafter"

is to be referred, not to this grammatical antecedent, but to "recess of the senate," the result must be the same, because, to effectuate the same apparent legislative intent, such recess must here be understood as the recess in which the vacancy first occurred. Now the third section is inapplicable to vacancies which first occur when the senate is in session, whether they occur through death, or through resignation, or otherwise. This being so, it must be recollected that according to the general argument on the affirmative side of the question, if such vacancies continue till after the session, they become vacancies happening during the recess. It may be said, and, to a certain extent, correctly, that if the president has then power to fill them by temporary appointments, it cannot be abridged by congress. And this, if we stopped here, might explain the omission to legislate on the subject. But it must be recollected further, that, according to the same argument, the president may fill such vacancies again and again, by temporary commissions on every recurring recess, just as, according to the argument, he may thus repeatedly fill them where the vacancy first occurred in a recess. The act omits all provision against such repetitions of temporary appointments, where the first occurrence of the vacancies was during a session, but provides against them where it was during a recess. According to the argument the necessity was the same, or equally great, in both cases. How is this difference in the legislation to be explained? The only answer to this inquiry is, that congress discriminated between cases which, in the opinion of the attorney-generals, were, in principle, undistinguishable. The whole subject was perhaps thought to be involved in doubt and obscurity, so much so that perhaps no precisely definable views of the general question of constitutional law are attributable to congress.

On the whole question of acquiescence, positive or negative, we thus find in the present case, a difference in every respect from those cases in which points of constitutional law have been established on the foundation of administrative usage. We might, for example, contrast the present question with that of the president's power of removal from office.

To recapitulate, as to the present question: There has not been opportunity for judicial contestation: the existence of the power in question has not been legislatively recognised, has been denied by the senate, has been practically asserted by presidents only, and has not been exercised without constantly recurring suggestions by them of doubts of its existence under the constitution: opinions of attorney-generals have been its only support; and in these opinions, other jurists of eminence have not concurred. All this might have been said in language more decidedly showing that the question, whenever directly litigated, will be quite open for judicial contestation. At present, I cannot answer it affirmatively.

2d. The second question is one upon which opinions have, I believe, differed. It may depend, perhaps, in part, upon congressional usages, of which my knowledge is imperfect. In the present case, there cannot have been a recess of the senate unless there was a recess of congress. On every adjournment of congress, except such an occasional temporary one as does not suspend the course of business of the two houses, the interval until the next meeting should, I think, be deemed a recess. If so, there was here a recess on the adjournment of 27th July last.

3d. On the third question I incline to think that if the words, "unless it be then otherwise ordered by the two houses," had not been contained in the resolution of 22d July, the meeting of the senate on 21st September would have been such a session that the commission of Mr. O'Neill, if otherwise valid, would have expired upon the adjournment on the same day. The insertion of the words which I quote, might not have prevented such a result, if anything had been done by the two houses to make the transaction of executive business by the president and senate possible, if the president and senate had desired it. But the adjournment excluded all business, and nothing had been done before it to permit the transaction of any business. The senate could not, however long they might have sat, receive a nomination to office from the president; and consequently there was, I incline to think, no such session that a temporary appointment, if otherwise valid, would have been terminated by the adjournment which occurred. I would have avoided intimating an opinion upon this point, if it had not seemed necessary, in order to explain my reason for expressing one upon the first question.

Upon the whole, I am of opinion that Mr. O'Neill is not a rightful incumbent of the office, and that any legal business which he may occasionally transact for the government, under its law department, or any other department, will not be conducted by him as the local law officer. Under the attorney-general's instructions and authorization of the 18th and 22d of September, I think that the clerk of this court should recognize Mr. O'Neill's right of directing process to issue at the suit of the United States. I consider the office, upon the question of rightful incumbency, to have been vacant, as I have said, from 15th March. But there may be a difference between Mr. Gilpin's authority before the 19th of last month, and Mr. O'Neill's present or occasional future authority. The existence of such a difference depends upon the question, whether Mr. Gilpin was, until the latter day, the incumbent in fact, though not of right. Mr. O'Neill cannot, through any future exercise of such authority as he now has, become the incumbent in fact, if he is not the incumbent of right.

His relations with the officers of the court will be thus understood. His occasional authority will be recognized as resting on this footing only, however he may describe it. There will be no implied acquiescence in his own definition of its character. Unless the definition is impliedly concurrent, such acquiescence cannot be inferred. What I have said will prevent any inference of tacit acquiescence from acts of the officers.

Case No. 3,925.

In re DISTRICT ATTORNEY OF UNITED STATES.

Circuit Court, W. D. Tennessee. Dec., 1872.

GRAND JURY—PROCEDURE—FUNCTIONS AND POWERS OF DISTRICT ATTORNEY —MINUTES OF EVIDENCE.

[1. The United States district attorney or his assistant may be present before the grand jury to advise on questions of law, to submit evidence, and to examine witnesses, but he should give no advice as to the sufficiency of the evidence to convict, and should take no part in the deliberations as to the guilt of accused. He should withdraw during such deliberations, if requested to do so.]

[2. The minutes of the evidence taken before the grand jury should be deposited with the district attorney, to be kept among the records of the government.]

A difference of opinion having arisen between the United States district attorney and the foreman of the grand jury in reference to the right of the district attorney or his assistant to appear before that body and conduct the examination of witnesses for the government and advise them upon matters of law and questions arising upon the construction of the federal statutes, and the matter having been brought to the attention of the court, the grand jury was requested to appear in open court, when they were further instructed and charged as follows in the premises, and further as to the right of the government's attorneys to the minutes of testimony of the witnesses examined before the grand jury:

EMMONS, Circuit Judge. Gentlemen of the Grand Jury: I am informed by the district attorney that some difference of opinion exists between you in reference to his right to be present and aid you in the examination of witnesses, and give you his advice as to the law. I can not understand the source of such a doubt on the part of jurors long resident in Tennessee, where, alike in the federal and state courts, the practice has been uniform for that officer to assist and advise the grand jury in its labors. I learn by inquiry from the most experienced members of the state bar that its attorneys general from the earliest times have attended grand juries and informed them of all matters in his hands, and aided in the examination of witnesses. With rare exceptions, this has been the usage substantially in every state in the Union as it is in England. When from differences of judicial opinion in some states, the practice was not uniform, it has been corrected by statute. The question having been made in the circuit court of the United States of the northern district of New York, Judge Nelson, of the supreme court, laid down the unquestioned law upon the subject as follows: "It is the uniform practice in the federal and state courts for the clerk and assistant of the district attorney to attend the grand jury and assist in investigating the accusations presented before it. That has been the practice to my knowledge, without question, ever since I have had any connection with the administration of criminal justice. In England even the prosecutor may appear before the grand jury and aid the representative of the crown in respect to the evidence and the management of the case. We cannot, at this late day, overturn a uniform practice that has been settled for so long a time. You must assume that the attendance of the clerk of the district attorney before the grand jury to aid in bringing out the testimony, is admissible. But if any abuse has been committed by him, or by any other person, it is a proper subject for investigation by the court." U. S. v. Reed [Case No. 16,134]. The duties and confidence imposed in this responsible officer are thus described by the supreme court of Tennessee in the case of Fout v. State, 3 Hayw. 98: "He is to judge between the people and the government; he is to be the safeguard of the one and the advocate of the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions and individual malevolence, when he can not use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretion, requires it. Can these views be attained by leaving prosecutions to every attorney who will take a fee to prosecute? Does every one feel the responsibility imposed by the oath of the solicitor general by his selection for the discharge of these duties; by the confidence of the public imposed in him; by a consciousness of the impartial duties he owes to society and his country?"

This high officer cannot thus stand between the innocent and the guilty by the exercise of that sound discretion which is here accorded to him, if he is to be excluded from the grand jury room. The proposition is novel, and its adoption would be as impolitic as novel. Especially is this so in that large class of offences under the modern revenue laws, so difficult of construction and so fre-

quently changed. It would be impossible for an unprofessional jury, without this assistance, to proceed a single day properly with its duties. It is not unfrequent for the court to require much explanation from the district attorney, in reference to the meaning and connections of such laws, before it is able intelligently to suffer him to proceed with evidence before the trial jury. We do not understand how it is possible for the grand jury to perform its duty with less; or how, without constant explanation, it can determine the proper application of the facts to the law. Although not requested to go further in our instructions, we deem it well to add that the limit of the district attorney's duties is reached when he has explained the meaning of the laws, laid before you all evidence in his hands, officially, and aided in the examination of the witnesses. He should take no part whatever in your discussions as to guilt. The weight and credibility of the testimony is wholly for you, without even a suggestion from him. And although in plain cases such a formality is not usually complied with, we should deem it decorous for the government officer to withdraw when you are to decide upon the case, and in all questions of importance, and of doubt, indelicate for him to remain. Without exception, it is his duty to do so upon request of the jury when he has submitted all the evidence in his possession or which you may desire yourselves to send for. His opinion as to the sufficiency of the evidence to prove guilty should never be given, even if asked by the jury. His opinion in reference to the meaning of the law should never be withheld. Whether the facts are proved, he has no right to suggest even. Although I have no opportunity to consult with my brother, the district judge, on this subject, there is no doubt whatever, that such is his view of the law. Under his administration for years it has been applied, and in his often repeated instructions he refers the grand jury to the district attorney for information in all matters when it does not desire information from the court. You ask, also, what you shall do with the minutes of the evidence when you are through with your duties. They should be delivered to the district attorney, and be by him kept among the records of the government. They are necessary to enable him to prosecute offenders. Should he be excluded from the jury room and refused the inspection of your minutes of the testimony, the public business of his department could not be conducted; there would be no possible means for the prosecuting attorney officially to learn large classes of facts indispensable to the performance of his duty as public prosecutor. It is suggested that your oath of secrecy compels you to destroy the evidence you take for the government. The motive for this secrecy is only to prevent untimely publication of the indictment, that offenders may escape, and as some of the books I think rather uselessly add, to prevent defendants from tampering with the witnesses and preparing false testimony. Whatever may be its motive, it does not extend to legitimate calls for your doings by the government, either to testify to what witnesses swore before you, if they swear differently elsewhere, or to enable it to prepare for the trial of offenders against whom you find indictments. The government may proceed in many cases if the district attorney elected so to do without your agency. It is only because the law officers prefer your intelligent and impartial investigation in all cases to the assumption of responsibility on their part that they do not proceed by information instead of indictment. We heartily agree with their enlightened decision in this regard. Nothing can be more useful to the country than this study of its laws by so many leading men yearly. Its worth overtops ten times the petty cost of your assembling and deliberations. The citizen, too, who is indicted by his fellows, selected alone from among those he is compelled to respect, will, in the few cases where he is wrongfully arraigned, have more confidence that there was no attempt to oppress him. We should feel a sincere sorrow that any necessity should arise forever abandoning on the part of the government an instrumentality so beneficent as that of the grand jury.

DISTRICT ATTORNEYS' FEES. See Append. Fed. Cas.

DISTRICT OF COLUMBIA (RIDDLE v.). See Case No. 11,808.

DISTRICT OF COLUMBIA (WILSON v.). See Case No. 17,822.

DISTRICT OF NORTH CAROLINA (UNITED STATES v.). See Case No. 15,727.

DISTRICT SAV. ASS'N v. MARKS. See Case No. 3,812.

DITTENTHALER (SHARP v.). See Case No. 12,709.

Case No. 3,926.

DIX v. NICHOLLS.

[2 Cranch, C. C. 581.][1]

Circuit Court, District of Columbia. May Term, 1825.

ATTACHMENT—AMOUNT OF DEBT.

An attachment under the act of Maryland, 1795, c. 56, will not lie for a debt under the value of twenty dollars. The proceeding must be according to the directions of the act of Maryland, 1791, c. 68, § 1.

This was an attachment issued by the clerk of this court upon a warrant of a justice of the peace directed to the clerk, under the act of Maryland, 1795, c. 56, upon a debt of $8.87.

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

Mr. Morfit, for plaintiff [John Dix], moved for judgment against the garnishee upon his default of appearance.

Mr. Wallach. as amicus curiae, suggested that the case, being for a debt under $20, was not within the jurisdiction of this court, unless the plaintiff should proceed according to the directions of the Maryland act of 1791, c. 68, § 1, by which it is provided that "if the justice's warrant shall be returned non est inventus, the creditor may proceed in the respective county courts, for obtaining an attachment according to the directions of the act for issuing out attachments in this province, and limiting the extent of them," (1715, c. 40,) "against the goods, chattels, and credits of such person for any sum exceeding ten shillings, or fifty lbs. of tobacco."

Mr. Morfit, in reply, insisted that his remedy was strictly within the letter of the act of 1795, which makes no exception of cases under $20. That although a warrant from the justice against the defendant [Hezekiah Nicholls] had been returned non est, it did not prevent the plaintiff from proceeding under the act of 1795. That the return of non est gave this court jurisdiction of the case; and the act of 1795 is only a supplement to that of 1715, c. 40.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinon that this court could not take jurisdiction of this case in any other way than that which is pointed out by the act of 1791, c. 68. The act of 1795, does not purport to give the court jurisdiction in cases of less value than £100, and we think it did not intend to give it. That act must, as we think, be restricted to cases not before excluded from the jurisdiction of the county courts by the smallness of their value. The justice of the peace, therefore, in this case, had no right to command the clerk of this court to issue this attachment, nor was the clerk bound to issue it upon his command. The attachment not being legally issued, cannot give this court jurisdiction. The creditor ought to have proceeded according to the act of 1715, and not according to the act of 1795.

DIXEY (UNITED STATES v.). See Case No. 14,967.

Case No. 3,927.

Ex parte DIXON.

Circuit Court, District of Columbia. Sept. 7, 1860.

PATENTABLE NOVELTY—MODE OF BOOKKEEPING.

[A mode of bookkeeping whereby a balance sheet and statement of assets and liabilities are constantly shown on a single sheet, thus obviating reference to the ledger, is not patentable.]

[Appeal from the commissioner of patents.

[Application by Hiram Dixon for a patent for an improved method of bookkeeping. The applicant appeals from a decision of the commissioner of patents rejecting his application.]

MORSELL, Circuit Judge. The nature of the invention he thus states: "The nature of my invention consists in the application of a certain combination and composition of ruled columns to expedite, simplify, and prevent error and fraud in mercantile accounts, and whereby a balance sheet and statement of assets and liabilities are constantly shown without consulting the ledger with greater accuracy, less trouble and a material saving in labor, being at the same time a constant check against error; and by no other means now extant or known to me, so far as I have been able to ascertain, can these or similar results be produced." In his summary he says: "What I claim as my invention and desire to secure by letters patent is the application of a certain combination and composition of ruled columns in sections to accounts which will show a constant balance thereof, with statement of assets and liabilities on every page of the journal, as herein described, without consulting the ledger, using for that purpose the aforesaid combination in books of accounts, whether journals, cash books or any others, substantially the same, and which will produce the intended effect."

The commissioner's decision adopts the report of the examiners, dated 11th July, 1860, which says: "In this case the alleged invention consists in a mode of keeping mercantile accounts whereby a balance sheet and statement of assets and liabilities are constantly shown without consulting the ledger. The whole system is laid down upon a single sheet which at a glance shows, in appropriate columns, total accounts, personal accounts, cash, bills receivable, bills payable, together with a column showing the state of the concern, with columns for outlay and return. This, to our mind, is a method of teaching bookkeeping," etc., and cites a case decided by Judge Mason to show that such a case is not patentable, that is confirmed by the commissioner 12th July, 1860. To this decision the appellant filed the following reason of appeal: That the patent office has failed to make it appear that the invention claimed by the said Dixon has been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application of said Dixon.

The commissioner's report, in reply to the reasons of appeal, notices what is hereinbefore recited as to the nature of the invention as stated by the appellant in his specification, and says: "The office has treated this application as presenting no proper subject matter for the protection of letters patent." The

single reason of appeal alleges, etc. (as just above recited). The report proceeds: "The invention sets forth nothing more than a mode of presenting the journal entries of a regular business in a tabular form for the convenience of instant reference; and even if this were in its strict sense an invention, it could not be fairly brought within the enumerated subjects for patent protection in our organic patent law, which is limited to an art, machine, manufacture, or composition of matter, or an improvement or any of these." Now it is well known that finance commerce, manufactures, statistics, etc., are all represented by tabular statements, and, like the tables of the appellant, are designed for convenience, whilst the ledger of the accountant is in itself a tabular statement of a current business, and only somewhat different in arrangement from the method adopted by the appellant. Does it then require any further argument to show that this columnar statement of the daily condition of a well kept set of books is not new?

I shall not recite the second ground upon which the commissioner rests his report, and I shall give no opinion on that point here, having in other cases of appeal from the office expressed my views upon full investigation. This then was the case presented when, according to previous notice, all the original papers were duly laid before me, and the appellant by his attorney appearing also filed his written argument and submitted the case. Upon full consideration of this. my conclusion is that the decision of this case by the commissioner is correct and ought to be affirmed, and I do accordingly affirm the same.

Case No. 3,928.

DIXON v. BARNUM.

[3 Hughes, 207;[1] 2 Va. Law J. 312.]

District Court, E. D. Virginia. April 30, 1878.

BANKRUPTCY—EFFECT OF DISCHARGE—ENCUMBERED PROPERTY.

A discharge in bankruptcy is only a personal release of the bankrupt from a debt, and does not release any lien of the debt upon the property; and such property may be subjected by a state court to the lien when the property does not form part of the assets in bankruptcy, or by the bankruptcy court when it does, if it comes, after the discharge, again into the possession of the bankrupt.

This was a bill of injunction filed in the United States district court, on its equity side, to enjoin the defendant from interfering with certain real estate of the complainant which he had sold before his bankruptcy while it was subject to a debt of the complainant, and had repurchased some years after the discharge in bankruptcy; the lien of the debt to which it had been subject not yet having been satisfied.

The facts of the case are fully set out by the bill as follows: "Some time in the year 1869, John B. Donovan, administrator of E. Barnum, deceased, along with other persons, filed a bill in the circuit court of Matthews county to subject the real estate of your orator to the payment of certain judgments which had been obtained against your orator. The cause proceeded regularly, and at the March term of the circuit court of Matthews county, 1878, a decree was entered against your orator requiring him to pay to John B. Donovan, administrator of E. Barnum's estate, the sum of one hundred and eighty-four 93-100 dollars, with interest on seventy-eight 40-100 dollars part thereof, from the 15th September, 1877, until paid. Your orator prays that your honor will interpose and give him relief for the following reasons, viz.: On the 27th day of December, 1867, your orator sold and conveyed to one Fountaine Green, all the real estate of which your orator was possessed. In March, 1868, your orator filed his petition in the United States district court to be adjudged a bankrupt, and in a few months obtained his discharge in bankruptcy. On the 9th day of December, 1868, your orator purchased the said land from Fountaine Green, and soon thereafter the suit above referred to was instituted in Matthews circuit court. 'Tis true the judgment in favor of Barnum's administrator was obtained in April, 1861, but it was not docketed until September 4th, 1868, eight months after your orator sold the land to Fountaine Green, and four months after your orator had filed his petition in bankruptcy. Certain it was that Fountaine Green was a purchaser for valuable consideration and without notice. In the meantime your orator having obtained his discharge, certainly it was his right to purchase real estate, and the real estate thus acquired after discharge could not possibly be liable for any judgments against your orator, obtained before he filed his petition in bankruptcy. The land now owned by your orator has been decreed to be sold to pay off and discharge this judgment in favor of John B. Donovan, administrator of E. Barnum, deceased, and Sands Smith, of Matthews county, has been directed to execute the decree. Your orator states and so charges the fact to be, that this honorable court should protect him in those legal rights guaranteed to him in pursuance of his discharge, and should protect him in his after-acquired property. In tender consideration whereof," etc.

In the suit in the state court thus alluded to by the bill, the judge of that court had filed the following opinion on the question of law on which the case turned. There were two suits in that court precisely the same, and this opinion was filed in one for both:

Montague, Judge. This is a bill filed by the plaintiffs to enforce judgment liens against the real estate of John W. Dixon. The following facts appear from the record: That John W. Dixon, by deed, duly recorded

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

in the clerk's office of the county court of Matthews county, did, on the 27th day of December, 1867, convey to one Fountaine Green, in fee, his entire real estate situated in said county. That after this, and very soon after, he applied for the benefit of the United States bankrupt law, and obtained a full discharge. That the consideration, expressed in the said deed, was two thousand dollars. After the said Dixon was discharged in the bankrupt court, the said Fountaine Green, to wit, on the 9th day of December, 1868, reconveyed said real estate to the said Dixon, in fee. That before the conveyance by the said Dixon to the said Green, of the real estate, there were sundry judgments against the said Dixon; some of the judgments were docketed and some not. This bill was filed at March rules, 1869, and Dixon never answered the bill till the September term of Matthews circuit court for 1877. In his answer, he makes no other defence than to set up his discharge in bankruptcy, as a complete and full bar to the plaintiff's demand. Is it a bar? is the only question for this court to decide.

As to the judgments which were docketed before the sale to Green, there is no difficulty. They are liens on Dixon's real estate, and it is liable for their satisfaction. This is conceded by his counsel. But how is it with those not docketed? A judgment is a lien upon all the real estate of the judgment debtor from the time of its rendition. The docketing gives no additional force or validity to the judgment. If not docketed, a bona fide purchaser without notice of the judgment is protected. This, as I understand the rule, is the effect of docketing a judgment and nothing else. When Dixon took a reconveyance of the land from Fountaine Green, did not these liens, though not docketed, still adhere to the land in Dixon's hands? Under all the facts and circumstances in this case, were said liens destroyed, or did they ever cease to exist? Fountaine Green, quoad the undocketed judgments, may be treated as a purchaser without notice, and his title good against said judgments; and had he conveyed to any other person than Dixon, might have passed a good title. This he did not do, but reconveyed to Dixon. In 1 Story, Eq. Jur. § 410, the law is laid down thus: "The bona fide purchaser, for a valuable consideration, purges away the equity from the title, in the hands of all persons who may obtain a derivative title, except it be that of the original party (which in this case is Dixon), whose conscience stands bound by the violation of a trust and a meditated fraud."

In 1 Schoales & L. 379, that great equity judge, Lord Redesdale, said: "So, if Mr. Daly had made a conveyance to another person with notice of the trust, and taken back a reconveyance, this would have operated nothing; it would not have altered the estate; nay, if a trustee conveys to a person who has no notice of the trust, and then takes a reconveyance, he having notice of the trust, it attaches on him, though it would not on a person not having notice; if a third person had become a purchaser he would have held discharged of the trust." In the second volume of the Leading Cases in Equity [page 1], in the case of Basset v. Nosworthy, this whole doctrine of subsequent purchasers without notice is fully examined and discussed; and while it is admitted as settled law, that where one purchases an estate bona fide, and for valuable consideration, without notice of prior liens or incumbrances thereon, his title is good, and if he sells to another, the title will pass free of the incumbrances or liens, that authority says: "But this principle ceases to be applicable when an estate bought without notice, is reconveyed to a prior purchaser, who sold in violation of rights, which he knew at the time of his purchase, and whose conscience is still tainted with the original fraud." This doctrine has been recently approved by our court of appeals. They say: "A bona fide purchaser of an estate for valuable consideration, without notice, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud." Carter v. Allan, 21 Grat. 248.

Thus stands the law. Now, does it apply to this case? I think it does. Mr. Dixon sold to Mr. Green, went into bankruptcy, got his discharge, and in less than one year Green conveys back to him the land upon which the liens existed at the time of the sale to Green. Dixon knew, when he conveyed to Green, of the existence of these liens; he knew it when Green reconveyed to him; he knew it all the time. In such transactions the law requires good faith and fair dealing. Can it be truthfully said that we have this good faith and fair dealing here? Can just, fair, and bona fide creditors be thus deprived of their rights? Can a court of equity aid in such transactions as this? Dixon relies alone on his bankrupt discharge. Will this avail him? This is the next and last question we shall examine. The bankrupt discharges one personally from all antecedent debts. It is simply a personal discharge. It does not undertake to destroy liens on property; it simply gives a personal discharge and leaves the liens where it found them. If Mr. Dixon had never gone into bankruptcy, his sale to Mr. Green, and Green's sale to him (Dixon) with full knowledge of the liens, the liens would still stand against Dixon's land. We have seen that Dixon's selling to Green,—Dixon having full knowledge of the liens, and Green not,—and then Green's conveying back to Dixon,—Dixon still having knowledge of the liens,—has been. declared by our court of

appeal to be a breach of trust and a meditated fraud. The bankrupt discharge does not cure and purify this fraud. See Jones v. Clark, 25 Grat. 667. Dixon was guilty of a constructive or implied fraud by selling to Green, with full knowledge of the judgment liens on his land, going immediately thereafter into bankruptcy; and as soon as he gets a discharge therein, accepts a deed from Green conveying the land back to him, —and all this done in less than a year from the time he conveys the land to Green. With these facts shown in the record, can any one say that Dixon did not meditate a fraud upon his judgment creditors? To put it in the mildest form, it is a constructive or implied fraud, and the court of appeals, in the last case cited, says a constructive or implied fraud "has precisely the same effect with actual fraud, in regard to the measure of liability therefor," and most pertinently and forcibly asks, "Why has it not the same effect in regard to his discharge in bankruptcy? Can this question of discharge be made to depend upon the degree of aggravation of the fraud?"

There is to my mind another fact disclosed by the record, which strongly tends to show that this whole transaction was, on the part of Dixon, a breach of good faith and fair dealing, and therefore a "meditated fraud." The bill was filed at March rules, 1869, and Dixon never answered it till the September term of this court for 1877, a period of over eight years; and when he does answer, gives no explanation of the transaction, but simply attempts to screen himself behind his bankrupt discharge. I do not think this can protect him, and am of opinion, that by the facts in this case, the liens on Dixon's land, existing at the time of the sale to Green, have never been destroyed, but still exist in full force, and there may be a decree accordingly.

September 29th, 1877.

On the facts and law of the case thus stated, the United States district court dismissed the bill on grounds set forth as follows:

HUGHES, District Judge. In the suit of E. Barnum's Administrator et al. v. John W. Dixon, in the circuit court of Matthews county, Dixon's deed to Green, conveying the land which the bill sought to subject to judgment liens, was not attacked as fraudulent, but was treated as valid, and therefore it must be so considered by this court. If it was valid, then Dixon, when he came into bankruptcy, had conveyed away all his title, and the land did not become part of the assets in bankruptcy, and the bankruptcy court could not have had any jurisdiction over the land. Not only, therefore, did the land remain charged with any liens that might have been superior to Dixon's deed of conveyance to Green, but the enforcement of such liens remained within the exclusive jurisdiction of the proper state court. It is very true that it would have been competent for the assigns in bankruptcy or any alien creditor to come into this court and attack the deed as invalid by reason of fraud; in which event, this court would have had jurisdiction to try such an issue. If such a bill had been filed and this court had pronounced the deed fraudulent and void, then the land it related to would have become part of the assets in bankruptcy, and this court, on its bankruptcy side, would then have had exclusive jurisdiction to administer it as assets, and to ascertain and liquidate the liens resting upon it. But the deed of Dixon to Green has been all along accepted and treated as valid; and it therefore operated to convey away all of Dixon's title, and therefore the land it conveyed formed no part of the assets in bankruptcy, and was not and is not within the jurisdiction of this court. If it was charged with liens when conveyed by Dixon to Green, it is exclusively for the state court so to decree. It is not competent for this court to consider of that matter.

But it is claimed that the discharge of Dixon in bankruptcy operated to extinguish as to him all debts which he owed before the date of his petition in bankruptcy, and that such discharge operated to release the land which he had conveyed away from the lien of the debt to E. Barnum's administrator when the land came back to him by Green's reconveyance. Let us examine this pretension. The bankruptcy proceeding consists of two branches. The bankrupt surrendered his estate to the court, and becomes civiliter mortuus as to it from the filing of his petition. The estate comes to the court charged by the bankruptcy law with all liens which were resting upon it. The bankruptcy proceeding then goes on, in one branch as to the bankrupt, and in the other branch as to his estate and the liens upon it. The law requires the bankruptcy court to respect and discharge the liens resting upon the estate, and contains nothing in the remotest degree implying that the estate which had been held by the bankrupt previously to the filing of his petition shall be exonerated from the liens legally resting upon it. The bankruptcy proceeding, in the branch relating to the bankrupt himself, is purely personal, and the discharge in bankruptcy is simply a personal exoneration of the bankrupt from the debts which he had owed. Even the assets which he brings into bankruptcy are charged with all liens existing against them, and if they are sold after his discharge (a thing not unusual), and he becomes the purchaser of such of them as are incumbered with liens, he takes them subject to the liens of the very debts from which he is personally discharged. If this be so by the express terms of the bankrupt law [of 1867 (14 Stat. 517)], as to property which he brings into the bankruptcy court, how much more certainly is it as to property which, by fraud or contrivance, or even by honest transfer, he has managed not

to surrender in bankruptcy. The discharge in bankruptcy is merely personal as to the bankrupt, and does not affect his estate. If the estate is subject to liens, the personal discharge of the bankrupt does not operate to release it from the liens. The bankrupt cannot, by conveying away any part of his estate before filing his petition, discharge it of liens which would be enforced against it if it came into bankruptcy. That which he thus conveys away may be subjected by state courts to liens incumbering it. That which he brings into bankruptcy will be subjected to liens incumbering it by the bankruptcy court. In either case the lien in rem will stand and be enforced, though the debt in personam be discharged in bankruptcy. The language of the order of discharge is that John W. Dixon, the bankrupt person, "be discharged from all debts which existed at the filing of his petition;" not that his estate be discharged from the liens of those debts. Documents of this sort mean only what they express, and are not construed to operate beyond the strict effect of their terms. When, therefore, a discharge in bankruptcy declares that the said bankrupt, John W. Dixon, is forever discharged from debts and claims due on the day of his petition, it refers to him personally, and cannot be construed to mean that his estate is discharged from the liens which incumber it.

As to the more general aspects of this case, I concur fully in the opinion of Judge Montague rendered in the cause in the state court, and will dissolve the temporary restraining order heretofore entered by me, and dismiss the bill in this court.

The case of G. W. Simmons is similar to this one in its general features, and I will dissolve the injunction and dismiss the bill in that case also.

Case No. 3,929.

DIXON v. COLUMBUS, ETC., R. CO.

[4 Biss. 137.][1]

Circuit Court, D. Indiana. Jan., 1868.

FREIGHT BILL—CONSTRUCTION—ONUS PROBANDI—LOSS BEYOND CARRIER'S LINE.

1. A freight bill is a contract; and its effect cannot be varied by parol evidence.

2. A freight bill ending "Acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee.

3. The words "I. & C. Central R .R." cannot, without an allegation of misnomer, or offer to prove the identity, be taken to mean the Columbus and Indianapolis Railway Co., in a contract not purporting to be made by such company.

4. Where a freight bill is signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company.

5. In the charge of a breach of a common law duty—as the duty of a common carrier—denied by the defendant, the burden of proving the breach is with the party alleging it, whether it is alleged as a mal-feasance or a non-feasance; and he cannot recover without proving it.

6. Where a railroad company received goods for transportation to a point beyond their own terminus, and the plaintiff alleges that they undertook to carry the whole distance by rail, the burden is upon him to prove such undertaking.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

7. In such case the burden is not upon the carrier to account for the loss, if he has delivered at his own terminus to a proper person.

[This is an action at law by Henry Dixon against the Columbus and Indianapolis Railroad Company.]

McDonald & Roach, for plaintiff.

J. S. Ketcham, for defendant.

McDONALD, District Judge. This is an action of assumpsit. The declaration contains two counts. The first count charges that the defendant is a common carrier from Indianapolis, Indiana, to Columbus, Ohio, in the direction of New York, its road forming one of several connecting lines from the city of Evansville to the city of New York; and that on the 12th of October, 1865, the defendant entered into a written contract with the plaintiff, and thereby promised, in consideration of the payment of freight, to transport twenty-five hogsheads of tobacco, worth four thousand dollars, from Evansville to New York by railroad. The count then avers that the plaintiff "shipped" said tobacco on the Evansville and Crawfordsville Railroad, which carried it to Terre Haute and delivered it to the Terre Haute and Richmond Railroad Company, which transported it to Indianapolis, and there delivered it to the defendant, to be by the defendant carried over its road in the direction of the city of New York; and that the defendant failed to deliver said tobacco at the eastern terminus of its road to any connecting line to be transported by rail to the last-named city; but, on the contrary, forwarded it by rail to Baltimore, and thence by water toward New York, whereby the tobacco was lost at sea.

The second count is substantially like the first, except that, alleging no contract in writing, it avers that the defendant engaged to carry the tobacco from Indianapolis to New York "by railroad and not otherwise," and "permitted it to deviate from the said route by railroad," and to be transported part of said distance by water in boats; whereby it was lost at sea. The defendant pleads the general issue.

By agreement this cause is submitted for trial to the court without a jury. On the trial, the plaintiff proved the delivery of seven hogsheads of tobacco on the 12th of October, 1865, to the Evansville and Crawfordsville Railroad Company, and its carriage, by that company, to Terre Haute, thence by the Terre Haute and Richmond Railroad Company to Indianapolis, thence by the defendant's railroad to Columbus,

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

Ohio, thence by a direct railroad line to Benwood, thence by the Baltimore and Ohio Railroad to Baltimore, thence by a steamer for New York. The plaintiff also proved that the tobacco never reached New York, and that it would have been worth three thousand and fifty-six dollars and ten cents at New York, had it reached that place in due course of transportation.

The plaintiff also produced in evidence a freight-book of the Terre Haute and Richmond Railroad Company, in which is contained the following manifest:

No. 223. Terre Haute and Indianapolis Railroad Company. Manifest of freight from Evansville to Indianapolis, October 14, 1865.

Description & No of car	Consignor.	Consignee & destina'n.	No. of packages.	Description of articles.	Weight.	Unpaid Freight.	Charges.	Remarks.
Ree 469	W. T. Noell & Co.	Bacon, Clardy & Co., New York.	5	Hhd Strips 10. 1520 5. 1540. tukd 8. 1560. H.D. 4. 1560. 2. 1480.	7660	1302	230 4200	Route, I. & C. Central All rail. William Grayden
			2	Hhd. Leafe 1. 2050. Mkd 2. 2070. H.I.	4320	734	130	

The plaintiff further proved that William Grayden, whose signature appears to the above manifest, was, at the time when it was made, the defendant's freight agent at Indianapolis. The manifest was read in evidence without objection from the defendant. Preparatory to the production in evidence of the writing hereinafter copied, the plaintiff further proved that W. T. Noell & Company, mentioned therein, and residing at Evansville, were in October, 1865, the agents of the defendant to solicit and procure freight to be passed over the railroad of the defendant; that said W. T. Noell & Co. executed the said writing, and that about that time they executed many other writings, all which the defendant had recognized and ratified as being done by the said W. T. Noell & Co. as the defendant's agents. This latter evidence was given under the objection of the defendant. The plaintiff thereupon offered in evidence said writing, which is as follows:

"W. T. Noell & Co., Forwarding and Commission Merchants, and agents for the Great Eastern Express Line, via Evansville and Indianapolis.

"Through Bill of Lading.

"Evansville, Indiana, October 12th, 1865.

"Received from W. T. Noell & Co., in apparent good order, the articles described below, contents and value unknown, which are to be transported to Terre Haute by the Evansville and Crawfordsville Railroad Company, and thence via Terre Haute and Richmond Railroad and connecting roads, I. and C. Central R. R., all rail, to Messrs. Bacon, Clardy & Co., at the customary place of delivery in New York, he or they paying freight at the rate — cents, if of first class; if of 2d class, — cents; if of 3d class, 80 cents; if of 4th class, per 100 pounds, — cents; per bbl., — and charges as below.

"And it is agreed and is a part of the consideration of this contract, that the several carriers and parties in whose charge said goods may be, between this and the place of delivery, are not to be held responsible for any loss or damage arising from the danger of the seas, or railroad, canal, river, or lake transportation, or from providential causes; for delay of perishable articles, or for loss or damage to packages, the bulk of which renders it necessary to forward them in open cars; or from fire from any cause while in transit or at stations; nor for any accident or delay from any unavoidable cause. And it is further agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for, whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, damage or detriment. ☞ It is understood that the shipper, in accepting this bill of lading, agrees to all its terms and conditions.

H. D. Marks.	Articles.	Weight	Charges
1 2 3 4 5 6 7 8 9 10 11 12 1460 1480 148 1560 1540 1510 1400 1560 1400 1520 1570 1510	12 Hds Strips,		
1 2 2250 2070	2 do Leaf Tobacco.		$42 00

"Sell leaf in New York, and forward strips to Messrs. Robert Kerr & Son, Liverpool. Acc't Henry Dixon, Esq., Henderson, Ky.

"W. T. Noell & Co., Agents."

The defendant objected to this paper as evidence: First, because it is only a receipt, and not a contract; secondly, because on its face it does not purport to be a contract, of the defendant. These objections were held over till the final decision on the evidence; and I now proceed to decide them.

1. It is argued that this writing is not a contract, but a mere receipt. Certainly, in its general features, it seems to be a bill of lading; and a bill of lading is always a contract—one which, according to the authorities, may be assigned very much like a note or bill of exchange. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386. Singularly enough, however, at first sight this would seem to be a bill of lading executed by W. T. Noell & Co. to W. T. Noell & Co., for it is signed by that company, and it begins with these words: "Received from W. T. Noell & Co.," and if it is a receipt made by them to them it is a nullity. But, on a closer inspection, we find that it ends thus: "Acc't of Henry Dixon, Esq., Henderson, Ky." In view of this language, and of the maxim that written contracts should, if possible, be so construed "ut res magis valeat quam pereat," I am inclined to hold the instrument as being made to the plaintiff, Henry Dixon. If I am right in construing this to be a bill of lading made to the plaintiff by W. T. Noell & Co., there can be no doubt that it is a contract. For it contains an express agreement as to the liabilities of the carriers. Indeed, it seems very plain that it is a receipt and a contract both.

2. It is insisted that this bill of lading does not on its face, even prima facie, purport to be the contract of the defendant. It appears to me that this objection is well taken. The name of the defendant does not appear in it. It is true that, in stating the route which the tobacco was to take, it has this phrase: "I. & C. Central R. R." But this is not the name of the defendant or the defendant's road. If the phrase had been the "C. & I. Central R. R.," perhaps the court ought to construe it to mean the defendant's road. But as there is no allegation of a misnomer in the declaration, and no offer to prove that the "I. & C. Central R. R." means the Columbus & Indianapolis Railway, I think the court cannot officially take notice of such meaning.

On its face, then, this bill of lading does not appear to be the contract of the defendant, and the question is, can the plaintiff be permitted by parol evidence, to prove that it is the defendant's contract? I think he cannot. I think that, on its face, the bill of lading is the receipt and contract of W. T. Noell & Co., and not of the defendant. The general rule, that parol evidence is inadmissible to add to or vary the terms of a written contract, is too well settled to require any citation of authorities, and I see no reason for not applying this general rule to the contract in question. It has been applied in several cases. Higgins v. U. S. Mail Steamship Co. [Case No. 6,469]; The Reeside [Id. 11,657]; Goodrich v. Norris [Id. 5,545].

The circumstance that, to the signature of W. T. Noell & Co., to this bill of lading, is added the term "Agents," amounts to nothing. If, on examining the whole bill, we do not construe it so as to make Noell & Co. "agents for the Great Eastern Express Line," whatever that may be, I think we must regard the term "Agents" attached to their signature as mere descriptio personarum. McClure v. Bennett, 1 Blackf. 189; Hobbs v. Cowden, 20 Ind. 310; Pentz v. Stanton, 10 Wend. 271. The plaintiff insists that the case of Mechanics' Bank v. Bank of Columbia, 5 Wheat. [18 U. S.] 326, is in point to show that parol evidence to aid this bill of lading is admissible. In that case the check sued on was as follows: "Mechanics' Bank of Alexandria, June 25, 1817. Cashier of the Bank of Columbia: Pay to the order of P. H. Minor, Esq., ten thousand dollars. W. Patton, Jr."

The question was, whether the Mechanics' Bank was liable on this check, and it was decided in the affirmative. And the court said that "the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction." "The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction." This ruling goes as far as I would be willing to follow. But, whether right or wrong, the case is evidently different from the one at bar. The ground of the decision was that because the name of the Mechanics' Bank was at the head of the draft, it was prima facie the act of the bank. But in the present case, the defendant's name is not at the head of the bill of lading, or any where in it or on it. No one looking at it could suppose that it is a contract by the Columbus & Indianapolis Central Railway Company.

On the whole, then, I rule out the bill of lading as evidence against the defendant. On this ruling, the plaintiff cannot recover on his first count. For as it is on a written agreement, and as he shows no such agreement in evidence, there is a failure of proof to sustain it.

It remains to be inquired whether the evidence sustains the second count of the declaration. This count, as we have already seen, is on a parol contract. It charges that the defendant received the tobacco in question at Indianapolis, and, on sufficient consideration, promised to carry it by railroad to New York, and, in violation of that promise, permitted it to deviate from said route by railroad, and

to be transported part of said distance by water, in boats. Are all these allegations substantially proved?

I think it is fair to conclude from the evidence, that the defendant did receive from the plaintiff, at Indianapolis, the tobacco in question, and did promise to carry it to Columbus, Ohio, and there to deliver it to some other railroad carrier for transportation on a usual and safe route all the way by rail to New York. I conclude also from the evidence, that, if the defendant did so carry the tobacco to Columbus, and did so deliver it there to some other railroad company whose track formed a link in a usual and fair line of transportation by rail to New York, directing it to be so transported, the defendant is not liable in this action.

There is not the slightest evidence that the defendant promised to carry the tobacco to New York by rail or any other conveyance. But, as the defendant must be presumed, from the manifest shown in evidence, to have known that the plaintiff intended that his tobacco should be carried all the way by rail to New York, and as the defendant with this knowledge undertook to carry the goods to Columbus, an implied obligation followed to deliver the tobacco there on some other road forming a link in a proper and usual line of transportation by rail to its destination in New York, and to notify the party to whom the same was so delivered of the plaintiff's direction to have it carried all the way by rail. Did the defendant do this? And if there is not evidence on any point included in this duty, what is the legal presumption? The answers to these two questions must decide the plaintiff's right to recover on his second count.

1. Did the defendant carry the goods to Columbus, and there deliver them to some other company whose road formed a link in a proper and usual line of transportation by rail from Columbus to New York, and notify the company to which such delivery was made of the plaintiff's direction to carry all the way by rail? It is clearly proved that the defendant carried the goods to Columbus. It is also clear that, at that city, the defendant delivered the goods to a company whose railroad led directly to Benwood, the western terminus of the Baltimore and Ohio Railroad; and that they were carried on the two last-named roads from Columbus to Baltimore. At Baltimore, it appears that the tobacco was put on a steamer to be carried by sea to New York. The evidence adduced by the defendant also proves that from Columbus to New York there are several usual and proper through freight railroad lines; and that one of these is by the way of Benwood and Baltimore, though it is not the nearest and most direct line. It is certain that the tobacco might have gone all the way by rail on this line to New York; that it was a usual and proper line for freight transportation to that city from Columbus, Ohio; and that, for sending the tobacco on that line, the defendant, therefore, is not chargeable with any breach of duty. But did the defendant in delivering the tobacco to be carried on this line properly direct that it should be carried all the way by rail? On this point there is no evidence.

2. The only remaining question, then, is, what is the legal presumption? The defendant having performed all the other duties of a carrier, ought we to presume, in the absence of all proof, that on the delivery of the tobacco at Columbus to be carried by the route past Benwood and Baltimore to New York, the defendant properly directed that such carriage should be all the way by rail? In other words, as to this point, on whom does the burden of proof devolve? If the plaintiff had proved the allegation in his second count, that the defendant, for valuable consideration, promised to carry the tobacco all the way by rail to New York, this question would be unimportant. But as there is not sufficient proof of that promise, the question, I think, is the turning point in the case.

It is, indeed, a general rule that he who affirms a proposition must prove it. To this rule, however, there are many exceptions, especially in charging breaches of common law duties. For, in general, a court ought not to presume such a breach of duty without proof. And in those cases in which the plaintiff grounds his right of action upon a negative allegation, and, where, of course, the establishment of this negative is an essential element in his case, the burden devolves on him to prove the negative. 1 Greenl. Ev. § 78.

Such is the present case. The averment as to the defendant's breach of duty concerning the tobacco, is that the defendant "permitted it to deviate from the said route by railroad and to be transported part of said distance by water in boats." Now if this word "permitted" is to be construed as the charge of some wrongful act by the defendant, the allegation is affirmative; and so the necessity on the plaintiff to prove it would be unquestionable. But if it is to be deemed—as I think it should be—merely an allegation of an omission of duty, then it is substantially a negative averment, on which, in the language of Professor Greenleaf, "the plaintiff grounds his right of action;" and still, I think, according to the rule above laid down and to the reason of the thing, it devolved on the plaintiff to prove the omission of that duty.

The plaintiff, in order to escape this conclusion, insists on the application of another rule, namely, that where the action is founded on a negative allegation, and the affirmative is peculiarly within the knowledge of the defendant, the burden is on the defendant to prove such affirmative. No doubt this is law. I do not think, however, that it is applicable to the point under consideration. It is mostly applied to charges of unlawfully performing things without a written license, —as to retailing liquor without a license.

Here, if there is a license, the defendant is supposed to have possession of it; and if he does not produce it, it is fair to presume he has none. But in the case at bar, it ought to be presumed, in the absence of evidence to the contrary, that the defendant gave directions to carry the tobacco by rail to New York, and that those directions were in writing, and were delivered with the tobacco to the next carrier. The matter of such directions, therefore, was not peculiarly within the knowledge of the defendant.

It is also insisted on behalf of the plaintiff that, though no presumption of the breach of a common law duty on the part of a common carrier ought to be indulged in the absence of the evidence, yet, when the plaintiff proves, as in this case, the loss of his goods, the burden of accounting for that loss devolves on the carrier. This is undoubtedly the general rule; but I think it is inapplicable to the present case. It applies to losses happening while the goods are under the care or control of the carrier; and it should not be extended to cases of loss after the carrier has taken the goods to the proper place, and delivered them to the proper person. Here, I repeat, there is no evidence that the defendant engaged to carry the goods beyond Columbus, Ohio. The goods were lost at sea hundreds of miles beyond the eastern terminus of the defendant's road. The proof of such a loss, in my opinion, does not cast on the defendant the burden of accounting for that loss. Upon the whole, I think the plaintiff cannot recover on this evidence. He may be non-suited if he please, else I shall find for the defendant.

The plaintiff submitted to a non-suit.

NOTE. So far as bills of lading and other writings are mere receipts, they may be contradicted by parol, but so far as the writing contains terms of a contract it stands on the same footing as other written contracts. Thus a bill of lading receipting goods as in good order and well conditioned, may be contradicted by showing that their internal order and condition was bad, and any other fact erroneously recited. 1 Greenl. Ev. § 305, and notes. As to how far bill of lading is a contract, and how far a receipt, consult 1 Par. Shipp. & Adm. 190, 191, and notes; 3 Kent, Comm. 208; The J. W. Brown [Case No. 7,590], and cases cited; The Wellington [Id. 17,384]. As to the shipment, it is not conclusive evidence between the original parties. Grant v. Norway, 10 C. B. 665; Bates v. Todd, 1 Moody & R. 106; Berkley v. Watling, 7 Adol. & E. 29.

Though it appears to have formerly been the general rule that the contract must show on its face, that a person other than the executing party is the principal, or such principal is not bound, yet this would seem to hold now only in cases of solemn instruments under seal; and the authoritative rule now is that where the agent makes a contract, apparently in his own name, but really for his principal, his principal is liable. The difference being that the agent also makes himself personally responsible. Mr. Justice Story says "there is no doubt that parol evidence is admissible on behalf of one of the contracting parties to show that the other was an agent * * * although contracting in his own name, so as to fix the real principal." Story, Ag. § 270; also Id. §§ 110, 147, 160–162, 269, 392; 2 Smith, Lead. Cas. 226, and cases cited; Chit. Cont. (11th Am. Ed.) 149, note y[1]; Id. 303, note o; Id. 309, note h; Higgins v. Senior, 8 Mees. & W. 834; Dykers v. Townsend, 24 N. Y. 57.

Mr. Parsons, in his work on Contracts (volume 1, p. 55,) states the general rule to be, "Parol evidence may always be admitted to charge an unnamed principal; but not to discharge the actual signer." Consult also notes to same page, and page 549. Common carrier under special contract limiting his liability has no authority to contract with next carrier for a limited responsibility. Babcock v. Lake Shore & M. S. R. Co., 49 N. Y. 491. Effect of marks showing ultimate destination and using printed blank adapted to through contract. Id.

Where a common carrier contracts for the transportation over his route and delivery to connecting line, the fact that the contract fixes the price for the entire carriage does not make it a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract. Aetna Ins. Co. v. Wheeler, 49 N. Y. 616. In a contract by a carrier to transport and deliver to a point beyond its own line, an exception as to liability extends to connecting lines who share the freight. Maghee v. Camden & A. R. Transp. Co., 45 N. Y. 514. Under an agreement to carry freight to a point beyond the terminus of its own line, a railroad company is liable for the default of a connecting line; but the mere receiving goods marked for such a point only binds the carrier to deliver to the next carrier. Root v. Great Western R. Co., 45 N. Y. 524.

For an elaborate discussion of the liability of common carriers on through bills of lading, and what constitutes a through bill, and under what circumstances a carrier is discharged from further liability by delivery at his own terminus to a connecting carrier for further transportation, consult Woodward v. Illinois Cent. R. Co. [Cases Nos. 18,006 and 18,007], and cases there cited; also a recent opinion by the U. S. supreme court. Railroad Co. v. Manufacturing Co., 16 Wall. [83 U. S.] 318. The rule adhered to by the Illinois supreme court is that a carrier receiving goods marked beyond his own route is liable for their delivery at their ultimate destination. Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Same v. Johnson, 34 Ill. 389; Same v. Frankenberg, 54 Ill. 88.

Case No. 3,930.

DIXON et al. v. The CYRUS.

[2 Pet. Adm. 407.][1]

District Court, D. Pennsylvania. 1789.

SEAMEN'S WAGES—FORFEITURE BY MISCONDUCT.

The libellants, seamen of the Cyrus, at the commencement of the voyage, had refused to proceed to sea, unless the rigging was repaired. An accommodation took place, and they performed the voyage. After the arrival of the ship at Philadelphia, they attended on board to do duty, but finding other persons employed to unload the ship, and no provisions prepared for them, they went on shore. It was attempted to forfeit their wages for the voyage, in consequence of the conduct of the seamen in the beginning of the voyage, and also by their having left the ship. The court decreed wages for the voyage.

[Cited in The Nimrod, Case No. 10,267; The Mentor, Id. 9,427; Magee v. The Moss, Id. 8,944; Grannon v. Hartshorne, Id. 5,689; The Childe Harold, Id. 2,676; The Wenonah, Id. 17,412; Halverson v. Nisen, Id.

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[1] [Reported by Hon. Richard Peters, District Judge.]

5,970; The Hudson, 6 Fed. 830; The Heroe, 21 Fed. 528; The Noddleburn, 28 Fed. 857; The Lizzie Frank, 31 Fed. 480.]

Before PETERS, District Judge.

As there are no depositions filed in this cause, but the suit has, by consent of counsel on both sides been conducted on oral testimony, I may not perhaps be able to state the case with that precision I might otherwise have done. I have, however, given close attention to the witnesses and find the leading circumstances to be follows. The libellants entered on board the ship Cyrus, Thomas Scott, master, in the month of April last, and signed articles in the usual form for a voyage from Philadelphia to the port of Lisbon and back again. When the ship had got under way, the mariners discovered that she was very badly provided with running rigging; that many of the halliards and ropes were not in the usual condition of a vessel entering upon a voyage: that they could not clue the sails without going aloft to search for the proper ropes; and that, upon enquiry, they found there was but one coil of spare running rigging on board to remedy these defects. Whereupon, when the ship had come to, a few miles down the river, they remonstrated to the captain, and finally refused to weigh anchor, or proceed with the vessel in her present condition. How this remonstrance and refusal was conducted, whether in a mutinous disorderly manner or otherwise, does not appear by any part of the testimony. Upon this the captain dispatched a messenger to the city to inform the owners of his situation, and in consequence of this intelligence, Captain Keith, one of the owners, went down to the ship, and took with him several hired men, either to assist in getting the vessel under way, or to compel the mariners to do their duty. What passed between Captain Keith and the discontented seamen does not appear, except that, before he left the ship, he prevailed with them to proceed on the voyage, promising that if they would do their duty, and behave themselves well for the remainder of the time, no notice should hereafter be taken of their late conduct, nor any deduction made from their wages on that account, Captain Scott standing by and hearing these assurances given them. This affair occasioned a delay of the ship of two or two and a half days. The vessel then prosecuted her voyage, during which the mariners supplied the deficiency of running rigging by untwisting old ropes and manufacturing them over again into ropes fit for the purposes wanted. In due time the ship completed her voyage, and returned safe to Philadelphia. On the third of September the ship was moored in the port, and at eleven o'clock in the evening of the same day, the mariners in general, if not all of them, left the vessel and went on shore. The captain being present, desired them to return early next morning to go to their work: and they came back accordingly, some at, and some before day-light; but no orders were given as to what they were to do, except to two of them, who were directed to unbend certain sails, which they did. The mariners observing that men were hired by the day to unload the cargo, and seeing no preparations made for their provision, or that the kettle was cold, (as they term it,) enquired of the cook, whether he had received any orders to provide for the crew, who told them he had not received any; and they knowing that there was no meat on board, the last of their store having been consumed the day before, again left the ship, and went on shore. It appears that some of the libellants, and particularly John Winters,[2] went frequently afterwards to visit the ship, and sometimes staid two hours on board, without receiving any orders from the captain to go to work; and that the captain saw them come and go without desiring their attendance, or reproaching them for their absence, until at length they looked upon themselves as discharged from the ship's service.

Upon these facts the counsel for the respondents hath urged against the libellants that they have in two instances violated their contract, and forfeited their wages. First, in a mutinous refusal to do their duty on board, on a frivolous pretence of deficiency in the vessel's rigging; and secondly, in leaving the ship as soon as she arrived in port, and before her cargo was discharged. That it is manifest their complaint of the rigging was frivolous, because the ship hath completed her voyage without any addition of naval stores, observing that it would be very injurious to commerce if mariners should, on slight causes and artificial complaints, be encouraged to justify a disobedience of orders, as they are, for the most part, not in a situation to answer the damage they may occasion to owners by the delays and losses which such disobedience may incur. That the promise of the owner, in the present case, that no deduction should be made from the wages of the libellants on account of their refusal to do duty, cannot avail, or in the least affect the strict operation of the articles, because the mariners do not contract with the owner, but with the captain; and that it is for this reason only, they are allowed to sue in the admiralty, and have a lien upon the ship. Molloy, 236, 244, 250; 1 Salk. 33. So that the owner, being no party to the articles, cannot by his engagement alter the terms thereof, or qualify their construction. That although Captain Scott was present and heard the assurances given by the owner to the libellants, yet, as he did not himself expressly join in those assurances, the penalty on a breach of the arti-

[2] John Winters, one of the libellants, was alone able to give the usual security on instituting the suit; but it was agreed by counsel, that the issue of the cause with respect to him, should be conclusive as to the rest.

cles remains in full force against the mariners; and that these articles, like other contracts, ought to be strictly construed. And lastly, that their deserting the ship before the cargo was discharged, without the express permission of the captain, is of itself a forfeiture of wages by the plain and direct terms of the articles.

In attending to these facts and arguments, I find it necessary to observe that shipping articles, as they are usually drawn, fully express the duties and obligations on the part of the mariners, and the penalties they are liable to for non-performance, but on the part of the captain there is no stipulation mentioned, except the payment of monthly wages, which is made the sole consideration. But notwithstanding this silence of the articles, law and reason will imply sundry engagements of the captain to the mariners. Two of which are: First, that at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy; and, secondly, that the captain shall supply the mariners with good and sufficient provisions whilst they are in his service. I am far from wishing to intimate, that it is either necessary or proper that the merchant or captain should be obliged to exhibit to the mariners he engages, a list of his stores, to take their opinion whether they are sufficient or not; yet when from accidental neglect or otherwise, there is a manifest and visible deficiency, the mariners may reasonably complain and remonstrate—as in the present case, when the seamen were obliged to go to the main-top to command those ropes which are usually within reach from the deck, and there could not be found on board a sufficiency of spare rigging to supply the defect. I think such a vessel cannot be said to be duly furnished for a voyage, according to the implied contract of the captain. I say such a complaint may reasonably be made at the commencement of the voyage, whilst it is yet in the power of the captain to procure all necessaries; for when the ship is at sea, nothing but inability can excuse the mariner for a refusal of duty, whatever deficiencies may then occur, or be discovered. With respect to the objection made to the validity of the owner's promise, I would observe, that although the contract of the mariner is always with the captain by name, yet it is the owner who actually pays the wages; and it happens not unfrequently, that the owner engages the mariners before it is known, who the captain for the voyage will be. But the law makes no distinction; the mariner may sue either the ship, the captain, or the owner for wages duly earned, and a summary jurisdiction is allowed to him. But, to give full force to the argument, and suppose, that because the articles are made in the name of the captain, he alone could make the promise alluded to with effect, yet as Captain Scott stood by and heard the owner give these assurances to the libellants, and did not declare his dissent, it amounts to such a tacit acquiescence as ought in equity to be construed a confirmation of the engagement on his part. For it ought not to be supposed, that Captain Scott stood silent by, with a reserved determination that after the mariners should have performed the services of the voyage, he would cut them off from their wages, by disputing the authority of the owner to pardon a breach of the articles. To close this part of the subject.—Supposing the libellants to have been ever so reprehensible, and liable in damages for the delay they had occasioned, yet they could not by the terms of the articles, forfeit more wages than what were due at the time of committing the offence: for how can wages be forfeited which have not yet accrued?

I now come to the second charge laid against the libellants, viz. their leaving the ship at the conclusion of the voyage before the cargo was discharged, contrary to an express article in the contract. And here there can be no doubt but that the general maritime law, and the tenor of most, if not all shipping articles, requires that the mariner shall stay by the ship until her cargo is safely landed, under the penalty of forfeiting all the fruits of his preceding labour. if he wilfully and disobediently abandons his duty in this particular. But if the owner or captain, as is frequently the case, shall find it more for his interest to hire men on daily pay to unload the ship, than to keep the crew under monthly wages, and find them with provisions in port, he may certainly release the mariner from this part of his duty. This appears to me to have been the intention in the present case. No provisions were on board, nor any ordered for the use of the crew. The mariners, or some of them, repeatedly left and returned to the ship in the presence of the captain, without his expressing the least dissatisfaction at their conduct, or giving them any orders of duty. Men were hired by the day to discharge the cargo, without any intimation given to the libellants that this was done in consequence of their absence. And finally, some of the crew have been fully paid off, although under the same circumstances of conduct with the libellants. These strong marks of consent on the part of the captain, and more especially the total want of provisions on board, are sufficient, I think, to screen the libellants from being considered as deserters, so as to forfeit their wages. See the case of Swift v. The Happy Return [Case No. 13,697]. I adjudge and decree, that the libellants have and receive their wages to the third of September, instant; and that the respondents pay the costs of this suit.

DIXON (DELOACH v.). See Case No. 3,775.

Case No. 3,931.

DIXON v. MOYER.

[4 Wash. C. C. 68;[1] 1 Robb. Pat. Cas. 324.]

Circuit Court, D. Pennsylvania. April Term, 1821.

PATENTS—VALIDITY—WHAT SPECIFICATIONS MUST SHOW—INFRINGEMENT — DIFFERENCES IN FORM AND PROPORTION —ACTIONS — NOTICE OF PRIOR USE.

1. Upon the plea of not guilty the plaintiff must prove, not merely that the defendant had made a saddle described in his patent, but that it substantially resembled the invention of the plaintiff; and if the difference be in form and proportions only, they are the same.

[Cited in Whitney v. Emmett, Case No. 17,585.]

2. A patent cannot be said to be obtained in fraud of the right of another, who had given up his rights to the plaintiff, by expressly or tacitly permitting him to obtain a patent for it.

[Cited in Whitney v. Emmett, Case No. 17,585.]

3. It is contended that the plaintiff must date his right from the time of his application for the patent; the distinction is this, he must in all cases prove that the infringement of his right took place after his application or the date of his patent. But if the defendant attempts to avoid the patent by showing that the plaintiff was not the original discoverer, the patent will be considered as relating back to the original discovery.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 437.]

4. The specification must point out the new improvement of the patentee, so as to show in what the improvement consists; and it will not be sufficient that the same is shown on the trial by exhibiting the invention.

5. Upon a notice of the invention confined to a prior use in the United States, the court will not permit evidence to be given of a prior use in England.

[Cited in Brooks v. Jenkins, Case No. 1,953.]

This is an action [at law] for violation of a patent right, for a new and useful improvement in manufacturing men's and women's saddles, without saddle trees [granted to P. Dixon, July 16, 1819]. The schedule states, that "the pad is first cut out, and made in any shape thought proper. The part of a pad usually covered with a saddle tree, is then covered with a piece of thick leather. A piece of web is then sewn across the pad, over the thick leather, sufficiently wide for the girth straps to be attached to it. A cantle of very strong leather is then put on, and secured to the pad. A plate of iron is then put across the head of the pad, to which the stirrup bars are riveted. This plate goes into case loops, made on each side of the pad; and the extremities of the plate are tied in the loops to prevent them from working. A seat cloth is then put on, in the same manner as in the common saddle, in which the saddletree is used. The seat is then stuffed and set. The leather for the seat is then drawn over it, and the skirts fitted, as in a common saddle. The seat is then taken off and seamed to the skirts; the flaps are cut out, and instead of being nailed, are sewed to the skirts, a little below the welt of the seat. The seat is then drawn on, and instead of being nailed, as in the common saddle, it is sewed. The saddle, thus made, resembles in appearance the common saddle in which the saddletree is used. It is capable of enduring as much hard usage as the common saddle, and is much easier to the rider, and safer to the horse." The patent bears date the 16th of July, 1819; but it was proved that the plaintiff had a saddle of the kind above described, made in his shop about the latter end of May preceding. It was also proved that the defendant made and sold saddles without trees, and with skirts and flaps, after the date of the plaintiff's patent, and before the commencement of the suit. In support of the notice given to the plaintiff, "that the defendant would give in evidence under the general issue that the saddle for which the plaintiff had obtained a patent, was not originally discovered by him, but had been in use in various places within the United States, and that the plaintiff had surreptitiously patented the discovery of another person;" witnesses were examined, who proved, that a saddle, substantially like the plaintiff's, was made and sold by a Mr. Andrews, on or just before the 15th of July 1819; and that another was made by Hudson, and sold on the 28th of May: and it was further proved, that another saddle had been made in the month of April preceding, differing from the plaintiff's only in the circumstance, that the pad and skirts of that saddle were fastened together. It further appeared, that one Wimbly, a journeyman in the plaintiff's shop, suggested the improvement for which the patent was obtained; but that he made no application himself for a patent; on the contrary, he asked the plaintiff, if he (the plaintiff) could obtain a patent for the discovery, and that he took charge of the shop whilst the plaintiff went to Washington to obtain the patent. Many witnesses were examined upon the subjects of identity on the plaintiff's and defendant's saddles, and originality of discovery. Upon the first point, the witnesses pointed out some differences between the two saddles, in the manner of making them, and in their external appearances, but both of them were made with skirts and flaps, and without trees. The skirts in the defendant's saddle were so fastened as to answer as a substitute for the draw-down in the plaintiff's, for confining the seat. Upon the second point it was proved, that the pad saddles without saddle trees or skirts and flaps, had been in use long before the 16th of July, 1819, and that the common tree saddles with skirts and flaps, were as old as the memory of the witness could reach.

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

Phillips, for the defendant, contended: 1. That the defendant was not guilty of having invaded the plaintiff's patent, inasmuch as the saddles which he had made, differed in many respects from the one described in the specification, and shown in court. 2. That the plaintiff's discovery is nothing more than a combination of old materials, without any thing new; or, if there be any thing new, the specification does not distinguish the old from the new, or state in what the improvement consists. 1 Mass. 182; 3 Wheat. [16 U. S.] Append. 21. 3. That the plaintiff was not the first inventor of this saddle, but the same was in use prior to the date of the patent, which he insisted was the only date to be regarded; or if the plaintiff has a right to go back to the time of discovery, which was the latter end of May, still the same kind of saddle had been previously made and used. 3 Inst. 184; Wood v. Zimmer, 1 Holt, N. P. 58. 4. That the discovery if it be one, was made by Wimbly: who not having assigned his right to the plaintiff, his obtaining a patent was surreptitious, in relation to Wimbly; and for this reason also the patent is void.

C. J. Ingersoll, for plaintiff, combated the points made by the defendant's counsel; and in reference to the second, insisted, that the specification sufficiently describes the improvement, and distinguishes the old from the new materials; but that even if it does not, the defendant cannot avail himself of defects in the specification under the general issue, and without also showing that they were introduced for the purpose of deceiving the public; and finally, that artists only are competent to say whether the specification is sufficiently explicit, to enable one skilled in the art to make such a saddle as is there described.

WASHINGTON, Circuit Justice. Upon the plea of not guilty, it is incumbent on the plaintiff to prove, not merely that the defendant had made, used, or sold a saddle; but that it substantially resembled the one for which the plaintiff has obtained his patent. And if the difference between them be only in form, or proportions, they are the same in legal contemplation; since to permit the defendant to shelter himself under a mere formal difference, would be to sanction a fraudulent evasion of the plaintiff's right, and to render the patent law a dead letter. The second section of the patent law, which declares that simply changing the form or proportions of any machine, or composition of matter, shall not be deemed a discovery, affords a sensible and a just rule, equally applicable to an art or manufacture, and has always been so considered and treated. In actions of this kind, persons acquainted with the particular art to which the controversy relates are usually examined for the purpose of pointing out and explaining to the jury the points of resemblance, or of difference, between the thing patented, and that which is the alleged cause of the controversy; and the opinions of such witnesses, in relation to the materiality of apparent differences, are always entitled to great respect. But after all, the jury must judge for themselves, as well upon the information so given to them, as upon their own view, where the articles, or models of them, are brought into court. The witnesses, who testified in this case, did not entirely agree in opinion as to the nature of the difference between the plaintiff's and the defendant's saddles. Most of them however stated, that it consisted in the workmanship bestowed upon the saddles, and upon their external appearance. You have had an opportunity of examining them, and must decide whether they are, or are not substantially the same. If they are, the plaintiff has made out his case on the general issue; since it is not denied that the defendant had made and used saddles similar to those produced in court, subsequent to the 16th of July, 1819, and before the institution of this action. Another objection to the plaintiff's right of recovery arises out of the special matter given in evidence, of which notice was given by the defendant to the plaintiff. It is, that the plaintiff surreptitiously obtained this patent for a discovery of one Wimbly, who worked as a journeyman in his shop. If the jury are satisfied that the discovery was in reality made by Wimbly, they must be also satisfied that the patent was obtained in fraud of any right which such discovery bestowed upon Wimbly. For if, upon the evidence, you should be of opinion, that Wimbly gave up his right of discovery to the plaintiff, by expressly or impliedly permitting him to encounter the trouble and expense of obtaining a patent, it cannot be affirmed that the plaintiff obtained the patent surreptitiously, or in fraud of Wimbly's discovery.

The next inqury is, whether the saddle for which the plaintiff has obtained a patent, was in use prior to his alleged discovery. The patent bears date the 16th of July, 1819; and Taylor, one of the witnesses, has deposed that the first saddle made in the plaintiff's shop, upon which the patent was obtained, was about the latter end of May preceding. Hudson swears that he made a saddle like the plaintiff's, and sold it on the 28th of May, 1819; and Andrews swears, that he saw a saddle substantially the same, except that the skirts and pad were fastened together, in April of the same year. It is contended by the defendant's counsel, that the plaintiff's right is to date from the time when he applied for the patent, which for any thing that appears to the contrary, should be considered as having happened on the same day on which the patent issued. If so, then Hudson's saddle was made and sold before the plaintiff's title accrued. But the court cannot yield its assent to the doctrine of the defendant's counsel. It is incumbent on the plaintiff to show, that the infringement took

place after the time of his application, or the date of his patent. But, if the defendant attempts to avoid the patent by showing that the patentee was not the original discoverer of the thing patented, the patent will be considered as relating back to the original discovery. The notice authorized to be given by the sixth section of the law is, that the plaintiff was not the original discoverer, but that the thing patented had been in use, &c., anterior to the supposed discovery of the patentee. Taking it for granted that this patent is to date from the latter end of May, there would be some difficuly in deciding the question of priority between the plaintiff and Hudson, whose saddle was made also the latter end of May. Did the cause turn on this point, the jury should require the defendant to clear up their doubts, by satisfying them that the right of priority was due to Hudson; because upon that fact he grounds the defence, and in his notice he undertakes to establish it. But at all events, if the evidence of Andrews be believed by the jury, and if they are also of opinion that the connecting of the skirts to the pad of the saddle, spoken of by this witness, is a mere difference in form from the patented saddle, the plaintiff cannot be considered as an original discoverer. This, if so found by the jury, is fatal to the plaintiff's right.

The last objection, or the second made by the defendant, is, we think, fully made out, and is not less fatal to the plaintiff's recovery. This is founded on the imperfect description of the thing patented, given in the specification. It professes to be an improvement in the manufacturing of saddles without trees. The materials and the manner of making the saddles described are all old, or if there be any thing new in the combination, or in the application of the old to the new, they are not distinguished; nor does the specification describe, or attempt to describe in what the improvement consists. It is quite impossible to say, whether it consists in substituting some other material for the tree, so as to constitute an improvement of the old saddle tree; or in adding skirts and flaps to the pad saddle, which was in use long before the date of the plaintiff's discovery, and was made without trees; or whether it consists in all, or any of the other described operations in the making of saddles. If in all, then the patent is broader than the discovery, since it is clear that the materials, as well as the process in the manufacture, described in the specification, are old. If the improvement consists in any one or more of the particulars set forth in the specification, it ought to have been so stated, in order that other persons might have known how to avoid any infringement of the plaintiff's right; and that the public might have the benefit of the discovery, by referring to the specification itself, after the expiration of the plaintiff's monopoly. It is not enough for the plaintiff's counsel or the witnesses to point out at the trial, or even for the jury to perceive by examination of the thing patented, and comparing it with others before in use, what it is that constitutes the improvement. This would afford no advantage to third persons, and least of all would it afford consolation to the defendant, who, if he has offended at all, did it innocently, and through ignorance, and can make atonement in no other way, but by submitting to the penalty which the law imposes upon him, and the troubles and expense incident to litigation. Third persons wishing to avoid these consequences, can safely depend upon no other information than what the records of the secretary of state's office may afford. No description of the discovery secured by a patent will fulfil the demands of justice and of the law, but such as is of record there, and of which all the world may have the benefit. It was insisted by the plaintiff's counsel, that this specification is perfectly intelligible to an artist, who could experience no difficulty in making such a saddle as is there described; and that if it be not so, still the defendant cannot avail himself of the defect, unless he had stated it in his notice, and also proved at the trial an intention in the plaintiff to deceive the public. But these observations are all wide of the objection, which is not that the specification does not contain the whole truth relative to the discovery, or that it contains more than is necessary. It is admitted that the specification does not offend in either of these particulars. But the objection is, that throughout the whole of a very intelligible description of the mode of making the saddle, the patentee has not distinguished what was new, from what was old and before in use, nor pointed out in what particulars his improvement consisted. Upon this objection then, the verdict ought to be for the defendant, whatever the jury may think on the other points.[2]

Plaintiff suffered a nonsuit.

DIXON (POTTER v.). See Case No. 11,325.

Case No. 3,932.

DIXON v. RAMSAY.

[1 Cranch, C. C. 472.][1]

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

ACTION AGAINST EXECUTORS—PLEADING.

Counts charging the defendants as executors, upon the promise of their testator, and upon their own promise as executors, in consideration of assets, may be joined in the same declaration, and the judgment upon each count will be de bonis testatoris.

[2] The court refused to allow evidence to be given, to prove that saddles like the plaintiff's had been in use in England many years ago, the notice being special and confined to the alleged use within the United States.

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

The declaration contained six counts, but made no profert of the plaintiff's letters of administration. The 1st count was on the promise of the testator. 2d. Same, quantum valebant. 3d. Money had and received by the testator. 4th. A promise by the defendants as executors in consideration that testator was indebted and in consideration of assets. 5th. Insimul computasset, and a similar promise by the defendants as executors in consideration of assets. 6th. That two of the executors accounted as executors with plaintiff and a like promise. General demurrer to the declaration.

Mr. Taylor, for defendants, contended that the counts were such as cannot be joined, and that such misjoinder may be taken advantage of upon general demurrer, and so may the want of profert. The letters of administration are part of the plaintiff's title to recover, and without profert the defendant is not entitled to oyer of them. Before the statute, the want of profert was fatal on general demurrer, for it was matter of substance. Com. Dig. "Pleader," O 17. There is a difference between the Virginian and the English statute of jeofails. The Virginia act does not specify what shall not be fatal on general demurrer. It must, however, be the want of something necessary to the justice of the case. An account stated by executors, as executors, is a personal undertaking; where the default of the executor is the cause of action, the judgment is de bonis propriis. Com. Dig. "Pleader," 2 D 15. If the judgments upon the respective counts are to be against the defendants in different rights, the counts are incompatible, and there can be no correct judgment rendered upon them.

E. J. Lee, for plaintiff, cited the cases of Courtney v. Hunter [Case No. 3,285]; Henderson v. Parson's Ex'rs, at November term, 1805 (not reported); and Faxon v. Dyson [Case No. 4,705].

THE COURT (DUCKETT, Circuit Judge, absent), without hearing the other side, decided, upon the authority of those cases, that the judgment upon the demurrer ought to be for the plaintiff.

Case No. 3,933.

DIXON v. RAMSAY.

[1 Cranch, C. C. 496.][1]

Circuit Court, District of Columbia. July Term, 1808.

SALES OF LAND UNDER WILL.

The proceeds of sales of lands made under a will to pay debts are equitable assets.

Assumpsit. Plene administravit, and issue.

Mr. Taylor, for defendant, contended that, on the plea of plene administravit, the plaintiff could not give evidence of lands ordered by the will to be sold by the executor to pay debts, and sold accordingly. They are only assets in equity, and to be distributed pari passu.

C. Lee, for plaintiff. Money received for lands sold by executors, under a will devising them to be sold by executors to pay debts, is assets at law and not in equity. Burwell v. Corrant, Hardr. 405.

Mr. Taylor, in reply. The case in Hardres is not now law. Courts have leaned to the other side, and rather consider them equitable than legal assets. If equitable they cannot be given in evidence in a suit at law. 6 Bac. Abr. 537, tit. "Exectors," H. Gwillim's note; Toll. Ex'rs, 328; Newton v. Bennet, 1 Brown, Ch. 135; Silk v. Prime, Id. 138; 2 Fonbl. Eq. bk. 4, pt. 2, c. 2, § 1, note d; Harg. Co. Litt. 113, note 2; Freemoult v. Dedire, 1 P. Wms. 430; Batson v. Lindegreen, 2 Brown, Ch. 94; Prowse v. Abingdon, 1 Atk. 484.

C. Lee, contra. On plene administravit the defendant must show that he has fully administered equitable as well as legal assets. The plaintiff is a simple contract creditor; if he had been a specialty creditor it might possibly be otherwise. The cases are contradictory. Toll. Ex'rs, 331; Blatch v. Wilder, 1 Atk. 420.

THE COURT (nem. con.) was of opinion that the money arising from the sale of the land was equitable and not legal assets, and that the defendant was only bound to account for legal assets in this case.

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

Case No. 3,934.

DIXON et al. v. UNITED STATES.

[1 Brock. 177.][1]

Circuit Court, D. Virginia. May Term, 1811.

EMBARGO BONDS—DECLARATION UPON—VARIANCE—VALIDITY OF BOND AT COMMON LAW—STATUTORY REQUIREMENTS—CONTRACT IN RESTRAINT OF TRADE.

1. The assignment of breaches in an action upon an embargo bond, is a part, and a very important part, of the declaration: and upon demurrer to the declaration, the plaintiffs' attorney will not be permitted to strike out the assignment of breaches, on the ground that the declaration is good without it. Such a course would not be tolerated in any court.

2. A variance between the declaration and bond, is an erroneous description of the instrument referred to, so that it does not appear to be the same when produced in evidence, either on oyer, or at the trial.

3. A bond made payable to "The United States of America," would, it seems, be binding at common law, for "The United States of America" is a corporation, endowed with the capacity to sue, and be sued, to convey and receive property.

[Cited in U. S. v. Ames, Case No. 14,441.]

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

4. The rule, that all contracts made in restraint of trade are void at common law, is founded upon the principle, that such contracts contravene the policy of the law; and, it seems, that this rule would not vitiate a contract in restraint of trade, entered into at a time when it was the policy of the law to impose restrictions upon commerce; consequently, that an embargo bond, made while the embargo laws were in force, would be binding as a common law bond.

5. An embargo bond made payable to the United States, is good, though the act directed that the master, &c., should give bond to the collector of the district from which the vessel was bound to depart, the proper construction of that act requiring, that the bond should be taken by the collector, but made payable to the United States.

6. A clause was inserted in an embargo bond, not authorised by the statute, and a condition was omitted, which the statute directed to be inserted. It seems: 1. That a statutory bond that contains more than the statute requires, is not vitiated by the surplus matter, but the court will reject the surplusage, as a mere nullity, and construe the bond as if such surplus matter were not contained in it. 2. That a statutory bond is vitiated by the omission of a material condition required by the statute, viz.; "dangers of the seas excepted." (See these two last positions, further examined, in U. S. v. ——, [Case No. 14,413], and reaffirmed; see, also, note 5 to the same case.)

[Distinguished in U. S. v. Mynderse, Case No. 15,851. Cited in U. S. v. Humason, Id. 15,-420.]

Writ of error from the district court of Norfolk. The United States brought an action of debt in that court, on an embargo bond, executed by the plaintiff in error, and others, which bond was in the words and figures following, to wit: "Know all men by these presents, that we, John Lewis, master of the ship, called the 'Adams,' of Boston, burthen 189 tons, licensed for the coasting trade, and William Dixon of Portsmouth, &c., are held and firmly bound, unto the United States of America, in the just and full sum of $23,900, to which payment well and truly to be made, &c. Whereas the following goods, wares and merchandise, that is to say, 10,000 staves, &c., as per manifest now delivered to the collector of customs for the district of Norfolk and Portsmouth, are intended to be transported in the said vessel, called the Adams, to the ports of Boston and Portland, in the state of ——: Now the condition of the above obligation is such, that if the said vessel shall not proceed to any foreign port or place, and the cargo aforesaid shall be relanded in some port of the United States, then the aforesaid obligation shall be void, otherwise to remain in full force." In the assignment of breaches, the plaintiffs averred that the condition of the bond had been broken in this, viz: that the cargo of the said vessel, "which was a vessel duly registered according to the laws of the United States," had not been relanded in any port of the United States. The defendant craved oyer of the bond, and demurred, and the plaintiffs joined in demurrer. The district court overruled the demurrer, and gave judgment for the plaintiffs, and the defendant obtained a writ of error to this court.[2]

MARSHALL, Circuit Justice. This cause comes on upon a demurrer to a declaration, assigning breaches of the condition of a bond of which oyer had been given. Previous to an investigation of the points supposed to arise, it becomes necessary to decide how much of the writing certified by the clerk of the district court is to be considered as essentially the record now before this court. By the attorney of the United States it has been contended, that he may strike out the assignment of breaches, and support his judgment upon the declaration, without that assignment. Consequently, that the case is to be considered as if no assignment of breaches was to be found in the record. If the demurrer should not be understood to confess a breach of the condition not shown by the declaration, it would follow that, strike out the assignment of breaches, and there is an end of the case. If the demurrer would be construed to confess a breach of the condition, still the assignment of breaches is a part of the declaration. It is an amendment of the declaration, and has the same effect, as if originally inserted in it. Can it be supposed that, where a part of the declaration discloses a fact which is cause of demurrer, the plaintiff, because he can support an action without such statement, may strike it out, and yet hold the

[2] It is essential to the clear comprehension and application of the reasoning of the chief justice, in the following opinion, that the following sections of the original and supplementary embargo acts should be inserted entire. The second section of the original act, passed on the 22d of December, 1807, declares: "That during the continuance of this act no registered or sea letter vessel, having on board goods, wares and merchandise, shall be allowed to depart from one port of the United States to any other within the same, unless the master, owner, consignee or factor of such vessel shall first give bond, with one or more sureties, to the collector of the district from which she is bound to depart, in a sum of double the value of the vessel and cargo, that the said goods, wares or merchandise shall be relanded in some port of the United States, dangers of the seas excepted; which bond, and also a certificate from the collector where the same may be relanded, shall, by the collector respectively, be transmitted to the secretary of the treasury. All armed vessels, possessing public commissions from any foreign power, are not to be considered as liable to the embargo laid by this act." 2 Story's Laws, 1071 [2 Stat. 451]. The first section of the supplementary embargo act, passed on the 9th of January, 1808, declares: "That during the continuance of the act to which this act is a supplement, no vessel licensed for the coasting trade shall be allowed to depart from any port of the United States, or shall receive a clearance, until the owner, consignee, agent or factor shall, with the master, give bond, with one or more sureties, to the United States, in a sum double the value of the vessel and cargo, that the vessel shall not proceed to any foreign port or place, and that the cargo shall be relanded in some port of the United States." 2 Story's Laws, 1071 [2 Stat. 453].

defendant to his demurrer? This would not be tolerated in any court. The assignment of breaches, therefore, is certainly a part, and a very essential part, of this record.

It is alleged by the plaintiffs in error, that there is a variance between the bond declared on, and that exhibited on oyer, which is fatal, and of which they may avail themselves on demurrer. That the law is as stated, I readily admit; but the fact of variance cannot be conceded. I understand a variance to be an erroneous description of the instrument referred to, so that it does not appear to be the same when produced in evidence, either on oyer or at the trial. In this case, the bond represents the vessel as a licensed vessel, and the declaration avers her to have been, in fact, a registered vessel. This averment in the declaration, however, is not in that part which professes to describe the bond. It is an extrinsic fact, which exhibits this case of a registered vessel, which has given a bond, stating her to be a licensed vessel. The question appears to be, not whether the bond be erroneously described, but how far such a bond conforms to the statute, and is binding on the obligors?

It is contended, on the part of the plaintiffs in error, that the bond is void. It is void, they say, at common law, because the United States of America, not being a natural but an artificial being, is incapable, at common law, of becoming a party to a contract. The United States of America will be admitted to be a corporation. But it is incidental to a corporation to sue and to be sued, to convey and to take property. Proper organs for conveying must certainly be provided before this power can be executed; but if it be incidental to this ideal being to receive, then a conveyance to it, or an obligation to it by its proper name, would be valid, unless there be no person to whom it can be delivered. A claim to the obligation, by the officer authorised by law to assert that claim, would seem to be sufficient evidence of assent to the contract, and if there be any person appointed to transact the particular business, a delivery to him would be a good delivery. The instances given to illustrate the position taken by the plaintiffs in error, are those of a corporation which has acted, not by its corporate name, or of a corporation that has expired, neither of which is supposed to be the fact in this case. A bond given to the people of the United States would, undoubtedly, be void at common law, and perhaps a bank whose charter had expired might no longer be capable of sustaining an action; but "The United States of America" is the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigour. The bond, it is said, is also void at common law, because it is made in restraint of trade, in restraint of common right. Had there been no act of congress prohibiting foreign trade, there would have been much force in this objection. But the rule relied on is founded on the principle, that the obligation is hostile to the policy of the law, that it surrenders legal rights, the exercise of which are conducive to the general interest. If the case be not within this principle, it is not within the rule to which the principle has given existence. If, at the time, the policy of the law restrained trade, a bond in restraint of trade would not seem to be void, unless it extended so far as to contravene the spirit and intention of the law.

But whatever may be the fate of the objections made to this instrument, as one resting on the common law, it is contended, that it does not conform to the statute, and, therefore, that it is not supported by it:

1. Because it is made payable to the United States, and not to the collector. The words of the act under which the bond is taken, require, that the bond shall be given to the collector of the district from which she is bound to depart. Original embargo act of December 22, 1807, § 2. It has been argued with considerable force, that the terms used, according to their natural meaning, import that the bond shall be payable to the collector; and this construction is the stronger because, in subsequent statutes on the same subject, the same terms are obviously used in the sense which the plaintiffs in error affix to them in this act. That this argument is correct in the fact it states, is admitted; but although the natural meaning of the words "give bond to the collector," be, that the bond should be made payable to the collector, yet it is not their necessary meaning; and if, upon a consideration of the whole subject, it be reasonable to suppose, that the legislature used them in a different sense, they ought to be construed according to that sense. The doctrine, that penal laws are to be construed strictly, does not oppose a liberal construction of this part of the act; for take it the one way or the other, and it does not render the law more or less penal. The words ought to be construed as they would have been construed before the execution of a bond.

The act itself furnishes motives for the opinion, that the legislature intended the bond to be taken by the collector, but to be made payable to the United States.

There is no clause in the act appropriating this penalty to the United States. Consequently, if made payable to the collector, it would be for his sole benefit. It being a penalty inflicted for a breach of the laws of the United States, there can be no reason for supposing that it would be bestowed entirely on the collector. The act provides, that the bond thus taken shall be transmitted to the secretary of the treasury. Why transmit it to the secretary, if it enured to the use of the collector only? The additional act, however, is deemed conclusive on

this point. That act declares, that in every case where a bond hath been given to the United States, under the act laying an embargo, a suit shall be instituted within four months, if a certificate of relanding the cargo be not produced. See additional embargo act of March 12, 1808, § 3; 2 Story's Laws, p. 1080, § 3 [2 Stat. 473]. Now, no bond is to be taken under the act laying an embargo, but those which are of the same description with that on which this suit is instituted. Consequently, the legislature contemplated this as a bond which was to be given to the United States, but delivered to the collector. Had this third section of the additional act been inserted in the original embargo act, the doubt would probably never have been suggested. It is not to be denied that, with respect to this bond, the case is to be considered as if the two acts had formed one act. In the case decided before Judge Washington (U. S. v. Hall, [Case No. 15,285]), in Pennsylvania, the bond was taken to the United States; and I recollect one case decided in the supreme court, on a bond taken under the same law, in the same manner (Id. 6 Cranch [10 U. S.] 171). In the case in the supreme court, this objection was not made. If it was made before Judge Washington, it was overruled.

2. But if the bond be admitted to pursue the statute, in being made payable to the United States, the condition varies essentially from it. A clause is inserted in the condition, not warranted by law, and an exception is made by the law which is not inserted in the condition.[3] The bond, therefore, does not pursue the statute. The question is, whether the variance be such as to avoid the bond as a statutory obligation? That the member of the condition not required by the statute, cannot be permitted to prejudice the obligors, is admitted by the attorney for the United States.[4] But he contends, that it cannot affect so much of the condition as pursues the statute. The plaintiffs in error insist, that it vitiates the whole bond, because it makes the instrument a different one from that which the collector was authorised to demand.

The cases adduced by neither party, appear to me to decide the question, nor have I been able to find one that does. If a statute render a bond void, which is taken for a particular object, and one be taken with a condition in part, for this illegal object, and in part for other objects not illegal, it is clear law, that the illegal part vitiates the whole instrument. It is also believed, that if a bond be given at common law, where both the obligor and obligee are free agents, acting for themselves on an equal footing, and a part of the condition be void, but there is no statute annulling the bond on account of that condition, the instrument is valid as to so much as is lawful. But the case of a bond, taken under a statute by an officer specially empowered to take it, and containing additional conditions not warranted by that statute, differs essentially from either of these cases. The general policy of the law must require that the statute should be pursued, and the nature of the case requires, that the power should be executed conformably to the act creating it. If the form of the bond and condition were prescribed, there could be no doubt of the necessity of pursuing that form strictly and literally. But the form of the condition is not prescribed, and it must be sufficient, that the bond conform substantially to the statute. But may the statute be exceeded? It would certainly be mischievous, to allow officers to insert in the bonds they are empowered to require, conditions not warranted by law. Although courts and lawyers may know that such conditions have no effect, obligors may not know it, and this abuse of official power may very materially affect the interest of individuals, who may regulate their conduct on the opinion, that they are bound to the full extent of the instrument they have executed. That, in this particular case, the condition inserted may not be in hostility to the general views of the legislature, cannot materially vary the question, for it is not warranted by the statute; and if the officer be at liberty, under the colour of office, to introduce such conditions as his own judgment may approve, then his judgment, and not the statute, becomes the director of his conduct. Yet it is going far to say, that, for the insertion of even a material condition, not warranted by law, not only the unauthorised condition, but the bond, in other respects lawful, becomes absolutely void.

This question, if considered in a general point of view, is, certainly, not without its difficulties. But there is a particular aspect belonging to the case itself which ought not to be entirely overlooked. It is said, that if this bond be void under the statute, it is good at common law. That is, that if the statute had directed no bond, still judgment might be obtained on this obligation, as on a voluntary contract by which the obligors bind themselves not to do an act

[3] It will be perceived that throughout this opinion, the bond on which the suit was brought, is treated by the chief justice as a bond taken under the 2d section of the original act, and not under the 1st section of the supplementary act (see these sections quoted, ante, p. 179): although, in point of fact, the condition of the bond conformed more nearly to the latter than to the former section. It is so treated, it is presumed, because the declaration having averred, that the vessel was a registered vessel, the demurrer to the declaration must be understood as admitting that she was truly described in the declaration. The condition inserted in the bond, not required by the original act was, that the vessel should not proceed to any foreign port or place, and the omitted condition was, "dangers of the seas excepted."

[4] U. S. v. Hipkin [Case No. 15,371], decided in the district court at Norfolk; the same concession was made by the district attorney.

which the policy of the law prohibits. If this argument be correct, then these obligors are liable at common law, under this bond, for the breach of that part of the condition which is now under consideration. The third section of the first supplemental act (2 Story's Laws, 1072, § 3) subjects the vessel and cargo to forfeiture, in the very case which this condition contemplates; and on a failure to seize them, renders the owner or owners, agent, freighter, or factor, liable for the double value. This forfeiture is not secured by bond. If then, for the fact of going to a foreign port, the obligors are liable at common law under this bond, and are also liable under the statute, this circumstance seems to strengthen very much the reasons for requiring, that bonds taken under colour of office should contain no condition not warranted by law. This condition is exceptionable in other respects. It omits the words, "dangers of the seas excepted." Original act of December 22, 1807, § 2. The attorney for the United States admits, that if these words be material, the omission is fatal. I should have been astonished had he not admitted it. But he contends that they are immaterial, because the law implies the exception. It is not to be doubted, that the law does imply, as an exception, any inevitable event which renders the performance of the condition impossible. This has been solemnly decided in the supreme court, in an embargo case. U. S. v. Hall, supra. But the plaintiffs in error have shown that the term "dangers of the seas," has a broader meaning than would be allowed to it if limited to those inevitable events which, being unmixed with human negligence, are ascribed to Providence. In construing this act, which is emphatically a penal law, since it punishes with extreme severity, transactions, which, independent of the statute, would be entirely innocent, those maxims which time has rendered venerable, and whose utility experience has confirmed, must be totally disregarded by the court, which would narrow the meaning of words in order to create the forfeiture.

If, then, the case rested entirely on the original act, I should without hesitation have pronounced the opinion, that these words were material, and that the omission was fatal. But the third section of the additional act, gives a legislative construction to the words "dangers of the sea" in the original act, which, with respect to bonds taken after the 12th of March, is to be taken into consideration. This law enacts, that if a certificate of relanding be not produced within four months, bonds taken under any of the embargo acts shall be put in suit, "and judgment shall be rendered against the defendants, unless proof be produced of such relanding, or of loss by sea, or other unavoidable accident." The word "other" certainly goes far to prove the sense of the legislature to be, that the loss by sea, to excuse the nonperformance of the condition of the bond, must be an unavoidable accident. But is a loss produced by unavoidable accident, in the sense of this law, synonymous with a loss produced by the act of God? This is not entirely clear. The object of the law is, not so much to secure the relanding of the goods in the United States, as to prevent their transportation to a foreign port. The relanding is a mean to secure this ultimate point, and with a view to it the law is framed. The words "unavoidable accident" may be construed, any accident which renders a breach of the condition inevitable, by rendering the relanding of the goods impossible, and which renders it also impossible to convey the goods to foreign ports. The word "unavoidable" is not attached to "loss by sea." It would seem, then, as if loss by sea would excuse the failure to reland, since relanding would be impossible, although, in bringing about that loss, something was to be ascribed to human negligence. If this be the correct construction of the act, that part of the condition which is required by law, and which is omitted, does not become entirely unimportant. Should a different construction be put on this section, it must yet be admitted to be a question of uncertain solution until the opinion of a court in the last resort shall be taken on it; and can an officer be permitted to vary the condition of a bond prescribed by law, in a point, the importance of which is so very doubtful? I do not rest on the circumstance that this act declares that judgment shall be rendered against the defendants unless loss be proved, and does not say that judgment shall be rendered for them, if such loss be proved, because I believe no court could hesitate in supplying those words.

There is still another part of this bond, which, in my judgment, deserves consideration. The vessel is averred in the declaration to have been a registered vessel, and the court must understand this to be the fact. If a licensed vessel, that part of the condition which stipulates that the vessel shall not proceed to any foreign port or place, conforms to the statute. It is, consequently, a material part of the condition which binds the obligors, unless they could be permitted to contradict their bond, and could be certain to find evidence to support their plea. These are difficulties to which the collector has no right, under the statute, to expose them. The obligors could escape the effect of this argument, only by maintaining that the bond is void as a bond given by a coasting vessel, because it does not appear to have been executed by the owner as well as the master. But the owner and master may be the same person. One court has already decided that this objection would not be valid, and I am not confident that other courts might not affirm the decision. If so, the condition which is introduced without the authority of law, is a ma-

terial one. But if these points could be decided against the defendants, it is, in my opinion, not for an officer taking a bond under a statute to exclude a condition prescribed by law, because, in his opinion, its insertion is useless. It is a point on which the judgment of the officer is not to be exercised; and whether right or wrong, the effect will be the same. He is a ministerial officer, whose business it is to pursue the statute, and if he fails to do so, the statute will not sanction his act. Although the operation of the bond should be the same, whether the condition prescribed by law be inserted or not, the law considers that condition as material, or it would not have been prescribed. The record, then, as it appears in this court, exhibits a bond not demandable under the statute from a registered vessel, which this is admitted to be, and a suit on such bond cannot be sustained under the statute. If, as is my present opinion, the whole penalty be recoverable in a suit on a statutory bond, yet it is not recoverable on a bond rendered valid only by the common law, and deriving no aid from the statute. This is a contract said to be good at common law, and if it be, then being a contract made in Virginia, the United States could only recover according to the laws of Virginia the damage actually sustained. In the judicial act it is declared, that, in such cases, the court shall give judgment only for so much as is equitable, which must, on the application of either party, be referred to a jury. But I am strongly inclined to the opinion that bonds taken to the government by one of its officers, to prevent the commission of an act rendered culpable by statute, if not valid under the statute, cannot be supported at common law, so as to recover damages. I can perceive no criterion by which damages may be ascertained. I am by no means clear in this opinion; but as the award of a writ of inquiry, with directions to consider the penalty as no guide to the jury in estimating damages, would be obviously a proceeding never contemplated by the law in these cases, I shall not award one, but shall sustain the demurrer.

DIXON (UNITED STATES v.). See Cases Nos. 14,968–14,970.

Case No. 3,935.

DIXON v. WASHINGTON.

[4 Cranch, C. C. 114.][1]

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

GAMING ORDINANCES—MAGISTRATE'S JURISDICTION—WARRANT—PRIOR CONVICTION OR ACQUITTAL—DAILY PENALTY.

The keeping of a faro-table, contrary to the by-law of the corporation of Washington of June 12th, 1830, is a single offence, although continued for many days. And although the penalty is $50 a day, yet as the prosecution must be before a single magistrate whose jurisdiction cannot exceed $50, no greater sum can be recovered upon any one warrant. A conviction or acquittal upon any such warrant is a bar to all acts of keeping prior to the issuing of such warrant. The day laid in the warrant is not material, so that the time actually proved, be subsequent to a former prosecution, (if there has been any such,) and before the issuing of the present warrant, and within the time of limitation. If the corporation would avail themselves of the daily penalty, they must issue their warrants daily.

Appeal from six judgments of a justice of the peace, upon six warrants for $50 each, for the penalty of the by-law of the 12th of June, 1830, for keeping a faro-table, on six consecutive days. The warrants were all issued on the 6th of October, 1830. The first was for keeping the faro-table on the 7th of September, 1830. The second for keeping it on the 8th of September. The third for keeping it on the 9th, &c. The words of the by-law are—"No E. O.," "faro," &c., "table or other device," &c., shall be set up, kept, or exhibited, in any part of this city, under a penalty of fifty dollars for every day or less time that each "E. O.," "faro," &c., "shall be so kept or exhibited; to be recovered before any single magistrate, of the person so setting up, keeping, or exhibiting the same."

Mr. Ashton, for appellee [Jacob Dixon], contended that each day's keeping constituted a whole and separate offence; otherwise the corporation could recover only a single penalty of $50, although the keeping should continue many days; for the penalty is to be recovered before a single magistrate whose jurisdiction in any one case is limited to that sum.

R. S. Coxe, contra. As the penalty is $50 for every day or less time, it may as well be contended that every minute constitutes a separate offence. If every day constitutes a separate offence, the day alleged in the warrant is material; for the offence of the 7th of September would not be the offence of the 8th of September.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent).

In this case, we are of opinion that the keeping of a faro-table, contrary to the by-law of the corporation of Washington of June 12th, 1830, is a single offence, although continued from day to day for many days, and that the amount of the penalty is to be regulated by the number of the days, reckoning $50 for each day. That all the keeping, previous to the issuing of the warant, constitutes but one offence, and therefore that the day, charged in the warrant, is immaterial, so that the time, actually proved, be subsequent to a former prosecution, (if there has been any such,) and before the issuing of the present warrant, and within the

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

time of limitation. By the by-law, the penalty is to be recovered before a single magistrate, and cannot be recovered in any other manner; and as the jurisdiction of causes by a single magistrate is limited to $50, a greater sum cannot be recovered in this suit; although a recovery in this suit will be a bar to all prosecution for acts, of keeping a faro-table, done previous to the issuing of this warrant. If new acts of keeping have been committed since the issuing of this warrant, they may be the subject of a new prosecution. The judgment in this cause must be affirmed with costs. In all the other cases, for acts done before the issuing of this warrant, the judgments must be reversed, with costs.

If the corporation wish to avail themselves of the daily penalty, they must issue their warrants daily.

Mr. Coxe suggested a doubt whether the court could give costs upon the reversal of the judgments; and the court said they would consider of it. See Ward v. Washington [Case No. 17,163], May term, 1832, where costs were given upon reversal, at the discretion of the court.

Case No. 3,936.

DIXON v. WATERS.

[2 Cranch, C. C. 527.][1]

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

COMPETENCY OF WITNESSES—REPLEVIN—LANDLORD'S BAILIFF.

If the defendant in replevin be the bailiff of the landlord, and is indemnified by him, he may be examined as a witness in the cause. Quaere.

[Cited in Hilton v. Beck, Case No. 6,509.]

Replevin; avowry for rent arrear.

Mr. Ashton, for defendant, moved the court to substitute Mr. Van Ness for the defendant Waters, the latter being only the bailiff of the former in a distress for rent.

The court refused (nem. con.), but on the trial, being pressed by the case of Wise v. Bowen [Case No. 17,905], decided at April term, 1821, the court (Morsell [Circuit Judge], contra) permitted the defendant, Waters, to testify as a witness, not perceiving any material difference in principle between this case and that of Wise v. Bowen, on that point. In that case the defendant, Bowen, a constable, had taken the property in execution. The plaintiff claimed the property and replevied it. The officer, upon receiving indemnity from the plaintiff in the execution, was permitted by the court to testify for himself (Cranch, Chief Judge, doubting).

MORSELL, Circuit Judge, said that he had concurred in the opinion of the court in the case of Wise v. Bowen [supra], because the officer was obliged, after receiving the indemnity, to take the goods in execution, and was merely a formal party to the suit, which differs in that case from this, where the defendant is a voluntary bailiff, and not bound by official duty to make the distress.

CRANCH, Chief Judge, said that he should probably have been of the same opinion with MORSELL, J., if he had known that he did not concur with THRUSTON, J., in the present case; as he had doubted of the propriety of the opinion in the case of Wise v. Bowen; and thought the point ought to be reconsidered.

Verdict for the plaintiff.

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

DIXON (WOOD v.). See Case No. 17,943.

Case No. 3,937.

DIXWELL et al. v. JONES.[1]

[2 Dill. 184.][2]

Circuit Court, E. D. Missouri. 1873.

ACTION TO RECOVER PERSONAL PROPERTY—WHEN MAINTAINABLE—PROPERTY DISTRAINED BY TAX COLLECTOR—RIGHTS OF MORTGAGEE — FEDERAL COURTS.

[1. In a proceeding to recover possession of personal property, in the mode prescribed by the Missouri statute, the rule is the same as in the old action of replevin; namely, the plaintiff must show a general or special property in the goods and the right of an immediate and exclusive possession. Gray v. Parker, 38 Mo. 160, followed.]

[2. A mortgagee of personal property, who has no right of immediate and exclusive possession, cannot maintain replevin against a tax collector who has seized the property as by distraint for taxes due from the mortgagor; and it is immaterial that the assessment was irregular or void ab initio.]

[3. As a general rule, replevin is not the proper mode of testing the regularity of tax assessments: and when property has been seized, whether under a warrant of distress or by other warrant issued to enforce collection of taxes, it is in custodia legis, and irrepleviable.]

[4. A federal court will not go beyond the questions necessary to the decision of the case before it, for the purpose of construing state constitutions with reference to state legislation and the acts of state authorities, more especially when the question affects the revenues of the state and its mode of raising and collecting the same. See Union Pac. R. Co. v. Lincoln Co., Case No. 14,379.]

The plaintiffs were the mortgagees of property for the benefit of bondholders. The mortgage was executed by the South Pacific Railroad Company, and the property mortgaged is now owned by the Atlantic & Pacific Railroad Company. Jones, the defendant, as sheriff of Franklin county, seized the property for taxes due from the South Pacific Railroad Company, the mortgagor. The mortgagees, Dixwell & Bigelow, brought replevin, and the case was submitted to the court upon

[1] [This case was originally published in 2 Dill. 184, as a note to Atlantic & P. R. Co. v. Cleino, Case No. 631.]

[2] [Reprinted by permission.]

an agreed statement of facts. The court gave judgment against the plaintiffs on the ground that they had no right to the present possession of the property.

D. T. Jewett and James Baker, for plaintiffs.

Thos. W. B. Crews and James S. Laurie, for defendant.

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

TREAT, District Judge. This is a suit brought by plaintiffs in the form prescribed by the Missouri statutes, to recover possession of personal property, the form of action being a substitute for the old action of replevin. The plaintiffs are mortgagees of property now owned by the Atlantic & Pacific Railroad, the mortgage in express terms giving to the mortgagor the right of possession until default in payment of the principal or interest of the mortgage debt. The doctrine in replevin is a familiar one, that plaintiff must not only have a general or special property in the goods and chattels, but also the right of immediate possession. The substituted mode of proceeding under the Missouri statute does not change the rule, for in Gray v. Parker, 38 Mo. 160, it is held that where plaintiff's title is denied, he must show a general or special property in the goods, and the right of an immediate and exclusive possession. It appears in this case that the plaintiffs have no such right of possession. They aver (as the statute requires) that they are the owners of the property, and make affidavit that it has not been seized under any process, execution, or attachment against the property of the plaintiffs. The property was seized, however, under process duly issued for the collection of county taxes, assessed against the Atlantic & Pacific Railroad, which corporation is the lawful successor of the mortgagor; and, hence, the question presented is, whether a mortgagee who has no present right of possession can maintain replevin against a tax collector who has seized the mortgagor's property as by distraint, to enforce the payment of taxes due. In the first place, the mortgagees in this case are not owners entitled to immediate or exclusive possession; and, secondly, it matters not that the process was not formally issued against their property, but was issued against the property of the mortgagor. There is no need of argument to show that a tax properly assessed against the property of a mortgagor in possession, who is also entitled to the immediate and exclusive possession, is valid and binding on said property, despite any claim a mortgagee may have in the property. In a narrow and restricted sense, or nominally, the process did not issue against the property of the plaintiffs, but really and actually the process was issued against their property, so far as they had any interest in it. Freeman v. Howe, 24 How. [65 U. S.] 451.

It is contended that the assessment was irregular, and therefore this court should pronounce the seizure wrongful or void. The supreme court has in many cases held directly the reverse. State v. Dulle, 48 Mo. 283; Mayor, etc., v. Opel, 49 Mo. 190; Walden v. Dudley, Id. 419. In 48 Mo. 283, that court held that whether the stock of shareholders was to be taxed, or the property of the corporation, was a question to be determined in the first instance by the assessing board, and that when the tax was assessed, whether in the one manner or the other, and the collector proceeded to distrain accordingly, he was not a trespasser, notwithstanding the mode of assessment was not regular. Indeed, it is obvious, as has been repeatedly decided in this class of cases, that when modes of assessment are prescribed, to be enforced by designated tribunals, whose decisions are subject to review in direct proceedings, and the proper tribunal has made an assessment which the collector enforces, no action will lie against the collector. Were this otherwise, there would be no safety for the collector, and no certainty or promptitude in the collection of the public revenues. This is illustrated in the cases just cited from the Missouri Reports, and also in Erskine v. Hohnbach (decided by the United States supreme court, 1871), 14 Wall. [81 U. S.] 613. See, also, Deshler v. Dodge, 16 How. [57 U. S.] 622; Dill. Mun. Corp. § 176, note. If, however, there is no authority to assess at all (as where the property is not taxable, or is exempt), it may be that the proceedings of the board of assessment being void, the collector would not in such case be protected. Under this rule it is urged that the process under which defendant acted was void, and consequently his seizure invalid. Counsel urged further, that by the act of March 10, 1871, the county board of equalization ceased to have any power to act in the premises. That act could hardly relate to any assessment for taxes in 1871, inasmuch as the returns, etc., prescribed by it are to be made thereafter on the first of February of each year, and to a different board, for the first time created by that statute.

The principal purpose plaintiff's counsel had in view, as stated by him to the court, was to procure a decision on the main question concerning the exemption of the Atlantic & Pacific Railroad Company, as the successor of the South Pacific Company, from state and other taxation, notwithstanding the forfeitures and sales mentioned and the provisions of the state constitution of 1865. It is obvious, from the views already expressed, that no opinion on that point is necessary to the determination of this case, and, consequently, a labored analysis of the various statutes and acts done thereunder, and the effect of the new constitution with reference thereto, would be entirely superfluous. It does not become United States courts to travel beyond the requirements of suits pending in them, for the purpose of construing state constitutions with

reference to state legislation and the acts of state authorities, more especially when the questions affect the revenues of a state and its mode of raising and collecting the same. The harmony of our complex system of government can be better maintained by leaving the decision of all such questions, so far as practicable, with the proper judicial tribunals of the state. Union Pac. R. Co. v. Lincoln Co. [Case No. 14,379]. It may be stated as a general rule, supported by numerous authorities in England and this country, that replevin is not the proper mode of testing the regularity of tax assessments; and that when property has been seized, whether under a warrant of distress or other warrant, issued to enforce the payment of taxes, it is in custodia legis, and is irrepleviable. The reason generally stated is that the collection of the revenues of the country cannot be thus interrupted at the instance of any and every tax-payer, leaving, it may be, the government treasury exhausted pending the consequent litigation. Whether that rule prevails in full force in this state, as the language of the statute seems to imply, need not be decided in this case, because the plaintiffs have no right of immediate possession, and no right of exclusive possession of the property seized—indeed no present right of possession whatever; and, consequently, cannot maintain this action, whether the assessment was irregular, or void ab initio, or otherwise.

The next question is as to the judgment in this case. The plaintiffs have taken out of the possession of defendant property valued at $20,000, and have no right to the possession thereof. It may be that the mortgagor has such right as against this defendant, but the latter is responsible to the real party in interest, viz.: the mortgagor. If the defendant has seized, rightfully, the property in question, for taxes, amounting to some $8,000, and the same should be sold by him for its value, viz. $20 000, the surplus over the amount for which distraint was made, he would be liable to pay over to the mortgagor. The mortgagee, however, is not entitled to the possession of the property, nor to the surplus after the distraint is satisfied. This is not a case between general and special owner, and is, therefore, not within the decisions referred to. But inasmuch as this seems to have been a case in which the mortgagees appeared for the benefit of the mortgagor, the court will, on the suggestion of the attorney for both mortgagor and mortgagee, render judgment for the return of the property replevied on payment of the amount of taxes, with interest, for which the defendant made his seizure. What the remedies of the mortgagor may have been, or may be, is not a subject of inquiry in this case, or between the parties to this record. Judgment for the defendant.

NOTE. In First Division of St. Paul, etc., R. Co. v. Parcher (1869) 14 Minn. 297 [Gil. 224], an immunity from taxation in the original charter of a railroad company was held to accompany lands transferred by the state (after a foreclosure of a lien in its favor) to a new corporation. See, also, County Com'rs v. Franklin R. Co., 34 Md. 159; Tomlinson v. Branch, 15 Wall. [82 U. S.] 460; Wilmington R. Co. v. Reid [13 Wall (80 U. S.) 264].

D'MEZA (MYERS v.). See Case No. 9,987.

Case No. 3,938.

The D. M. FRENCH.

[1 Lowell, 43.][1]

District Court, D. Massachusetts. Jan., 1865.

MARITIME LIENS—LACHES—BONA FIDE PURCHASERS.

1. Secret liens must be enforced with reasonable diligence as against bonâ fide purchasers without notice.

[Cited in The Bristol, 11 Fed. 163.]

2. Where a vessel, owned in New Jersey, became subject to a lien for damage by collision, to a vessel owned in Boston, and afterwards came within this judicial district on three voyages, one of which arrivals was known to the libellants; and was then nearly four years after the collision, sold to bona fide purchasers without notice: *Held*, that a libel in rem, filed four years and one month after the collision, was too late.

[Cited in The C. N. Johnson, 19 Fed. 784.]

3. A sale by one of the original purchasers to another of them, of part of the vessel, pending the collision cause, will not affect that share with a liability to which it was not subject in the hands of the seller.

C. G. Thomas, for libellants.

H. A. Scudder, for claimants.

LOWELL, District Judge. This is a cause of damage promoted by the owners of a ballast sloop against the schooner D. M. French, for a collision which took place in that part of the harbor of Boston called "The Narrows," in August, 1858. The sloop was sunk and became a total loss, and her master and part-owner was drowned. The libel was filed in September, 1862. The case is one of great hardship for the libellants, who are poor; and if the facts of the collision are such as they allege, about which, however, there is much conflict of evidence, they would have been entitled to recover all their pecuniary losses by this disaster, in a court of admiralty, had their libel been brought in due season.

But they have applied to the court too late. A little more than four years had passed after the damage was sustained, before their libel was filed. In the mean time, and near the end of that period, the claimants had bought the schooner, for a full price, in good faith, and without notice of any liens, or any reason to suspect the existence of any. This is proved beyond controversy. It is the policy of courts of admiralty to require that secret liens shall be enforced within a reasonable time;

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

and if this be not done it is at the risk of the lien-holder; and this for the same obvious reasons which have induced all nations to require the record or publication of liens, such as mortgages, etc., wherever this course is practicable. Where no injury would result from granting the remedy, and there is reason to believe that no evidence has been lost by the delay, the holders may sustain a suit after a very considerable period, even, in the United States, after the lapse of the time prescribed by the statutes of the state as a peremptory bar to similar actions. But when there is danger of injustice between the parties, or the rights of innocent third persons will be affected, the rule of diligence is held in its strictness. A rather striking case of this kind is The Royal Arch, Swab. 269.

What is a reasonable time, must, of course, depend upon the circumstances of each case. As far as any general rule has been adopted it is, perhaps, that the lien will be presumed to be waived, as against innocent third parties, if a fair opportunity for its enforcement has not been availed of. See The Lillie Mills [Case No. 8,352]; The Eliza Jane [Id. 4,363]; Stillman v. The Buckeye State [Id. 13,445]. And so of a mortgage which the holder has neglected to record. The Romp [Id. 12,030]. The cases in which the secret lien has been upheld after a considerable lapse of time, proceed upon the ground, that the first proper occasion has been used in prosecuting it. The Mary [Id. 9,186]; Cole v. The Atlantic [Id. 2,976]; The Rebecca [Id. 11,619]. No very exact line of distinction is adopted between the different classes of secret liens; but bottomry holders are expected, from the nature of their contract, to proceed with peculiar diligence; and a like rule would perhaps be applied to salvors, whose delay might seriously embarrass the necessary adjustment between contributory interests.

In this case the schooner was owned in New Jersey, and her name and that of her home port were painted on her stern, and were seen by two of the libellants; for though one of them desires to have it understood that he knew only the name of the town, but not of the state, it is apparent from other parts of his evidence that he must have been aware of that also. And the other libellant does not deny full knowledge. This schooner, thus owned in a town easily accessible from Boston by railroad, came to the port of Salem, in this district, on the voyage immediately after the collision. This fact was known to the libellants, and they sent a person to Salem to look for her. The evidence does not show what the agent did, or why he failed to effect a settlement of the damages, nor why this action was not entered at that time. Afterwards, and not long before the sale of the schooner, she brought a cargo to Fall River, and was there for six days; and she soon after lay at New Bedford for a like period.

Whether, with the modes of communication now within reach of every one, lien-holders might not be required to follow a vessel from Massachusetts to New Jersey, at the risk of losing their privilege, I am not called on to decide, because I feel bound to hold that these libellants have lost their remedy against the vessel in competition with innocent purchasers, by neglecting to proceed when the schooner was known to them to be within reach of the process of this court. See the cases above cited, and The Admiral [Id. 84]; The General Jackson [Id. 5,314]; The Hercyna, Stu. Adm. 274.

It was proved that one of the claimants has, pending this suit, sold his interest to another of them, both having been, originally, bona fide purchasers without notice. It was argued that, so far as this fraction was concerned, the present holder could not have the benefit of the rule in favor of purchasers. But the answer is obvious, that this suit depends upon the state of facts which existed when it was instituted. And this not only technically, but for reasons of substantial justice. The rule is well settled that a person who has bought in good faith, without notice of an equity, and thereby holds a good title, can convey an equally good title to any purchaser, whether that purchaser have notice of the equity or not. Story, Eq. § 1503a. Were it otherwise, the title which the law holds good might be wholly valueless to the owner; for when any event has happened, which is notice to all the world, he could not sell at all. The trifling discount which was allowed in this case, if any was allowed, which is not certain, stood for a sort of premium or guarantee of what the decision of this case would be. The price represented the value of the property in the hands of the seller, and not a supposed diminution of value caused by the act of selling. Decree for the claimants.

Case No. 3,939.

The D. M. HALL v. The JOHN LAND.

[Hoff. Op. 96.]

District Court, N. D. California. Sept. 6, 1855.

SALVAGE COMPENSATION — RIGHT OF CREW OF SALVED VESSEL TO PARTICIPATE — MISCONDUCT OF SALVORS.

[1. The total amount awarded as salvage may be affected by the number entitled to share therein.]

[Contra, see Currie v. The Josiah Hathorn, Case No. 3,491a.]

[2. The transfer of the crew of a vessel in imminent peril to another vessel, pursuant to an agreement of the respective captains, does not so dissolve the contract as to entitle them to salvage for subsequent labors in saving the distressed vessel according to the agreement. The Blaireau, 2 Cranch (6 U. S.) 240; The Two Catherines, Case No. 14,288; Taylor v. The Cato, Id. 13,786; and The Florence, 20 Eng. Law & Eq. 607, distinguished.]

[3. The bona fide adoption of a certain course by salvors entitles them to compensation for work actually done in pursuance thereof, although it may subsequently appear that another course would have been better.]

[4. The amount awarded for salvage services should be more than a compensation for the mere labor employed in effecting them.]

[5. Slight misconduct of salvors under great provocation, and not resulting in any loss to claimants, should not reduce the amount of salvage.]

[6. Avarice and hard dealing by a salvor should reduce, and extraordinary energy should increase, the amount of his compensation.]

[7. $60,000 allowed upon a valuation of $260,000, where the salving vessel abandoned a whaling cruise at its commencement, and spent about nine months in rendering the service, bringing the salved ship into port, and enforcing the claim.]

[This was a libel by the owners and mariners of the bark D. M. Hall against the ship John Land and cargo for salvage.]

Hall McAllister, William Barber, and J. B. Manchester, for libelants.

Eugene Casserly and J. P. Haven, for claimants.

Before HOFFMAN, District Judge.

Before proceeding to a consideration of the merits of this case, it is fit that I should acknowledge my obligations to the counsel concerned in it. Not only have the books been explored by them with untiring industry, and every case brought to my notice by which my judgment might be assisted, but the voluminous testimony in the cause has been analyzed and digested, and every view of the facts presented which zeal and ingenuity could suggest. I do not propose, however, to enter into an investigation of every contested fact, for I feel assured that in cases like the present, the court must be guided in forming its judgment by a general consideration of the important features of the case, rather than by a minute examination of its details.

The facts of the case are briefly as follows: On the 15th of November, 1854, the John Land, a large clipper ship, with a valuable cargo, while on a voyage from Boston to this port, and in latitude about 4° S., and longitude 103° or 104° W., was discovered to be leaking badly. Attempts were made to discover and stop the leak, but without success, and preparations were made to abandon the ship, should such a step become necessary. During the 15th and 16th, the pumps were kept constantly going, and the crew had, by the morning of the 17th, become greatly fatigued, if not exhausted, by their protracted and severe labor. The situation of the John Land was thus rendered in a high degree perilous, not only from the great danger to which a storm would expose her, but from the inability of her crew (a fact demonstrated by subsequent events) long to endure the labor necessary to keep her afloat. On the morning of the 17th, a sail was descried, and after coming up with her, an officer was sent on board to demand assistance. The vessel proved to be the D. M. Hall, Spencer Pratt, master. Capt. Pratt, pursuant to the request of Capt. Percival, master of the John Land, repaired on board the latter's ship with a view of ascertaining his situation, and, it is to be hoped, offering him assistance. Much testimony was taken to show precisely what passed at the interview between the two captains, but the general nature of the propositions, or rather demands, made by Pratt, seems to me incontestably established. After some discussion he announced to Capt. Percival his resolution to afford him assistance on one condition only, viz.: that he, Capt. Percival, should surrender to him, Pratt, his vessel and her entire cargo, and should go with his officers and crew on board the D. M. Hall, and assist in working her into some port. To this demand Capt. Percival was, of course, reluctant to submit, and after some discussion and conferences with the crew of the John Land, Capt. Pratt, desirous of putting an end to the indecision, informed Capt. Percival that he was about to return to his ship, and on reaching her would set his colors, and that if in 15 minutes thereafter Capt. Percival did not set his colors in token that the terms were acceded to, he, Capt. Pratt, would brace forward and go about his business. Capt. Percival, placed in this trying and cruel dilemma, had to choose between being abandoned on the ocean, and at the distance of more than a thousand miles from land, in a leaky ship, and with a crew which must soon be incapable of further exertion at the pumps, or on the other hand surrendering at once his command, his vessel and his cargo to the stranger, whom chance had thrown in his way. After some hesitation, Capt. Percival determined to accept the latter alternative, and the signal agreed on was accordingly made. The crew of the D. M. Hall thereupon came on board the John Land, and Capt. Percival, his officers and crew, were transferred to the D. M. Hall. The counsel of Capt. Pratt, sensible how unfavorable an impression his conduct was likely to leave on the mind of the court, have endeavored, with much ingenuity, to excuse, if not to justify it. It is contended that the proposition made by Percival, that Pratt should lie by him for twenty-four hours, was obviously absurd; that a delay of twenty-four hours could have been of no service to either party; that the condition of the ship was well ascertained, and that the expectant course proposed by Percival could have produced no beneficial results. They insist that Capt. Pratt was entitled to say in what manner and on what terms he would render the assistance required; and that the object of Capt. Percival was to restrict Capt. Pratt's service to the lowest grade, and thus unreasonably diminish his claim to compensation. But, in reply to this, it is to be observed, that it is not Capt. Pratt's refusal to adopt Percival's suggestions, which exposes him to censure; but it is the fact that, profiting by the distresses which left those with whom he was dealing no alternative, he imposed upon them hard and cruel terms, suggested by an extortionate and rapacious spirit. Undoubtedly he had a right to say on what terms he

would assist them to save their vessel, but if, in exercising that right, he has taken an advantage of the necessities of others, he is liable to the censure and punishment of the court called upon to consider the merits of his services. But reluctant to believe that the master of an American whaler could have so coldly speculated upon the calamities of a countryman as to demand as the price of any assistance the absolute and final surrender to him of so much property of such great value, I have been induced to hope that Capt. Pratt's object may have been to secure to himself the possession of the ship and cargo, as a pledge and security of his future compensation, rather than with any intention of subsequently appropriating finally to himself. The slightest acquaintance with the law must have apprised him of the futility of such an attempt and his own reason must have told him that a claim to a ship and cargo, worth $280,000, as a reward for not having abandoned to their fate on the broad ocean a company of distressed mariners, would be rejected with indignation by the tribunals of every civilized nation. But, even adopting the more lenient construction of Capt. Pratt's conduct, it is impossible to justify it—and obliged as the court always is in salvage cases to consider not merely the value of the services, but the spirit in which they are rendered, and to enforce so far as it may by its judgment, the eternal principles of humanity and justice—it must mark by its decree its disapprobation of conduct, which, to say the least, is wholly destitute of that generosity, disinterestedness and "affecting chivalry," which give in these cases the strongest claim to its favorable consideration. Upon being transferred to the John Land, the crew of the D. M. Hall were placed under the command of Mr. Sanford, first officer of the latter, and the two vessels proceeded in company on the voyage to the Sandwich Islands. On the morning of the 19th, however, Mr. Sanford went on board the D. M. Hall and announced to Capt. Pratt that he was unable to proceed further without an additional force, as his men were fatigued by the severity of the labor. After some discussion, it was arranged that Capt. Percival should return to his ship with his crew and resume the command, that a portion of the cargo of the John Land should be put on board the D. M. Hall, and that the two crews should then endeavor to get the John Land into port. Under this arrangement the transhipment was commenced, and continued until the 20th, when a dispute arose between Capt. Percival and his crew, and the latter refused to work under his orders. Capt. Pratt, on being summoned on board, appears to have endeavored to adjust the quarrel, but the men persisting in their refusal, they were allowed to select by votes the officers under whom they would serve. Capt. Crosby, a passenger on board the John Land, was accordingly chosen as master. I think it but just to Capt. Pratt to observe that he seems to have acquiesced in this measure solely with a view of saving the ship, and because the services of the crew under any one they were willing to obey could not have been dispensed with. Nothing of importance occurred until the third day after. On that day Capt. Percival, against the wishes as it seems of Capt. Pratt and Mr. Sanford, went on board the John Land. What he said on reaching her deck cannot with certainty be ascertained from the evidence. But whether or not he ordered the pumps to be stopped, it is at least certain that he said or did something which had the effect of throwing everything into confusion. The men believing, as they swear, that some foul play was going on between the captains, ceased pumping, and prepared to abandon the John Land. Capt. Crosby went on board the D. M. Hall, and being persuaded by Pratt to return, he soon came back and reported the crew to be in such a condition as rendered it impossible and unsafe for him to resume the command. Capt. Pratt seems now to have almost abandoned the hope of saving the ship, and the appearances were certainly very discouraging. Mr. Stevens, however, who had been chosen by the crew to act as mate under Crosby, urged the crew to remain at the pumps while he should go on board the John Land [the D. M. Hall], and endeavor to make some satisfactory arrangement with the two captains. The crew intimated their willingness to help save the ship, provided some agreement was made or they could be satisfied that they would get something for their work. Fargo, one of their number, said to him, that they could work the vessel along without much trouble, if "Capt. Percival and his officers would keep away, and not keep making such confusion." Mr. Stevens accordingly went on board the John Land [the D. M. Hall], to have an interview with the captains, and the crew resumed their labor. Capt. Pratt, on learning from Mr. Stevens what he and the crew required, assented to his demand, and the original paper by which Percival had surrendered his ship to Pratt, was given to him with an indorsement upon it certifying to Capt. Percival's sanity. Upon receiving this paper, Stevens returned to the John Land, and read it to the crew, who declared themselves satisfied and willing to persevere in their labor. The ship continued her voyage, accompanied by the D. M. Hall, and arrived at Nukaheeva, about fifteen or sixteen days afterwards. Before reaching that place, Pratt and Percival both endeavored to persuade the men to continue on to Tahiti, but they declined to do so, declaring that they stood in absolute need of repose. On arriving at Nukaheeva, the command of the ship was restored to Percival, and, after some delay, she proceeded to Tahiti with him as master, Stevens as mate, Thatcher as second mate, and Barnes, third mate of the barque, as third mate. Her crew comprised, as before, the greater part of the crews of both ships. The voyage to Ta-

hiti lasted eight days. At Tahiti facilities for repairing her could be obtained. Her cargo was accordingly discharged and the leak was stopped. The salvage service of the libelants was now completed, but by the advice of the American consul, the master of the D. M. Hall proceeded to this port to obtain from this court the compensation to which he and his crew might be entitled. The John Land arrived here shortly after, and the present suit was instituted.

From the foregoing summary of the facts in this case, it is evident that the libelants performed a salvage service of a high degree of merit. Without their interposition the ship and her cargo must almost inevitably have been lost. The fact that Percival and his officers felt themselves constrained to accept the terms proposed by Pratt, is sufficient to demonstrate the perilousness of their situation; and it abundantly appears, from all the evidence, that the labors of the exhausted crew of the John Land could not have been long protracted, and that, in Capt. Percival's language, in a few days she must have sunk. The labor of the crew by whom she was saved, was arduous and long continued; and though their services cannot be deemed to have involved any considerable risk, or to have elicited any extraordinary display of gallantry, it exceeded in severity and in duration that of many salvors to whom the courts have allowed liberal compensation. The D. M. Hall was, as has been stated, a whaler, and had just arrived at the beginning of the season on whaling ground. By engaging in this service she was compelled to abandon her whaling voyage and relinquish the profits of that employ ment.

Before proceeding to fix the amount of salvage to be allowed in this case, it is proper to consider who are entitled to share in the amount awarded, for I cannot but consider that the question whether the compensation decrees be excessive or just, must depend in some degree upon the number of those who are to receive it, and what amount will fall to the share of each. It has been strenuously urged by the advocates for the crew of the John Land, that they are entitled to claim as salvors, and that as they participated in the labor, it would be unjust to refuse them a share in the reward. The claim of these seamen has been placed on the ground that their contract was dissolved, and they were discharged from any further duty as mariners, by their leaving the vessel with the consent of the master; that if they subsequently assisted in saving the ship, they did so as volunteer salvors, and, as such, are entitled to the reward. It is not denied that when the mariner's relation to the vessel has been dissolved de facto, or by operation of law, the circumstance that he has been a seaman on board of her will not preclude him from a salvage allowance. Such was the case of The Blaireau, 2 Cranch [6 U. S.] 240, where the master had abandoned the vessel with his whole crew, but had left, it would seem by design, one seaman on board. It was held that the master had discharged him from all further duty under his contract, as far as any act whatever could discharge him, and it little became those who devoted him to the waves to set up a title to his further services. So, too, in the case of The Florence, 20 Eng. Law & Eq. 607, where a ship was by order of the master abandoned, and her crew, which had been landed at Vigo, were by order of the British consul put on board a steamer to be taken home. On the day after leaving Vigo, the steamer fell in with the abandoned vessel, and the mate and part of the crew of the latter, thereupon volunteered to return to her; the master and the rest of the crew remained on board the steamer. It was held by Dr. Lushington, that the mate and seamen who thus volunteered were entitled to salvage. The principle established by this decision, as well as by that of The Two Catherines [Case No. 14,288], is that the character of seamen does not create an incapacity to assume that of salvors; and it was further held in The Florence [supra] that where a ship is abandoned at sea "sine spe revertendi aut recuperandi," in consequence of the perils of the sea, such abandonment being bona fide and by order of the master, to save life, the contract of the seaman is dissolved, and he may afterward assume the character of a salvor. In the case of Taylor v. The Cato [Case No. 13,786], the ship had been wholly abandoned, and her officers and crew taken on board the Alexandria. The latter then pursued her voyage, but six days afterward, by an extraordinary accident, fell in with the abandoned ship. The crew of the Cato assisted in saving part of her cargo, and were allowed a small salvage compensation.

It is apparent, that in the cases cited the vessel had been abandoned by the master and crew "sine spe revertendi aut recuperandi," and the contract of the latter dissolved. But the question is, was there such an abandonment in this case? It seems clear to me that there was not. The master, it is true, authorized the crew to go on board the saving ship, but did he mean to relinquish thereby all hope of ever regaining possession of his vessel? On the contrary, his object and intention were to secure her safety. He himself, or his crew, were, by the very nature of the arrangement, to contribute to the salvage, by working the ship on board which they went, and the crew of which were [to come] on board the John Land. So far from abandoning her, the vessel on which they were was to accompany the ship into port, and on arriving there, if not before, as proved to be the case, the master must have expected to regain his ship. To have supposed that by the temporary and forced surrender of his ship to Capt. Pratt,

he finally and forever lost all chance of recovering or returning to it, the master must have been strangely ignorant of his rights, and those of his owners. Nor can I conceive that even Capt. Pratt, or any of his crew, could have entertained so wild a notion. It is not the mere leaving a ship by authority of the master, that vacates the seamen's contract. In the case of shipwreck, when the crew have reached shore, the seamen are not at liberty to refuse further exertion, and disperse themselves over the country. They are bound to remain by the wreck, and assist in preserving the fragments. If they do so, they are entitled to their wages out of the savings. Whether this allowance should properly be deemed wages, or a salvage compensation, is disputed, and perhaps, as observed by Curtis (Merch. Seam. p. 2, 287), the distinction is but shadowy, for, in practice, the allowance rarely exceeds the amount which would have been earned as wages. The Two Catherines [supra]; The Cato [supra]; The Neptune, 1 Hagg. Adm. 227. If, then, leaving a shipwrecked vessel by the master's authority, and where irremediable disaster leaves no alternative, does not vacate the contract, the transfer of a crew to a saving ship, under circumstances like those of the present case, ought not to produce such an effect. If the rule of law which does not allow seamen to become salvors in the ordinary course of things, and while in the performance of their duties, whatever may have been the perils or hardships, or gallantry of their service in saving the ship and cargo, has any solid foundation in true policy, the same principle demands that they should not be permitted to assume that character on the ground that their contract has been vacated, except in extraordinary cases, where their relation to the vessel has been finally and unequivocally dissolved, and where the master has permanently renounced all hope of recovering or returning to her. Such is not the present case, and I am persuaded that I should violate the spirit which pervades the maritime law on the subject of the duties of seamen, if I should, under circumstances like the present, admit them as salvors, and thus in effect declare that in this case from the moment they left the ship they were at perfect liberty to disregard the orders of their officers, and to give or withhold their services at their pleasure.

The crew of the D. M. Hall being thus the only parties in court entitled to be deemed as salvors, the quantum of salvage remains to be considered. The counsel for these parties have argued that their allowance should be more than usually liberal, as the vessel was saved, contrary to the wishes and almost in spite of Capt. Percival. On reviewing of all the evidence as to Capt Percival's conduct, we have certainly need of all our charity to reconcile the language imputed to him with an intention fully to discharge his whole duty. But notwithstanding many wild and most improper expressions, I cannot bring myself to the conclusion that he ever deliberately wished for the destruction of his vessel. I rather incline to the belief, that overwhelmed by the extent of the disaster that had befallen him, and unable to contemplate with composure the probable results to himself, his reason may at times have been disturbed, and he may have been betrayed into incoherent expressions, the offspring of the distress of a spirit perplexed in the extreme, rather than the indications of the settled purpose of his mind. He may, perhaps, at moments when he realized most intensely the situation in which he was placed, have indulged and given utterance to the thought, that the waves which closed over his vessel would also bury beneath them the memory of any faults he might have committed, and that on his return home compassion would silence censure. That there was something in his manner and conduct which suggested the idea that he was not in his perfect mind is evident, not only from the expressions of the crew, but from the fact that a certificate of his sanity was signed by his own officers,—a circumstance which could hardly have occurred, if no suspicions to the contrary had been entertained. That he was not equal to the emergency which arose, cannot be doubted; but I prefer to think, that advanced in years, and with energies spent in the long service of a life, he succumbed to ill-fortune, rather than that he entertained the criminal purpose which some of the witnesses attributed to him. But in any view, I cannot think that his intentions or wishes can affect the merits of these salvors. Their duty was clear, and their interest coincided with their duty. The only point of view in which it would become material to consider Capt. Percival's conduct, would be in estimating what amount of censure was due to the crew for their refusal to obey him. As, however, they have been paid their wages, and I believe them not entitled, by law, to share in the salvage, their conduct need not now be the subject of examination.

It has been urged by the counsel for the claimants that the allowance of the salvors in this case should be greatly diminished on account of their general misconduct, and particularly because, instead of bringing the vessel to this port, she was taken by them to a remote island far out of the course, from whence she only reached this place after protracted delays. With regard to their alleged misconduct, I can only express in a general way the conclusion at which I have arrived. It seems to me that although some disorder prevailed among the crew, it chiefly occurred at the time when, owing to the interference of Capt. Percival, all hope of saving her had been well nigh abandoned. As soon as Mr. Stevens obtained the control, order seems to have been restored, and the men for the

remainder of the voyage behaved with regularity and subordination. In the confusion after Crosby left, no doubt some excesses were committed, but we have no means of ascertaining by which of the crew, nor even how many participated in them. In judging of the conduct of seamen, under such circumstances, some leniency ought, in justice, to be shown, and some allowance made for the feelings of indignation and disappointment with which they saw themselves about to be deprived, as they thought, of all remuneration for their labor.

With regard to the alleged deviation from the course the vessel ought to have pursued, there is more difficulty. On reviewing the testimony, however, on this point, it is not easy to say what course should have been adopted. Judging by the event and by the knowledge since acquired of the extent of the leak, it certainly is to be regretted that the vessel was not headed at once for San Francisco. But there is nothing in the evidence to justify me in saying that the salvors were grossly culpable for not doing so. They seemed to have exercised their judgment fairly upon the point, and the court cannot with certainty affirm that their determination was not, under the circumstances, a prudent one. Where no improper motive is assigned for adopting the course pursued, and where the result has been entirely successful, a court ought not to lend a willing ear to criticisms upon the mode of effecting the salvage, which has been adopted, or to suggestions that perhaps some other mode might have been more advantageous.

The quantum of salvage to be allowed in this case remains to be fixed. On this part of the case precedents, as observed by Judge Peters, have little application. The whole subject is open to discretion, and must depend upon the particular circumstances of the case. One principle is, however, clear,—that the allowance for such services should exceed a mere compensation for work employed in effecting them. Public policy and the general interests of humanity require that strong inducements should be held out to those who navigate the ocean, to assist in the preservation of property exposed to destruction. Nor can the owners of the property justly complain that a considerable portion of it is given to those without whose interposition all would have been lost. I have carefully examined almost all the cases cited by the parties on the hearing, with a view of ascertaining what has been the extent to which the courts have felt themselves at liberty to exercise liberality rather than with any expectation of deriving from them any fixed rule by which my discretion should be governed. In this case, it is to be considered that the value of property saved is very large—about $260,000 after deducting the bottomry bond, given to enable the ship to reach this port. The labor necessary to effect the salvage was protracted and severe. The time consumed in the undertaking and in the measures necessary to enforce the rights of the salvors has been nearly nine months, and during all that time the bark has been useless to her owners, with the exception of the small amount earned by her on her voyage from Tahiti to this port. To enter upon this service, she was obliged to abandon her whaling adventure and renounce her expectations of profit from that source. On the other hand, there has been no extraordinary risk encountered, nor has there been any signal display of gallantry or generosity. The merit of the service is not enhanced by the saving of human life under appalling circumstances; nor was there, at any time, any reasonable chance, if the undertaking was conducted with ordinary skill, that the fruits of the labor of the salvors would be lost. The business was coolly undertaken and conducted with a view to a compensation almost certain to be obtained. And if by the decree of this court that compensation is fixed at a sum several times exceeding any probable earnings of the crew during the same period, it seems to me that nothing more should be demanded. It is not to be forgotten, that the safety of the vessel is not alone due to the crew of the D. M. Hall, for without the assistance of the crew of the John Land, the undertaking was found to be impracticable.

Under all the circumstances, I think the sum of $60,000 is a just and fair allowance, and for that amount I accordingly decree. It would extend this opinion beyond all reasonable limits, if I were to attempt to review the cases which have been cited as most nearly resembling that under consideration. One, however, may be mentioned, of the highest authority in American courts, and decided by the greatest of American judges, and which certainly presented circumstances entitling the salvors to the exercise of the utmost liberality. The Blaireau, a French vessel, having sustained great injury by a collision, had been abandoned by her officers and crew, except one man. In this situation, she was fallen in with and saved by the ship Firm. The circumstances under which the salvage was effected, are detailed in the following extract from the report of the case (2 Cranch [6 U. S.] 240): "When the Blaireau was taken possession of (by the salvors) she had about four feet of water in her hold, and could not have floated twelve hours longer. There was great risk and peril in taking charge of her. She was brought into Chesapeake bay, after a navigation of nearly 3,000 miles, by six persons, her proper complement being sixteen men. The Blaireau was navigated without boats or anchors; she required to be pumped every two, three or four hours in fair weather, and in blowing weather, every hour. The bow was secured by a covering of leather, copper and sheet-lead, nailed on, and pitch and turpentine in large quantities, poured down hot between

the planks and coverings. The labor of working the Blaireau by the men on board was great and severe, and they had frequently thought of abandoning her, but fortunately persevered. She was a slight built vessel, and constructed without knees, and was very weak. The forestay was gone, and the foremast was secured by passing a large rope through the hawse holes and securing it to the foremast head. It was the opinion of several experienced sea captains, that the bringing in the Blaireau was a service of great risk and peril, and nearly desperate, and such as they would not have undertaken." The district court allowed three-fifths salvage; but the supreme court reduced the allowance to two-fifths, the whole value of the salved property being about $60,000. The vessel and cargo were, however, in reality, charged in consequence of savings produced by the forfeiture of the master's share, and the reduction of those of the other officers, with not more than one-third of the "gross value of the property." If the circumstances of this case be compared with those of the case at bar, the difference in the merits of the services is apparent. The John Land had neither been shattered by a collision, nor strained by a tempest. She was a strong and well built clipper, in every respect seaworthy, except for a leak arising from an opening of a seam, caused by insufficient caulking. From the moment when it was ascertained that the leak did not increase it was evident that the task of saving her, though requiring labor, was almost certain to be accomplished. No skill or intrepidity on the part of the salvors was called into action, and their labor, though arduous, was less than in boisterous weather on approaching a coast is often required of a crew. During all the time the men had their regular watches below, and while on deck their numbers permitted to take turns at the pumps, each man working only half an hour at a time. The D. M. Hall accompanied them during the whole voyage. and in case of accident her whale boats, peculiarly fitted for the purpose, were ready at all times to take them off. So lightly did the men think of the danger that they seem to have been willing, on the third or fourth day, to part company with the D. M. Hall and pursue their voyage alone. It seems to me clear that the whaler must be regarded as having abandoned one employment and undertaken another, attended with as little risk and the remuneration for which was more certain. The value of the whaler was about $25,000. The gross value of her catchings, on a very liberal estimate, would not have exceeded $20,000 for the season; out of which was to be paid the wages and provisions of the crew, with other expenses. The decree of the court allows three times that amount. The allowance is, I think, not excessive, for it is to be considered that by means of these libelants property to the amount of $280,000 was saved from destruction. The salving vessel has been useless to the owners for nearly nine months, except a small freight on the voyage from Tahiti to this port. She has incurred some expenses and sacrificed some property in performing the salvage service, and on resuming her cruise she will be obliged to refit at an expensive port. I think that the public policy demands that the remuneration in these cases should be liberal, and that inducement of the strongest kind should be held out to others to undertake similar services. In apportioning the sum decreed, I have given an amount somewhat exceeding a third to the owners of the ship, for it appears that they have paid the wages of the crew for all or a greater part of the time elapsed since the whaling cruise was abandoned, and various expenses have been incurred by them, which should be reimbursed. I have also thought it right to increase the share to which Stevens would have been otherwise entitled, for to him, more than to any other one person, the success of the undertaking is attributed. Fargo's allowance has also been somewhat increased.

The evidence has not disclosed which of the crew of the D. M. Hall were on board the John Land, and which remained on their own vessel. I have not therefore attempted to discriminate between them. I regret to be obliged to diminish to a considerable amount Capt. Pratt's share, for though we may perhaps acquit him of the inhumanity and merciless rapacity with which he has been charged, yet I think that his conduct, under the most charitable view that can be taken of it, deserves rebuke at the hands of the court. In other respects I have followed in fixing the allowance of the officers and crew the proportions or lays to which by the articles they were entitled. This mode seemed to me the most just I could adopt, for the salvage undertaking was substituted for the whaling cruise by general consent, and it seems right that the profits of the substituted adventure should be distributed in the same proportion as that agreed on for the distribution of the profits of the original employment. The costs and expenses are to be paid by the claimants.

Case No. 3,940.

DOAN v. COMPTON et al.

[2 N. B. R. 607 (Quarto 182).][1]

District Court, E. D. Missouri. 1869.

ACTS OF BANKRUPTCY — RETURN OF GOODS ORDERED—TEMPORARY SUSPENSION OF PAYMENTS.

1. Pending negotiations for an extension of time on debtor's business paper, a piano ordered for a customer who refused to receive it, was returned to the sellers. *Held*, that the return thereof was not a preference of creditors, or an act of bankruptcy.

[Cited in Re Gregg, Case No. 5,797; Baldwin v. Wilder, Id. 806.]

[1] [Reprinted by permission.]

2. A firm suspended payment of their commercial paper and did not resume within fourteen days, but obtained an extension of time from most of their creditors; one creditor withheld assent, and petitioned to have the firm adjudged bankrupt, to which one member of the firm made answer of denial, the other member making default. *Held*, that such suspension was not, under the circumstances, an act of bankruptcy. Mere insolvency is not of itself an act of bankruptcy.

[Cited in Hercules Mut. Life Assur. Soc., Case No. 6,402; Re Clemens, Id. 2,878.]

This was a proceeding [in bankruptcy] on the part of J. P. Doan, as petitioning creditor of the firm of Compton and Doan, to have the firm adjudged bankrupts. No opposition was offered by Thomas C. Doan of the firm, but Richard J. Compton, his copartner, filed answer denying the acts of bankruptcy alleged in the petition.

George P. Doan, for petitioner.

Slayback & Spencer, for respondents.

TREAT, District Judge. It appears that, pending negotiations for an extension of the defendants' paper, they returned to the vendors a piano, which had been bought to fill a special order, and was somewhat damaged during its transportation. The party for whom the same was designed refused to purchase it when it arrived. The action of the defendants in returning the same was no act of bankruptcy, as charged, but an entirely proper course of proceeding. It was returned with no view of giving a preference or of defrauding creditors, but as a prudent and proper business transaction.

The other ground alleged in the creditor's petition, is the defendants' suspension of their commercial paper, and the nonresumption thereof within fourteen days. Courts differ in the construction of the act on that point; some holding a fraudulent suspension necessary, and others not. This court has followed the latter construction, but not in the literal or arbitrary sense urged in behalf of the petitioning creditor. When a trader fails generally to meet his commercial paper according to the usual course of business—that is, suffers not some, but all, as it matures, to go to protest, or in other words, comes to a general supension, as unable to proceed further with his business—then his creditors may, through the bankrupt act, compel an adjudication and distribution of his assets. The mere fact of insolvency is not decisive. He may procure renewals or extensions, and thus, with the assent of his creditors, continue for their and his benefit. If all of his creditors assent to extensions or renewals, none of them can proceed against him; if a part consent thereto, the residue are benefited, for their demands can be enforced by ordinary legal proceedings. Thus, if in this case, all the creditors except the petitioners had unqualifiedly, each for himself, agreed to an extension for one year or more, then the defendants would have had no outstanding obligation enforceable against them at the present time, except the petitioner's, and, consequently, he could have recovered his dues by ordinary process. Many of the creditors agreed to the desired extension unqualifiedly; one or more with the qualification that all should join. The petitioner, though at first willing to join, concluded not to do so for reasons developed at the hearing. Negotiations were had between the several parties in interest, the creditors and partners, and inter sese between the partners. An honest difference of opinion existed, and reasonably, as to the ultimate success and existing solvency of the co-partnership. If any of these negotiations had been successfully terminated, this suit would probably not have been instituted. This case, therefore, is one where partners, with reasonable cause to believe that by a little indulgence they can make their comparatively new undertaking a decided success, consult freely with each other and their creditors, and being induced to suppose full assent would be had to the desired extension, suffer the payment of some —and it may be the larger part—of their commercial paper to be suspended for more than fourteen days; a suspension fully justifiable under the circumstances, for the payment of one would have been a preference given to that one. It may be the petitioner was justified in his opinion, that the business never could succeed; but that does not make the defendants guilty of an act of bankruptcy. Other creditors, and at least one of the defendants, thought otherwise. True, the peculiar relationship of the petitioner to the co-partnership might make him more anxious and sensitive, but he is before the court simply as a creditor of the co-partnership.

The provision in the bankrupt act [of 1867 (14 Stat. 536)] concerning the suspension of commercial paper has no just application to the case presented—is designed to work no such harsh or oppressive result as to enable one creditor, against the wishes of a majority or of all others, to compel a struggling trader who has fair prospects of success or believes he has, to surrender his effects, to the manifest injury of all concerned. If the trader meets his paper generally by renewals or extensions, and some one creditor does not grant the desired renewal or extension, but proceeds to enforce his demand at once, the latter is really benefited by the indulgence shown by the others, for he may thus make his money by ordinary suit at law. He cannot, however, under any provision of the existing bankrupt act, proceed to collect his personal claim through its agency. If as a creditor he makes his demand by a common law action, the advantage thus acquired by his diligence he will be permitted to retain. It must not be supposed that the bankrupt act is for the collection of ordinary debts; or that a creditor can force a debtor into bankruptcy for any other than the causes named in the act. Mere insolvency is not, of itself, ground for involuntary bankruptcy;

for a man actually insolvent may continue his business for years, by renewals, and extensions, and indulgence on the part of his creditors, and ultimately not only pay all indebtedness, with interest, but achieve success. His peculiar business may be such that if arbitrarily stopped by one creditor, debtors and creditors alike will be involved in a useless sacrifice, while continuance in business will be for the common benefit. If the design of the law is equality, why should one creditor, against the wishes of all others, involve all in an unwished for and, it may be, needless sacrifice? Why not take his ordinary remedy, leaving the others to pursue their own course?

In this case the court holds that there was no violation of the act in the return of the piano mentioned, and no such suspension of the commercial paper of defendants as constitutes an act of bankruptcy under the law. The petition is against two co-partners, one of whom is in default, and the other of whom contests; and as the co-partnership or both partners must be guilty under the act before judgment can be entered, the petition must be dismissed with costs. Voluntary and involuntary proceedings depend on distinct principles.

The following views expressed by the court in Jones v. Howland, 8 Metc. [Mass.] 385, meet the full approval of this court: "The doctrine, we think, is correctly and clearly laid down by Gibbs, C. J., in the case of Fidgeon v. Sharpe, 5 Taunt. 539. He observes that 'the general effect of the statutes on the subject of bankrupts is, that all payments made before bankruptcy are legal and valid; but a certain class of cases has arisen in which certain payments have been supposed to be made in fraud of the bankrupt laws, and are therefore fraudulent and void. But I find in all the cases, from Fordyce's to the present, the fact found that the act was done in fraud of the bankrupt laws. It must be an act, then, not only that in effect contravenes the bankrupt laws, but it must be done with intent to contravene them and in contemplation of bankruptcy. The innocence or guilt of the act depends, then, on the mind of him who did it; and it cannot be in fraud of the bankrupt laws unless the actor meant it should be so.' See, also, Hartshorn v. Slodden, 2 Bos. & P. 582; Morgan v. Brundrett, 5 Barn. & Adol. 289; Gibbins v. Phillipps, 7 Barn. & C. 529; Atkinson v. Brindall, 2 Bing. N. C. 225, and 2 Scott, 369; Belcher v. Prittie, 10 Bing. 408. The result of these cases is the drawing of a distinction between an actual insolvency and a contemplated bankruptcy; between the payment of a just debt in the course of business, though insolvency exists and is known to the insolvent, and the design to give a preference in view of stopping payment. And in view of all the authorities we hold the law to be this: That though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and, with such belief, pays a just debt without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors, and property that is transferred in making such payment, or giving the security, may be recovered by the assignee; and the debtor will not be entitled to a discharge under the statute. It rests upon the intent with which the act was done; and the intent is to be proved, as a fact, either by direct evidence, or the necessary and certain consequence of other facts clearly proved. In respect to the charge of the judge in the case at bar, it will be found, when carefully examined, to express the opinion that the fact of insolvency being proved, and a knowledge of it on the part of Stowell, the debtor, the jury were bound to infer the intention of Stowell to make a fraudulent preference, because he must be held to have intended the natural result of his own act; and consequently, that his act was in fraud of the bankrupt law. This direction, though in accordance with opinions of the court in Poland v. Glyn [Case No. 11,243], and Pulling v. Tucker [Id. 11,464], is, we think, broader than is warranted by the cases of Fidgeon v. Sharpe, Morgan v. Brundrett, and Atkinson v. Brindall [supra], which, as before observed, we think, lay down the law correctly. The charge assumes, as a fact, the very thing which is to be proved, namely, the intent which actuated the debtor at the time of making payment; whereas, insolvency may be known to exist, and yet the debtor, though compelled to make sacrifices, be determined to go on in his business, and not yield to the pressure, and thus make payment without any intention of giving a preference in contemplation of bankruptcy. Such instances are not of very rare occurrence; and such intent should have been more freely submitted to the jury. It is said that a man must be supposed to intend the natural result of his act. But this remark, though often treated as an axiom, is by no means an infallible proposition. The result is not always evidence of the supposed intent. When we look back upon events that have happened, we stand in a different position; we behold with a clear vision, as we embrace within one glance the beginning and the end, the act and the consequence. But the man who is doing the act may contemplate a very different result. His judgment may be biased by his wishes, and sanguine feelings may be the cause of overlooking difficulties which to a more quiet temperament might appear insurmountable. Disappointments may also take place which were not anticipated. The expe-

rience of others is rarely a guide to an embarrassed man, and he goes on with the hope of relief, even against hope. To infer, therefore, a design to give a preference to a favored creditor, and in the immediate expectation of bankruptcy, from the mere fact of insolvency, is by no means a certain inference, nor such as the jury would be necessarily bound to draw from the debtor's knowledge of his insolvency. The evidence must also go further, and establish, as a fact, the design to give the preference—a fact too important to be left upon conjecture. The instruction requested by the counsel for the defendants was substantially correct. With some slight modification,it may be stated as follows: That if, on the 8th day of March, Stowell feared or believed himself to be insolvent, but did not contemplate stoppage or failure, and intended to keep and make his payments, and transact his business, hoping that his affairs might be thereafterwards retrieved, and in that state of mind made the sale or payment on that day, without intending to give a preference to the defendants, and as a measure connected with going on in the business, and not as a measure preparatory to or connected with a stoppage in business, then the sale or payment on that day was not a sale or payment made in contemplation of bankruptcy within the meaning of the act. It is insisted by the counsel for the plaintiff, that the case of Arnold v. Maynard [Case No. 561] is directly in point to sustain the instructions which were given to the jury. And it is true that the reasoning there does go to support the cases which the later English authorities say have carried the doctrine of contemplation of bankruptcy too far. But the case itself, though with some features of similarity, is founded upon a very different statement of facts, and in which the design to give the preference is not drawn into doubt, and the answers to the question referred to the court do not advance a doctrine different from that which we think is correct. A similar question has arisen before the United States district court in Vermont. In Re Pearce [Id. 10,873] the learned judge held, that 'it is not a necessary and legal inference that a conveyance was made in contemplation of bankruptcy, merely because the debtor was insolvent at the time; but it must appear that the conveyance was made by the debtor in anticipation of breaking or failing in his business; of committing an act of bankruptcy, or of being declared bankrupt at his own instance and intending to defeat the general distribution of his effects.'" And with this we fully concur.

DOANE (AVERY v.). See Case No. 673.

DOANE (FLAHERTY v.). See Case No. 4,849.

DOANE (PENHALLOW v.). See Case No. 10,925.

DOANE, The MARY. See Case No. 9,205.

DOANE, The RICHARD. See Case No. 11,765.

DOBBIE (WILKINSON v.). See Case No. 17,670.

Case No. 3,941.

DOBBIN v. ALLEGHENY.

[3 West. Law Month. 74; 7 Pittsb. Leg. J. 282; 2 Pittsb. Rep. 120.]

Circuit Court, W. D. Pennsylvania. March 13, 1860.

EXECUTION—SPECIAL FI. FA.—CUMULATIVE REMEDIES—ADOPTION OF STATE PROCESS—CONSTITUTIONAL LAW.

1. The issue of a special fi. fa., under the act of 1834, and which has been executed and returned by the marshal, does not conclude the plaintiff, but he may resort to his common law writ of fi. fa., to obtain satisfaction of his judgment. He may have several writs in succession; or suing but one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, provided they all be of the same species.

2. The taking out of the writ is not an election, but only in order to an election.

3. An attachment execution, under the act of 1836, is in substance, if not in form, an execution, and such writ may issue pending a fi. fa.

4. The remedies of a plaintiff are cumulative and successive, and the pursuit of one remedy will not deprive him of another.

5. The courts of the United States may, in their discretion, adopt any part, or all of the remedies provided by the legislature of a state. This delegation of this power by congress, is held to be constitutional, by the supreme court of the United States.

6. The adoption of the act of Assembly of Pennsylvania, of 1834, as part only of the final process of the United States circuit court, to enforce judgments against counties, *held* to be within the limits of their legitimate and constitutional powers.

This was a motion to set aside a fi. fa., by virtue of which the U. S. marshal had levied on 14,000 shares of stock in the Allegheny Valley Railroad Company, and 15,000 shares in the Connellsville Railroad Company, owned by the defendant.

Judge Shaler, for plaintiff.

Mr. Geyer and Mr. Williams, for defendant.

McCANDLESS, District Judge. This case was tried by a jury at the last term. A verdict was rendered for plaintiff, on the 28th of November, for the sum of $7,525.50, and a judgment entered on the 6th day of December, 1859. On the 19th of the same month, plaintiff's counsel issued a special fi. fa., under the act of 1834, returnable to the first Monday of February. On the 4th of February, the marshal made return to this writ, and it not appearing, either by it or aliunde, that at the date of the service there were "any unappropriated moneys in the treasury of the county," nor that "any moneys have since been received for the use of said county," the extraordinary power of

this court could not be invoked "to enforce obedience to such writ of attachment." A power, it should be remembered, which, in this jurisdiction, is not satisfied by a fine, but by imprisonment until the contempt is purged, and from the penalties of which the constitutional clemency of the president of the United States cannot relieve the offending party. This writ, proving fruitless, the plaintiff resorts to his common law remedy, and issues an ordinary fi. fa., upon which the marshal seizes the stock held by the county, in the Allegheny Valley and Connellsville Railroads, amounting to upwards of a million of dollars. A motion is now made to set this execution aside, upon the ground that the plaintiff, having issued his writ under the act of 1834, has made his election, and is concluded; and that this court, in adopting that act as a part of its final process, had no authority to grant an optional remedy. These points will be considered and decided in their proper order; and to arrive at an accurate conclusion upon a question which involves the destination of so large an amount of public property as is levied on in this case, we have examined all the authorities bearing upon the topic, within our reach.

1. As to the first point submitted. It will be observed that the special fi. fa. has performed its office; it has been executed and returned. Two different species of execution cannot be executed at once on the same judgment, nor a second writ of the same, or of a species different from its forerunner, till that has, by return, been proved insufficient. 8 Mod. 302; Bingh. Ex'ns, 175. The party for whom judgment was given, may have a writ of fieri facias, or elegit, or levari facias, or capias ad satisfaciendum, at his option; or he may have them all in succession until his judgment is satisfied; or suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, provided they all be of the same species. Archb. Pr. C. P. 254; Tidd, Pr. 901; 2 Paine & D. Pr. 290; 8 Johns. 388. So, with respect to elegit, if the land be extended upon an elegit, the plaintiff is forever barred from having another execution; but if he levies on the goods only, and the sheriff returns nihil as to the lands, a ca. sa. may issue for the residue, or a fieri facias; for the election is not complete unless the plaintiff had some benefit from the land; for the taking out of the writ is not an actual election, but only in order to an election. 1 Sell. Pr. 536; 1 Strange, 226; Tidd, Pr. 1022. An attachment execution under the 35th section of the act of 1836, is process to enforce the judgment; and it is in substance, if not in form, an execution. It differs from a fieri facias essentially only in this, that it reaches effects, from which the debt could not otherwise be levied. 1 Harris [13 Pa. St.] 394. And yet the supreme court of Pennsylvania have decided that the plaintiff may issue an execution attachment pending a fi. fa. 5 Watts and S. 222. It is an execution so far collateral to the judgment that it may proceed simultaneously with the ordinary executions. 2 Casey [26 Pa. St.] 103. The plaintiff can have only one satisfaction, but is entitled to all process necessary to obtain that. In this connection, I am happy to have found a decision of the supreme court of the United States, delivered by Mr. Justice Baldwin, a great and good judge, than whom no one was more profoundly learned in the doctrines of the common law. It bears directly on this point. In Taylor v. Thompson, 5 Pet. [30 U. S.] 369, he says: "The plaintiff had an undoubted right to an execution against the person, and the personal or real property of the defendant; he has his election; but the adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative, and successive, which he may pursue until he reaches that point at which the law declares his debt satisfied. We know of no rule of law which deprives a plaintiff in a judgment of one remedy by the pursuit of another, or of all which the law gives him." It follows, then, both from reason and authority, that the first writ did not exhaust the remedy of the plaintiff in this case, but that he may issue subsequent and successive writs until he obtains satisfaction of his judgment.

2. Upon the second point submitted, it was contended, with great earnestness, by the learned counsel for the defendant, that this court has exceeded its authority in adopting the act of 1834, with a provision rendering it optional with the party to pursue it or not at his pleasure—that we were bound to constitute it, as the exclusive final process, to enforce judgment against a county. But such is not the law. It is well settled in [Wayman v. Southard] 10 Wheat. [23 U. S.] 1, and [Bank of U. S. v. Halstead] Id. 51, and in [Beers v. Haughton] 9 Pet. [34 U. S.] 329, by the supreme court of the United States, that this court may accept and adopt any part or all the remedies provided by the legislature of the state, at our discretion. It was there held, that this delegation of power by congress, was perfectly constitutional; that the power to alter or add to the proceedings in a suit, embraced the whole progress of such suit, and every transaction to it, from its commencement to its termination, and until the judgment should be satisfied; and that it even authorized the courts to regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was there emphatically laid down, that a general superintendence over this subject, was properly within the judicial province, and has always been so considered. That this provision enables the courts of the Union to make

such improvements in their forms and modes of proceeding, as experience may suggest. It was intended to adopt and conform to the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. In adopting, therefore, this act of 1834, as part only of the final process of this court in proceedings against counties, we acted within the limits of our legitimate and constitutional powers.

We entertain no doubt of the regularity of this execution. The rule is discharged, and unless this judgment is paid, the marshal must proceed with sale. Rule discharged.

[Davies v. Scott, 2 Miles, 52; Grant v. Potts, Id. 164; Tanis v. Wardle, 5 Watts & S. 222; Pontius v. Nesbit, 4 Wright [40 Pa. St.] 309. For a form of the writ provided by the act of 1834, see Hewson v. The Northern Liberties, 1 Pittsb. Leg. J. 322.][1]

Case No. 3,942.

DOBBIN v. FOYLES.

[2 Cranch, C. C. 65.][2]

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

NEGLIGENCE—PLEADING—JOINDER OF COUNTS—SPECIAL DEMURRER.

1. Upon a count charging negligence of the defendant and his servants, it is sufficient to prove negligence of the servant.

2. A count for injuring the plaintiff's mare by negligence, and a count upon a promise to return the mare safe, may be joined; and advantage can only be taken of the misjoinder (if it be one) by special demurrer.

Action on the case, upon the loan of a mare by the plaintiff to the defendant, who injured her by bad treatment and negligence. The declaration averred the negligence and bad treatment to have been by the defendant and his servants.

F. S. Key, for defendant, prayed the court to instruct the jury that they must be satisfied, by the evidence, that the negligence was that of the defendant himself, and that the negligence of the servants is not sufficient; and cited the case of Dunlop v. Munroe [Case No. 4,167].

But THE COURT (nem. con.) refused.

The declaration contained two counts. The first count stated that the plaintiff loaned a mare to the defendant, at his request, who promised to treat her well and return her safe, but by negligence and mismanagement of the defendant and his servants, she was injured, &c. The second count stated that the plaintiff loaned the mare to the defendant at his request, and he promised to return her safe but did not.

The defendant pleaded not guilty, generally, and the verdict being against him, he moved in arrest of judgment, because the counts are inconsistent and require separate pleas and judgments.

THE COURT, however, refused to arrest the judgment, being of opinion that both counts were good, and if not strictly proper to be joined, that the remedy was by special demurrer. See 4 Bac. Abr. 11, 12, and Whyte v. Rysden, Cro. Car. 20.

[1] [From 2 Pittsb. Rep. 120.]

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

Case No. 3,943.

In re DOBBINS.

[18 N. B. R. 268.][1]

District Court, N. D. Ohio. Aug. 17, 1878.

BANKRUPTCY—COMPOSITION PROCEEDINGS—POWERS OF REGISTER.

At the meeting of creditors called to take action on a resolution of composition, the register has no authority to require any other person to testify except the debtor.

Opinion by James Irvine, Register:

The debtor, Hugh Dobbins, having filed a petition for a composition with his creditors, which was duly referred to James Irvine, register, for proceedings authorized by the law on behalf of his creditors at a meeting of such creditors to be called by the register. At such meeting of the creditors, the debtor, Dobbins, was present, and was examined in presence of the creditors assembled. From that examination it appeared that Dobbins had, before petition filed, in October, 1877, made a general assignment for benefit of creditors, under the laws of the state of Ohio, to one Moses McGinnis, who had sold most of the property, and who had filed an account with probate judge setting out his proceedings in the trust showing the money collected and disbursed under the assignment. Thereupon Farwell & Co., creditors who had proved their debt, and being then present, filed a motion with the register, requesting him to issue a summons for said McGinnis, requiring him to appear before the register forthwith, with his books and papers, to give testimony before the creditors in relation to the said trust proceedings; and also asked that one Hoover, who it was alleged had bought up claims against said debtor, and procured payment therefor from the said assignee out of the funds in his hands, might be summoned and examined. The register refused to issue such summons, which refusal was excepted to by said Farwell & Co., and register asked to certify the question to the district court, which he did accordingly, with the following opinion:

Section 5103 [Rev. St. U. S.], under which composition proceedings are authorized, lays down the successive steps to be taken by the parties interested. It permits the examination of the debtor, but gives no authority to compel the attendance or testimony of

[1] [Reprinted by permission.]

others. The proper way, it seems to me, is to file objections to the confirmation of the resolution by the court (if it shall be adopted and confirmed by the required number of creditors), and then the court can order such examination as shall seem to be proper. But it is my opinion that, at the meeting of creditors called to take action on the resolution, I have no authority to require any other person to testify except the debtor, and I therefore refuse the request.

WELKER, District Judge. I have carefully examined and considered the question made by the register, and confirm and approve his ruling therein.

Case No. 3,944.

DOBBINS et al. v. BRADLEY.

[4 Cranch, C. C. 298.][1]

Circuit Court, District of Columbia. March Term, 1833.

NEGOTIABLE INSTRUMENTS—GUARANTY—NOTICE TO GUARANTOR.

1. A guaranty of paper payable at the Branch Bank at Washington, does not cover a note dated in New York and not made payable at that bank.

2. When credit is given upon a guaranty, notice thereof should be given to the guarantor in a reasonable time thereafter. When six months' credit was given upon the guaranty, five days' notice was held to be too short.

Assumpsit, on the defendant's letter of guaranty dated in Washington, D. C., June 27th, 1827, in these words: "I hereby engage to guarantee the payment of his (Mr. Andrew Smith's) paper payable at the Branch Bank here, not exceeding $5,000, at such dates as he may find expedient." On the 1st of October, 1828, Mr. Coxe, the plaintiff's counsel, wrote a letter to Mr. Bradley, informing him that the note of Mr. Smith, dated April 3d, 1828, at six months, for $3,344.57, would become due on the 6th of October, 1828; and that it was given for goods had upon his guaranty. The note was not made payable at the Branch Bank at Washington. It is dated at "New York, April 3d, 1828. Six months after date I promise to pay to the order of Dobbins and Evans, thirty-three hundred and forty-four dollars and fifty-seven cents, value received. Andrew Smith." Indorsed, "Dobbins & Evans."

Mr. Jones, for defendant, prayed the court to instruct the jury, that upon the plaintiff's evidence he cannot recover in this action. This note is a New York contract, and carries seven per cent. interest. The guaranty was of the paper of Mr. Smith, "payable at the Branch Bank here;" which is a very different contract from a sale of goods in New York. Notice of the acceptance of the guaranty was not given until five days before the note became payable, although the goods were furnished and the note given in April, six months before the notice. It should have been given immediately, or as soon after the credit given as it could conveniently be given. Douglass v. Reynolds, 7 Pet. [32 U. S.] 113; Russell v. Clark, 7 Cranch [11 U. S.] 69; Cremer v. Higginson [Case No. 3,383]; Fell, Guar. 128; Norton v. Eastman, 4 Greenl. 521; Ludlow v. Simond, 2 Caines, Cas. 1, 33, 44, 56, 63; Lanusse v. Barker, 3 Wheat. [16 U. S.] 101; Pearsall v. Summersett, 4 Taunt. 593. The letter from Mr. Bradley to Mr. Smith inclosing the letter of guaranty, was shown to the plaintiffs at the same time, as appears by Mr. Coxe's letter to Mr. Bradley. The letter to Mr. Smith limits the guaranty to Mr. Smith's fall supply of goods.

Mr. Coxe and Mr. Key, for plaintiffs, contended that this was a general, absolute, and continuing guaranty, and that notice is only necessary where it is a mere offer to guarantee. There it must be accepted, and notice given before it can amount to a contract. This note was payable at the Branch Bank, at Washington, for it was payable anywhere, and was placed in that bank for collection before it was due. The contract was not that the paper should appear upon its face to be payable at that bank; it is sufficient that it was placed there for collection. They cited Fell, Guar. 59, 129; Duval v. Trask, 12 Mass. 154; Lawrason v. Mason, 3 Cranch [7 U. S.] 492; Bastow v. Bennett, 3 Camp. 220; Ludlow v. Simond, 2 Caines, Cas. 1; Fell, Guar. 123, 143; Lanussee v. Barker, 3 Wheat. [16 U. S.] 128; Russell v. Clark, 7 Cranch [11 U. S.] 69; Simmons v. Keating, 2 Starkie, 426.

THE COURT (THRUSTON, Circuit Judge, not sitting in this cause, being connected with the defendant) stopped the counsel of the defendant, in reply, and

CRANCH, Chief Judge, said the case seemed very clear to the court on both points.

1. The note is not a paper made payable at the Branch Bank at Washington, and, therefore, not within the terms of the guaranty.

2. That the guaranty is neither absolute nor definite, and, therefore, notice ought to have been given in a reasonable time after the credit was given.

The plaintiffs had leave to amend their declaration, but afterwards dismissed their suit.

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

DOBBINS (UNITED STATES v.). See Case No. 14,971.

DOBBINS (WATSON v.). See Case No. 17,-281.

DOBBS (UNITED STATES v.). See Case No. 14,972.

DOBIE (GIBSON v.). See Case No. 5,394.

DOBSON (CALLOWAY v.). See Case No. 2,-325.

Case No. 3,945.

DOBSON v. CAMPBELL.

[1 Sumn. 319; 1 Robb, Pat. Cas. 681.][1]

Circuit Court, D. Maine. May Term, 1833.

PATENTS—DECLARATION UPON ASSIGNMENT—DEFECTS CURED BY VERDICT.

1. If the declaration upon an assignment of a patent right omit to state, that the assignment has been duly recorded in the state department, the defect is cured by a verdict for the plaintiff.

[Cited in Boyd v. McAlpin, Case No. 1,748; Van Hook v. Wood, Id. 16,854.]

2. Where a fact must necessarily have been proved at the trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof.

[Cited in Townsend v. Jemison, 7 How. (48 U. S.) 721.]

Case for infringement of a patent right for the double reflecting baker, brought by the plaintiff [Isaac Dobson], as assignee of the patent. The declaration, after alleging the obtaining of a patent by one Williston, proceeded: "The said Williston did always, from the time of making and granting the said letters patent, as aforesaid, exercise and enjoy the right, privilege, and liberty aforesaid, to wit, at Norwich aforesaid, until the 20th day of June, in the year of our Lord one thousand eight hundred and thirty-one, to great profit and advantage, when the said Williston, for a valuable consideration, by his writing under his hand of that date, sold and conveyed all his right and claim in said patent right to one John Robinson of Norwich aforesaid; as by said assignment in writing, in court to be produced, will fully appear; whereby the said John Robinson, as assignee of said Williston, became and was the true and lawful owner of said right, so as aforesaid patented, with the full and sole power in him, his heirs, administrators, and assigns, to make, use, and vend to others to be used, the said new and useful improvement, agreeably to the statutes aforesaid recited. And the plaintiff farther says, that the said Robinson did always, from the time of making and executing the said assignment as aforesaid, exercise, use, and enjoy the right, liberty, and privilege aforesaid, to wit, at Norwich aforesaid, until the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and thirty-one, when the said Robinson, by assignment of that date under his hand and seal, and in court to be produced, for a valuable consideration therein expressed, did grant, sell, and convey all his right, title, and interest in the said letters patent, and improvement therein specified and set forth, to the plaintiff, his heirs, and assigns. And the plaintiff farther says, that he, the said plaintiff, from the time of making and executing said last mentioned assignment, did use and enjoy the right, liberty, and privilege aforesaid, to wit, at Norwich aforesaid, to wit, at Portland and Bangor in said district of Maine, and has exercised, used, and enjoyed the same right, liberty and privilege to the day of the purchase of this writ by himself and servants, and his deputies, to his great profit and advantage, to wit, at Portland and Bangor. Yet the defendant," &c.

At the trial upon the general issue the plaintiff obtained a verdict; and now Mr. Sprague, for defendant [Benjamin Campbell], moved in arrest of judgment, upon the ground, that the declaration was substantially defective. He argued as follows: The case presented is not a case of a title defectively stated, but the statement of a defective title. There is a material difference in the allegations with respect to the rights of Robinson, the first assignee, and of the plaintiff, the second assignee. As to Robinson, it is indeed alleged, that "he became and was the true and lawful owner of said right," which general assertion of title might have been sufficient after verdict, if he had not himself narrowed it, by setting forth specifically what his title was, namely, the assignment only, adding, "whereby he became and was," &c. This is alleged to be his title; the conclusion is whereby, &c., excluding the recording and all other facts, but such as are stated, as constituting title. It is the statement of a defective title, if any other requisite, not specified before the whereby, is essential. Such a requisite is the recording. The allegation, that Robinson "used, exercised, and enjoyed" the right aforesaid, adds nothing to avail the plaintiff. It is "that from the time of making and executing the said assignment, as aforesaid, did exercise," &c. 1st. It is mere use, which might be with the temporary assent of the patentee; it certainly does not embrace a recording, &c. 2d. The right aforesaid. 3d. From the time of assignment, excluding any other act or interval of time. 4th. Assignment as aforesaid. In the statement of the title of the plaintiff, the important allegation, that he "became and was the true and lawful owner of said right," is wholly omitted; and no such allegation, nor any allegation, that the plaintiff ever became the lawful owner of the right, is to be found in the declaration. The title, which the plaintiff has from Robinson, is stated, namely, a written assignment under seal. This is a defective title; the recording in the office of the secretary of state being essential, and made so expressly by statute. St. 1793, c. 156, § 9. The allegation, that the plaintiff "used, exercised, and enjoyed," is subject to the same remarks, that have been applied to Robinson's title, with this striking addition, that the plaintiff adds, that said use, &c. was "by himself, and servants, and deputies," demonstrating, that it is the uses merely, that is intended, not the legal title. The following cases relate to

[1] [Reported by Charles Sumner, Esq.]

the point under consideration: Kingsley v. Bill, 9 Mass. 198; in error after verdict, omission to allege publication of an award; Stilson v. Tobey, 2 Mass. 521, arrest of judgment; Com. v. McCurdy, 5 Mass. 324; Brent's Ex'rs v. Bank of Metropolis, 1 Pet. [26 U. S.] 89–93; Lynn v. Mechanics' Bank of Alexandria, Id. 67, 68; Cutting v. Myers [Case No. 3,520]; an averment more specific than necessary must be proved as made, The Friendship [Id. 5,124]; Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581; Wilson v. Lenox, 1 Cranch [5 U. S.] 195. The true rule is laid down by Buller, J., in Spieres v. Parker, 1 Term R. 145; and also, in other language, in Smith v. U. S. [Case No. 13,122]. In the case before the court, the verdict does not find or assert the fact of recording the assignments, because it is nowhere alleged by itself, nor comprised in any other allegation. All the facts alleged in the declaration may be true, and yet no record ever made. The allegation, that there was an "assignment." or that the right was "assigned," does not embrace a recording. The assignment is one thing, the recording of that assignment is another, and so clearly distinguished by the statute. It is not like stating, that the plaintiff had a grant by deed, without stating a delivery; delivery, being of the essence of a deed, may be considered as comprised in the allegation of a grant, or conveyance by deed. It is perhaps more analogous to the recording of a levy of an execution on real estate, or the registry of a deed. Calvert v. Bovill, 7 Term R. 523, decided on the ground, that a statement of particular facts excludes the idea, that other facts are embraced; Bishop v. Hayward, 4 Term. R. 470–472, per Buller, J.; Da Costa v. Clarke, 2 Bos. & P. 257–259.

Fessenden & Greenleaf, for plaintiff.

The point to which we shall confine ourselves is, that the plaintiff has not directly averred in his declaration, that the assignments, from the original inventor to Robinson, and from Robinson to the plaintiff, were recorded, as required by the fourth section of the statute of 1793, and on this ground it is moved to arrest the judgment after verdict. In Smith v. U. S. [supra,] the court say: "It is a general rule, that wheresoever it may be presumed, that any thing must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it, after a verdict." In Jackson v. Pesked, 1 Maule & S. 237, Lord Ellenborough says: "Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict." In Sergeant Williams' notes to 1 Saund. 228a, it is said, in relation to the same subject, "that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts, so defectively or imperfectly stated, or omitted, and without which it is not to be presumed, that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law."

It is believed, that an examination of the case at bar, upon the principles above stated, will result in establishing the sufficiency of the plaintiff's declaration, in the present stage of the case. The section of the statute before cited renders it necessary, that an assignment should be recorded, in order that the assignee may "stand in the place of the original inventor, both as to right and responsibility." Thus the recording is by the words of the statute rendered necessary, in order that the assignee may support an action for the breach of the patent, in his own name. Without proof of such recording, a paper purporting to be an assignment could not be given in evidence. It would, in fact, be no assignment within the words of the statute. The same principle applies to this, as to an instrument required by law to be stamped. If not stamped, it could not be given in evidence, and this is all the effect which results from it. The fact, that such an instrument was "stamped," is never averred. In relation to the assignment to Robinson, it is averred, that Williston, by his writing, "sold and conveyed all his right," &c. "as by said assignment, &c. will fully appear," "whereby the said Robinson became and was the true and lawful owner of said right." Now, by the express words of the statute, the recording was indispensable to convey the right. "Stand in the place of the original inventor" are the words of the statute; and the allegation is, that Williston conveyed "all his right." Again, the allegation is, that thereby the said Robinson became and was "the true and lawful owner." He could not become so, unless said assignment had been recorded. Again, it is averred, that he exercised the "right, liberty, and privilege aforesaid." What right, liberty, and privilege? That which was secured to Williston by the patent, who had conveyed "all his right" to Robinson. Another averment here made is, that, by said conveyance, Robinson received "the full and sole power" to make, vend, &c. Had not the requisite of recording been complied with, he could not have received such a power. Any one might have exercised it, so far as he was concerned, without remedy for him. Again, he became seised of this power "agreeably to the statutes aforesaid recited." By these statutes recording is essentially requisite. This averment, it is believed, would be sufficient of itself, had the others, above referred to and relied on, been wanting. The averments in the plaintiff's

declaration, touching the assignment of Robinson to the plaintiff, are substantially the same. It is averred, that Robinson conveyed "all his right," and that in consequence the plaintiff did use and enjoy the "right," and has used it. It will be noticed, that, in the assignment of Williston to Robinson, is the expression, "the right so as aforesaid patented," and then in the assignment to the plaintiff is found the expression, the "right, &c., aforesaid," referring to the right mentioned in the first assignment. This right is in both instances alleged to be conveyed. All the right is conveyed to Robinson, and then all the right is conveyed to the plaintiff. If, then, the statute makes the recording necessary to the conveyance, these allegations are of themselves sufficient. At all events, these allegations are sufficient after verdict. These assignments could not have been given in evidence, had they not been recorded, and the fact, that they were so, is not denied.

In the language of the court, in the case cited from Gallison, the recording "must of necessity have been given in evidence." It was "so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict." The issue joined was "such as necessarily required, on the trial, proof of the fact." Without such proof, "the judge could not have directed the jury to give, neither could the jury have given the verdict." The general issue being pleaded and joined, the "right" claimed by the plaintiff was directly denied, and it was necessary for him to prove any thing rendered necessary by the statute to the existence of such right; and the existence of such right is found by the verdict. See, also, Hitchin v. Stevens, 2 Show. 233, and the other cases cited in the note of Sergeant Williams, before referred to.

STORY, Circuit Justice. We are of opinion, that the motion in arrest of judgment ought to be overruled. We accede to the doctrine stated at the bar, that a defective title cannot after verdict support a judgment; and therefore it constitutes a good ground for arresting the judgment. But the present is not such a case; but is merely the case of a good title defectively set forth. The defect, complained of, is the omission to state, that the assignments, on which the plaintiff's title is founded, were duly recorded in the office of the department of state, which is made essential to pass the title of the original patentee by the fourth section of the patent act of the 21st of February, 1793, c. 55 [1 Stat. 318]. The general principle of law is, that, where a matter is so essentially necessary to be proved, to establish the plaintiff's right to recovery, that the jury could not be presumed to have found a verdict for him, unless it had been proved at the trial, there the omission to state that matter in express terms in the declaration is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend it. This was the doctrine of Lord Ellenborough in Jackson v. Pesked, 1 Maule & S. 234; and it is very elaborately expounded by Mr. Sergeant Williams in his learned note to 1 Saund. 228a. The other authorities cited on behalf of the plaintiff are to the same effect. Now, it seems to us, that taking the whole declaration together, (however inartificially drawn,) the plaintiff sets up a title to the patent right by assignment, and an enjoyment and use of the right under that title, and that he has been injured in that right under that title, by the piracy of the defendant. This cannot be true, nor could a verdict for the plaintiff have been found by the jury, if the deeds of assignment had not been duly recorded; for, unless that was done, nothing would pass by the deeds. The cases of Hitchin v. Stevens, 2 Show. 233, and Mackmurdo v. Smith, 7 Term R. 518, cited at the bar, seem to us very strongly in point. So is France v. Tringer, Cro. Jac. 44. There are stronger analogous cases in equity; for it has been held, that if a feoffment is stated without any averment of livery of seisin, or a bargain and sale without stating an enrolment, it is not a good cause of demurrer, but the court will intend it perfect. Harrison v. Hogg, 2 Ves. Jr. 323, 328. As to livery of seisin, it is far from being certain, that, if a feoffment is in terms pleaded, it is necessary, even at law, to aver it, since it is implied. See Co. Litt. 303b; Throckmerton v. Tracy, Plow. 145. See Spieres v. Parker, 1 Term R. 145, per Buller, J.; 1 Saund. 228a, Williams' note. Upon the whole, judgment must be entered for the plaintiff according to the verdict. Judgment accordingly.

DOBSON (JORDAN v.). See Case No. 7,519.

DOBSON (WARDROP v.). See Case No. 17,166.

Case No. 3,946.

DOCKER'S CASE.

[Cited in U. S. v. Holly, Case No. 15,381. Nowhere reported; opinion not now accessible.]

DOCKER (MINCHIN v.). See Case No. 9,628.

Case No. 3,946a.

In re DODGE.

[Betts' Scr. Bk. 55.]

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

VOLUNTARY BANKRUPTCY—PETITION—SCHEDULE OF REAL ESTATE.

[1. A voluntary petition in bankruptcy need not allege the insolvency or dissolution of a firm of which petitioner was a member.]

[2. A schedule of petitioner's real estate which states the county and town in which the prop-

erty is situated, together with the name of the grantor, is sufficiently accurate.]

[In bankruptcy. On objections to petition of Levi Dodge, a voluntary bankrupt. Overruled.]

BETTS, District Judge. Objections have been made to the sufficiency of the petitioner's papers; that the petitioner does not show that the various firms of which he was a member are insolvent, and that they are not in a situation to apply for the benefit of the law [of 1841 (5 Stat. 440)]. There are other objections as to the manner in which certain judgments are set forth. The general allegation is that the schedule is uncertain and indefinite; that the inventory is loose and uncertain in the description.

The main objection, however, is that the petitioner was a member of various firms, and it is not stated if they are dissolved. The provisions of the act do not look to the condition of other parties with whom the petitioner may be connected. It is immaterial whether the firm of which he was a member was insolvent or not. It may happen that a firm may be perfectly solvent, while one of the partners was not. That objection cannot be made available. A person may apply for the benefits of this law, without averring the dissolution of a partnership, or the insolvency of others with whom he may be connected. The objections on these grounds are not sustained.

Objections are also made to the manner in which the real estate is set forth in the schedule. He states the county and town, and gives the name of the grantor. That is sufficiently accurate.

The objections are overruled.

Case No. 3,947.

In re DODGE.

[2 Ben. 347;[1] 7 Am. Law Reg. (N. S.) 438; 1 N. B. R. 435 (Quarto, 115); 1 Am. Law T. Rep. Bankr. 120.]

District Court, S. D. New York. April 6, 1868.

BANKRUPTCY—DISCHARGE—"NO ASSETS."

Where the assets of a bankrupt consisted of an interest in certain notes, from which the assignee in bankruptcy had collected nothing for more than sixty days after the adjudication of bankruptcy: *Held*, that, "no assets" had come to the hands of the assignee, within the meaning of section 29 of the bankruptcy act [of 1867 (14 Stat. 531)].

[Cited in Re Van Riper, Case No. 16,874.]

Before Henry W. Allen, Register.

In this case the register certified to the court the following statement of facts and questions: "The only assets of the bankrupt [Oliver W. Dodge] consist of certain notes, accounts, and claims, all past due and unpaid, in which he had a one-seventh interest, valued at $250, which interest has passed to the assignee, Mr. John Sedgwick, who has not received or paid any moneys whatever for, or on account of, the bankrupt's estate. One or more creditors have proved their claims against the estate of the bankrupt. More than sixty days having elapsed since the adjudication of bankruptcy, can the bankrupt now apply to the court for his discharge, under section twenty-nine of the act, on the ground that there are no assets? Are accounts, claims, and demands, from which nothing may be collected or realized, considered to be assets within the meaning of said section twenty-nine, so as to prevent the bankrupt from making application for his discharge until after the expiration of six months?"

[And the said parties requested that the same should be certified to the judge for his opinion thereon.

[Dated at the city of New York, the 27th day of March, A. D. 1868.][2]

Martin & Smith, for bankrupt.

BLATCHFORD, District Judge. Where, at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come to his hands, within the meaning of section 29 of the act. This is the interpretation given to such expression, "no assets," by the justices of the supreme court. Form No. 35 is headed, "Assignee's Return Where There are no Assets;" and that form consists merely of the oath of the assignee that he has "neither received nor paid any moneys on account of the estate."

Case No. 3,948.

In re DODGE et al.

[9 Ben. 480;[1] 17 N. B. R. 504.]

District Court, S. D. New York. May 8, 1878.

USURY—LEX LOCI CONTRACTUS.

1. D. & Co. made two promissory notes for the accommodation of W. & Co. They were made payable at the office of D. Co., in New York City, to the order of W. & Co., and were delivered to W. & Co. who endorsed them and placed them in the hands of note-brokers in New York City to be disposed of. The note-brokers, who were in correspondence with the N. H. T. Co., a corporation in Connecticut, advising them of opportunities to purchase paper, wrote to the company and enclosed the paper of D. & Co., saying, "This paper can be had at ten per cent. discount. Will you take it?" The president of the company wrote back that the company would take the paper, and enclosed a check on a bank in New York City for the amount of the paper less the discount, which check was collected by the brokers. W. & Co had represented to the brokers that the paper was business paper, and by the understanding

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

[2] [From 1 N. B. R. 435 (Quarto, 115).]

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

between the brokers and the company, the brokers were to offer to the company none except "first class business paper." D. & Co., being in bankruptcy, the N. H. T. Co. proved a claim on the notes, which claim was objected to on the ground of usury: *Held*, that the case was governed by the law of New York and not by the law of Connecticut; that the notes had no validity till they passed to the N. H. T. Co., and that they were void for usury.

2. The trustee of D. & Co. was not estopped from disputing the claim either because D. & Co. had charged W. & Co. with these notes on account on their books, or because, by a course of dealing, D. & Co. had led the public to believe that such paper was business paper, there being no evidence that the company acted or relied on any act or representation of the Co. or because the trustee of D. & Co., had proved the notes as debts against the estate of W. & Co. in bankruptcy.

3. That the claim must be expunged.

[In the matter of Anson G. P. Dodge and others, bankrupts.]

G. S. Hastings, for New Haven Trust Company.

E. R. Robinson, for trustee.

CHOATE, District Judge. This is a review of the decision of the register expunging the claim of the New Haven Trust Company, of which formal proof had been made.

The claim was upon two promissory notes made by the firm of Dodge & Co., the bankrupts, payable to the order of White & Co., and by White & Co. endorsed and placed in the hands of note-brokers in the city of New York to be disposed of and negotiated by them for account of White & Co. The notes were on five months time and made payable at the office of Dodge & Co., in the city of New York.

The New Haven Trust Company purchased the notes before maturity at a rate of discount higher than seven per cent. and the defence is usury.

The register properly finds, upon the evidence, that the notes were made and issued by Dodge & Co. for the accommodation of White & Co., and that the New Haven Trust Company was the first holder for value. They had their inception as contracts therefore by their negotiation to the New Haven Trust Company, and are usurious and void, if governed by the law of New York.

The facts in relation to the negotiation of the notes are as follows: One of the notes was placed by White & Co. in the hands of brokers by the name of Bound & Co., and the other in the hands of a broker by the name of Gallaudet. These brokers were in correspondence with the New Haven Trust Company advising them of opportunities to purchase paper. Bound & Co., acting under this general understanding with the company, wrote to them a letter enclosing the note, and saying, "This paper can be had at, say ten per cent. discount. Will you take it?" Thereupon the letter and note were submitted to the board of directors of the company who decided to take it, and the president of the trust company wrote to Bound & Co. that they would take the paper, and by the same letter sent to Bound & Co. a check on a bank in New York City for the amount of the note less the discount. This letter was written and mailed at New Haven, Conn. On the receipt of the letter the brokers collected the check. Prior to the negotiation of the note White & Co. represented to the broker that the paper was business paper, and by the understanding between the broker and the trust company the former was to offer the trust company none except "first class business paper."

The facts as to the other note are conceded to be substantially the same.

Upon these facts it was properly decided by the register that the law of New York and not the law of Connecticut governs the case, and that the notes were void for usury. The loan was made in New York. What took place in Connecticut was that the lender there consented to make the loan. He accepted the offer of White & Co.'s agent, and when the president of the trust company's letter was mailed at New Haven the trust company had agreed to make the loan. The acceptance of an offer by letter is complete when the party who is to accept puts in the mail his letter of acceptance. Tayloe v. Merchants' Ins. Co., 9 How. [50 U. S.] 390. The money with which the loan was to be made, however, was in the city of New York, deposited with an agent of the trust company, and until that money was actually drawn, or at least until that agent, the Fourth National Bank, should accept and promise to pay the check to the holder, the money remained as before, entirely subject to the control of the trust company. Notwithstanding the writing of the letter enclosing the check the trust company could at any time before the check was presented have directed the bank not to pay the check. The very terms of the acceptance of the offer by the trust company implied a payment of the money in New York by it through its agent there, the Fourth National Bank, to White & Co.'s broker. In principle I do not think the case can be distinguished from an acceptance by an individual in New Haven of the same offer, to be carried into effect by the payment of the money by the lender to the borrower the next day in New York. And I cannot doubt that a loan thus made, if usurious by the law of New York, would be void, although the borrower and lender had agreed in Connecticut on the terms of the loan, so to be thereafter made in New York. The cases of Tilden v. Blair, 21 Wall. [88 U. S.] 241, and Providence Sav. Bank v. Frost [Case No. 11,453], are controlling authorities in this court, but in both those cases the money lent was paid to the borrower on the security out of the state of New York. In Tilden v. Blair, the acceptance of Tilden was taken to Illinois and there negotiated, and the transaction as a loan on the credit

of the acceptance was there consummated, and the money paid. In the Savings Bank Case, the notes were taken to Rhode Island, and there they were negotiated and the money paid. In the present case there was no loan made in Connecticut. The parties there agreed upon the terms of a loan to be made in New York, and it was made in New York.

It was urged on behalf of the trust company that the trustee of Dodge & Co. was estopped to dispute its claim on several grounds: First, because Dodge & Co. had charged White & Co. in account with these notes on their books; secondly, because, by a long course of dealing in similar paper, Dodge & Co. had led the public to believe that the paper made by Dodge & Co. and endorsed by White & Co., and put on the market, was the business paper of Dodge & Co.; and thirdly, because the trustee of Dodge & Co. had made proof of these notes as debts against the estate of White & Co. in bankruptcy. As to the first point, entries in the books of the bankrupts would not estop them, much less their assignee or trustee. Besides, as matter of bookkeeping, the charge of these notes was not improper, though they were accommodation notes. Book entries are made not with a view to the happening of insolvency, but with the expectation that obligations entered into will be performed. Although the mere giving of accommodation paper creates no debt unless and until the paper is negotiated, and therefore when bankruptcy intervenes and nothing has been done with the paper by the payee, the charge made becomes, in the event that has happened, erroneous in so far as it imports a debt from the payee to the maker; yet when the charge was made, it was doubtless expected that the notes would be negotiated by the payee and be paid by the maker with funds, to be afterwards received from and credited to the payee, and, in anticipation of this course of business, the charge was proper enough.

As to the second ground of estoppel it is enough to say that there is no evidence whatever that the trust company acted or relied on any act or representation whatever of Dodge & Co., except what appears on the notes themselves, and the making of notes payable to another party has never been held to be such a representation as estops the maker from showing that they were accommodation paper even in favor of one to whom the payee represented them to be such and who took them in good faith, on such representations of the payee. As to the third ground of estoppel, whether or not the trustee of Dodge & Co. had knowledge of the usury when he made proof of the notes against the estate of White & Co., does not appear. If he had not, he might very properly make proof of the notes as a contingent claim, assuming that they were outstanding and valid debts against Dodge & Co., in the hands of endorsees for value, in which case he would have a valid claim against White & Co., if they should be proved against Dodge & Co., and even if he had knowledge of the usury, the proof of them against White & Co., if improper, would not operate as an estoppel in favor of the trust company, since it was at most a mistake, liable to be corrected on motion of any other creditor of White & Co., and the trust company has not upon the faith thereof parted with its money or changed its position as to the notes in question, which is essential to the creation of an estoppel in pais.

Decision of register expunging the claim confirmed.

Case No. 3,949.

In re DODGE.

[4 Dill. 532.] [1]

Circuit Court, D. Iowa. 1877.

BANKRUPT ACT—REV. ST. § 5101—STATE AS PREFERRED CREDITOR.

Under the bankrupt act [of 1867 (14 Stat. 517)],—Rev. St. § 5 101,—the state is entitled to be preferred to private creditors of the bankrupt.

Appeal from the district court of the United States for the district of Iowa.

The bankrupt was indebted to the state of Iowa, on account of contract, for the labor of convicts confined in the penitentiary at Fort Madison, the debt being secured by bond with sureties. The question arose, whether or not, under section 5101, Rev. St. U. S., the state has a right to have its claim declared prior to those of other creditors, and to have the same paid in full out of proceeds of bankrupt's estate in hands of asignee? The assignee objected to the allowance of same as a preferred claim, urging that congress had not intended by said section 5101 to give a state any greater preference under the bankrupt law than the statutes of such state gave to it, and that there is no statute in the state of Iowa giving the state such a preference; therefore, congress could not do so. The assignee also urged that a law which provides that one creditor, whether a state or individual, having no lien prior to bankruptcy, by virtue of contract, or statute, or custom, or otherwise, shall be paid, to the exclusion or prejudice of other creditors, violates the fundamental principles upon which a bankrupt law is based, and that it is simply a legislative confiscation of the debtor's estate for the benefit of a privileged class, and, when passed by congress, is unconstitutional and void. The district court ordered that the claim be allowed in full, as a preferred debt, and that the assignee pay the same out of funds in his hands belonging to said estate, after paying prior claims, if any. The order was brought to the circuit court for review.

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

Craig & Collier, for the State.
McCrary & Hageman, for assignee.

MILLER, Circuit Justice, after hearing the argument of counsel, affirmed the judgment of the district court. Affirmed.

Case No. 3,950.

DODGE et al. v. ARTHUR.

[22 Int. Rev. Rec. 402.]

Circuit Court, S. D. New York. Nov. 16, 1876.

ADOPTION OF REVISED STATUTES — CONSTRUCTION — CUSTOMS DUTIES — CLASSIFICATION — TIN AND TERNE PLATES.

[1. The fact that it was the intention of congress, in enacting the Revised Statutes, to compile existing laws without altering them, does not require the courts to give to a particular section a construction in opposition to the positive provisions thereof, in order to conform to the pre-existing statute; but, if the two cannot be reconciled, it is then to be presumed that congress supposed, and had reason to suppose, that the prior statutes had been changed, and intended to adopt such change.]

[2. Part of the tariff act of June 6, 1872, having been embraced in the Revised Statutes, that act was consequently repealed on June 22, 1874. by the express provisions of Rev. St. § 5596.]

[3. Tin plates and terne tin imported subsequently to the enactment of the Revised Statutes (June 22, 1874) were subject to the combined operation of sections 2503 and 2504; thus being dutiable at 90 per cent. of the 15 per cent. ad valorem imposed by the latter section.]

[4. Articles specifically provided for in a tariff act cannot be subjected to duty at a different rate under a general designation which would otherwise include them.]

This was an action by Wm. E. Dodge and others against Chester A. Arthur, collector of customs for the port of New York, to recover certain duties paid under protest.

Wm. M. Evarts and John E. Parsons, for plaintiffs.

H. E. Tremaine, Ass't U. S. Dist. Atty., for defendant.

SHIPMAN, District Judge (charging jury). The plaintiffs imported into the port of New York subsequently to June 22, 1874, sundry invoices of tin plates and terne tin, upon which the collector exacted a duty of 15 per cent. ad valorem. This duty was paid by the plaintiffs under protest. Appeals were subsequently duly made to the secretary of the treasury, who affirmed the decision of the collector, and this suit was subsequently commenced by the plaintiffs to obtain the amount of duty which they claimed had been improperly exacted. Tin plates are a well-known article of commerce, and are plates of sheet iron, which, having been properly prepared, have been plunged into a bath of molten tin, and carefully covered or coated with the latter metal. Terne tin is tin plate, used for roofing purposes. In this species of plate the brightness of color has been dulled by a slight admixture of lead in the molten tin bath. The terms "tin plate" and "terne tin," are well-known commercial terms, "terne tin" being a subdivision of the more general term "tin plate." "Tin in plates" is a general term which has been used for many years in the tariff acts, and is, by the uncontradicted testimony of the witnesses upon both sides, synonymous with the term "tin plates," and has been recognized as synonymous by the uniform construction which has been given to the term by the treasury department, which has uniformly exacted upon "tin plates" the duty imposed by the statutes upon "tin in plates."

Prior to the act of June 6, 1872 [17 Stat. 230], the duty which was by law imposed upon tin plates and terne tin was 25 per cent. The second section of that act provides that on and after the 1st day of August, 1872, in lieu of the duties imposed by law on the articles in this section enumerated, there "shall be levied, collected, and paid, on the goods, wares, and merchandise, in this section enumerated and provided for, 90 per centum of the several duties and rates of duty now imposed by law upon said articles severally," it being the intent of this section to reduce existing duties on said articles 10 per centum of such duties, i. e. "on all metals not herein otherwise provided for, and all manufactures of metal of which either of them is the component part of chief value, excepting percussion caps, watches, jewelry, and other articles of ornament." The fourth section of the same act provides that on and after August 1st, 1872, in lieu of the duties theretofore imposed by law on the articles mentioned in said section, there should be levied, collected and paid on the articles in said section enumerated, imported from foreign countries, the following duties and rates of duty, that is to say, "on tin in plates, terne tin or taggers tin, 15 per centum ad valorem." The duty upon tin plates was thus reduced 40 per cent., and it is not claimed that tin plates were included in the provision of the second section. By the Revised Statutes, which went into effect June 22, 1874, it was provided in section 2503 as follows, viz.: "There shall be levied, collected and paid upon all articles mentioned in the schedules mentioned in the next section, imported from foreign countries, the rates of duty which are by the schedules respectively prescribed; provided, that on the goods, wares and merchandise in this section enumerated and provided for, imported from foreign countries, there shall be levied, collected and paid only 90 per centum of the several duties and rates of duty imposed by the said schedules severally, that is to say, on all metals not herein otherwise provided for, and on all manufactures of metals of which either of them is the component part of chief value," etc. Among the articles enumerated in Schedule E, being the schedule of section 2504 pertaining to metals, were the following: "Tin in plates or sheets, terne and taggers tin, 15 per centum ad va-

lorem." That portion of the Revised Statutes which relates to the tariff law makes no other mention of the duty to be imposed upon this article by its name, or of the article itself. The question of law thus arises, what rate of duty should have been legally imposed upon the importations of the plaintiffs made subsequently to June 24, 1874, and to the enactment of the Revised Statutes? Section 5596 of the Revised Statutes provided as follows: "All acts of congress passed prior to said 1st day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: provided, that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, and temporary character, shall not repeal or in any way affect any appropriation or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of congress passed prior to said last named day no part of which are embraced in said revision, shall not be affected or changed by its enactment." A part, at least, and the greater part, of the act of June 6, 1872, was embraced in the revision. That act was therefore repealed on June 22, 1874, congress having provided that all acts of congress passed prior to December 1, 1873, any portion of which is embraced in any section of said revision were repealed. If no part of the act of June 6, 1872, have been embraced in the revision, such act would not have been affected or changed by the new statutes. The prior act having been repealed, the question becomes one of the construction which should properly be given to the statutes which were at the time of the importation the only statutes in force upon the subject.

It has been declared by the supreme court, in substance, that the purpose of congress in enacting the Revised Statutes was to collate all the statutes as they were on December 1, 1873, and not to make any change in their provisions, and that the revision is a legislative declaration of the state of the general and permanent statutory law which was in force on that day. The presumption at least then is that if any part of a statute existing prior to December 1, 1873, is contained in the Revised Statutes, and any part of such statute is not contained therein, the part which is not contained had been theretofore repealed. The revision is a legislative declaration that such part had been repealed. But it seems to be manifest that the duty upon tin plate which was provided in the fourth section of the act of June 6, 1872, had not been changed by any legislative act prior to June 22, 1874. It is further apparent that an examination of the provisions of the Revised Statutes from the repealed act of June 6, 1872, in respect to the article commercially called "tin plates," or styled in the tariff act "tin plates," can furnish no plausible ground for a construction which shall separate this article from the operation of section 2503. The counsel for the government has attempted to give no other construction to the language of the revision apart from the statute of June 6, 1872, in regard to the article called "tin in plates," than the one for which the plaintiffs contend. It is, however, strenuously urged, that the facts that the revision was intended to be a compilation of existing laws, and was not intended to change or alter existing laws, should control the judicial mind, and should compel a construction in accordance with what the court believes, and what counsel concede the law to have been prior to the date of the revision. The question is narrowed to this: Shall the declared intention not to alter pre-existing statutes compel a construction which is in opposition to the positive provision of the revision? I am of opinion that an affirmative answer would be an unsafe rule by which to be guided. The true rule should rather be to seek to harmonize the statutes by the principles which have heretofore been adopted in the construction of tariff acts. If the two statutes cannot be reconciled, it is then to be presumed that the legislature supposed, and had reason to suppose, that the prior statutes had been changed or altered, and intended to adopt the provision which is contained in the later act. It is contended by the defendant that in the metal schedule of section 2504 is found the clause "iron and tin plates galvanized or coated with any metal otherwise than by electric batteries, 2½ cents per pound;" that tin plates are iron plates galvanized or coated with tin otherwise than by electric batteries; and that under this provision tin plates might also have been assessed, and that the duty is more than 15 per cent. ad valorem, or at least has not been shown by the plaintiffs to be not in excess of their payment; and that the court can properly say that tin plate being dutiable under one of two clauses, the latter clause should govern. It may be remarked that it has been proved that galvanized iron and galvanized tin are well known commercial articles, and are articles galvanized or coated with zinc; but waiving this consideration, tin plates and terne tin are specifically mentioned in the revision, and have been specifically mentioned since the year 1861 at least, and where articles are specifically mentioned, and may also be included under terms of general description, the duty imposed upon the specifically described articles is to be the governing rate; and, further, the construction of the treasury department, since the act of June 30, 1864, when galvanized iron and galvanized tin were made dutiable at 2½ cents per pound, has been in

accordance with this rule in regard to this article in question. To judicially declare that this article could be dutiable at 2½ cents per pound would be, in my opinion, at variance with principles of construction which have been long recognized, and which have been announced by the supreme court of the United States. The motion of the defendant is denied, the motion of the plaintiffs is allowed, and, there being no disputed question of fact in the case, the jury is directed to render a verdict for the plaintiffs in the sum of $16,-647.95 gold, and $2,609.02 interest in currency. The usage of this circuit to compute interest in currency has been uniform for a number of years. It was the existing usage when I came to this district.

DODGE (BANK OF DOVER v.). See Case No. 10,053.

Case No. 3,951.

DODGE et al. v. CARD.

[1 Bond, 393;[1] 2 Fish. Pat. Cas. 116.]

Circuit Court, S. D. Ohio. Oct., 1860.

PATENTS—PRELIMINARY INJUNCTION — INFRINGEMENT OF COMBINATION—FIRE-PLACES.

1. It is in accordance with the practice and decisions of the court to refuse a preliminary injunction if, upon the facts presented, there is a fair doubt whether the defendant has infringed.

[Cited in Cross v. Livermore, 9 Fed. 607.]

2. The law is well settled that a patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used.

3. When the plaintiffs' patent was for the combination of a flat, horizontal iron plate in connection with a chamber or recess below the plate, and the defendant put horizontal plates into fire-places already provided with recesses which he had no agency in constructing: *Held* that the question of infringement was so far doubted as to forbid the granting of an injunction.

In equity. This was a motion for a preliminary injunction to restrain defendant [Thomas F. Card] from infringing letters patent [No. 14,447] granted to Calvin Dodge for an "improvement in fire-places," granted March 18, 1856, one-half of which was assigned to John B. Ryan. The disclaimer and claim of the patent were as follows: "I do not claim the contracting of the vent or throat of the chimney, as that is well known as a device; but I do claim the use of a deep recess, A B C D, or chamber, placed back of the fire-basket, L, of the grate, and out of the reach of the draft, in combination with the horizontal covering F, over the recess and fire-basket, extending down below the mouth of the chimney, constructed and arranged substantially as hereinbefore described, for the purpose of consuming the smoke and causing the ignition of the gas, which would otherwise be lost, and thus increasing the amount of heat thrown into the room, and by the slow combustion of the fire effecting a great saving of fuel." The defendant had letters patent for an "improvement in fire-places," dated April 17, 1860, which described an arched deflecting plate to be placed over the fire-basket. He put up one of these plates in a fire-place where a recess back of the fire-basket had already been formed by the mason who built it. The complainants insisted that the defendant thus completed the combination patented to Dodge, by placing a horizontal cover over a deep recess, and that he was responsible for making the patented improvement.

G. M. Lee and S. S. Fisher, for complainants.

Curwen & Wright, for defendant.

OPINION OF THE COURT. The complainants have filed their bill, praying, among other things, for a provisional injunction to restrain the defendant from using or vending his improvement in chimney flues, as being an infringement of the rights of complainants, under a patent issued to the said Calvin Dodge, on March 18, 1856. They allege they are now the joint owners of the patent, and that the defendant is using and vending an improvement, substantially the same as that embraced in their patent. The defendant has not put in his answer to the bill, but appears and resists the motion for an injunction on the grounds: First. That the improvement patented to Dodge is not new. Second. That he has not infringed his right under the patent. It would not be proper, nor is it intended, in this preliminary motion, to decide definitely the merits of the controversy between these parties. The only question now to be considered is, whether the facts before the court are such as to warrant an order for an injunction. These facts are presented in the affidavits exhibited in connection with the patents granted to Dodge, and the defendant, Card, for their improvements. And in the brief statement of my views on this motion, I shall limit myself wholly to the question of infringement. It is proper here to remark that it is in accordance with the practice and decisions of this court to refuse an injunction if, upon the facts presented, there is a fair doubt whether the defendant has infringed. In my judgment, there are sufficient grounds for such a doubt in the present case, and I am clear, therefore, that it would not be proper for the court to interpose by the award of such process.

The Dodge patent, which has been referred to, embraces an invention which, though simple in its character, is undoubtedly useful. The claim of the patentee is for a combination, consisting of a flat iron plate placed horizontally above the grate, closing the throat or flue of the chimney, with the exception of

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

a narrow opening in front for the escape of smoke, in connection with a chamber or recess below the plate, from six to eighteen inches in depth from the front of the grate. The utility of the invention, as claimed by the patentee, consists in this—that the smoke and gas from the burning coal strike against the iron plate, and are detained in the chamber or recess below until they are partially consumed, and the heat radiates from the chamber or recess, while the unconsumed smoke escapes through the narrow opening in front; thus increasing the heat from the grate with less than the usual quantity of fuel. In April last, the defendant obtained a patent for an iron plate, to be placed in the flue of the chimney, in an arched position, so constructed as to be capable of extension, and of being adjusted to suit the dimension of any flue, without alteration. This is the only claim of his patent; and its utility consists in its adaptation to any fire-place or flue, and its effect in preventing the heat, to some extent, from escaping up the chimney. It provides for no particular mode of setting a grate, nor for any chamber or recess in the rear, which is one of the elements of the combination embraced in the Dodge patent. The only evidence before the court to sustain the allegation of the bill that the defendant has infringed the Dodge patent, is found in the affidavit of P. W. Strader. He states that he employed Card to put his patented plate in six fire-places at his dwelling-house in Cincinnati, but that Card had nothing to do with setting the grates in the adjustment of his extensible plates. It appears, however, from the affidavit of Knight, who examined these fire-places, that, as the result of putting in the defendant's plate, a recess or chamber was left in the rear of the grate, corresponding substantially with that contemplated by Dodge's improvement. It is not necessary, on this motion, to decide whether the extensible iron plate claimed by Card as his invention, and patented to him, is identical with that claimed by Dodge as a part of his combination. If it be conceded that they are substantially the same, does it necessarily follow that Card, in using one part of the Dodge combination, has infringed his patent? The law is well settled, that a patent for a combination of old things, applied to produce a new and useful result, is not violated unless all the parts or elements of the combination are used. And I can not perceive on what ground it can be claimed, that Card, in the use of his plates in the fire-places at Strader's, under the circumstances before stated, has infringed the two elements of the Dodge combination. It is true, it resulted incidentally from the use of his plates at Strader's that recesses or chambers were left in the fire-places, similar to those claimed by Dodge as a part of his invention. But Card is not responsible for this result, as he had no part or agency in the construction of those recesses or chambers, nor does it appear that they are necessary to the successful operation of his plates, according to the claim of his patent. But without giving a final and positive opinion on this point, I am clear in the conviction that the complainants have not made out a case justifying an order restraining the defendant from the use or sale of his plate, under the circumstances in proof before the court. On the final hearing, when the evidence shall be fully before the court, this question can be reviewed. At present, it is clear the complainants are not entitled to an injunction, and the application is therefore overruled. Whether the complainants have a remedy as for an infringement of their patent, against those using Card's plate in connection with such a recess or chamber, as that claimed by Dodge as a part of his combination, is not now before the court, and of course not for its decision. Injunction refused.

DODGE (GOOD v.). See Case No. 5,531.

DODGE (HARRIMAN v.). See Case No. 6,-104a.

DODGE (HOLMES v.). See Case No. 6,637.

DODGE v. The ILLINOIS. See Case No. 7,-002.

Case No. 3,952.

DODGE v. ISRAEL.

[4 Wash. C. C. 323.][1]

Circuit Court, E. D. Pennsylvania. Oct., 1822.

OBJECTIONS TO DEPOSITIONS — NOTICE — UNANSWERED INTERROGATORIES—EXHIBITS.

1. If the general interrogatory under a commission to take testimony be not answered, it is a fatal objection to the whole deposition. All the interrogatories must be substantially answered.

2. Quaere, if it be not an objection to a deposition that it was committed to writing by the witness before he was sworn? And whether exhibits referred to in a deposition ought not to be annexed by the commissioners to the deposition, or so designated by them as to leave no reasonable doubt of their identity.

3. If reasonable notice to the adverse party of formal objections to a deposition be not given, the court may be induced to set aside a verdict or non-suit, rendered in consequence of this objection, without costs.

Upon the trial of this cause, the defendant made the following objections to the execution of a commission issued to Hayti: 1. That it appeared, from the deposition taken under this commission, and from the certificate of the persons to whom it was directed, that the deposition of the witness was not com-

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

mitted to writing by him under the sanction of an oath, but was written and signed by him many days before the oath was administered. 2. That the general interrogatory is not answered at all, or even noticed. 3. That the exhibits which accompanied the deposition under the same envelope which covered the commission, were not annexed to the deposition, or identified by any marks or reference, to show that they were the very exhibits referred to by the witness in his deposition.

Meredith & Hopkinson, for plaintiff.
C. J. Ingersoll, for defendant.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The second objection is fatal to the whole of the deposition, and has been so decided in this court, more than once. The witness must answer substantially all the interrogatories, as it is otherwise impossible to say that he has told the whole truth. There seems also to be great weight in the other two objections. As to the first, although it may be fair, and indeed proper, to give the witness an opportunity to prepare himself to answer the interrogatories, after having examined them, it might be of dangerous consequence, by being a temptation to perjury, to receive his written answers to those interrogatories, given without the solemnity of an oath previously administered to him; as he might possibly be seduced, by false notions, to attest by his oath the truth of what he had deliberately stated in writing to be true.

There are very strong reasons also in support of the last objection. For although the exhibits come in the same envelope with the commission, they should appear, beyond all reasonable doubt, to be the very papers referred to by the witness.

The plaintiff agreed to suffer a non-suit, and then obtained a rule to show cause why it should not be set aside.

BY THE COURT. As this non-suit was suffered in consequence of objections taken to the formal execution of the commission, of which the plaintiff's counsel had no notice until he was surprised by them at the trial, the court think it but fair to take off the non-suit. Had timely notice been given of these objections, the plaintiff might possibly have had time to remove them by sending another commission, and having it returned to this term. But as the defendant's counsel was not required by the practice of the court to give such notice, the non-suit must be taken off upon payment of the costs to this time. In future, the want of such notice will have weight with the court in cases where applications are made to take off non-suits, and to grant new trials upon the ground of surprise, without the payment of costs.

Case No. 3,952a.

DODGE et al. v. The JOHN STUART.

[22 Betts, D. C. MS. 182.][1]

COLLISION BETWEEN SAILING VESSELS—PLEADING—NECESSARY AVERMENTS.

[1. When sailing vessels approach each other in contrary directions, the vessel sailing free before the wind must give way to the one close-hauled, unless there exists some adequate reason to vary the rule.]

[2. Misconduct causing a collision precludes recovery by the party in fault for injuries sustained.]

[3. A libel for injuries sustained by collision must allege facts showing the proper conduct of libellant's vessel, and the fault of the vessel sought to be charged therewith.]

This was a libel by William E. Dodge and others against the ship John Stuart for injuries sustained by collision.

PER CURIAM. This action is grounded upon a collision in the night time between the ship John Stuart and the bark Greenpoint in the Pacific ocean. The vessels were running in contrary directions, not directly in opposite lines; the bark free before the trades-wind, and the ship closehauled, beating against it. The sea was open to both vessels on each side; the wind fresh but not severe.

1. The law imposed the duty upon the bark to give way for the ship, and gave the ship the privilege to hold her course, unless adequate reasons are brought out by the case for varying that rule. 1 Abb. Shipp. 309; 1 Trinity Rules, 19 Westm. Rev. 62; 1 W. Rob. Adm. 488. If there be a distinction when vessels are approaching obliquely (Rules of Road, 13) it does not apply here.

2. When the collision is the result of the misconduct of the suffering party, he must bear the loss of it. 2 Dods. 83; Woodrop Sims.

3. The libel does not state facts charging fault upon the ship, but, prima facie, on the pleading of the libellant, the blame is on the bark. It would be vitally defective, on proper exception, for not alleging facts showing the conduct of the bark to have been correct, and that of the ship culpable. Wells v. The Anne Caroline [Case No. 17,389a].

4. The cases do not support the proposition that a vessel closehauled loses her privilege as to one sailing free, when they are not approaching head to head.

5. Admitting the proofs properly in, and that the case is to be determined as if the facts found by the libellants had been distinctly pleaded, they do not discharge themselves from the fault of the collision, which belonged to the prosecuting vessel to do (The Boliver, 3 Notes Cas. 208); or show that any act or omission of the ship produced it. Decree for claimants, dismissing the libel.

[NOTE. The libellants appealed to the circuit court, where the decree was affirmed. See Case No. 7,427.]

[1] [Affirmed in Case No. 7,427.]

DODGE (KENNEDY v.). See Case No. 7,-701.

Case No. 3,952b.

DODGE et al. v. LEARY et al.

[23 Betts, D. C. MS. 84.]

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

LIBEL BETWEEN CO-OWNERS FOR SUPPLIES—AGAINST MORTGAGEE.

[1. A libel by one ship owner against his co-owner for supplies furnished to the ship's husband for the use of the vessel cannot be sustained in the absence of averments supported by proof that libellant had paid more than his share upon the common liability, and it is at least equivocal whether the credit has not been given to the ship's husband personally.]

[2. Such a libel cannot be maintained against one holding a conveyance of the vessel merely as security for a debt, without possession, and who has not appointed her master.]

The libel alleges that in November, 1854, the bark Storm Bird was owned jointly by the libellants [William M. Dodge and others] and respondents [Arthur Leary and others], and was fitting for sea at New York for such joint owners under the charge and superintendence of Appleton Oaksmith, and that the libellants furnished said ship's husband, for the use and service of the vessel, furniture and utensils necessary to her fitting out, and to enable her to perform her intended voyage, amounting in value to $251.44. The respondents by their answer deny the joint ownership of the bark alleged in the answer, and aver that the supplies furnished her at the request of said Oaksmith were sold on the credit of Oaksmith alone, and not on that of the respondents. It was proved on the hearing by Oaksmith, the ship's husband, that the respondents were not part owners of the vessel, and only held a nominal title in her to secure a debt owing them by him, and that the libellant Dodge held an interest in the vessel.

PER CURIAM. It is plain that no right to maintain the action is shown by the libellants, in the pleadings or proofs. The allegations on the face of the libel are felo de se to the right of action in the name of the libellants, as they aver themselves part owners of the vessel. They have no color of right to prosecute their co-owners in this form of proceeding for any supposed liability to them upon a mutual debt, without at least an averment in the pleadings supported by the proofs that they had actually paid more than their legal share upon the common liability. Nor could the action be maintained upon their right of co-ownership, if brought against the vessel, as this court does not possess the functions necessary to compelling an adjustment of accounts between joint owners. It is furthermore fatal to their suit, that the respondents are only proved to have held a conveyance of the vessel as a security for a debt, and were thus only mortgagees, and the possession not having been in them, nor the master appointed by them, they cannot be made liable for debts contracted on her account by the master or ship's husband. Moreover, in this case, upon the testimony it is at least equivocal whether the libellants had not given credit, for the articles furnished the bark, wholly to Appleton Oaksmith personally, with whom all their dealings were conducted. The libel must be dismissed, with costs.

DODGE (NATIONAL UNION BANK v.). See Case No. 10,053.

Case No. 3,953.

DODGE v. PEREZ et al.

[2 Sawy. 645.] [1]

Circuit Court, D. California. March 25, 1872.

AUTHORITY OF DECISION ON QUESTION OF FACT—MEXICAN GRANT, JURIDICAL POSSESSION UNDER—RIGHT TO PURCHASE UNDER ACT OF JULY 23, 1866—SURVEY OF PUBLIC LANDS—PATENT—COLLATERAL ATTACK.

1. When a question of fact as to the proper location of a Mexican grant has been determined by the district court, and on an appeal the finding has been reviewed and affirmed by the justice of the supreme court assigned to the circuit; the determination is entitled to great weight as authority on a similar issue of fact submitted upon the identical testimony in another proceeding.

2. The magistrate who gave juridical possession to the grantee under a Mexican grant, was not authorized to include lands in the juridical possession not embraced within the exterior lines designated in the grant.

3. A claimant under a Mexican grant who never presented his grant for confirmation under the act of 1851, and who is not in privity with any party who did present the grant, is not within the provisions of the seventh section of the act of congress passed July 23, 1866 (14 Stat. 220), authorizing certain purchasers of Mexican grantees to purchase lands excluded by a final survey of the grant.

4. Lands claimed under a Mexican grant excluded from the external limits of the grant by the express terms of the decree of confirmation, cannot properly be embraced within a survey of the grant, and are public lands subject to survey and sale as such from the time when the decree of confirmation so excluding them becomes final.

[Cited in U. S. v. Southern Pac. R. Co., 45 Fed. 610.]

5. Such lands when surveyed by the surveyor-general of the United States, under the general authority given for that purpose, are subject to selection by the state of California as a part of the lands granted to the state by congress.

6. A patent of the state, valid on its face, cannot be collaterally impeached by matter dehors the patent, by a party having no title, in an action at law brought in the national courts to recover the land purporting to be granted by it

[This was an action by Owen Dodge against Theodosio Perez and others to recover lands.]

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

J. H. Harding, for plaintiff.

Glassell, Chapman & Smith, for defendant.

SAWYER, Circuit Judge. Plaintiff relies on a patent from the state of California in all respects regular on its face, granting the land as having been located as a part of the school land donated to the state by act of congress. The defendants claim title under a Mexican grant of lands called "Los Nogales," by Governor Alvarado to one Linares, made in 1840. The grant to Linares was duly presented under the act of 1851, to the board of land commissioners for confirmation, in the name of one Garcia et al.; was finally confirmed and finally located by the courts under the act of 1860. The premises in question are excluded from the grant as finally confirmed and located. But the defendants claim that their grantor, Ricardo Vijar, derived his title from Linares before the presentation of the claim by said Garcia et al., for confirmation; that neither the defendants, nor their grantor, Vijar, were parties to said proceedings; that the said grant to Linares was a perfect grant; that being so, under the decision in the case of Minturn v. Brower, 24 Cal. 644, it was unnecessary to present their grant for confirmation, and no rights were lost by their failure to present it; that not being parties to the proceedings had for the confirmation of the grant, they are in no way affected by them; that the decree and location as made erroneously exclude the lands in controversy, and, that they are now entitled to have the question of the proper location of the grant determined irrespective of, and unaffected by, the proceedings already had.

On the other hand, the plaintiff denies both the main facts as claimed by defendants, and the legal conclusions deduced from them. And also insists, that if the defendants' grantor was not by name a party to the proceedings for confirmation, he was the real party in interest; that he did, in fact, prosecute the proceedings at his own expense, and for his own benefit in the names of the parties to the record; and that he is, therefore, as effectually barred by the result, as though he had been a party to the record by name, as well as the real party in interest, and the active party in fact.

Under the view I take upon the question of the location of the grant, it will be unnecessary to decide any of the other questions of fact suggested, or the law arising thereon. The testimony offered in this case to show the location of the grant to Linares, was introduced by agreement from the record of the proceedings in the said case of Garcia v. U. S. [Case No. 5,215], for the confirmation of the grant, and it is, therefore, precisely the same as the evidence on the same point in that case. Whatever the testimony as to the location shows in that case, then, it must also show in this, the testimony being identical.

Conceding that the facts determined in Garcia's Case are not res adjudicata as to the defendants in this case, still the case itself is authority, bearing upon this case upon the same evidence, and the same issue of fact, so far as the determination of a district judge, upon exactly the same state of circumstances, and of the associate justice of the supreme court of the United States sitting as circuit judge in the same court, on appeal from the decision of the district judge, can be regarded as authority controlling my action. It is true that I am not absolutely bound in this case to follow the determination of those distinguished jurists, in deciding the same issues upon the same testimony in another case; but where the question has been deliberately determined in an elaborate written opinion exhaustive of the whole subject, by the district judge, and that determination as to the boundaries now in question affirmed, after further examination on appeal, by the associate justice of the supreme court assigned to the circuit, sitting as circuit judge, it would be presumptuous in me to decline to recognize their action as authority upon the point; but in this case, after a careful examination of the testimony, I happily find no good ground for coming to a different conclusion. It is insisted, however, that the district and circuit judges were hampered in determining the question of location by the terms of the decree of confirmation, which they were compelled to follow, rather than the grant. But in this counsel are mistaken. The description in the decree is a verbatim copy of the description of the grant, except that the decree limits the quantity to "one league, and no more," while the grant says "a league, a little more or less." But the amount within the location is far less than a league, so that this difference in the decree and the grant does not affect the question. The language of the decree construed, being the exact language of the grant, so far as the question at issue is concerned, the construction of the decree is necessarily the construction of the grant. The boundaries of the grant were held to be two creeks mentioned in it, and laid down on the diseño, and the boundary of the San José rancho. The same construction was given to the grant examined by the light of the evidence by the two district judges, who at different times decided the question, and by the justice of the supreme court assigned to the circuit. There was evidently a desire on the part of the judges to so construe the grant, as to give the league of land called for, but it was found impossible. The last location enlarged the amount somewhat by adopting a different line for the southern boundary of the San José rancho, but leaving it still far short of a league. Could the court have ignored the two creeks as boundaries, the league—or at least a much larger quantity than was given—might have been obtained without encroaching on the San

José rancho. But these well-defined natural boundaries could not be disregarded without a manifest disregard of the language of the grant, the plain delineations of the objects on the diseño, and the testimony of witnesses as to the topography of the country.

The juridical possession, whether taken as described in the act of possession, or as pointed out by Lugo to the surveyors, manifestly extended far beyond the limits indicated by the language of the grant, and embraced a large tract of land not included in the diseño at all. The magistrate had no authority to include in the possession lands not within the exterior boundaries of the grant. He was authorized to measure off and segregate within the exterior boundaries indicated the lands granted, not to grant other lands. Manuscript opinions of Mr. Justice Field and Hoffman, J., in U. S. v. Castro [Cases Nos. 14,-749-14754]. I am satisfied that the lands in controversy are not within the exterior limits of the said grant to Linares.

It is next claimed by the defendants that their lessor, Ricardo Vijar, is a purchaser in good faith under the said grant to Linares, and possesses all the qualifications prescribed in the seventh section of the act of congress, "to quiet land titles in California," passed July 23, 1866 (14 Stat. 220), and as such entitled to purchase the lands in controversy from the United States; that the said lands were, therefore, not subject to selection in lieu of the sixteenth and thirty-sixth sections by the state, and that the said selections and patent by the state under which the plaintiff claims are consequently void.

But Ricardo Vijar shows no privity or connection with the proceedings in the case of Garcia v. U. S. [supra], for the confirmation of the Los Nogales grant. On the contrary, he utterly repudiates being a party, or in privity with the parties, to that proceeding; and says that those proceedings in no way affect him. He plants himself upon the grant to Linares, as a perfect grant, requiring no confirmation or survey. He claims that he obtained his title long before Garcia et al. presented their petition, and that they could not affect his rights by their action in that matter. In short, he holds no relation whatever to the proceedings for confirmation, but presents himself in the same attitude that he would occupy if that proceeding, and no other, had ever been had for the confirmation of said grant. In that aspect, his grant has never been presented and never been rejected, and there never has been any survey, and the time allowed having expired, the grant now never can be presented, rejected or surveyed.

Taking his case as he himself presents it, and relies on it, he is, in no sense, within the terms of said seventh section of the act of July 23, 1866. The lands lying without the boundaries of his grant, as it has already been determined, he has no title, and he having never presented any claim for confirmation, and never had his claim rejected, or the land claimed excluded from any final survey, he is not within the provision of the act of congress, and has no equities whatever. He is, therefore, in no position to attack the patent in any form whatever.

Another view leads to the same result. For the purpose of this view I will assume that Ricardo Vijar was a purchaser in good faith under Linares; that the lands were claimed by him under the Los Nogales grant as such purchaser; that they were occupied as required by the statute of 1866; and that he was a party or privy to the proceedings for confirmation in the case of Garcia v. U. S. The decree of the district court finally confirming the Nogales grant in the case of Garcia v. U. S. bears date January 16, 1857. A survey of the grant to Linares was ordered into the district court of the southern district of California for review November 15, 1859. Exceptions were taken and heard and various proceedings had. In the minutes of the proceedings of said court in said cause for March 20, 1861, is an entry in the words following: "In this case the court delivers an opinion, after having fully considered the evidence in this cause and being fully advised thereof, overruling the exceptions filed in this case and confirming the said survey of the surveyor-general of the United States for the state of California, now on file in this court." The survey "now on file in this court" referred to, excluded the premises in controversy. No formal decree in pursuance of the above entry appears to have been filed, but, unless a final decree was filed and subsequently lost, the court and parties must have treated the foregoing entry as a final confirmation of the survey; for, on April 15, 1861, an appeal was granted from the "decision and decree of the court confirming the survey," etc. The appeal, however, does not appear to have been prosecuted, and no further steps were taken for over nine years. In the mean time the surveyor-general of the United States treated the grant as finally located, and surveyed the lands excluded from this and the neighboring grants, as public lands of the United States. The lands so surveyed as public lands include the lands in controversy.

A certified copy of the plat of township No. 2, among the papers in the case of Garcia v. U. S., introduced in evidence, shows that these lands must have been surveyed into sections and subdivisions as early, at least, as February 28, 1865. The testimony also shows that, on July 3, 1869 (some four years afterward), a state selection, covering the premises in question, was filed in the United States land office at Los Angeles; that the said lands were listed to the state of California January 20, 1870, and patented by the state to the plaintiff's grantor May 5, 1870. This suit was commenced June 3, 1870, and process served on the sixth and seventh of the same month. After all these transactions,

on July 12, 1870, and more than nine years after the rendering of the said decision of March 20, 1861, by Judge Ogier, confirming the survey made, the claimants moved the court to reopen and rehear the case upon the survey, and the district judge granted the motion; and, after taking further testimony, re-confirmed the survey before approved. On appeal to the circuit court, the land confirmed was enlarged in one direction by extending the grant over a portion of land already confirmed to the San José rancho, but not taking in any land outside the two creeks, named as boundaries in the grant and diseño before excluded and surveyed as public lands.

This final confirmation was made September 23, 1871. It is evident that the decision of Judge Ogier of March 20, 1861, was intended to be a final confirmation. It was so treated by him and the parties, otherwise the appeal granted was premature. The appeal was never prosecuted, and manifestly the confirmation of the survey only failed to become final by an oversight in not drawing up and filing a final decree in pursuance of the decision rendered, if such failure there was. The court, however, in 1870, regarded this omission as leaving the case open for further action, and took further proceedings, so that there was in fact no final survey till Sept. 23, 1871. But the survey confirmed, during the nine years succeeding the confirmation of Judge Ogier, must have been treated as final. The officers of the government, as well as the court and the parties, so treated it, and before 1865 surveyed the excluded lands as public lands, and they were so treated by the state of California in making the selections in question, and by the land office in listing them over. The claimants seemed to have acquiesced till roused to action by the commencement of this suit after the land had been selected, listed over and patented as aforesaid. Are they now in a position to resist a recovery? The legal title must prevail in an action of ejection in this court. The defendants, certainly, have not the legal title. They have, at most, but an equity, which cannot avail if the patent issued is not an absolute nullity. Non constat that defendants will ever apply for a patent, even if plaintiff's patent should be avoided. The patent is regular on its face. The proceedings resulting in the patent were the usual proceedings in such cases, and regular in form. The patent is not attacked for any defect in the form of the proceedings. If void at all, it is for matter dehors the patent, and the proceedings resulting in it. It is insisted, however, that the patent is void, because the surveyor-general was not authorized to survey the lands until the final location of the Los Nogales grant, September 23, 1871, and because the land was not open to selection by the state before such final location; and further, because the lands, claimed under a Spanish grant, which the claimants are authorized to purchase under the act of 1866, are not subject to selection. No statute has been called to the attention of the court forbidding a survey of public lands, that may possibly fall within the external boundaries of some Spanish grant, until a final survey; and certainly none to prevent the survey of the public lands not embraced at all within the external boundaries of a grant as designated in the decree confirming it, as is the case now in hand. The decree of confirmation itself in this case excluded the lands, so that they could not have been included in the survey, for they were not embraced within the external boundaries as designated in the decree. So far as the lands in question are concerned, they were finally excluded when the decree of confirmation became final. The defendants' counsel so claims in one branch of his argument. The survey could by no possibility afterwards properly include them. The case of a confirmation of a league of land within exterior boundaries embracing two or more leagues, would be different, for, in that case, there is some latitude for discretion in the location, and the league might be located upon any part, within the exterior limits, and it could not be known what would be excluded till a final survey. But where, as in this case, the decree itself confines the location within certain limits, defined by unmistakable physical objects, as two streams of water, the decree itself finally excludes all lands outside of those boundaries. At least in such case, I do not think the land department could be charged with acting wholly without authority in treating lands thus excluded as public lands.

The only provision of the statute cited to show that lands claimed under a Mexican grant are not subject to selection till after final location, is a section of the act of March 3, 1853 (10 Stat. 246, §§ 6, 7), but this section only refers to pre-emptions, and the plaintiff does not derive his title under any pre-emption claim. No such limitation is found in section 7 of the same act; nor in any other statute called to the attention of the court. Besides, as stated with reference to the survey, this land was necessarily finally excluded from any possibility of ever being properly included in the survey by the terms of the decree, which also follows the language of the grant, and which did not embrace it within the external boundaries designated in it. From the time when the decree of confirmation became final, there was no Mexican grant that could have embraced the lands in question, and they were necessarily public lands, and open to survey and selection as such, unless there is some statute forbidding it, and none has been cited.

As to the claim under section 7 of the act of 1866 (14 Stat. 220), there is no time specified in the act within which the claimants may purchase. The defendants have not

shown what regulations were made by the commissioner of the general land office on the subject, nor whether they have complied with these regulations. They do not show that they have ever made any application to purchase, or that they ever intend, or desire so to do. How long is this privilege to be held open?

The lands appear to have been surveyed sometime prior to 1865, and they were not listed over to the state of California till January 20, 1870, five years after the survey, and nearly four years after the passage of the act of 1866, and during all this time, and from March 20, 1861, the defendants, and their grantors, made no movement in regard to these lands. How were the officers of the land department to know whether the defendants desired, or claimed the right to purchase, or not? In my judgment, the principle adopted in Doll v. Meador, 16 Cal. 325, disposes of this branch of the case. The proceedings resulting in a patent were all taken by the proper officers, and were regular in form. The surveyor-general determined that these lands were subject to be surveyed as public lands, and accordingly surveyed them. The lands having been officially surveyed by the proper officers, the state of California selected them as a part of the lands granted to the state by congress, and filed the selection in the proper land office; and thereupon the proper officer, after taking ample time for consideration, determined that they were subject to selection, and listed them over to the state.

To determine these questions, and act upon the determination was a part of the duties of the land officers, and if they made a mistake in judgment, their action was erroneous, and not a mere nullity. If nobody else complains, the government cannot, and the title of the United States certainly passed. Suppose the United States had brought an action of ejectment to recover these lands of the plaintiff, would not the patent constitute a good defence? I think it would. If so, the patent is not absolutely void, it is at the worst only voidable.

In Doll v. Meador, the court by Field, Ch. J., say: "If the authority to issue the patent depends upon the existence of particular facts in reference to the condition or location of the property, or, the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment—then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases, the parties without title cannot be heard at all, and the parties with subsequent title must seek their remedy by scire facias or bill, or information to revoke the first patent or limit its operation." 16 Cal. 325. See, also, Ah Yew v. Choate, 24 Cal. 566.

I am satisfied that the patent is not an absolute nullity. If the defendants have any rights, as against the plaintiff, they must establish them in some other proceedings, for the patent must prevail in this action. Let judgment be entered for the plaintiff with costs.

Case No. 3,954.

DODGE v. PERKINS.

[4 Mason, 435.][1]

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

JURISDICTION OF FEDERAL COURTS — CITIZENSHIP —HOW SHOWN—PLEADING—CITIZENSHIP OF ADMINISTRATOR.

1. In all bills in equity in the courts of the United States, the citizenship should appear on the face of the bill, to entitle the court to take jurisdiction, otherwise the bill will be dismissed.

2. If the citizenship be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea, and cannot do it by general answer, for it is a preliminary inquiry.

[Approved in Wood v. Mann, Case No. 17,952. Cited in Adams v. White, Id. 68; Bland v. Fleeman, 29 Fed. 672.]

3. Where the real parties in the record are not citizens of different states, the court has no jurisdiction.

4. Where an administrator sues, as such, and he is a citizen of the same state as the defendant, the court has no jurisdiction, although the intestate was a citizen of another state. An administrator is, in such case, the real, and not a nominal party.

[Cited in Clarke v. Matthewson, Case No. 2,857; Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co., 18 Wall. (85 U. S.) 586.]

Bill in equity for an account.

The bill, after the usual address to the court, proceeded as follows: "Humbly showeth your orator, John Dodge, executor of the last will and testament of Unite Dodge, of New York, in the state of New York, merchant, and a citizen of said state, deceased, whose said will was proved before the surrogate of the county and city of New York, on the twenty-eighth day of July, A. D. 1806, and of whose goods, chattels, rights, credits, within the state of Massachusetts, administration has since also been granted by the judge of probate, &c. within and for the county of Suffolk, in said state of Massachusetts, to the said John Dodge, as by the letters of administration, bearing date the 9th day of April, A. D. 1827, will fully appear, &c.: That, in the month of November, in the year of our Lord eighteen hundred and three, the said testator, Unite Dodge, then a resident merchant of Cape François, in the island of Saint Domingo, remitted, by letters to James Perkins, who has since deceased, and Thomas H. Perkins, who sur-

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

vives, both of Boston aforesaid, in the state of Massachusetts, citizens thereof, merchants, constituting the commercial house or copartnership of J. & T. H. Perkins, three bills of exchange." The defendant filed his answer, excepting, in the first place, to the jurisdiction of the court, and averring, that John Dodge, the plaintiff, and the defendant, were both citizens of Massachusetts at the commencement of the suit, &c. and denying also, that Unite Dodge was, at his decease, a citizen of the state of New York, or that any administration had been taken upon his estate in Massachusetts, and prayed an inquiry into these facts; and then insisting on the objections, proceeded, as if the court had overruled the objection to the jurisdiction, to state the defence upon the merits at large. The cause came on for argument, upon a motion made by the plaintiff for an order of the court, that the defendant should pay a certain sum of money into court, which he admitted, in his answer, to be due from him, as surviving partner to the estate of Unite Dodge, when a doubt was suggested by the court, whether it had any jurisdiction in the case.

The point of jurisdiction was accordingly argued by Mr. Saltonstall for the plaintiff, and by Mr. Gardiner for the defendant. The former cited [Browne v. Strode] 5 Cranch [9 U. S.] 303; [Chappedelaine v. Dechenaux] 4 Cranch [8 U. S.] 306; and [Sere v. Pitot] 6 Cranch [10 U. S.] 332.

STORY, Circuit Justice. It is very clear, that this court cannot maintain jurisdiction over this cause, unless the averments in the bill bring the case within such a description of persons as the act of congress contemplates to give jurisdiction to the circuit court. But before I proceed to consider the objection which has been raised, it is proper to observe, that the mode of proceeding in this case, and the manner in which the exception to the jurisdiction is brought forward by way of answer, is wholly irregular. Where the want of jurisdiction is apparent upon the face of proceedings, from a defective statement of the citizenship of the different parties, it is fatal at all times, and may be insisted upon by way of motion or otherwise, in any stage of the cause, and even upon an appeal. But where the citizenship is properly averred in the bill, but the objection meant to be insisted on is the denial of the fact of citizenship, or the allegation of a citizenship, which would oust the jurisdiction, in such case the objection should be taken by way of plea, and confined to that point, and not by way of answer. A general answer admits, that the plaintiff is rightfully in court, and assumes, that the court have jurisdiction over the parties to hear and dispose of it according to the principles of a court of equity. How then can a cause be put at issue upon a general answer, which denies the jurisdiction of the court over the parties, and at the same time insists upon the merits? Before the court can proceed to entertain any question upon the merits, it must know, that it possesses the proper jurisdiction over the parties. It is plain, therefore, that the question, as to the citizenship of the parties, must be preliminary in its nature; and the exception must be taken by way of plea, and not by way of general answer inter alia. In this case I should feel it my duty to give the defendant a right to withdraw his answer and to put in a plea, if the posture of the cause hereafter should render that course desirable to him.

Then as to the point of jurisdiction. It is not stated in the bill, what is the citizenship of the plaintiff himself. The only description of him is in his capacity as executor of Unite Dodge, whose citizenship in New York is averred; and the citizenship of the defendant in Massachusetts is also averred. The suit, if it can be maintained at all, can be maintained only in virtue of the citizenship of Unite Dodge, deceased, and even his citizenship is denied in the answer. The judiciary act of 1789, c. 20, § 11 [1 Stat. 78], gives the circuit court jurisdiction of suits of a civil nature at common law, or in equity, &c. (among other cases) where "an alien is a party, or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state." If John Dodge, the plaintiff, had been stated in the bill to be (what the answer avers him to be) a citizen of the state of Massachusetts, the suit would clearly not be maintainable; for though he sues in a representative capacity, yet he sues in his own right as a citizen. No suit can be maintained in the circuit court upon the ground, that the deceased was a citizen of another state, for the deceased is not a party to the suit. By his death he has lost all power to institute, or carry on a suit; and in no correct sense is he to be deemed a party or citizen of any state. This is the clear result of the decisions of the supreme court. In Chappedelaine v. Dechenaux, 4 Cranch [8 U. S.] 306, the plaintiffs sued as French subjects and aliens, in their respective characters of administrator and residuary legatee of one Chappedelaine, deceased, who was a citizen of Georgia, and the defendant was a citizen of Georgia, and was sued as executor of Dumoussay, also a citizen of Georgia. The court held, that the jurisdiction was maintainable, notwithstanding both of the parties deceased, in whose right the controversy was carried on, were citizens of the same state. The plain ground was, that the present controversy was between aliens and a citizen. Browne v. Strode, 5 Cranch [9 U. S.] 303, is not inconsistent with this decision; for there the real plaintiff was an alien, and alive; and the nominal plaintiffs only sued officially for his benefit. The case of Sere v. Pitot, 6 Cranch [10 U. S.] 332, turned entirely upon a different question, and was brought within the proviso of the 11th section of the act of

1789, c. 20, respecting assignments. How the case would have been, if it had clearly appeared by the averments in the bill, that none but heirs and legatees had any interest in the suit, and were all aliens or citizens of another state, and the executor was merely a nominal party, I give no opinion. That is not the case before us. This is to all legal intents a suit between John Dodge and Thomas H. Perkins, and the citizenship of these parties decides the question of jurisdiction. If that be defectively stated, the jurisdiction cannot be sustained. Under these circumstances the present motion cannot be entertained by the court. But the parties may have leave to amend; the plaintiff to amend his bill, as he shall be advised, and the defendant to withdraw his answer, and, if necessary, to file a plea. Motion denied.

DODGE (ROBERTS v.). See Case No. 11,900.

Case No. 3,955.

DODGE v. STUART.

[See Case No. 7,427.]

DODGE (UNITED STATES v.). See Cases Nos. 14,975 and 14,976.

Case No. 3,956.

DODGE v. VAN LEAR.

[5 Cranch, C. C. 278.][1]

Circuit Court, District of Columbia. March, 1837.

STATUTE OF FRAUDS — UNSIGNED MEMORANDUM AIDED BY PAROL EVIDENCE AND LETTERS — SALE—DELIVERY.

1. A written memorandum made by the plaintiff in his day-book, not signed by either of the parties, or by any person for either of them, and proved, by oral testimony only, to have been made in the presence and with the consent of the defendant, and corroborated by the defendant's letters, not referring particularly to that memorandum, nor stating the terms and consideration of the contract, is sufficient to take the case out of the 17th section of the statute of frauds; and it is competent for the jury to connect the letters with the written entry; and the same, taken together, constitute legal and valid evidence of a written contract, in conformity with the requisitions of the statute of frauds.

2. If a contract be absolute to deliver flour on or before a particular day, the vendor will not be excused by an obstruction of the navigation of the canal.

3. It is not material whether the defendant had, or had not the flour on hand at the time of the contract.

Assumpsit, upon a contract to deliver 1000 barrels of flour; half on the 5th, and the residue on the 15th of May, 1835. On the 30th of March, 1835, the defendant [Matthew S. Van Lear], being concerned with others in a large flour-mill in or near Williamsport, in Maryland, and having a large quantity of flour on hand, and being in the plaintiff's warehouse in Georgetown, agreed to sell to the plaintiff [Francis Dodge] 1000 barrels of flour, of the defendant's brand, at $4.75 per barrel, to be delivered in Georgetown, half on the 20th, and half on the 30th of April, 1835. The plaintiff, in the presence and with the assent of the defendant, made the following written entry in his day-book, under date of the 30th of March, 1835: "Bought of Mr. Van Lear 1000 barrels his brand flour @ $4.75, to be delivered, half 20th April, and half by 30th; if not here then, I am to be off or not, as I please. ½ D. & Dodge." The words and figures "½ D. & Dodge" were not written until after the defendant had left the warehouse. They were understood to mean that the firm of Davidson & Dodge, consisting of one John Davidson, and the plaintiff's son, Francis Dodge, Junior, were to take upon themselves one half of the amount of the contract. It was afterwards agreed between the plaintiff and the defendant that the time of delivery of the flour should be extended to the 5th and 15th of May, 1835. Upon his return to Williamsport, the defendant wrote to the plaintiff on the 6th of April, 1835, saying that a breach in the canal would probably interrupt the navigation for a month, and render it impracticable to fulfil the contract made with the plaintiff, and requesting an extension of time for thirty days longer. He says, "If boats can be procured from above, a part of the flour, and perhaps the five hundred barrels, can be delivered in due time. But for fear that things may occur to prevent, over which I have no control, I want to know from you, by return mail, whether you will extend the time. I am anxious to live up to the contract, and have the same offer that you made, and an extended time. The canal navigation is so precarious it is out of the question to make any calculation with certainty. My brother will be down as soon as the canal opens." To this the plaintiff replied, on the 7th of April, "Yours of 6th, is received. We must extend the time for the delivery of the contract flour, but hope it will yet be here within the time; say 20th and 30th April. We shall of course claim the first which comes from your mill, and until all can be delivered; and if, in consequence of breaks in the canal, it be kept back until 5th and 15th May, we will not object; and if not here then we are to still take it or not as we please. On receipt of this, please write and inform when you expect to get it here, &c., and when the four hundred and twenty will be down. We intend to stick to the contract, (although it don't promise any profit,) if it can be placed here before too long a time; and must be liberal when the canal

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

will not permit its coming. Yours, Fra. Dodge. You ask for thirty days; I suppose you mean from the time you wrote." On the first of May, 1835, the plaintiff wrote to the defendant as follows: "As you have not been able to deliver the flour, (say now behind 1275 bbls.,) we must extend the time still further and until you can get it here. I sold my half of the last 1000, at 4.80, to a New York man, and he is anxious to have it delivered. We shall rely on its delivery, and in the shortest possible time. Yours, Fra. Dodge. Flour—4.90 to 5—sales." On the 7th of May, 1835, the defendant wrote to the plaintiff as follows: "Your two letters of 7th of April, and 1st of May, are before me; the former extending the time for the delivery of the flour contracted to be delivered on the 20th and 30th April to the 5th and 15th of May, as requested by me in my letter of the 5th of April, and the latter still wishing to extend the time without any limit, or, according to your construction of the contract, as long as flour remains above the contract price. Now, sir, my view of the contract is entirely at variance with that construction. I made every exertion to deliver you the 1000 bbls. of flour by the first contract on the 20th and 30th April; say 500 bbls. on the 20th, and 500 bbls. on the 30th April. But finding it impossible, from circumstances not within my control, to make good that contract, I asked, by letter of the 5th of April, for an extension of time for thirty days, say 5th and 15th May; the same things having occurred, as before, to prevent its fulfilment, I considered it null and void after that time. I never would, and I never did make a contract so entirely against myself; for if flour had fallen, you would not, of course, have given me one day after the specified time, say 5th and 15th May; and it would not have been in my power to have delivered; therefore according to your view of it it is a complete one-sided bargain, and such a one as an idiot would have made. You will perceive, by reference to my letter, that I asked for and obtained, a certain number of days, say thirty. I therefore consider myself absolved from the first part of the contract, namely, the 500 bbls. to be delivered on the 5th of May. And still consider myself bound to deliver the other 500 bbls. by the 15th, if practicable to do so. Yours, M. S. Van Lear." To this, the plaintiff replied on the 11th of May, as follows: "Yours of the 7th is received, and I am really astonished at your not being willing to deliver the 1000 bbls. of flour as contracted for. I have been very particular throughout, and in mine of the 7th, in which I gave you the extension asked for, I then restated the original bargain, that if not delivered at the time, say 5th and 15th May, I was to take or not as I pleased; and although there was no obligation, on my part, to say any more, yet I thought best to say on the 1st inst. that we would still take it, and gave the unlimited time thus stated, in doing of which I, of course, would risk a fall of price. Now, sir, I hope, upon reflection, that you will not think of refusing to comply with this contract; it will be altogether what I could not have expected from you. I am sure no one would say that you are not bound to deliver, and I must insist on its being done. It is no longer my interest to any amount, as I sold the contract for five per cent. profit; and assured the purchaser that there was no doubt of its being complied with on your part; this refusal I could not have believed possible; don't omit to deliver it. I bought it at first more to accommodate you than from any profit I expected. Yours, Fra. Dodge."

Upon the trial, the plaintiff's counsel offered to examine Francis Dodge, Jr., one of the firm of Davidson and Dodge, as a witness, and produced an instrument in writing dated the 16th of May, 1835, signed by Davidson and Dodge on one part, and Francis Dodge, (the plaintiff,) of the other part, rescinding the agreement, by which they were to take one half of the contract. The defendant objected that the witness appeared, by the memorandum, to be interested; but THE COURT overruled the objection, and he was sworn and examined.

Upon this evidence the defendant prayed the court to instruct the jury that the plaintiff could not recover, because no part of the flour was delivered at the time of the bargain; no earnest money paid, and no note or memorandum, in writing, of the bargain made and signed by the parties or their agents, as required by the 17th section of the statute of frauds and perjuries.

But THE COURT (CRANCH, Chief Judge, contra) refused to give the instruction; and at the prayer of the plaintiff's counsel, Mr. Marbury, instructed the jury, "that if they believe, from the evidence, that on the 30th of March, 1835, the defendant contracted with the plaintiff to sell to him one thousand barrels of flour at $4.75 per barrel, to be delivered, half on the 20th and the residue on the 30th of April thereafter, and that the plaintiff, in the presence of the defendant, and with the intent to reduce the terms of the said contract to writing, made an entry in his book, in the words following," (as before stated) "and read the same to the said defendant, who assented to the correctness of the said entry; and that the said defendant afterwards addressed letters to the plaintiff, signed by him, referring to the said contract;" (see the letters of the defendant to the plaintiff, of the 6th of April and 7th of May, 1835, as above recited,) "it is competent for the jury to connect the said letters with the written entry; and the same, taken together, constitute legal and valid evidence of a written contract in conformity with the requisitions of the statute of frauds."

CRANCH, Chief Judge, stated his opinion to be that the case was within the statute of frauds and perjuries. The plaintiff's memorandum in his book is not signed by any one, and the defendant's assent to it is only proved by oral testimony; so that, without the letters, the case is clearly within the statute. The letters do not contain the whole contract, nor do they refer to the written memorandum in the plaintiff's book; with which the letters cannot be connected without parol testimony. 2 Kent, Comm. 511.

THE COURT further instructed the jury, at the prayer of the plaintiff's counsel, "that if they believed, from the evidence, that the defendant, residing and carrying on the business of a miller, at Williamsport, in the state of Maryland, contracted, on the 30th of March, 1835, to sell to the plaintiff one thousand barrels of flour, at $4.75 per barrel, and to deliver the same at Georgetown, on the 20th and 30th April next thereafter; and that afterwards, at the request of the defendant, and in consequence of a breach or breaches in the canal, the plaintiff agreed to extend the time for the delivery of the said flour, to the 5th and 15th day of May next thereafter, and that the defendant neglected and refused to deliver the said flour at the said last-mentioned times, then the plaintiff is entitled to recover in this action, although the jury should believe that the navigation of the said canal was much obstructed during the spring of the year 1835, and the defendant was put to inconvenience and difficulty in executing his said contract by reason thereof."

CRANCH, Chief Judge, observed that, as the court had overruled his opinion that the evidence was not sufficient to take the case out of the statute of frauds, he concurred in the present instruction.

The defendant's counsel, Mr. R. J. Brent, then prayed the court to instruct the jury, "that if they believe, from the evidence, that the whole of the one thousand barrels of flour, or any part thereof, was (Qu.? not) on hand at the time of entering into the alleged contract, then the entire contract is void, and the plaintiff is not entitled to recover." Which instruction THE COURT refused to give. Whereupon the defendant's counsel further prayed the court to instruct the jury, "that if they believe that Davidson and Dodge were parties in the original, or any substituted, contract, then the plaintiff is not entitled to recover." Which instruction THE COURT also refused to give.

The defendant's counsel then moved the court to instruct the jury, that there is no evidence of a contract to deliver five hundred barrels of flour on the 5th, and five hundred on the 15th of May, as charged in the declaration. Which instruction THE COURT (THRUSTON, Circuit Judge, contra) also refused to give. CRANCH, Chief Judge, concurred in this refusal; his opinion in respect to the statute of frauds having been overruled by THE COURT, as aforesaid.

To these refusals of the court to instruct the jury, as prayed by the defendant's counsel, and to the instructions given at the prayer of the plaintiff's counsel, the defendant took a bill of exceptions. The jury found a verdict, in favor of the plaintiff, $681.25. The defendant took a bill of exceptions, and, it is understood, applied to one of the justices of the supreme court for a writ of error, (which he could not have, as a matter of right, because the verdict was for less that $1,000,) but the justice refused to award it.

DODGE (WOOLSEY v.). See Case No. 18,-032.

DODGE & S. MANUF'G CO. (KIRBY v.). See Case No. 7,838.

DODGE & S. MANUF'G CO. (MARSH v.). See Case No. 9,115.

DODGE COUNTY (CHANDLER v.). See Case No. 2,592.

DODGE HEALY, The (CLARKE v.). See Case No. 2,849.

Case No. 3,957.

In re DOE.

[2 N. B. R. 308 (Quarto, 100);[1] 1 Chi. Leg. News, 123.]

District Court, S. D. New York. Dec. 22, 1868.

BANKRUPTCY—ELECTION OF ASSIGNEE—SOLICITATION OF VOTES BY STRANGER.

The court will not sanction the practice of soliciting the votes of creditors by one seeking thereby to be chosen assignee, especially when such person is a stranger to the creditors, and makes it a regular business to seek out creditors and persuade them to prove their debts and vote for him as assignee.

[Cited in Re Mallory, Case No. 8,990; Re Wetmore, Id. 17,466.]

[In bankruptcy. In the matter of John Doe.]

BLATCHFORD, District Judge. In this case the register, in transmitting to the court the result of the first meeting of creditors, certifies to the court that at such meeting one creditor who had proved his debt appeared; that only one debt was proved; that the register enquired of such creditor if he desired to elect an assignee; that such creditor replied that he would elect Mr. ——, who was present; that as Mr. —— had been elected in six out of the last ten cases before the register, the register thought it right to make enquiries of the creditor concerning the choice, and elicited from him the statement that Mr. —— was a stranger to him, and

[1] [Reprinted from 2 N. B. R. 308 (Quarto, 100), by permission.]

called at his place of business on the day preceding, with one of the notices to creditors, which was the first he had heard of the meeting, and called his attention to the notice, and solicited of him that he would prove his debt and elect Mr. —— as the assignee of the bankrupt, and, after consultation, it was agreed that he should attend the meeting of creditors, and swear to his claim and vote for Mr. —— as assignee; and that this statement was made in the presence of Mr. ——, who remarked that if he had not so called upon the creditor, the creditor would never have known of the meeting. The register remarks that he saw nothing in the conduct of Mr. R—— in any way disingenuous, but that. on the other hand. Mr. R—— was understood by the register to claim that it was not improper thus to secure himself to be elected. The register states that he certifies the case to the court, that it may be fully advised of the facts of the case in passing upon the question of the approval or disapproval of the assignee so elected, only suggesting the enquiry whether it would be a wholesome proceeding if adopted and approved by this court.

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

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

DOE ex dem. STURGESS v. BANK OF CLEVELAND. See Case No. 13,571.

DOE ex dem. LEWIS v. BARKSDALE. See Case No. 8,317.

DOE (HYDE v.). See Case No. 6,969.

Case No. 3,958.

DOE v. JOHNSTON et al.

[2 McLean, 323.][1]

Circuit Court, D. Ohio.[2] Dec. Term, 1840.

EJECTMENT—STAY OF EXECUTION PENDING EQUITY SUIT IN STATE COURT—INJUNCTION—SERVICE OF SUBPOENA—LANDLORD AND TENANT—NOTICE TO QUIT.

1. This court will not stay proceedings on a judgment in ejectment, until the equity between the parties, of which they have jurisdiction, shall be investigated in a state court. But such proceedings will be stayed, where this court have not jurisdiction of the equity.

2. It is sufficient service of the subpoena, on an injunction bill, to serve it on the attorney of the plaintiff in the ejectment.

[Cited in Cortes Co. v. Thannhauser, 9 Fed. 228.]

3. A notice to quit, by the English rule, is necessary only where the relation of landlord and tenant subsists.

[Ejectment.]

Mr. Curtis, for lessor of plaintiff.

Mr. Goddard, for defendants.

OPINION OF THE COURT. Judgment having been entered, a motion was made by defendants' counsel, that further proceedings be suspended until a suit in equity, pending between the plaintiffs and defendants in the state court, which involves the title to the premises recovered in this suit, shall be decided. This motion was opposed by the plaintiff's counsel. It is the practice of this court to stay the writ of possession on a judgment in ejectment, where the defendant has an equitable right, which this court can not investigate for want of jurisdiction, until the same shall be heard and decided in the state court. And, if a conveyance of the legal title shall be decreed to the defendant, this court will give effect to the decree, by a final order to enjoin the writ of possession. In this mode of procedure, great inconvenience, expense and delay, arising from the limited jurisdiction of this court, are avoided. But, in this case, the court have jurisdiction of the matter in equity, as it arises between the parties to the present judgment. And, under such circumstances, to suspend the habere facias possessionem, until the defendants shall have spent their equity in a state court, would not only virtually supersede the jurisdiction of this court, but it would deprive the plaintiff of a right given to him by law. to be heard before this tribunal. Although the bill has been filed in the state court, yet the suit can not be said to be pending in that court, as the process has not been served, nor can notice be given, except by publication under the statute. But if the process had been served, this court, having jurisdiction of the equity, would not suspend the judgment on account of the proceedings in the state court.

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

[2] [District not given.]

An injunction bill is not considered an original bill, and a service of the subpoena on the counsel of the plaintiff in the ejectment, will be a sufficient notice.

A question was made, whether the lessor of the plaintiff was entitled to a judgment, no notice to quit having been given by him to the defendants. But the court held that notice, by the English rule, was necessary only in cases where the relation of landlord and tenant subsists, and that such relation does not subsist in this case.

The defendants claim as the assignees of a contract of purchase, and there was no agreement that their assignor should enter into the possession. In the case of Spencer v. Marckel, 2 Ohio, 263, the court held that the English rule, as to notice, is not adopted by the law of Ohio.

Case No. 3,959.

DOE v. WELCH.

[See Case No. 11,456.]

DOEBLER (UNITED STATES v.). See Case No. 14,977.

Case No. 3,960.

DOGGETT v. EMERSON et al.

[3 Story, 700.][1]

Circuit Court, D. Maine. May Term, 1845.

EQUITY—RESCISSION OF SALE — FRAUD AND MISTAKE—LACHES—PRESUMPTION OF AGENCY—RATIFICATION.

1. Where a purchaser buys on faith of a false representation by the seller, touching the essence of the contract, the sale will be set aside in equity, whether the misrepresentation were the result of fraud or of mistake.

[Cited in Smith v. Countryman, 30 N. Y. 670.]

2. A seller is bound to act with the utmost good faith, and if he mislead the purchaser by a false or mistaken statement as to any one essential circumstance, the sale is voidable.

[Cited in Barnes v. Union Pac. Ry. Co., 4 C. C. A. 199, 54 Fed. 90.]

3. Where a sale of certain timber lands was made in 1835, and the present bill was brought in 1841 to set it aside, for mistake and fraud, and it appeared, that false statements had been made by the seller, going to the essence of the bargain, on which the buyer had relied, and that knowledge of the fraud had not before come to the knowledge of the plaintiff,—it was *held*, that the lapse of time was not, under the circumstances, a bar to the suit.

[Cited in Webb v. Powers, Case No. 17,323; Veazie v. Williams, 8 How. (49 U. S.) 158; Marsh v. Whitmore, Case No. 9,122.]

4. Where a paper was executed by A, as agent of the defendant, to D, giving D the refusal of certain timber lands, for a certain time, at a certain price, and D subsequently sold the land to the plaintiff, and the deed of conveyance to the plaintiff was made by A directly, and not through D, and the plaintiff brought an action against A, and his principals, to set aside the sale on account of fraudulent misrepresentations by D,—it was *held*, that the circumstances created a legal presumption, that D was acting as agent of A and his principals, and that, as A, by his conduct, subsequently ratified the sale, he and his principals were responsible for all D's misrepresentations made at the sale, whether D exceeded his authority or not, inasmuch as they could not ratify a portion of the transaction and reject the rest.

[Cited in Foster v. Swasey, Case No. 4,984; Mason v. Crosby, Id. 9,234; Smith v. Babcock, Id. 13,009.]

5. Where a sale made by an agent is ratified by his principals, the agent's representations, made at the time of the sale, bind his principals.

[Cited in Hough v. Richardson, Case No. 6,722; Mason v. Crosby, Id. 9,234; Veazie v. Williams, 8 How. (49 U. S.) 157.]

[This was a bill in equity by John Doggett against William Emerson and others.]

The bill, in substance, stated as follows: "That on or about the twenty-first day of February, in the year 1835, William Emerson, Amos M. Roberts, Isaac Farrar, Joseph W. Mason, and Nicholas G. Norcross, all of Bangor, in the state of Maine, merchants, defendants hereinafter named, purchased of the state of Maine, a township of land, numbered three in the thirteenth range of townships west from the east line of the state, containing, exclusive of land covered by water and the public lots reserved by the state, nineteen thousand eight hundred and twenty-five acres; that the said purchasers agreed to pay therefor, to the said state, sixty-four thousand four hundred and thirty-one dollars and twenty-four cents, it being three dollars and twenty-five cents per acre; one third part of which they paid in money at the time of the purchase, and for the remainder they gave their joint notes, which remain unpaid up to the time of filing this bill of complaint; that the said purchasers did not take a deed of conveyance of the said land, but made an agreement with the land agent of the said state, through whom the said purchase was made, whereby the said agent bound himself to convey the said land to the said purchasers or their assigns, when requested so to do. That the said Roberts, Farrar, Norcross, and Mason, agreed with the said Emerson, at the time of the said purchase, or shortly thereafter, that he, the said Emerson, should act as the agent of the company in selling the said land, and parts and portions thereof, which the said Emerson agreed to do. That a short time after the said purchase, as the plaintiff believes, some time in the month of May, in the year 1835, but the exact time the plaintiff does not know, the said Emerson, as well for himself as on account of his said associates, gave to one John Williams, then of the state of New Hampshire, but now of the state of New York, a certain bond, or obligation or power of attorney, wherein and whereby the said Emerson bound himself and his associates to procure a conveyance of the said land to be made to the said Williams or his assigns, on being paid therefor the sum of six dollars and fifty cents per acre; the sole object of

[1] [Reported by William W. Story, Esq.]

which said obligation was to enable the said Williams to make sale of the said land on account of the said Emerson and his said associates; that the said Emerson, as agent, as aforesaid, both before and at the time of executing the said instrument, stated to the said Williams, that the said township contained twenty-two thousand and forty acres, besides the public lots reserved by the state, and gave the said Williams distinctly to understand, that he, the said Emerson, and his said associates actually paid the said state for twenty-two thousand and forty acres, whereas, in truth and in fact, the said state, in selling to the said Emerson and his said associates, deducted from the whole quantity of land in the said town, two thousand two hundred and fifteen acres, so much thereof being covered with water, and having no timber thereon; and the said Emerson and his said associates paid the said state in money and notes as aforesaid, for nineteen thousand eight hundred and twenty-five acres only as aforesaid. And the said Emerson as agent, as aforesaid, at the time of executing the said obligation to the said Williams, delivered to the said Williams, for the purpose of enabling him to sell the said land, certain certificates or statements made by persons who had explored and examined the said township, with the view of ascertaining the quantity of timber thereon, which certificates represented and set forth that the said township was one of the best timbered tracts in the state of Maine, and that the quantity of good, sound merchantable pine timber thereon would average eight thousand feet to the acre, throughout the township; making the whole quantity of sound merchantable pine timber on the said township one hundred and seventy-six millions three hundred and twenty thousand feet. And the plaintiff further showeth, that on or about the eighth day of June, in the year 1835, the said John Williams, as the agent of the said Emerson, Roberts, Farrar, Norcross and Mason, as aforesaid, applied to the plaintiff, and proposed to sell to him a portion of the said township, and represented and stated to the plaintiff, that the said township contained twenty-two thousand and forty acres; that it was the best timbered township in the state of Maine, and that it contained eight thousand feet of good, sound merchantable pine timber to the acre; the whole quantity of good timber, as aforesaid, on the township, exceeding one hundred and seventy-five millions feet. And in confirmation of his said statements, the said Williams exhibited to the plaintiff the said certificates, received of the said Emerson as aforesaid, and certain other certificates of a like character, all of which represented and affirmed that the said township would not produce less than eight thousand feet of good pine timber to the acre as aforesaid. And the said Williams, on the said eighth day of June, when treating with the plaintiff as aforesaid, stated that he had on that day made sale of four-tenths of the said township to some gentlemen in Portsmouth, at the rate of six dollars and fifty cents per acre; that the said obligation from the said Emerson would expire by limitation on that day; and if the plaintiff desired to purchase any part of the said land, the bargain must be immediately completed; that the said land could be had for six dollars and fifty cents per acre, and no less; and that the whole purchase-money would be paid to the said Emerson. And the plaintiff further says, that this treaty with the said Williams was had at Stillwater, near Bangor, in the state of Maine, at a great distance from the said township, and under circumstances rendering it impracticable for the plaintiff to go upon and explore the said land,—all of which was known to the said Williams.

"And the plaintiff further showeth, that confiding in the statements of the said Williams, and in the evidence he exhibited, in regard to the quantity and quality of the timber on the said land, and in regard to the quantity of land in the said township, owned by the said Emerson and others, and believing the statements to be true, the plaintiff concluded to purchase one-eighth part of the said township, at the price named by the said Williams, and accordingly the said Williams, on the said eighth day of June, informed the said Emerson, Roberts, Farrar, Norcross, and Mason, of his said treaty and negotiation with the plaintiff, and that the plaintiff had concluded to purchase and give his notes for one-eighth of the said township, at six dollars and fifty cents per acre, estimating the township at twenty-two thousand and forty acres, exclusive of the reserved lots. And the said Emerson, Roberts, Farrar, Norcross, and Mason, on the said eighth day of June, upon being so informed, approved of the acts and doings of the said Williams in the premises, and on the same day obtained from the land agent of the state of Maine, at his office in Bangor, a deed of conveyance to the plaintiff, of the said eighth part of the said township, in common and undivided, and delivered the same to the said Williams, to be delivered to the plaintiff, and the said Williams did, on the same day, deliver the said deed to the plaintiff, whereupon the plaintiff, on receiving the said deed, executed and delivered to the said Williams, his several notes and drafts, to the amount of seventeen thousand nine hundred and seventy dollars and sixteen cents, all payable to the said Emerson, and all on interest. And the plaintiff further showeth, that the said Emerson, Roberts, Farrar, Norcross, and Mason, contriving how to wrong and injure the plaintiff in the premises, fraudulently concealed from the plaintiff the actual quantity of land purchased by the said Emerson and others of the said state; and fraudulently concealing from the plaintiff, that the said state, in selling to the said Emerson and his associates, had deducted from the whole

quantity of land in the said township, two thousand two hundred and fifteen acres, on account of a portion of the said township being covered with water and having no timber thereon, and representing that they purchased twenty-two thousand and forty acres, received from the plaintiff, as aforesaid, on the said eighth day of June, his notes for one eighth part of twenty-two thousand and forty acres, at six dollars and fifty cents per acre. And the plaintiff further says, that all the notes and drafts so given by him to the said Emerson, have been paid by the plaintiff, in full, both principal and interest. And he further showeth, that he became the purchaser of the said land, solely for the timber represented to be thereon, and that the said land, without timber, is worth to the plaintiff little or nothing; all of which was well known to the said Williams and Emerson, Farrar, Roberts, Norcross and Mason. And the plaintiff further states, that some time after the said purchase by him, as aforesaid, and after paying his drafts and notes, given to the said Emerson as aforesaid, to wit, in the month of July, in the year 1841, the plaintiff discovered, for the first time, that the said tract of land did not contain the quantity of merchantable timber represented by the said Williams to be thereon, nor the quantity of good merchantable timber represented by the said explorers, as aforesaid, but that on the contrary, on a thorough examination of the said township since made, it has been ascertained that there is but little or no sound merchantable timber on the said tract, and the said land is almost worthless, and the said parties acted in the sale and purchase of the said eighth part of the said township, under a mutual mistake in regard to the quantity and quality of timber on the said land; or else, that the said Williams, Emerson, Roberts, Farrar, Norcross, and Mason, fraudulently deceived the plaintiff in the premises, and wilfully misrepresented to him the quality and quantity of the timber thereon. And the plaintiff further showed, that the said Williams, Emerson, Farrar, Roberts, Norcross, and Mason, fraudulently deceived the plaintiff in regard to the quantity of the land in the said township, bargained for by the said Emerson, and others, as aforesaid, inasmuch as by their fraudulent acts as aforesaid, they induced the plaintiff to purchase and pay for more timber land than the said township actually contained, or than was purchased by the said Emerson and his said associates, which fraud was first discovered by the plaintiff in the month of July, 1841.

"And the plaintiff, in view of all the facts hereinbefore set forth, being advised that the said purchase of the said eighth of the said township made by him ought not to remain, but that the same should be rescinded, has often requested the said Emerson, Roberts, Farrar, Norcross, and Mason to rescind the same, and pay back to the plaintiff all the money so as aforesaid paid by him, and to restore the plaintiff entirely, and be restored, to the original position of the respective parties; and in particular that they would refund to the plaintiff the amount paid by the plaintiff for that portion of his said eighth part of the said land which is covered by water, and which the said Emerson and his said associates fraudulently obtained pay for as aforesaid. And the plaintiff well hoped that the said Emerson, Roberts, Farrar, Norcross, and Mason would have complied with such the plaintiff's reasonable request as in justice and equity they ought to have done: but now so it is, they refuse so to do, and, in concert with each other, they pretend, that there was no mistake between the parties in the bargain and purchase hereinbefore set forth, in regard to the quantity or quality of timber on the said land, and that no fraud was practised on the plaintiff either in regard to the quantity or quality of the timber on the said land, or in regard to the quantity of the said land, the contrary of which the plaintiff expressly charges to be true, and as evidence of the facts hereinbefore set forth he further states, that, on the 31st day of March, in the year 1841, the legislature of the state of Maine passed certain resolutions appointing certain persons therein named commissioners for the purpose of examining the equitable claims of any person or persons praying to be relieved from the payment of any moneys due to the said state for the purchase of lands sold after the first day of January, in the year 1834, and empowering such commissioners on a full examination of such cases to make a written report to the land agent, directing him to adjust and settle such claims in such way and manner and upon such terms, as to them should seem just and equitable; the resolutions requiring each applicant to make out and file with the land agent a statement of his case. The particulars of which resolutions will more fully appear by reference thereto. That on the 29th day of April, 1841, the said Emerson under the said resolutions filed in the land office of the state of Maine his petition, as follows:

"'To the Honorable Board of Commissioners, Appointed by the Resolves of March 31st, 1841, to Settle Claims between Certain Individuals and the State: The memorial of William Emerson, of Bangor, in the county of Penobscot, Esquire, respectfully showeth: That on the twenty-first day of February, A. D. 1835, your memorialist, together with Amos M. Roberts, Isaac Farrar, Joseph W. Mason, and Nicholas G. Norcross, by the style and name of Norcross and Mason, all of said Bangor, merchants, purchased of the state, township No. 3, range 13, of townships west from the east line of the state, containing nineteen thousand eight hundred and twenty-five acres, at three dollars and twenty-five cents per acre. That they paid in

cash at the time of the purchase twenty-one thousand four hundred and seventy-seven dollars and eight cents, and gave their notes for the balance, being two-thirds the amount of the purchase, on which the sum of four thousand two hundred and thirty-nine dollars and thirty-nine cents has since been paid, making a sum total of twenty-five thousand seven hundred and sixteen dollars and forty-seven cents received by the state on account of said town. The purchase was made without the purchasers having seen said town and without any other knowledge of its quality than the representations of the state's agent, who assured the purchasers that by the report of Joseph L. Kelsey, made by the direction of Hon. Daniel Rose, land agent, in 1831, the town contained eighteen million feet of merchantable pine timber of the first quality, that he had no doubt the estimates would rather overrun than fall short, as the state's surveyors were expected to be very cautious in their estimates. Relying on these statements and at the same time informing the agent that they had no knowledge of the town other than his representations, they made the purchase. There has been no timber cut and the town remains in the same condition as when purchased. The state has sold the best timber lands in this section the last two years at prices varying from one dollar to one dollar and twenty-five cents per acre; and picked lots in No. 4, in the 13th range, a town lying directly north of No. 3, and said selected lots being greatly superior to No. 3, were sold by the agent in 1839, at one dollar and twenty-five cents per acre, Upon examining the town for the purpose of operating, they found the timber so defective as to be nearly worthless. Large groves of pine which had a fair appearance, and would be likely to deceive a person not well acquainted with lumbering, were found upon inspection to be so rotten as to be unfit to cut, and after a thorough examination they could not find a chance to put in more than one team for a winter's logging upon merchantable timber. Instead of eighteen million the town does not contain three million, probably not one million of merchantable lumber of the first quality. Your memorialist would further represent, that the town was purchased exclusively for timber, and that the soil at such a distance from settlements and roads is comparatively worthless. This town was estimated by Milford P. Norton, Esq., land agent, in 1830, to be worth twenty-five cents per acre. This communication was made to the governor and council and filed away in the vaults attached to the secretary's office, and its existence was unknown at the land office until the present year. This price probably bears as large a ratio to the actual amount of timber of the first quality as three dollars and twenty-five cents does to the amount certified to by Mr. Kelsey, then in the employ of the state, and your memorialist would be equitably entitled upon this principle to have a large portion of the payment already made to the state refunded. But he has no expectation, nor does he ask the state to pay back any part of the money already received. The state, however, still holds the notes of your memorialist to a large amount, given for said town in exchange for the orignal notes, and secured by mortgage; he having assumed the whole debt to the state, and said Roberts, Farrar, and Norcross and Mason having released to him all claims against the state for deduction or otherwise, in consideration of said transaction. Your memorialist, therefore, as the representative of the original purchasers, believing himself entitled upon every principle of equity, justice, and expediency, to have the notes, held by the state against him for said town, cancelled, and his mortgages to the state on account of the said notes discharged, makes this request of your honorable body, and files this brief statement of his case, agreeably to the provisions of the "Resolves for the appointment of a board of commissioners to settle claims between certain individuals and the state," approved March thirty-first, 1841, and a resolve additional to said resolve. William Emerson.'

"And the said commissioners afterwards, on the twentieth day of July, 1841, made their report touching the said matters, as follows: 'To Elijah L. Hamilton, Esq., Land Agent of the State of Maine: The undersigned commissioners appointed by certain resolves of the legislature of the state of Maine, approved the thirty-first day of March, A. D. 1841, and the sixteenth day of April, 1841, "to settle the claims between certain individuals and the state," having given notice, as in and by said resolves is required, and in pursuance thereof having assembled at the court house in the city of Bangor, on the twelfth day of July, A. D. 1841, and continued in session by adjournment, from day to day, to the time of signing these presents: On the memorial of William Emerson, duly filed in the land office of said state, after having heard the evidence on the part of the memorialist, and the arguments of his counsel, and of the attorney general thereon; we find that the said Emerson, together with Amos M. Roberts, Isaac Farrar, and Messrs. Norcross and Mason, on the twenty-first of February, 1835, contracted with the then land agent of the state, for the purchase of township No. 3, in range 13, agreeing to pay therefor sixty-four thousand four hundred thirty-one dollars and twenty-four cents, one third of which, viz., twenty-one thousand four hundred seventy-seven dollars and eight cents, was at that time paid by the contractors in equal quarters, and the residue secured by their joint notes. That Norcross and Mason were to be interested in one quarter, and the others in a quarter each. No deed was at that time taken, and Emerson was employed by his associates, to

make sale of their rights, to wit, of their three quarters, which he effected through the instrumentality of John Williams, at the rate of about thirty thousand dollars for each quarter. And thereupon procured conveyances to be made by the then land agent for the state, viz., to John Doggett, of five fortieth parts, to Cyrus Goss, of four fortieth parts, to John Williams, of five fortieth parts, and to Bartlet and others of sixteen fortieth parts, making three fourths of the said township, the said Emerson retaining his right to the said other quarter part, which was not conveyed to him till some time in 1837. Farrar and Roberts received of Emerson their shares of what was realized for the three fourths of the township, sold as aforesaid. But the said Norcross and Mason received the amount due for their share in the said Emerson's securities, and then or subsequently, paid the said Emerson the amount of the money due to the state from them for their part of the land which Emerson thereupon assumed to pay. We find that subsequently and before the negotiation hereafter stated, the said Emerson had received of the said Roberts, the full amount of his proportion of the notes due to the state, viz., eleven thousand two hundred thirty-eight dollars and twenty-nine cents, with such interest as was due thereon at the time of receiving the same, and also of said Farrar what was due to the state from him towards his share of the said notes, viz., seven thousand one hundred dollars, he having paid to the state towards the same, all but that sum. We find that in 1837, Emerson, then being under obligation to pay the whole amount due on the said notes, gave his individual security therefor, securing the same by mortgage, and received in exchange therefor, the joint notes of the original contractors. We further find that the said township, at the time of the said contract and sale, did not contain pine timber of a sound and valuble quality to the amount of more than one fourth part of what was estimated in the survey and field notes of the surveyor, Kelsey, so that the township was much less valuable than either the land agent who sold the same, or the contractors for the purchase had reason to suppose, and that therefore the bargain was made under mutual mistake between the parties, inasmuch that we feel satisfied more money has been paid to the state, than the land was reasonably worth. And we believe it to be just, equitable and expedient, that the grantees and their assigns should have the full benefit of all that now remains due from the said Emerson to the state therefor. We further find that the said Emerson has never parted with his quarter part of the said township otherwise than by mortgaging it to the state as part of the collateral security for the payment of his said notes, and that the said Emerson is the legal assignee of one other eighth part of the said township, except that it is mortgaged to the state, as further collateral security for the payment of his said notes. We further find that the said Isaac Farrar is, at this time, the legal owner of eleven fortieth parts of the said township, whereby he would become entitled to eleven fortieth parts of the benefits of whatever may be deducted from the amount due from the said Emerson to the state, but he having assigned all his claim to the benefit of any such deduction to the said Emerson, we consider the said Emerson to be the equitable assignee thereof, whereupon we deem it just, equitable and expedient, that a deduction from the amount due from the said Emerson on his said notes, should be made equal in amount to twenty-six fortieth parts of forty-two thousand nine hundred and fifty-three dollars and sixteen cents, being the amount for which notes were originally given by the contractors, as aforesaid, with interest thereon from the time when the same notes were originally given. And we accordingly order and decree that the deduction be made accordingly, and that on payment of the residue of the said Emerson's notes, the same be delivered up to him to be cancelled. Done at Bangor, this twentieth day of July, 1841. (Signed) Ezekiel Whitman. Frederick H. Allen. Anson G. Chandler.' And the said amount of twenty-six fortieth parts of forty-two thousand nine hundred and fifty-three dollars and sixteen cents, has since been indorsed on the notes of the said Emerson, by the land agent, in compliance with the said report."

The prayer of the bill was that, "upon a full and fair disclosure of the several matters aforesaid, the said purchase may be declared to be null,—the said Emerson, Roberts, Farrar, and Norcross and Mason compelled to refund to your plaintiff all moneys by them or either of them received as aforesaid,—and that the parties may be restored to their respective positions before the said contract was entered into; your plaintiff hereby offering to perform all acts necessary for him to perform in the premises; and that your plaintiff may have such further relief or such other relief in the premises as the nature of his case may require, and as may be agreeable to equity and good conscience."

The answer of Emerson stated that, on or about the 21st day of February, A. D. 1835, he "purchased in common and undivided with the said Roberts, Farrar, Norcross and Mason, of the state of Maine, township numbered three, in the thirteenth range of townships west from the east line of the state, which township contained according to the said purchase, exclusive of land covered by water and the public lots, nineteen thousand eight hundred and twenty-five acres—that these defendants paid therefor the sum of sixty-four thousand four hundred and thirty-one dollars, twenty-four cents, being three dollars and twenty-five cents per acre, exclusive of land covered by water and public lots—one third part of which they paid in

money at the time of the purchase, and for the remainder they gave their joint notes, which in December, A. D. 1837, were paid by this defendant by substitution of his own notes, secured by mortgage for the same amount. And that these defendants received from the land agent of the said state, an agreement to convey the said township, which said agreement is annexed to the answer of Isaac Farrar, one of these defendants, and makes a part thereof—the land covered by water and public lots aforesaid were deducted from the contents of the said township in our purchase of the state. And this defendant further answering, says, that he was by a certain writing, the original copy of which is annexed, constituted an agent of these defendants according to the terms thereof; and that afterwards and prior to the sale of the premises, as hereinafter set forth, the said writing was so modified (verbally, as this defendant thinks, for upon examination he is unable to find any written qualification of the said authority) as to authorize the said Emerson to dispose of these defendants' interests in the said township, for a sum not less than one hundred and twenty thousand dollars, one third in cash at the time of sale, and the residue thereof in one and two years thereafter; and this defendant says, that the said written agreement, qualified as aforesaid, was the authority under which and by which he effected a sale as is hereinafter stated. And this defendant further answering, says, that after the said written agreement, and prior to the said modification thereof, having had an offer of twenty-five hundred dollars from one Goddard for a refusal of the said township for a given number of days, at a given price, he consulted with these defendants, who specially authorized him (or a majority of them so did,) to give such refusal upon the terms and conditions proposed by the said Goddard; and this defendant says, that he was thereunto induced by the consideration of the amount paid for the said refusal, and the expectation entertained by him, that the said Goddard, or the said Goddard and his friends would purchase the said township. And this defendant further answering, says, that in the month of May, A. D. 1835, he gave to John Williams, then of the state of New Hampshire, now of the state of New York, an obligation under his own signature, to convey to the said Williams three fourths of the said township, on payment by the said Williams of the sum of six dollars and fifty cents per acre; the said obligation was in writing, and, as this defendant thinks, was written by Cyrus Goss, of Bangor. It was presented to him by the said Goss on the morning of the day on which it was executed, previous to the departure of the steamboat which left Bangor on the same morning, in which boat the said Williams then left; that he signed the said obligation at the request of the said Goss, who had previously written the same; that he had had no previous conversation with the said Goss or the said Williams, in respect to giving either to the said Goss or the said Williams a refusal of the said township, and that in the conversation with the said Williams on the morning aforesaid, there was not consumed the space of ten minutes; that the said Williams was in haste to leave in the steamboat, and that, although this defendant objected at the time to the phraseology, and to the terms of the said refusal, yet there not being time to re-write the same, the said refusal was signed by this defendant and delivered to the said Williams. And this defendant says, that although the said agreement in terms was a stipulation for the conveyance of the said township to the said Williams, at the rate of six dollars and fifty cents per acre, this defendant says that the said refusal was in fact upon the terms and conditions, that the said Williams should have the refusal of the said township for the period of twenty days, for the sum of ninety thousand dollars for three fourths thereof, which was the proportion of the said township embraced in the said written refusal. And this defendant believes that the said refusal stipulated for the payment of interest from its date.

"And this defendant further answering, says, that the true intent and understanding between this defendant and the said Williams, in the matter of the said refusal, however the same may have been written, was that the said Williams should have the refusal of three fourths of the said township for the period of twenty days, and that at any time within that period, upon the payment by the said Williams to the said Emerson of the sum of ninety thousand dollars, the said Williams should have a conveyance of three fourths of the said township, according to the stipulations of the said refusal. And this defendant further answering, says, that previous to this refusal given to the said Williams, a Mr. Weeks, who this defendant supposed to be a friend of Mr. Goddard, to whom a previous bond had been given as aforesaid, applied to this defendant to purchase a portion of the said township, and was at the time of the said refusal upon the said township, having the verbal agreement of this defendant that he should have a quarter part thereof, if upon examination he was desirous to have it, which was the reason why this defendant gave to the said Williams a refusal of three fourths of the said township only. The said defendant is unable to find the said refusal among his papers, and believes the same has been destroyed. And this defendant further answering, says, that he made his obligation for the conveyance of the said three fourths of the said township, with the said Williams as before stated; that the said Williams, as this defendant is informed and believes, sold one eighth of the said township to this complainant; that this complainant paid the

said Williams in notes and drafts to the amount stipulated between them for the said purchase. And this defendant says, that he received from the said Williams, in discharge of the said Williams's refusal, certain notes and drafts, including certain notes and drafts of this complainant, to the amount of ninety thousand dollars, with interest from the date of the said refusal. And this defendant denies that the said Williams was authorized to act, or did act or assume to act, as the agent of these defendants in his negotiation with this complainant. On the contrary, this defendant says that his contract of refusal was with the said Williams—that he received of the said Williams, and not of this complainant, this complainant's draft and notes aforesaid, as the property of the said Williams—that he was not present when the said draft and notes were executed or delivered to the said Williams, and that this complainant's notes, though payable to this defendant, were not delivered to the said Williams as the property of this defendant, but as the property of the said Williams, and were by the said Williams delivered to this defendant as the property of the said Williams, and in cancellation of his the said Williams's obligation to this defendant. And this defendant admits that he received from the said Williams two promissory notes, signed, as he believes, by John Doggett & Co., for the sum of five thousand nine hundren and sixty-nine dollars sixteen cents each, payable in one and two years, and a draft drawn by John Williams on John Doggett & Co., at sixty days, for the sum of six thousand thirty-one dollars eighty-four cents. And this defendant denies that the sole object of the said refusal was to enable the said Williams to make sale of the said township on account of these defendants. And this defendant, further answering, denies that as agent of these defendants, or personally, that he stated to the said Williams that the said township contained twenty-two thousand and forty acres, besides the public lots reserved by the state, although he believes the said township to contain that number of acres. And this defendant denies that he distinctly or indistinctly, directly or indirectly, gave the said Williams to understand, that these defendants paid the state for that number of acres, or any number exceeding the actual number paid for, or that there was not deducted two thousand two hundred and fifteen acres covered with water. And this defendant denies, that at the time of executing his said refusal to the said Williams, or at any time, he delivered to the said Williams any certificate or statement made by persons who had explored and examined the said township; on the contrary, this defendant says that he made no representations whatsoever respecting the number of acres which were embraced in the said township, or of the number of acres covered by water, or of the number of acres embraced in their purchase of the state. And this defendant says, that he delivered neither to the said Williams, nor to the said Goss, nor to any person, any certificate containing any estimate of any quantity of timber on the said township, or any certificate that the same had been explored by any person, or make any representations to the said Williams respecting the said township.

"And this defendant further answering, says, that he has no knowledge of any representations made by the said Williams to this complainant, or that the said Williams exhibited to this complainant any certificates respecting the said township, neither does this defendant know the consideration which induced this complainant to enter into the contract of purchase with the said Williams, and this defendant expressly denies that he either knew or approved of any acts or doings of the said Williams in the premises. On the contrary, this defendant says, that his said contract or obligation was with the said Williams; that he did not know this complainant in the purchase, otherwise than by receiving of the said Williams this complainant's notes and drafts as aforesaid, as so much money due from the said Williams to these defendants, and this defendant's recollection and belief is, that he knew not of this complainant's said purchase, or that this complainant proposed to make the said purchase until the evening of the expiration of the said refusal. And that this defendant on the succeeding day notified the land agent of the said state, after he had received from the said Williams the consideration expressed in his said refusal, that the said agent might convey the said three fourths to whomsoever the said Williams should direct—that the other defendants were not present at the time of the said settlement with the said Williams, neither was this complainant—that he considered himself as negotiating with the said Williams, and had no occasion to inquire, neither did he inquire or know the relations which subsisted between the said Williams and this complainant. And this defendant further answering, denies that he or any of these defendants to his knowledge fraudulently or otherwise concealed from this complainant the quantity of land purchased by these defendants from the state, or that the said state in selling to these defendants had made any deduction from the quantity of land in consequence of the same being covered by water and having no timber thereon, or that he or they represented to this complainant any given quantity of acres. And this defendant denies that he, or either of these defendants, to his knowledge, knew for what object this complainant made his said purchase, and this defendant has no knowledge when this complainant first discovered anything respecting the value of the said township, and denies that he has ever made any such discoveries as this complainant in this part of his said bill has

alleged. And this defendant says that in April last he subscribed a memorial, a copy of which makes part of this complainant's bill, which said memorial was drafted by his attorney, and was intended to contain a true representation of the facts therein set forth, that all therein set forth is not true in respect to this defendant. This defendant was not present when the said purchase was made, and received no assurances or representations whatever from the said land agent, that the examination of the said township in the said memorial mentioned, had reference to the examination made by Benjamin P. Gilman and others associated with him in his examination, and the estimate made by Milford P. Norton, Esq., had reference to the said Norton's written communication to the governor and council, as is therein stated.

"And this defendant further answering, says, that at the time of his said purchase of the state, he had not seen the report of the said Kelsey, and although he was informed that the said Kelsey had made such a report as in the said complainant's bill is set forth, the time occupied by the said Kelsey in making his said exploration, the manner in which the said exploration was made, and the means which the said Kelsey possessed of forming an estimate of the quantity or quality of timber on the said township, were not known to him, which was all the knowledge this defendant possessed respecting the value of the said township. This defendant had been for several years previous to the said purchase engaged in the lumbering business; he knew the difficulty of obtaining an accurate estimate of the quantity of timber upon a township of land, and the still greater difficulty of ascertaining the quality of that timber. He did not believe that the said township had been explored by the said Kelsey in such a manner as would enable him to form an accurate estimate of the quantity or quality of the timber thereon, and he would not have purchased the said township for the purpose of operating upon the same, without a more thorough examination than he supposed the said Kelsey had bestowed, nor without knowing the particular means of judging which any explorer had possessed. And this defendant further says that he did not purchase the said township principally for the timber supposed to be thereon, nor for the purpose of retaining it, but for the purpose of disposing of the same in the market at that particular period of excitement, and in the then peculiar condition of the market; that at this distance of time he is unable to say what quantity of timber he then supposed was on the township, or that he supposed any definite quantity. His remembrance and belief is that he considered the quantity wholly unsettled; he could have entertained no opinion that there was any particular quantity, upon the information which he then possessed. He supposed that it might considerably exceed or fall short of the said Kelsey's estimate, that he neither purchased nor sold upon the supposition of any particular quantity. He considered that wholly unsettled, and that it was a risk which he incurred in the first instance, and the complainant in the last; that whatever were the opinions entertained by this complainant and which induced his purchase, they were unknown to and not participated by this defendant. This defendant further answers and says, that land in the section of the state where this township is situated, is chiefly valuable for its timber. That this defendant received from the said Williams, in notes and drafts, the sum of ninety thousand dollars with interest from the date of the said refusal, and no more; that of this ninety thousand dollars no part or portion thereof belonged to this defendant. His interest in the purchase from the state was one fourth, which was not sold to the said Williams or to any other person. That he has no knowledge that this complainant has made any exploration of the said land; that one David Smiley was on the said township in the spring of 1836, examining the timber, and that Benjamin P. Gilman and his associates, in the fall of 1839, examined the said township for the purpose of locating teams thereon, and that John Turner, for Leonard Jones, was on the said township for a few days during the last summer, and that this defendant knows of no other exploration since the exploration of the said Kelsey, for the purpose of ascertaining the quantity of timber on the said township. And this defendant is unable to say what quantity of timber is on the said township, what is the quality of the timber, what is the present value of the land without the timber, or what is the value of the timber now on it. This defendant has no knowledge nor information respecting the quantity of timber or quality of the same, or the present value of the land without the timber, which would lead him to a belief respecting either, upon which a prudent man should act in making a purchase of the same for the purpose of operating, or which would justify this defendant in stating any particular quantity of good merchantable timber. This defendant means to say, that if he were asked how much timber, merchantable or otherwise, was now on the said township, he should be obliged to answer hypothetically, that if the representations of this man were to be relied on as accurate, there would be one quantity—that if the representations of another, there would be another quantity, and so on; that this defendant has no knowledge of any such exploration or examination of the said township as would satisfy him, or justify him in expressing an opinion which might or could properly be expressed or called by the term belief. This defendant has been informed that there are large bodies of timber on the said township, and the quality of it has been variously represented to him by various in-

dividuals. He has no knowledge or belief that any timber has been taken off since the sale to this complainant, and that if the said township contained three millions of good pine timber, its value would depend upon the situation of the said timber, and a variety of other circumstances. Stumpage in that section of the state commands four or five dollars per thousand. And this defendant further answering, says, that after the said first payment to the state, the said Farrar paid to the state a certain sum, the amount of which is not recollected by this defendant, which was endorsed on these defendants' notes. And this defendant is informed and believes, that the amount awarded by the said commissioners has been endorsed on the notes of this defendant, the precise amount of which in dollars and cents this defendant does not recollect; he believes it to have been twenty-six fortieths, according to the report of the said commissioners. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that if there is any other matter, cause, or thing, in the said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, according to the knowledge or belief of this defendant. All of which matters and things this defendant is willing and ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained. William Emerson."

The paper refered to in this answer as constituting Emerson as agent of the other defendants, is as follows: "Whereas we, William Emerson, Isaac Farrar, Amos M. Roberts, and Norcross and Mason, all of Bangor, gentlemen, have this day purchased of John Hodge, land agent of the state of Maine, township number three in the thirteenth range, west from the east line of the state, and have, in addition to the cash payment, given our notes to Asa Reddington, Jr., treasurer of Maine, for forty-two thousand nine hundred and fifty-four dollars and seventeen cents, in three notes, for fourteen thousand three hundred and eighteen dollars and six cents, each, payable in one, two, and three years from date, and interest annually, the said township being purchased in equal shares, and our several liabilities on the said notes being equal. Now, therefore, we agree and determine to put the said township into the hands of William Emerson, and authorize him to take a deed of the same on the following terms, and for the following purposes, to wit: To sell, for the sum of one hundred thousand dollars, for the benefit of the parties above named, and to pay out of the proceeds of the said town the three notes above described, as of this date, and to pay over the balance, in equal proportions, on demand, to the said Emerson, Roberts, Farrar, and Norcross and Mason. And the said Emerson hereby agrees, in consideration of the premises, to take the charge of the said town, to sell it, if opportunity should present, for the purposes aforesaid, and, if sold, to pay the notes as aforesaid, and to pay over the balance in manner above described, to the parties above mentioned. And it is mutually agreed that a majority of the above named parties shall control the direction of the said township, and make other regulations as they may at any time deem proper, whether in price or terms of payment, the present being considered cash in hand. Provided, however, that nothing herein contained shall restrict the said Emerson from selling the said town at a higher sum than one hundred thousand dollars. In witness whereof, we have hereunto subscribed our names, this twenty-first day of February, 1835."

The answers of the other defendants contained nothing substantially different.

The cause was argued partly at the May term in 1844; and upon the suggestion of the court, a supplemental bill was filed, to which there were answers put in.

The supplemental bill, after recapitulating the facts stated in the original bill, proceeded as follows: "And now the said Doggett further showeth, that the original paper, obligation, or refusal, given by the said Emerson to the said Williams, for the conveyance of three fourths of the said township of land, referred to in the original bill, at six dollars and fifty cents per acre, was by the said Williams exhibited to this complainant, at the time of, and pending the negotiation between the said Williams and this complainant for the purchase of a part of the said township. And the said Williams, at the time when the said paper was so exhibited to this complainant, in order to induce this complainant to become a purchaser of a part of the said township, expressly stated to this complainant that he, the said Williams, was desirous of purchasing, and intended to purchase, a part of the said township, under and according to the terms of the said obligation, designedly giving this complainant to understand that the said township of land was a full township, containing, exclusive of reservations, twenty-two thousand and forty acres, and that the sum of six dollars and fifty cents per acre was the true price for which the said township could be obtained. And that the same could not be purchased of the said Emerson for a less price than six dollars and fifty cents per acre. And that he, the said Williams, was desirous of purchasing, and would purchase, a part of the said township at that price, and that the whole sum of six dollars and fifty cents per acre was to be paid to the owners of the said township. And this complainant avers

that the whole negotiation, between the said Williams and this complainant, was predicated, and proceeded. upon no other idea than that the said obligation contained the truth as to the price per acre for which the said township could be purchased of the owners, and concealed no fact material, in the said negotiation, to the purchaser. And your complainant further avers that, after examining the said obligation, he had reason to believe, and did believe, that the owners of the said township of land would not sell any part thereof for a less sum than six dollars and fifty cents per acre, and that the entire sum of six dollars and fifty cents per acre for three-fourths of twenty-two thousand and forty acres was to be paid to the owners thereof. And he further believed that the said Williams would also purchase a portion of the said land at six dollars and fifty cents per acre. And, inasmuch as this complainant supposed and believed that the said Emerson was well acquainted with the value of timber lands in Maine, this complainant was induced by the terms of the said obligation to believe, and did believe, that the said land was well worth the aforesaid sum of six dollars and fifty cents per acre. And your complainant further avers, that in making the purchase of one eighth of the said township as stated in the original bill, he not only confided in the certificates referred to in the said bill. and the representations of the said Williams and the said Emerson in relation thereto, but he also fully relied upon the said written obligation of the said Emerson, and the statements of the said Williams in relation thereto, and the natural inferences to be deduced therefrom. And your complainant further in fact avers that the sum of six dollars and fifty cents per acre was not the price for which the said Emerson agreed to sell the said three fourths of the said township, but, on the contrary, the agreement between the said Emerson and the said Williams was, at the time the said written obligation was given, that the same three fourths of the said township would be sold for the sum of $90,000, which is a much less sum than six dollars and fifty cents per acre, and all which was well known to the said Emerson at the time he gave the said written obligation to the said Williams. And your complainant expressly charges that, by means of the said false and fraudulent written refusal thus given by the said Emerson to the said Williams. the said Emerson, agent of the owners as in the original bill is set forth, did, through the instrumentality of the said Williams, commit a gross fraud upon the complainant, or knowingly enable the said Williams so to do, as the facts stated herein, and in the original bill, fully show. And this complainant further avers, that at the time when the said Emerson gave said written obligation to the said Williams, the same being of a false and fraudulent character, and well known by the said Emerson so to be, he the said Emerson also well knew, or had good reason to believe, or mistrust that the object of the said Williams in obtaining the same, thus setting forth a price per acre for the said land greater than the said Emerson had in fact agreed to sell the same for. was, and could be, none other, than that, by means thereof, the said Williams might be enabled to dispose of the said land to others, at a price exceeding that for which the said Emerson had so agreed to sell the same, by concealing the true price, and inducing such other persons to believe, that the said Emerson would not sell the said three fourths of the said township for a less sum than six dollars and fifty cents per acre. And so the complainant charges that the said Emerson thus knowingly and wilfully placed it in the power of the said Williams to deceive and defraud other persons who might be disposed to purchase the said land, or a portion thereof, in the said purchase, and did deceive and defraud this complainant through the instrumentality of the said Williams, as is herein, and in the said original bill, fully set forth. And this complainant further avers, that in pursuance of the design of the said Williams in obtaining the said written obligation. he did affect to become a purchaser of a portion of the said township, to wit, of one eighth part thereof. And the said Williams and this complainant, and other persons who purchased other portions of the said township at the same time, received deeds of the several portions of the said township, so purchased by them. And this complainant and the said other persons placed their notes given in payment, made payable to the said Emerson, or his order, in the hands of the said Williams, who delivered the same to the said Emerson, together with his own notes for a small sum, being the difference between the sum of $90,000, and the amount of notes and drafts given by the said other purchasers and this complainant, this complainant being ignorant of the exact amount of the notes so given by the said Williams, and supposing at the time. that the said Williams paid the full sum of six dollars and fifty cents per acre, for one eighth of the said township. And the whole amount of notes, so given, were, by the said Emerson, divided and apportioned with the other defendants, though in what precise manner this complainant is unable to set forth. To the end, therefore, that the said defendants may answer the matters and things hereinbefore set forth by way of supplement, and that your complainant may have such and the same relief against the said defendants as is prayed for by the original bill, this complainant prays that the said defendants may be held to answer the premises, and that such other and further proceedings may be had as the nature of this case may require, and to equity may appertain."

The answer of Emerson stated, that

"whether this defendant's obligation to the said Williams for the conveyance of three fourths of said township, at six dollars and fifty cents per acre, was by the said Williams exhibited to this complainant, at the time of and pending the negotiation between the said Williams and this complainant, for a purchase of a part of the said township, this defendant has no knowledge or means of belief. And this defendant further answering, says, that he has no knowledge in respect to the said paper having been exhibited to this complainant, or to any inducements the said Williams had to exhibit the said paper, if any such paper was exhibited; or what declarations were made by the said Williams to this complainant. The said Williams did purchase a part of the said township, but not according to the terms of the said obligations. And this defendant further answering, says, that if the said Williams did give this complainant to understand that the said township of land was a full township, containing, exclusive of reservations, twenty-two thousand and forty acres, the said representation was true in point of fact; that the said township was a township six miles square, which contains that number of acres, and although the state sold to these defendants the said township, deducting the number of acres covered by water, these defendants, nor the said Williams would have been guilty of a fraud in reselling the same as and for a full township, without deduction, had they sold it. And this defendant further answering, says, that it is the usual custom in that section of the country to sell townships without reservation; and that the reason why this was not sold by the state, was because the state had surveyed it into sections, with a view to sell it in fractional parts, by sections as surveyed; and that there was no fraud or misrepresentation, and could have been none, in the sale of this tract as a township, in representing it as being a full township, and as containing twenty-two thousand and forty acres. And this defendant further answering, says that he has no knowledge, or means of knowledge or belief, what representations said Williams made to this complainant, as to what price, per acre, said township could be obtained for, or what said Williams said in respect to purchasing the same, or what he said in respect to the sum which was to be paid to these defendants. And this defendant further answering, says, that he has no knowledge what induced this complainant to make the said purchase, nor what paper, certificate, or obligation, if any, was exhibited to this complainant by the said Williams, nor what this complainant had reason to believe, or did believe, in respect to the owners of the said township, or what sum was to be paid them therefor, nor at what price the said Williams was to become a purchaser. And this defendant further answering, says, that he had no previous acquaintance with this complainant, and has no knowledge that this complainant had any previous acquaintance with him, except what might have grown out of a purchase of a carpet for the Unitarian church in Bangor, some years since; whether this complainant supposed and believed that this defendant was well acquainted with the value of timber land in Maine, he cannot say. But this defendant says, that this complainant made no inquiry of him as to the value of this or any other timber land in Maine; and this defendant has no knowledge in respect to the belief of this complainant as to the value of this township. And this defendant further answering, says, that he has no knowledge in respect to what this complainant confided in, or what induced him to make his said purchase, but this defendant absolutely denies that he was instrumental in obtaining any certificate, or that he knew that any certificate had been exhibited to this complainant, or that this defendant had made any representations whatsoever to this complainant in respect to the value of the said township, or that the said Williams had made any representations thereto. And this defendant has no knowledge, or belief, that this defendant's obligations with the said Williams, in any manner deceived this complainant, or operated as an inducement for him to enter into the said contract. And this defendant further answering, admits, as in his former answer he has stated, that the sum of six dollars and fifty cents per acre was not the price for which this defendant agreed to sell three-fourths of the said township to the said Williams, and that the price was the price mentioned in this complainant's supplemental bill. And this defendant further answering, says, that when he signed the said obligation to the said Williams, to convey the said three quarters of the said township at six dollars and fifty cents per acre, he had in his own mind the idea of the deductions made by the state, and had he thought, or supposed that the said Williams would have used the same for any such purposes as in the said complainant's supplemental bill is alleged, he would not have given the same. And this defendant denies, that through the instrumentality of the said Williams he intended to commit, or did commit, any fraud whatsoever upon this complainant. And this defendant, further answering, says, of the said obligation of the said Williams, though not expressing the true intent and meaning of the parties, that it was not fraudulent, or known or intended to be so by this defendant, and that the same was not given with any such purpose or intent, or with the expectation or belief that the same would be thus used; and this defendant did not know, neither did he suspect or believe, that the said Williams, in obtaining the said obligation, intended or

designed to avail himself thereof for any such purpose as is alleged, or might thereby be enabled to dispose of the said land at any price, or thereby to conceal the price which he was to pay therefor, or thereby to induce any person to believe that he was not to pay therefor the price stipulated for in said obligation. And this defendant denies, that he did give to the said Williams the said obligation with any knowledge or intention that he was thereby placing it in the power of the said Williams, or that he knew or believed that the said Williams would use the same in any manner to deceive or defraud any person who might be disposed to purchase any portion of the said land. And this defendant further answering, says, that the said Williams did not only affect to become, but did actually become, a purchaser of one eighth of the said township, and did pay therefor to this defendant, as aforesaid, independently of the money and notes of this complainant and his co-purchasers, the sum of two thousand seven hundred and ninety-two dollars and fifty cents; which sum, and the interest on the price paid for the said three quarters from the day of the date of the said refusal, he paid, at that time, in money and his two promissory notes, for one thousand dollars each; and the said Goss paid four thousand dollars in sixty days' paper, and gave his two several promissory notes for four thousand dollars each; which last two notes of the said Goss, and the said Williams's notes were secured by mortgages of their respective interests in the said township. And this defendant further answering, says, that he has no knowledge to whom this complainant gave the said promissory notes for the said purchase, but that he received this complainant's notes, as stated in his original answer, from the said Williams, in part payment of the said Williams's payment for the said township. And this defendant further answering, says, that he received from the said Williams the sum of ninety thousand dollars for three quarters of the said township; that he had no interest in the said three fourths, and that the amount paid to him by the said Williams was by him accounted for to Amos M. Roberts, Isaac Farrar, and Norcross & Mason, who were the owners of the said three fourths, by him sold; and although he did subsequently give his notes to Messrs. Le Bretton & Moody for one sixth of the said ninety thousand dollars, it was in consequence of the said Norcross & Mason's having transferred to them one moiety of their interest. And this defendant further answering, says, that he has no knowledge of any representations having been made by the said Williams to this complainant in relation to any of the matters inquired of in this complainant's supplemental bill of complaint."

The answer of the other defendants did not materially vary the case.

The cause was argued again at this term upon the original and supplemental proceedings, by William Pitt Fessenden, for plaintiff, and by Mr. Rowe and J. Rogers for defendants.

STORY, Circuit Justice. This is one of that unfortunate class of cases, which grew out of the marvellous spirit of speculation in timber lands, which a few years ago pervaded the whole state of Maine, and spread such wide ruin and disaster in many directions, and produced a most sad spectacle of delusion and moral infirmity. The cause has been argued at great length, and with great ability. I shall not pretend to go over the complicated facts presented in the printed record; but shall principally advert to those questions, which, in my judgment, involve the substantial merits of the case, and to those conclusions of facts, which I have drawn from a full survey of the evidence, in their application to those questions. The material questions appear to me to be these: In the first place, was the plaintiff, Doggett, induced to make the purchase by any gross misrepresentations or mistakes, on the part of Williams, as to the quality of the land in the township, or the amount and quality of the timber thereon? In the next place, was Williams the agent of Emerson, and the other co-defendants, in the negotiation and sale to the plaintiff? In the next place, do the lapse of time and the intervening circumstances interpose any bar to the present bill, supposing the other questions to be decided favorably to the plaintiff?

Upon the first question, it does not appear to me that there is any reasonable ground to doubt, that the purchase of the plaintiff was made upon an entire credit given to the representations of Williams of the quantity and quality of the timber on the township. The plaintiff resided in Boston, and, confessedly, had no knowledge of timber lands, and had never seen the township. He must, therefore, have placed implicit reliance upon the statements of Williams. Now it is quite immaterial, in a case of this sort, whether Williams was himself at once the deceiver and the deceived. The question is not, whether he acted basely and falsely; but whether the plaintiff purchased upon the faith of the truth of his representations. If the plaintiff did so purchase, then, upon the settled principles of courts of equity, the bargain ought to be set aside as founded upon gross misrepresentation and gross mistake, going to its very essence and objects. The whole doctrine turns upon this, that he who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not his victim. I had occasion to consider this subject somewhat at large in the case of Daniel v. Mitchell [Case No. 3,562]. It came also under consideration in some of its aspects in the case of Small v. Attwood, 1 Younge, 407, 459, and was elabor-

ately discussed in the house of lords, in the same case, on an appeal from the decree of the court of exchequer. Now it is manifest that the sole object of this purchase, was in the then inflated and exaggerated state of the market respecting timber lands, the timber on the township. The object was, not settlement or agricultural purposes, but speculation on the sale of the timber on the township. The quantity and the quality of the timber, were, if not the sole, the main object of the bargain. It appears to me, that it is high time, that the principles of courts of equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, uberrima fides, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial, whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of law had been steadfastly kept in view, and fairly upheld by public opinion, the various speculations, which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation.

In the present case, the representations made by Williams, and confirmed by the certificates, which he produced with such an ambitious display, as the main inducements to the purchase, are, as is now conceded, grossly false. It is impossible, perhaps, at this moment to say exactly the amount of timber, which, at the time of the sale, was standing on the township. In all probability it does not contain more than from four to eight millions of feet of merchantable timber. In 1831, one Kelsey was employed by the land agent of the state of Maine, to survey and examine it, and he represented it to contain eighteen millions of feet; whereas, Emerson himself, in his memorial to the state commissioners in 1841, made to procure a reduction of the bonds given to the state, avers under oath, that "it does not contain three millions, probably not one million of merchantable timber of the first quality;" so that he treats Kelsey's survey as a very gross exaggeration, founded in positive mistake. And the commissioners of the state, in their report, after full examination of the evidence, stated, that the township "did not contain pine timber of a sound and valuable quality to the amount of more than one fourth part of what was estimated in the survey and filed notes of the surveyor Kelsey." But what shall we say to the certificates of Towle, and others, shown to the plaintiff by Williams at the time of, and as inducements for, the purchase? It is said that these certificates were not procured by Emerson and the other defendants; but they were procured by other persons contemplating a purchase from the defendants, and were known to, and used by Goss, the brother-in-law of Emerson; and being in the same house with him, and interested in the sale of the township, were put into the hands of Williams, by Goss, for the purpose of being used in procuring purchasers. Again, it is said, that Emerson and the other defendants had no knowledge, that the certificates were used or designed to be used by Williams in accomplishing a sale of the township; and they, therefore, are not partners to, or to be affected by his acts. But if Williams was, and acted as their agent in the sale, then his representations bind them, or the sale must be treated as a mere nullity. If they did not authorize the use of the certificates nor the representations of Williams, and he was their agent, then one of two things must be the result; either, that the sale, having been made by the agent upon false material representations binds them to make those representations good, they having afterwards adopted and confirmed the sale; if so, they must be bound by it cum onere, with all the incidents; or, the sale having been without authority from the defendants, and procured by false material representations of Williams, is not binding, either upon the defendants or upon the plaintiff. In short, the sale is utterly void; the plaintiff, as purchaser, cannot be bound by a sale made by an agent, who falsely represents the quantity and quality of the thing sold, for if he is to be bound by the sale, it is because the agent has authority to make the representations as well as the contract. And the defendants cannot avail themselves of the contract, as a sale by their agent, and repudiate the accompanying representations. The defendants are bound by the contract of sale in its totality, or not at all; so that the actual posture of the case, if it be one of agency by Williams, is either a nullity throughout, or binding throughout. The principals have no right to bind the other party by a ratification of part of his acts and transactions, and by a rejection of the rest. They must take the whole or none. The representations are a part of the res gestae, and not separable from the sale. The question as to the agency of Williams will arise hereafter. Now, the certificates above alluded to, which constituted the basis, as it were, of the purchase,

represent the township to contain from one hundred and fifty to two hundred millions of timber. So gross an exaggeration, so extravagant an estimate, never could have been made in good faith by the certificate makers —notwithstanding their affected sincerity— nor could the certificates have been intended otherwise than to mislead and cheat purchasers, credulous, if you please, but on that very account more easily seduced and deceived. This record, as well as some others of a kindred character, which have already been before this court, exhibit a very low standard of morals and duty—if one might not more strongly characterize it as a most unscrupulous profligacy—much in vogue among this class of certificate makers. Admitting, that Williams himself was a dupe of the deception, (which is not very easily to be admitted), the aggravation of the case is not lessened as to the plaintiff and other purchasers. They believed in him and in the certificates, and the plaintiff made the purchase upon the faith of both. It was, therefore, either a case of mutual mistake or of gross misrepresentation in a matter vital to, and constituting the very basis of the bargain. If the law would tolerate such a bargain, which I am very slow to believe, it would find no countenance in a court of equity. There is not any ground to suppose, that Emerson was not acquainted with the contents of these certificates. On the contrary, if Williams is to be believed, his testimony fully establishes, that Emerson not only knew the contents, but corroborated them; and there is some other independent testimony in the record to the same effect. There is, besides, a not unimportant ingredient in this case, which ought not to be passed over in silence. The paper given by Emerson to Williams, (of which we have several versions in the case not differing substantially from each other in their import on this point,) affirms, that Williams is to have the refusal of three fourths of the township at six dollars and fifty cents per acre;—the terms one third cash, one third in one, and one third in two years, with interest annually. Now from this paper it would seem, that Emerson was to retain one quarter part on his own account; and that the real price was truly stated. In point of fact, the price is untruly stated, and as it would seem purposely. At all events, it could not but mislead, as it was considerably higher than the actual bargain, and would have a tendency to show, that Emerson placed a higher value on the land than was the truth. The other defendants deny, in their answers, that they ever authorized Emerson to sell any portion less than the whole township, or that they ever authorized him to make such a contract of refusal as he gave to Williams. Be it so. They subsequently ratified the sale as made to the plaintiff, and are bound by it, as much as if they had given a precedent authority. There is some attempt made to explain the ground of this false statement of the price in the paper given by Emerson to Williams; but I must say, that it is wholly unsatisfactory, and looks very much like an afterthought. Besides, the paper would naturally lead every purchaser to suppose that the price was six dollars and fifty cents for every acre in the whole township; and not upon a deduction on account of an excess of land covered with water in the township beyond the usual quantity. Nay, such is the obvious purport of the language used in it. Emerson could not but know, that the paper would be shown to purchasers; nay, that its known object must have been to procure purchasers. Why then should he have suffered them to be misled by a statement now admitted to be untrue on the face of the paper?

Passing from this, let us proceed to the next question, and that is, whether the sale was made by Williams, as the agent of Emerson and the other defendants, or on his own sole account as principal. I am aware of the positive denial of Emerson of any such agency; but, looking at all the facts, is not the agency substantially an inference of law? If Williams is to be believed, he acted as the agent of Emerson and the other defendants, and not upon his own sole account as a purchaser. It is said, that Williams is an interested witness; but it seems to me, that his interest is no more than that of any other person, called as a witness to establish his agency in a particular transaction; and the competency of such a witness is a known exception, in the law of evidence, to what may be deemed the general rule. Then, again, his credibility is assailed, upon the ground of his mistakes and the frail state of his memory. But the ex parte deposition, taken in May, 1842, before his apoplectic attack, if it be not primary evidence, is, at least, corroborative evidence of his deposition in November, 1842, to the general truth of his statements, as to all the material facts on which I rely upon the present occasion; and his testimony derives no small support incidentally from other witnesses. The main fact, whether he was a purchaser or an agent, is scarcely a matter in which he could be under any error or mistake. The paper given to Williams by Emerson is by no means inconsistent with the suggestion, that he was an agent. It is precisely what would take place, if the design was to conceal the agency, and yet at the same time to give the agent an interest and premium upon all he could sell the township for beyond a fixed price. Such a course of proceeding is not unknown in general commercial business; and this court has had occasion to know, that, in the recent timber land speculations, it was not an uncommon expedient. It was not unimportant to give to a real agent, the appearance and character of a purchaser on his own account. His representations would be likely to be listened to with more respect and confidence, as a purchaser, than as an agent,

clothed with the instructions and interests of others. The subsequent facts corroborate this view of the matter. All the defendants, except Emerson, deny, that they ever authorized him to give any such paper of refusal, or to sell sub modo. Emerson was to sell for all of them, and to sell the entirety of the township; and certainly he might consistently employ a sub-agent to effect the sale upon such terms as he, Emerson, might dictate and subsequently sanction. Williams never made any deed; but Emerson acted as the substantial party in interest, and the title from the state to the purchasers was procured by and through Emerson. So that, whatever was the form of the transaction, Emerson acted as principal for the defendants in procuring the deeds from the state, and he received the purchase money and took the notes in his own name. Williams incurred no responsibility either to Emerson or to the purchasers in the final arrangements, whatever he might have done in the antecedent steps of the negotiation. Indeed, it is very difficult to see, how, upon the admitted facts, he can be treated as a purchaser from Emerson—or as principal selling to the plaintiff and the other persons, interested in the sale. He never acquired any title to the property himself. How could he then be treated otherwise than as an agent, not in form, but in substance, negotiating for Emerson and the other defendants? It is true, that he was permitted to appear as a principal; but it is equally true, that he was a mere conductor rei, subject to the control and confirmation of the sale by Emerson as the owner of the property.

In considering the testimony of Williams, I have not adverted to the depositions of Moses Paul and Joseph Hanson, introduced into the supplemental record; not that, if regularly introduced into the case, they would in any manner change my opinion as to the value of his testimony; but simply because, being irregularly and improperly taken, and being irrelevant to the matters of the supplemental bill, they must be suppressed.

In the next place, as to the lapse of time. This in many cases is a most important consideration, and weighs much, and sometimes, "est maximi et momenti ponderis," especially when there has been a great change of circumstances as to the character and value of the property, in the intermediate period; and a fortiori, where the party complaining has been fairly put upon his diligence, and has had ample means of inquiring as to all the material facts, and has chosen to lie by in gross indifference and indolence. This question does not indeed seem fairly open upon the present pleadings. The bill charges that the plaintiff first discovered the gross fraud and imposition practised upon him in July, 1841, and, as it should seem, by means of the memorial of Emerson to the commissioners, in March, 1841, and their report thereon made in July, 1841. The answer sets up no denial to this statement of the bill; and does by implication admit its correctness. But whether this be a just inference or not, it seems to me, that the lapse of time cannot interpose any bar to the relief asked by the bill, if otherwise well founded; for the memorial of Emerson is of itself clear proof, that he was before that time fully aware of all the material facts; and there is no pretence to say, that he communicated them to the plaintiff. Neither is it shown, that the plaintiff had, by any other means, obtained suitable information to put him upon inquiry. In short, for aught that appears in the case, the plaintiff never discovered the gross falsity of the representations made to him until the memorial and report brought it home to his knowledge. Besides, as was remarked by the lord chancellor in Partridge v. Usborne, 5 Russ. 195, 232, when one party to a contract makes a positive representation, it is not laches in the other not to proceed immediately to verify that representation. At all events, the defence is not put upon any such ground as the lapse of time, and knowledge by the plaintiff of the material facts, so as to have called upon him for precise proofs of his real situation and of the time when he first discovered the full nature and extent of the deception practised upon him. So that it seems to me, that the court is not called upon in this case, by the state of the pleadings and evidence, to act upon any such defence as the lapse of time, whatever, under other circumstances, might have been the just value of any such defence. Upon the whole, without going more at large into the merits of the case, my opinion is, that the contract of sale with the plaintiff ought to be set aside, as founded in gross mistake and gross misrepresentation, and that the plaintiff ought to be restored to his original rights, and receive back the purchase money, upon executing a due re-conveyance to the defendants, and making such other allowances as upon a hearing before a master shall, under all circumstances, be equitable and just.

[NOTE. This cause was heard in vacation, by agreement of the parties, but Judge Story died before the decree sketched out by him was entered. A motion to enter the decree at the next term was granted by Judge Woodbury over respondents' objections. See Case No. 3,961. Afterwards the cause was heard on exceptions to the master's report, and also upon an application of respondent Norcross to put in evidence, under a cross bill, a discharge obtained by him in bankruptcy. See Case No. 3,962.]

Case No. 3,961.

DOGGETT v. EMERSON et al.

[1 Woodb. & M. 1.][1]

Circuit Court, D. Maine. Oct. Term, 1845.

EQUITY PRACTICE — HEARING IN VACATION BY AGREEMENT—DEATH OF JUDGE —ENTRY OF DECREE—OPINION—REHEARING—NOTICE.

1. A case heard and decided in vacation before one judge, by agreement of the parties, is to be considered as if heard and decided before and by the court.

2. If the decree be not actually entered till after the judge dies who drew it up and announced it, an entry of it may be made at the next term.

3. The intervening death of the judge, in such a case, is no objection, and no ground, for a rehearing, if an opinion was actually delivered; but otherwise, if only prepared. To justify a rehearing, it is not sufficient to satisfy the court, that the opinion may have been erroneous in law, if there was no mistake as to the law or fact when it was given.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

4. A court may alter its judgment at any time before it is entered up; or, if entered, before it is made final to be carried into effect. But it should not be altered without notice to both parties, if it has before been announced, nor without the full hearing and adequate causes which take place and justify rehearings usually in chancery.

[Cited in Jenkins v. Eldredge, Case No. 7,-269; The Illinois, Id. 7,003; U. S. v. Garcia, Id. 15,186; Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 201.]

This was a bill in equity pending here at the last May term for argument. The pleadings and evidence being closed, and sufficient time not existing then for the hearing, it was mutually agreed by the parties to have it heard in the vacation at Boston. The cause was accordingly argued there, at length, before the presiding judge of the circuit court for this district, the other not wishing to take part in the case, though not asking to be excused on account of any interest or connection with the parties, nor declining to take part in it when necessary. In August last, in the presence of the counsel for both parties, and both assenting to the act, an opinion on the case was delivered in writing by the presiding judge. [Case No. 3,960.] It was in favor of the plaintiff; and in order that it might be entered on the record by the clerk here, the form of a decree was sketched by the judge in conformity to the opinion, and corrected in the presence of the counsel; and a blank filled up with the name of a master in chancery, mutually acceptable to the parties, for making a further report in the case. This paper was then handed with the opinion to the gentleman who reports the decisions of the court, in order that it might be transmitted to the clerk here;—but it was not in fact forwarded till the 9th of September, three days after an adjourned term of the circuit court closed here, and hence was not entered at that session.

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

The next day after it was forwarded, the presiding judge died, and at this term the plaintiff by his counsel, William Fessenden, moved the court to enter and carry into effect the decree.

This was objected to by the counsel for the respondents, W. Preble and J. Rogers.

WOODBURY, Circuit Justice. It will conduce to a more correct understanding of the several objections, which have so ingeniously been urged against this motion, to consider how the case would stand, independent of the death of Judge Story.

Could it be urged with effect or plausibility that only one judge was present or participated in the opinion and decree, if that judge had not died before the decree was actually entered on the docket? We think not. Because the hearing before only one judge, and an opinion rendered, or decree prepared only by one judge of this court, where the other is either absent, or desirous not to take part in them, is a very common practice, and is legal. On the contrary, if both choose to be present, and to take part in a cause, it is undoubtedly true, that no binding decision can be made without the co-operation and union in views of both judges. The opinion and decree, therefore, in this case, were not invalid because given by one judge alone, when the other wished to be excused from taking part in the hearing and decision at Boston, and did take no part, and the parties through their counsel had their hearing voluntarily before the other judge alone. "Volenti non fit injuria." Plowd. 501; 4 Bing. 628. Next, it cannot impair the validity of the opinion and decree, that the hearing was had and they were made in the vacation. Because such is often the practice for the convenience of the parties themselves; and when assented to, as in this case, by them, and attended on by them, no court of law, much less of equity, could permit either of them on that account to impeach their validity. Gould v. Oliver, 2 Scott N. R. 241. Nor is it any sound objection to such an opinion and decree, that the entry of them, or the results of them on the docket, is not made till the next stated term in the district, though an adjourned term may intervene. It is understood in such cases that they shall be seasonably carried into effect; and a delay of one or two weeks, when at a distance and not extending beyond the next stated term of the court in the district, would not seem unreasonable, or beyond the presumed spirit of the agreement concerning cases thus heard and thus to be disposed of.

We come next to the only other objection, except that which grows out of the intervening death of the presiding judge. It is, that till the decree is actually entered on the docket, and probably till the close of the term, it may be reviewed, amended or an-

nulled. Hudson v. Guestier, 7 Cranch [11 U. S.] 1. This is true; but it is still, before entered, if made by the court, a decree showing the judgment of the court. It shows what is the decree of the court as much as an opinion, read by one of the judges in the court room, containing the views of the court, shows the opinion of the court. If both are completed and announced to the parties at the time and place agreed by them, they are finished, except the mere entry of them on the docket and record. The subsequent steps are rather steps to enforce or carry them into effect, than parts of the opinion and decree themselves. But as an entry is necessary to complete their operation and give them full effect, like an enrollment of a decree or a signature of it by the chancellor in England, it is in the power of the court to make changes in them before that is done, and probably before the term closes at which the entry is made. Such changes, however, after the opinion and decree have been formed and communicated to the parties, would be altogether destructive of judicial consistency and firmness, as well as public policy, unless made upon good and urgent cause, on a full rehearing by both parties.

The intervening death of the judge, who delivered the opinion and made the decree of the court, is, in our view, not such a cause. Both of these—the opinion and decree—were acts of the court, and not of the judge personally, and hence it is not necessary he should make or see to the entry of the decree, but other judges or the court can see to it. [Life & Fire Ins. Co. v. Wilson] 8 Pet. [33 U. S.] 291, 303. Both may be altered by the court, but not by the judge delivering it after communicated to the parties, except he continues alone to represent the court in that case; and they may be altered by other judges when representing the court, as well as by him who formed them originally. Here, the same court exists now as then, and with the same powers. To justify an alteration, then or now, in an opinion once pronounced or in a decree once made, but not entered, there must be shown some obvious mistake of law, or some obvious mistake of fact; or some new matter since discovered, entirely changing the grounds of the former opinion and decree. Indeed there must be something tantamount to what would justify a new trial. A rehearing is not granted for mistake of counsel as to the force of evidence, nor if facts are wished to be introduced by a supplemental bill, which are merely cumulative. And there must be a supplemental bill in such cases, if there be newly discovered evidence such as to justify a revision. Baker v. Whiting [Case No. 786]; 16 Ves. 350; 17 Ves. 178; Dexter v. Arnold [Case No. 3,856]. But nothing of this kind is pretended here; nothing beyond that difference in views as to the law and facts, which usually exists between opposing parties or counsel, and which are probably in no respect stronger now, than they were when the case was first argued.

A rehearing merely for the intervening death of a judge, who pronounced the opinion, would be neither for a mistake shown in law or fact, nor for a new discovery of what showed the former opinion and decree to be erroneous. A rehearing can be had in equity on a petition, even after judgment, but not of course. It rests in the discretion of the court, and probably is where the judgment is not final, or not yet executed. Daniel v. Mitchell [Cases Nos. 3,562 and 3,563]. For in The Avery and Cargo [Case No. 672], it is said the court will not grant a rehearing at a term subsequent to that at which it was finally decided. See [Sibbald v. U. S.] 12 Pet. [37 U. S.] 492; The New England [Case No. 10,151]; 3 Dow. 157. Is there, then, any other conceivable principle, why his death should affect the question one way or another? It may be said that the opinion and decree are not, and may not be, the opinion and decree of the court at the time when the decree is to be entered up. So it may be said always, where cases are continued nisi, that the opinions, rendered on the circuit after the term, may not be the opinions of the court at the time the court was held, as a change in views may have been produced in the same judges, or new ones may have been appointed in the case of old ones deceased, and of different views from them. But that is never the inquiry, or the test. On the contrary, it is, was the opinion rendered by the court, and at the time and place agreed by the parties? and was it, or is it to be, entered substantially at the term agreed? Thus here, if the opinion and decree were given at the time and place virtually agreed by the parties, and the decree is now entered at the time and place proper under that agreement, no intervening death of a judge can be any ground for re-opening or invalidating them. Where a court has been changed between the formation of an opinion and the delivery of it, or a judge dies with opinions on file and never delivered, and decrees never completed in their details, nor communicated to the parties in court, or at an agreed hearing in vacation, it is admitted that the whole ground fails, that exists here for sustaining and entering up this decree. A court changed is not the same court. An opinion, not delivered, or a decree, not drawn up in detail, may never be uttered or made as proposed. But here the opinion was actually delivered, and read to the parties.[2] The decree was framed after a full hearing, and also communicated to them, and then handed to the reporter, in order that it might be, as it afterwards was, transmitted to the clerk of the court to be properly entered as the act of the court. It is in our discretion now, to be sure, not to enter it; but it would be a violation

[2] It is now published in Doggett v. Emerson [Case No. 3,960].

of the evident intention of the parties themselves and of the equities of the case, as well as of analogies and the encouragement of needless delay and litigation, not to carry it into effect, if neither such a mistake, nor such a fraud, nor such a discovery of new facts are pretended here as would justify a rehearing in other cases. Where judgment has been rendered by one judge, and he dies, his successor must certify or sign it, else a mandamus lies. Life & Fire Ins. Co. v. Wilson, 8 Pet. [33 U. S.] 291. And the mandamus would be, not to order him to give, or reverse a judgment; but merely to authenticate what his predecessor had done, so as to bring it up here, if either of the parties wish to have it revised.

It is a great satisfaction to know that, in coming to this conclusion, the respondent is not precluded from a revision of the original decree by a still higher tribunal, if it be erroneous; and, under the force of this circumstance, with the other considerations mentioned, the court feels bound to direct that the decree be entered and carried into effect. Motion granted.

[NOTE. This cause was subsequently heard on exceptions to the master's report, and also upon an application by respondent Norcross to be allowed to put in evidence, under a cross bill, a discharge in bankruptcy obtained by him. See Case No. 3,962.]

Case No. 3,962.

DOGGETT v. EMERSON et al.

[1 Woodb. & M. 195.] [1]

Circuit Court, D. Maine. May Term, 1846.

EQUITY—RESCISSION OF SALE OF LAND — REPAYMENT OF CONSIDERATION — JOINT PURCHASERS AND AGENT—INTEREST — DISCHARGE IN BANKRUPTCY—DELAY IN PLEADING AS DEFENSE.

1. Where timber had been cut from land by the grantee of the land, and the money not realized when a decree was rendered, that he was liable to account for it, he having rescinded the contract, he was required to file a satisfactory bond to pay the amount as soon as collected.

[Cited in Smith v. Babcock, Case No. 13,009.]

2. If four persons agree to purchase of the state a tract of land, and give their joint note for the consideration, and take a writing from the agent of the state to make a deed on demand, and they authorize one of their number, in writing, to take a deed of the same and sell it for the whole, each being entitled to the extent of one fourth by their private agreement, that one has an interest in the whole as agent, besides his interest as principal in one fourth. And if he gets a deed from the state for one eighth running directly to a purchaser of one eighth, instead of one to himself, and then from himself to the purchaser, he is answerable for the whole consideration received, on the sale being rescinded

[Cited in Mason v. Crosby, Case No. 9,234.]

3. But if after the sale, he divided the whole of it between the other three owners, concluding to keep as his own share the other one fourth of the land, having sold in all to various persons three fourths of it, the other three are responsible to refund, in aid of him, the one third each received.

4. If a sub-agent receives from the vendee a part of the purchase money, and pays it over to the principal, taking land instead of it for his compensation, the principal is liable (on a rescission of the purchase for fraud) to repay that part as well as what he received directly.

5. Where a conveyance is set aside for gross misrepresentations and deceit, the ground of the decision must be considered to have been fraud, and in such a case, interest is to be paid on the money refunded, without reference to any demand, and from the time it was received, and interest on the interest from the time of its payment on any of the notes originally given.

6. Where one of the respondents was discharged as a bankrupt in November, 1843, but showed no efforts to plead it till April, 1845, and in July, 1846, after the case had been published and an opinion given on the merits, moved to be allowed to avail himself of it; the court considered the application too late, and the subject-matter of this bill, a claim in equity to rescind a contract, as one not provable under the bankrupt law.

[This was a bill in equity by John Doggett against William Emerson and others.]

This case came before the court again at an adjourned session of the May term, 1846, on exceptions to the report of the master in chancery upon the decree against the respondents, rendered at May term, 1845. The original opinion of the court was delivered in August, 1845, by Justice Story, and is now published in Doggett v. Emerson [Case No. 3,960], and a decree was prepared to carry it into effect; and both were communicated to the parties at a sitting held by their agreement under a continuance nisi. Objections being made to entering up the decree, after the death of Judge Story, the parties were heard on that point, and a request was made for a rehearing of the cause, at the October term, 1845. Afterwards, during that term, an opinion was pronounced by Woodbury, J., for the court against the respondents on these points. Doggett v. Emerson [Case No. 3,961]. The master then proceeded to make the inquiries which were submitted to him, and reported thereon at May term, 1846. Exceptions were filed to his report by all the parties, and were argued at an adjourned session of the court, held at Portland, July 7th, 1846. Enough of the report and exceptions will be stated in the opinion of the court to show the grounds of the questions. The case was continued nisi, and judgment pronounced at Boston, September 8th, 1846.

W. P. Fessenden, T. Fessenden, and Mr. Deblois, for Doggett.

Rogers and Rowe, for Emerson, Farren and Roberts.

McCrillis and Poor, for Norcross and Mason.

WOODBURY, Circuit Justice. The objection taken to the report in this case for not allowing a deduction to the respondents on account of timber, which had been cut recently, but not sold, is disposed of by the subse-

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

quent agreement of the parties to any mode of arranging it, which shall appear just to the court, and shall avoid delay. I therefore direct, on this point, that beside the allowances, specified in the report for timber cut on the land and sold, the further quantity, found by the master to have been cut, but the proceeds not then realized, is to be allowed and deducted, if they have been so realized when the judgment is entered up; and if they have not been at that time, the complainant is to file a bond with satisfactory sureties, to pay the same on demand to Emerson in trust for those entitled to it, in the proportions in which the consideration paid by Doggett for the land in controversy shall be actually refunded by them.

Most of the other exceptions in this case may be resolved into three general heads. 1st. That which concerns the title of Emerson. 2d. That relating to the computation of interest. 3d. And that concerning the amount of principal which should be refunded.

In relation to the question about Emerson's title to the land, I entertain no doubt except on the point, whether his interest was so extensive that he should be charged in the first instance for the whole consideration, or only one fourth of it. That he was a party in interest to some extent, must have been decided by the judge who made the decree, or he would probably have directed the bill to be dismissed in respect to Emerson. From the proof in the case, also, it is manifest, that he was, in truth, one of the purchasers of the land in dispute. from the state. That beside this, he was one who joined with the other owners, as copartners in interest, in authorizing himself, as agent of all of them, to dispose of the land on certain specified conditions; that he made the sale and took the money and notes therefor—the notes running to himself on account of the owners, who had constituted him agent; and that though in one of the writings given to Williams, he speaks of reserving one fourth of the land from sale for himself and some other persons, yet he then took no deed of that fourth from the state to himself, or to himself and others; nor did he take any afterwards when the consideration was divided; nor did he then take releases or quit-claims from the other owners. Whatever intentions or expectations he may have then formed of retaining one fourth for himself and some of the other owners, or whatever arrangements he and the other owners made by parol at the time of the division of the consideration, the legal title, after the purchase from the state, stood thus. Till different and actual conveyances some time after, made it otherwise, it must be regarded either as in the state alone. (no deed having then been executed by the state of the one fourth,) or if in the respondents, under the contract with the state, then in all of them jointly; as all jointly are named in the receipt for the money and in the promise to convey, which was made by the agent of the state, and all jointly had become responsible to the state by joint notes for the consideration. If we go next to the collateral evidence, it seems that the state was to convey to all of them, including Emerson, and that his portion was to be one fourth, Farren one fourth, Roberts one fourth, and Norcross and Mason, as a commercial firm, one fourth.

Looking still further to the written power given by all of them to Emerson, as their agent, to sell the whole at a given price, it was signed by all, and evidently contemplated that Emerson should take a deed of the whole land from the state, and sell the whole on account of all as owners of undivided portions. Thus, the promise by the agent of the state to convey the land, is in terms made to them all by name; and agrees "to deed the same to them, whenever they shall call on me for that purpose at the land office," and bears date February 21st, 1835. The same day they all by name jointly empowered Emerson "to take a deed of the same," which must be of the whole, and to sell it, "if opportunity should present," and account for it in four equal shares, such being recited to be their true liabilities on the notes to the state. It is contended by the respondents, that the construction of this power is, that Emerson should sell the whole of this interest or none, and not three fourths of it; and when the proceeds of the sale of three fourths were divided, it is believed that the settlement was closed on that basis, by his paying over to the others all which the whole of their shares would sell for, and retaining in himself all the one fourth,—the residue of the land not sold. It may be sound law, that in a case like this, a power to sell the whole land would not imply a power to sell a part at the same rate undivided, though we see no evil in a construction of the power allowing a sale of a part, except that it would admit new co-owners not wanted. But the proprietors were liable to that before by Emerson's selling his own one fourth to whomsoever he pleased. It is not, however, necessary to decide this question, as the parties agreed anew and after the sale, to treat this as a sale of the whole of all the interests of all the co-owners except Emerson. This, it is supposed, they also completed by deeds at some subsequent period, though not at that time. In any legal view, then, of the title and the written agreements at the time of the sale to Doggett, Emerson must be considered as having at first the title to the whole land as agent for the whole, (regarding in equity that as done which was agreed to be done,) or he must be considered as having the title of one fourth undivided as principal, which all concede he was to receive as one of the principals, and which he maintains is still in him. He was, then, interested at the time of the sale, and had a title to something

as fully as any of them, but to how much we will examine further hereafter. As another guide in coming to a conclusion, whether he is to be treated as then having some interest in the land conveyed, and hence to be liable for some of the consideration, it is manifest that the purchasers looked to him alone, through Williams, his sub-agent, for obtaining this title. That he wrote to the agent of the state to make the deed to the complainant, of his one eighth; that the notes for the consideration ran to him, or were indorsed by Williams to him alone; and that, if any other circumstance had occurred, rendering an action at law proper for recovering back the money paid to the plaintiff, it could have been sustained against Emerson; or if the money received by Emerson of Doggett had proved to be counterfeit, that Emerson in his own name could have sued Doggett to recover the whole amount. It is my opinion, then, that Emerson was interested in the land not only for one fourth, but that the legal rights of the parties, at the time of the sale to the complainant, were in Emerson as agent for the whole, to demand and receive a deed of the state for the whole; and then to convey to purchasers such portion as he was authorized to, as agent for all. The title to the whole must, then, be considered to have been in him when the plaintiff bought, to be disposed of for the benefit of himself and the rest of the purchasers in conformity to his contract with them. So situated, he sells one undivided eighth to the complainant. It was one eighth of the whole and not of three fourths. It gave a title to partition of the one eighth, out of and from the whole, not out of three fourths; and the only distinction or difference in the case from this is one of form, and arises from the circumstance, that the conveyance was made directly from the state to the vendee by Emerson's request, rather than first to Emerson and then by him to the vendee. This cannot, however, alter the equitable or legal view of the transaction as among these parties. Emerson thus bargained away, as holder in trust, as agent for all the owners, this one eighth of the whole land. He conveyed it to the plaintiff through the state—he received the whole consideration—and, on account of all this, if the conveyance be avoided, he must be considered as in the first instance, liable for the whole.

In the next place, having paid over that consideration to the other respondents, as each was originally entitled to one fourth of it, considering Norcross and Mason as one firm, they are each, as original owners to that extent in the whole, bound to refund one fourth. Here the case on this point would end, looking to no subcontract, or arrangement among these parties subsequent to the sale, and generally looking to none, in fixing the liability if made with others beforehand, and not before it had been carried into legal effect. For this reason, I do not regard, as affecting the liability under this bill, the subsequent agreement of Le Breton and Moody to buy of Norcross and Mason, and another sub-contract with Goss and Mitchell, and others of like character referred to. But as Emerson and all the other parties to the bill concur in admitting, that before the consideration was actually divided, they agreed, that the others should take one third of it instead of one fourth, and consider the three fourths of the whole land sold to Emerson as their three fourths, and the one fourth retained as his—it seems right, in considering the amount of damages or money to be returned, to make them refund one third each in aid of Emerson. This does not affect the question of liability, but merely the amount which it is equitable for some to refund, and is distinguishable from other arrangements, either with others not parties, or among parties at subsequent periods; and it conforms to the truth of the case among those possessing the legal title. It makes Emerson liable at first for all, as entitled to a deed of all from the state as agent, and then the others liable in aid of him for all, as they afterwards agreed to be. This conclusion, as to Emerson's liability to refund all, would not be very different, if Emerson had possessed no title to the whole. In cases of this kind, where there is an agency coupled with an interest in the land, or an interest in the consideration of the sale, though not in the land itself, we see no objection in principle where the agent receives actually, in the first instance, the whole consideration, and through fraudulent representations of himself and others under him, the sale is avoided, why he should not be held responsible for refunding the whole. Such is not the case of a mere naked agent or attorney, receiving money and paying it over for the purpose received, and who may be exonerated afterwards in certain cases, from liability to refund. But it is the case of an agent or attorney interested in the matter sold and interested in the proceeds, and one whose misconduct renders a return of the consideration proper. In such case, therefore, his liability to refund the whole is certainly not very questionable on that ground.

In Daniel v. Mitchell [Case No. 3,563] the agent was held responsible for refunding the whole which had passed through his hands, making at the same time all, who were parties to the bill and had received portions of the consideration, contribute and repay the amounts they had respectively received.

In the present case, if we look to the strict legal title to this land, before the one eighth of it now in controversy was conveyed by the agent of the state to the complainant, it was in the state alone. And looking to that exclusively, and not the receipt of the money, none of the respondents could be made to refund the consideration, and take a reconveyance. But the reconveyance would be to the state, or agent of the state, who gave the

deed to the complainant, and the state should be required, or its agent, to refund that portion of the consideration which he virtually received for this one eighth through the respondents on their joint note. This whole proceeding, however, has been instituted and carried on without reference to any liability by the state, but on the ground of liability and rights under the state; as if the state had made such a conveyance as it was bound in law and equity to make, under the written agreements about this land, before the sale to the plaintiff. The agent of the state at first delayed to give a deed, merely because the contract was not made at the seat of government, where the papers existed which it was necessary to refer to. The delay to make one soon afterwards to the owners or their agent, and by them or him to other purchasers, arose either from a desire in the purchasers to avoid the expense of double deeds, or from a wish not to make any covenants or warranties. In any fair view, then, of the rights and relations of these parties, my conclusion on this branch of the master's report, as to the extent of the interest of the respondents in the bill, and the respective amounts they are liable to refund before making any deductions for rents, timber, &c., are: First, that Emerson had a right, under the written power, as agent and trustee for all the parties, to the title of the whole premises,—each of them as principal having a claim to one undivided fourth; and, secondly, that Emerson, receiving the whole consideration, as agent for all, is to refund the whole under the decree; but having paid over one third of it to each of the others, they are in aid of him to refund that proportion respectively, and he be held answerable only for the balance not paid by them; and, thirdly, that the reconveyance of this one eighth is then to be made, in the form reported by the master, to Emerson alone, in trust for and as agent for the others —they being entitled to receive a deed from him of such portions of the one eighth as each refunds of the whole amount directed to be returned.

In respect to the next point, to which the exceptions relate—the time for which interest is to be allowed—it is not without some difficulty. In cases where contracts are rescinded for mere mistakes, and the property sold was taken possession of by the vendee, and yielded a regular income, it has often been the practice to set off the income against the interest, and to go into no computations about either, till possession of the premises was given up. Edwards v. McLeay, 2 Swanst. 287; Powell v. Martyr, 8 Ves. 146; 1 Dana, 423, 594; 2 Dana, 375; 3 A. K. Marsh. 180. Such a rule is often more convenient and easy than just; and could never be equitable unless the property yielded a certain and considerable income. Where interest has in any such cases been given, it usually does not begin till a demand is made to refund the consideration. Powell v. Martyr, 8 Ves. 146. But here the original bill charges a fraud in the contract of sale, as one ground for rescinding it. The opinion of the court on that bill was, "that the contract ought to be set aside, as founded in gross mistake, and gross misrepresentations." Not in one, or the other, but in both; and though there may be a mistake in cases, sometimes with and sometimes without misrepresentation, it is difficult to conceive of "gross misrepresentations" without fraud. If they do not always imply actual fraud, or a scienter which would make the party liable criminally, they implied in this case, according to the court, a fraud in law, which annulled the whole sale. But beside this the decree itself states both "misrepresentation" and "deceit" as entering into the transaction; and the ordinary definition and use of the latter term is the same as that of fraud. Though not employing the precise word "fraud," the whole case, as well as the decree, manifestly shows that the sale was avoided as well on account of fraud as of mistake, and the former word was not used, either from inadvertence or from a kindly feeling to employ a term seeming less harsh, to describe what the law regarded as coming within its purview and meaning. The usual incidents to such a decision must, in the next place, be attached to it. One of them is, that no demand is necessary in order to obtain interest from the time the demand is made. But on the contrary, the taking of the money being wrong and fraudulent in law, the law will grant interest upon it from the time it is so taken. Forster v. Forster, 1 Ves. Jr. 451, and note; Schieffelin v. Stewart, 1 Johns. Ch. 620; Evertson v. Tappen, 5 Johns. Ch. 497; 2 Story, Eq. Jur. § 1277. It seems to me more just and equal for the parties, that in all cases of rescinded contracts, interest be allowed on the money paid from the time of payment till the judgment; and on the other hand, the party occupying the land be charged with rents and profits during the possession, deducting taxes, and the cost of any permanent improvements made. Powell v. Martyr, 8 Ves. 146; Taylor v. Porter, 1 Dana, 423. Because in some cases the rents are little or nothing, and in others more than the interest. This rule was recently adopted by the supreme court in Michoud v. Girod, 4 How. [45 U. S.] 503.

In respect to the sums or amounts, on which interest is to be cast, if the bargain had been to pay a particular sum in money for the whole consideration, and notes had been voluntarily taken in part as a substitute, it would seem to me proper, as the master has reported, to cast interest on all as if money. The interest then would be from the time of the making of the contract, the execution of it, to the time of final judgment on the whole consideration, and nothing more. But as this is not the truth of the case, and a part only of the

consideration was to be paid at the time in money, and the rest on credit, I am inclined to think the interest should be computed according to the truth of the transaction, and hence should be cast on the different sums paid from the times actually paid, whether as principal or interest, until the time of the final judgment. This will give some interest on interest, where it has actually been paid on a note on which an original credit was stipulated; but it will conform to the truth of the case, and restore the party to no more than he has really lost. In England, breaks or interruptions are sometimes countenanced in the payments, in order to allow compound interest. See cases in Vesey before cited, and notes.

The only remaining question, raised by the exceptions, is, whether the respondents shall refund, as principal, the amount paid by the complainant to this agent or sub-agent,—Williams,—or only the amount which the three respondents, beside Emerson, received after paying to Williams the excess that he was by the contract to be allowed over five dollars per acre. It is certain that the plaintiff contracted to pay for the one eighth, the whole amount of $6.50 per acre. It is equally certain, that he paid that amount for the land. It is further manifest, that the respondents are charged as liable to refund what was paid on that contract on account of the fraud and mistake accompanying it. It is also manifest that the fraud entered into and contaminated the whole $6.50, and not merely the $5 per acre, and that the contract set aside was one for $6.50, and not $5 per acre. And that the respondents would not have got or taken the $5 to themselves, except for the $6.50 paid to their agent or sub-agent, and of which he retained $1.50 for his services. It is likewise clear, that the sum paid to an agent on a contract, is in law generally considered as paid to the principal. It is as clear, that what the agent retains by agreement for his services, is as much paid to the principal, or in other words, to the agent on account of the principal, as if it all passed through the hands of the principal himself. Nor can the grounds of justice or law be satisfied when setting aside a contract for fraud, unless all is refunded, which was paid on it, whether a portion was at first retained by the agent, who conducted the business, or whether it was all passed over to the principal, and the same portion repaid by him to the agent for the services of the latter. Still cases may exist, where equity does not require those who may be parties to the bill to refund the whole; but this is not one of those cases. Another view of the transaction strengthens this conclusion in the present case, and removes any doubts remaining. All the $6.50 per acre was in fact paid over to the principals by the agent and sub-agent, but the sub-agent was allowed to take a conveyance of another one eighth of the same township, on paying only the difference between its cost at $5 per acre, and the $1.50 per acre to be allowed to him on the sale to the plaintiffs. So that in reality, all the sums paid to Doggett went into the hands of the respondents; but $1.50 per acre of it was allowed on or deducted from what Williams, the sub-agent, would otherwise have been required to pay on the one eighth he purchased for himself. Indeed, but for this last circumstance, I would not be understood as charging the parties to the bill for notes, if any existed, that ran to one not made a party to the bill, and the money on which never came into their possession, and to surrender which, if still unpaid, they might possess no power. That point I leave to be settled when it shall arise. But on the facts here stated, the whole sum, notes and money, paid by Doggett as principal, all going to the respondents, must be refunded, after the deductions before directed.

The exceptions to the master's report, which are sustained by these views, are to prevail; and those which are overruled by those views are not to prevail, and judgment must be entered up on the decree accordingly. It is supposed that the clerk and the parties can make the computations, and draw up the conveyances to conform to this opinion on the decree; but if they cannot without difficulty and delay, let the same master do it on a re-commitment, and make further report early, at the next term.

After the pleadings were closed in this case, and the evidence published,—indeed since the argument on the merits was finished and judgment pronounced against the respondents,—an application has been made by Norcross, one of them, to put in as evidence under a cross-bill, a discharge obtained by him in bankruptcy. It does not appear yet with exactness when Norcross was discharged. The discharge is sworn to be lost, and no copy or duplicate is produced. He shows no efforts to file the plea of it till April, 1845, and it is said to bear date as early as November, 1843. Some time elapsed between the discharge and those efforts, and that delay is not accounted for in any way. There was negligence in not employing counsel and feeing them until April, 1845; or if Norcross then had counsel who were apprized of Norcross's wish to have the bankruptcy pleaded, no reason is known why it was not done at May term, 1845; unless it may then have been considered too late. No explanation is given of this in the papers, and I am not aware of any ground of accident, or mistake, or fraud, made out to justify permitting a cross-bill to set out the discharge now, and attempt to defeat the claim of the plaintiff by it, or permitting all the existing pleadings to be set aside, and this discharge now to be interposed, after an unsuccessful attempt to get rid of the case on the merits, and after an omission to have

the discharge pleaded as soon as it was obtained. A remedy by a rehearing, or bill of review, has been referred to in the argument, but neither would be of any avail without a cross-bill or new pleadings under this bill. To grant either of these, on the facts now before the court, would be to encourage negligence, and favor, as a defence, what is inequitable, certainly, in this stage of the proceedings. Young v. Keighly, 16 Ves. 348; 1 Story, Eq. Pl. § 414; Baker v. Whiting [Case No. 786]; 2 Atk. 177, 533.

There is another fact stated as to this, which is material. It is said that the discharge was obtained before the supplemental bill was filed; and, under a full knowledge of its existence and the possession of it, no plea was then put in as the law requires. Eden, Bankr. Law, 425; 12 East, 664. Nor is it shown that any attempt was then made to give it in evidence under the general pleadings in the case. Where a claim in suit is one, which could be properly proved before a commissioner in bankruptcy, and after the pleadings are closed, a discharge has been obtained, it is usual to plead it as a defence at the very next term, happening after the last continuance. Nor am I aware of any practice to allow it to be pleaded afterwards, when long delays have intervened, unless a good excuse is given for the delay, and on suitable terms. Surely it ought not to be so long after, that the proceedings in the bankrupt court are closed, and all dividends made, and more especially if the claim was one, as here, about which real doubt existed as to its being legally provable before a commissioner. It would be unjust in such a case to make the creditor discontinue, and risk the proof, unless the defendant, if he can, seasonably drives him to it by a plea. Cook, Bankr. Law, c. 6, § 2. But however that may be, I am also satisfied, that if allowed to be now pleaded, notwithstanding the delays, the present claim in controversy is not of a character rendering it proper to have been proved and tried in the bankrupt court. It is manifestly not a claim on a contract to enforce it. Nor is it a suit to recover a debt. Almost every section of the bankrupt laws refers to debts. Generally, too, it must be a debt that the party can swear to in amount (Cook, Bankr. Law, 187, 225; 4 Burrows, 2,446); one, required formerly to be due at the time of bankruptcy (3 Wils. 271); one, ascertainable, though a tort, without a jury; and one, not contingent, till of late years. There must also be no wrong or malconduct in the debtor beyond neglect. 3 Durn. & E. [3 Term R.] 539; Cook, Bankr. Law, 223; Parker v. Norton, 6 Durn. & E. [6 Term R.] 695; Banister v. Scott, Id. 489. Utterson v. Vernon, 4 Durn. & E. [4 Term R.] 570, overruled 3 Durn. & E. [3 Term R.] 539, and sustained the above position.

It will thus be seen, that a bankrupt who has acted fairly, still remains liable in many cases of damages, torts, &c. (Cook, Bankr. Law, 221), on account of the nature of his liability. The same result still follows in some cases of debt, when payable in futuro or when contingent, though several have in later days in England been obviated by special clauses in new acts of parliament, as they have here, and some by exceptions well established in the courts of law. Thus damages, as well as debts, may sometimes be proved, if liquidated or fixed and certain. In this case, however, if any damages can be given, they are unliquidated, and might extend not only to the money received by Mr. Norcross, but if the notes of the plaintiff existed and were in a situation not to be surrendered, the damages might cover their amount also.

The objection here then is, not that the damages, if allowed at all, could not in one event be settled without the intervention of a jury; but that, in other events, they might not be conveniently; and that it is entirely uncertain or contingent whether any damages whatever will ever be allowed,—the claim set up being rather for a rescission of the contract, than for any debt or damages of any kind, or to any extent. Utterson v. Vernon, 4 Durn. & E. [4 Term R.] 570; Goodtitle v. North, 2 Doug. 583. If a right to damages at all is in dispute or uncertain, and not the amount of them, the claim cannot be proved. Eden, Bankr. 130; Cullen, 110; Dusar v. Murgatroyd [Case No. 4,199]. In bills to rescind contracts, often no damages can be given, but merely the sale vacated. It is true, that now, though not formerly, future debts can be proved under special clauses in the bankrupt law, and some contingent ones may be, as where the contingency occurs before the proceedings are finished. This may be right in such case, and in some others also it "may be" done, but seems to be left optional with the creditor. The spirit of none of the exceptions, however, appears to reach a case like this, when the claim is not for either a debt or damage, contingent or otherwise, but for a rescission of a contract. In the next place, it is very doubtful whether a discharge in bankruptcy can be pleaded against any claim resting merely in equity and not in law. Medlicot's Case, Strange, 899; Hillyard's Case, 2 Ves. Sr. 407, 1 Atk. 147; 1 P. Wms. 783; Eden, Bankr. 42. A claim for relief in a court of equity is a naked equity, and not a trust, right, or interest, and cannot be assigned to another. Dunlap v. Stetson [Case No. 4,164]; 5 Maule & S. 228; 2 P. Wms. 491; 8 Ves. 583. How could it then be proved in case of bankruptcy as a "debt"? Nor does a commissioner usually seem a proper or competent tribunal for trying complicated disputes in equity. So a bankrupt's discharge is not valid against a suit or claim founded on fraud in the defendant. Parker v. Norton, 6 Durn. & E. [6 Term R.] 695; Goodtitle v. North, 2 Doug. 583. And here

fraud was alleged and found. Liability for fraud implies something more than mere debt or liability on a contract, and unless the damages have been previously liquidated by a judgment, and then the liability is on that rather than the original cause of action, it will be difficult to find a case where a claim of that character is discharged by the bankrupt laws. See cases before cited. This motion is, therefore, overruled.

DOHERTY v. The CAROLINE E. KELLY.
See Case No. 2,422.

Case No. 3,963.

DOHERTY v. HAYNES.

[4 Cliff. 291;[1] 1 Ban. & A. 289; 6 O. G. 118.]

Circuit Court, D. Massachusetts. May Term, 1874.

PATENTS—NOVELTY AND USEFULNESS — PRESUMPTION FROM GRANT OF PATENT—SUIT ON REISSUE —BURDEN OF PROOF.

1. An alleged invention, in order to be patentable, must be new and useful, but if useful only in a small degree, it is unusual for the court to reverse the decision of the patent office in issuing the patent.

2. When, as a defence to a reissue patent, it is set up that the reissue covers more than was embraced in the original, the respondent must introduce in evidence the original to support the allegation.

3. Otherwise it will be assumed that the invention described in the reissue patent is the same as that secured by the original.

4. The respondent must overcome by proofs the prima facie presumption afforded by the complainant's patent, that the patentee was the original and first inventor of what is therein described as his improvement.

Bill in equity [by Lucy A. Doherty] to restrain the respondent [James G. Haynes] from infringement of certain letters-patent [No. 38,519] upon table trays or waiters.

The nature of the complainant's invention was described as consisting,—

1. In producing a waiter, or tray, with a lip, or its equivalent, to project down from one edge and below the bottom of the tray, such lip, when the waiter is placed on a table, being to rest against one edge of it so as to prevent the waiter from being accidentally pushed forward on the table by a person, while pressing against that edge of the waiter which is next adjacent to the lip.

2. In the waiter, or tray, as formed without any rim to project upward from the rear edge of its bottom, the rim being extended from the other edges of the bottom.

The part of the bottom on which there is no rim may be either curved or straight, but as a general thing it is preferred to curve it, in order that it may better fit to a round table top, and the lip better abut against the edge thereof, when the tray may be in use, than would be the case were the said part to be straight.

The claims were,—

A table-waiter, or tray, as made or provided with the lip C, or its equivalent, applied to and projecting down from its rear part, such lip being for the purpose specified.

Also, a table-waiter or tray, as made with the rim extending partially around it and above its bottom, in manner substantially as specified.

Also, a table-waiter, or tray, as having not only a rim extending partially around and above its bottom, as set forth, but with a lip, or its equivalent, extended down from its rear edge, the whole being substantially as explained.

The respondent claimed the right to manufacture trays under a patent to A. Turner, granted subsequent to that of complainant. The description and claims were substantially as follows:—

Table-trays for children have before been made with the side and back edges turned up, and the front edge turned down, to take hold against the edge of the table.

With this character of tray there is nothing to retain water or other liquid that may be spilled on the tray by the child, but the same is very likely to run off and wet the child's clothes, or the hanging portion of the table cloth, or drop on the floor.

My invention is to obviate these difficulties; and consists in a child's tray, in which all the sides are turned up, so as to retain any liquid substance that may be spilled upon such tray, thereby preventing the child's clothes becoming wet, or damage ensuing from the upsetting of a mug of tea or other drink; and I prevent the tray sliding upon the table, by means of stop-legs, that are fastened to the front edge of the tray.

Claim.—The child's table-tray, formed with the rims b b and c, higher than the rim d, in combination with the stop-legs e, attached at the front edge of the tray, and as for the purposes set forth.

Other matters of defence are sufficiently explained in the opinion.

A. A. Ranney, for complainant.

C. D. Wright, for respondent.

CLIFFORD, Circuit Justice. Letters-patent were granted to Nathaniel Waterman on the 12th of May, 1863, for an invention consisting of an improved table-tray, or waiter, as fully described in the specification, and the record shows that the original letters-patent were subsequently surrendered and reissued as alleged in the bill of complaint, and that the complainant is the sole owner of the described invention, as secured in the reissued patent on which the suit is founded. Discussion of the title of the complainant is unnecessary, as it was not controverted in argument, nor is it necessary to refer with much particularity to any other of the allegations of the bill of complaint, ex-

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

cept to say that the respondent is formally charged with infringing the patented invention, and that the complainant prays for an account and for an injunction. Various defences are set up in the answer, of which the following are the only ones which require to be noticed:—

1. That the invention is not patentable.

2. That the person named in the original patent as the patentee was not the original and first inventor of the improvement.

3. That the reissued letters-patent were fraudulently obtained in violation of the rights of the respondent, and that the patent as reissued "covers more than was contained" in the original patent.

Obviously the first two defences involve mere questions of fact, which in view of the record, do not require much discussion. Such an improvement, in order that it may be patentable, must be new and useful; but if it be useful even in a small degree, it is not usual for the court to reverse the decision of the patent office in that regard. Applying that rule to the case, the court is of the opinion that the first defence is not sustained, as the new form of the device may be quite convenient in the use for which it is designed; no direct proof having been introduced to support the allegations of the answer. Curt. Pat. § 29; Lowell v. Lewis [Case No. 8,568].

In examining the second question it must be assumed that the invention described in the reissued patent is the same as that secured by the original patent, especially as the original patent is not given in evidence by either party. Tested by that rule, it is quite clear that the second defence must also be overruled for two reasons:—

1. Because the letters-patent set forth in the bill of complaint afford a prima facie presumption that the original patentee was the original and first inventor of what is therein described as his improvement.

2. Because the proofs introduced by the respondent to overcome that presumption, and to prove the allegation of the answer, are wholly insufficient for that purpose.

Attempt was made to show that the Seller device is of prior date; but it will be sufficient to say that the proofs are not sufficient to support the proposition. Enough has already been remarked to show that the third defence cannot be sustained, as there is no proof to sustain the charge of fraud; and the second ground assumed is not open to the respondent in this case, as the original letters-patent were not introduced in evidence. Whenever a party desires to set up the defence that a reissued patent is not for the same invention as the original, he must introduce the latter in evidence, as the question is one of law, depending upon the comparison of the two instruments. Seymour v. Osborne, 11 Wall. [78 U. S.] 546. Consequently the third defence must also be overruled, and the complainant is entitled to a decree for account, and for an injunction.

DOHRMAN (CONOVER v.). See Case No. 3,120.

DOLAN (AIKEN v.). See Case No. 110.

DOLAN (UNITED STATES v.). See Case No. 14,978.

Case No. 3,964.

In re DOLE.

[11 Blatchf. 499;[1] 9 N. B. R. 193.]

Circuit Court, S. D. New York. Feb. 20, 1874.

BANKRUPTCY COURTS — JURISDICTION OF DISCHARGED BANKRUPT—EXAMINATION AS TO CONCEALED PROPERTY.

1. The summary jurisdiction of the bankruptcy court over the person of the bankrupt ceases on the granting of his discharge from his debts.

2. After such discharge, he cannot, by summary order, be required to submit to examination touching his property alleged to have been concealed or fraudulently transferred.

[Cited in Re Witkowski, Case No. 17,920; Re Nichols, 1 Fed. 844.]

3. For the recovery of such property a plenary suit is necessary, in which, if the bankrupt be required to make discovery, or be examined as a witness, he will be entitled to the benefits and the protection belonging to a party or witness in like cases.

George W. Lockwood, Jr., for creditors.
Francis N. Bangs, for bankrupt.

WOODRUFF, Circuit Judge. On the 25th of June, 1867, Nathaniel Dole presented his petition to the district court for the southern district of New York, for a discharge as a bankrupt. Upon that petition, and on the 27th of June, 1867, he was adjudged a bankrupt. On the 12th of October, 1867, Isaac M. Andruss was elected assignee of the estate of the bankrupt, such election was approved, and an assignment of the estate was made to him. On the 7th of January, 1868, the said Dole received from the court a discharge duly made and in proper form, filed January 9th, 1868. On the 27th of November, 1872, upon the petition of the said assignee, and the affidavit of G. W. Lockwood, an order was made requiring the said Dole to attend before John Fitch, Esq. on the 29th of that month, "to submit to the examination required by the 26th section of the bankrupt act" [of 1867 (14 Stat. 529)]. Subsequently another order or summons was issued and served on the said Dole, requiring him to appear before the said register on the 9th of December, 1872, "then and there to be examined in relation to said bankruptcy, according to the provisions of said act." On the 29th of November, 1872, the said Dole appeared before the register with counsel, and presented numerous specific objections to the proceedings, and the questions supposed to arise thereupon were certified to the district court. Again, on the 9th of December, 1872, he appeared with counsel before the said

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

register, and made other or further objections, the questions upon which were also certified to the district court. Very many of these objections were overruled by the district judge, "as not having arisen before the register." The precise meaning of this is not obvious. Of course, it does not mean that the objections were not made and insisted upon before the register. Possibly, it was intended by this to hold that the objections related to the effect of the examination sought, upon the rights of the assignee in some future litigation, and were, therefore, not reasons why he should not give such information to the assignee for his assistance, and to aid him in the pursuit of property which the assignee claimed to belong to the estate; or, perhaps, it was intended that, even if the objections might be deemed reasons for declining to answer possible questions that might be put in the course of the examination of the party, they were not reasons why he should not be sworn, or submit to any examination. In the view that I have taken of other objections, it is not material to notice this holding further. Other objections were held not to be correct in law, and were overruled on that ground. [See Case No. 3,965.]

It will be unnecessary to recite a previous application for the examination of Dole, or what was done thereupon, or to recite the papers or proceedings relied upon to show that this attempt to compel Dole to submit to an examination was vexatious, oppressive, and in bad faith, for the purpose of extorting money from him or from his friends. For the purposes of this appeal, I shall assume that the orders for Dole's examination were obtained by the assignee in good faith, and upon the grounds stated in his application therefor, viz., that, two years or more prior to his petition in bankruptcy, Dole was the owner of large amounts of property, real and personal; that, contemplating insolvency, and with intent to hinder, delay, and defraud his creditors, he, in 1864, conveyed that property to his brother-in-law; that he purchased other real estate in the name of his brother-in-law, and sold it at large profit, for his own use and benefit; and that Dole retained the possession, control, and use of the property aforesaid, and sold large portions thereof for his own benefit, since his discharge as a bankrupt, the consideration being paid to him or to some one for his use, and various other like matters, which, if proved, are claimed to entitle the assignee not only to recover, for the benefit of the creditors, large amounts from the brother-in-law, and have the conveyances, &c., declared void, but, also, to entitle the assignee to compel Dole himself to pay over and deliver to the assignee large amounts, to be distributed among the creditors.

In various forms, the counsel for Dole, in the said objections, insists: First, that the said Dole is not subject to the orders of the court, nor subject to examination at the instance of the assignee, after his discharge has been granted to him. Second, that, if the discharged bankrupt is not wholly beyond the power of the court to compel such examination, so soon as his discharge is granted, he is, after the expiration of two years, within which the court has, under the 34th section of the act, power to annul the discharge, for causes therein specified, on the application of a creditor; and that a proceeding to annul the discharge can only be taken affirmatively by a creditor, and not by the assignee, and, therefore, even within two years, no such examination can be compelled on the application of the assignee. Third, that, on the face of the papers, it appears that the examination sought can serve no useful purpose, for various reasons, and, among them, that, by the 2d section of the act, any action against third persons by the assignee, to recover property alleged to have been fraudulently conveyed, and claimed by such third persons, is barred, because more than two years have elapsed since the appointment of the assignee; that, if the examination should disclose that any property so fraudulently conveyed had, since the discharge, come back to the possession of Dole, the court could make no summary order requiring him to deliver it to the assignee; that a formal suit would be necessary; that, whatever authority the court has to cause an examination of Dole, it was not given, and should not be exercised, when a suit is the only mode in which the property can be recovered from him, and in which, if he be examined, he will have the rights of a witness, and his testimony will be available for his own protection; and that even a discovery in equity enures to the benefit of the defendant required to make discovery. Other considerations were urged, both in denial of the power to compel Dole to submit to examination and, also, to show that, if the power existed, it ought not to be exercised in this case.

The question whether one, whose improvidence or misfortunes have involved him in bankruptcy, remains, after his discharge, for the residue of his life, subject to the orders of the bankruptcy court, and liable to be compelled to submit to summary proceedings for his examination, at the instance of the assignee appointed to close and settle his estate, is a question of some interest. That question is not to be determined by the special circumstances of a particular case, which may seem to make the examination of the bankrupt reasonable. It is a question of authority, and, perhaps, in a strict sense, one of jurisdiction of the debtor, which, if it exists in the court four years after his discharge, has no apparent limit short of the termination of his life. If the arguments by which the claim to such examination is urged prevail, I perceive no reason why the power does not continue, notwithstanding the assignee shall have rendered

his final account and been also discharged, if a creditor afterwards discovers other assets not administered, or property that, he suspects, has been fraudulently concealed or conveyed by the bankrupt.

The only provision of the statute which is claimed to confer this extraordinary and ever-continuing power, is the 26th section of the bankrupt act; and that meaning is assigned to the following language: "The court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings." On the construction contended for, the power of the court is unqualified, and may be exercised, according to the terms of the section, by the court itself, of its own motion, without any application therefor, and without any limit as to time, and although the assignee has been discharged.

It is, unquestionably, important to the interests of creditors, and very often indispensable to the proper performance of the duties of the assignee, that the debtor should furnish all the information which he has concerning his property and debts, or which may aid in the collection, disposition and best appropriation thereof, in the settlement of his estate, to the greatest advantage of all who are interested. It was unquestionably the intention of the statute to require that all such information should be furnished by the debtor, as well when he was adjudged bankrupt upon his own petition, as when he was proceeded against, by his creditors, in invitum. Hence, sections 1 and 7 provide summary and stringent means of compelling such disclosures, if the debtor do not voluntarily make them. To accomplish this fully, the very first step in proceedings on the petition of the debtor must be accompanied by full particulars relating to his debts and his estate, which, in cases of those who have been perfectly honest in their dealings, and have done no act contravening the provisions of the bankrupt law, will, in general, be all that is really necessary. Section 11. The like requirement in cases of involuntary bankruptcy is also provided. Section 42. By section 14, the debtor is required, also, to execute whatever instruments, &c., may be proper to enable the assignee fully to possess himself of the property. By section 22, the court may, on the application of the assignee, or of any creditor, or of the bankrupt himself, or of its own motion without any application, examine, upon oath, the bankrupt or any person proving or tendering proof of claims, concerning the debt sought to be proved. Next, section 26, above recited, authorizes the examination of the bankrupt as to all matters concerning his property and estate; and this, in section 43, is in substantially the same form provided, in cases where trustees are selected to settle the estate, in lieu of an assignee. When a discharge is applied for, creditors may oppose upon any or all of very numerous grounds, imputing falsehood, concealment of property or books and writings relating thereto, failure to deliver property to the assignee, unlawful preference given, removal of property from the district, fraudulent preference, fraudulent payment, transfer, conveyance or assignment, and other acts or misconduct, and, such opposition being made, the questions arising thereupon must be tried in some form. On such a trial, the debtor can, unquestionably, be required to submit to examination touching all the grounds of objection, if the creditors so desire. Sections 29, 31. Finally, the discharge of the bankrupt may, within two years after its date, be impeached and annulled, upon proof that it was fraudulently obtained in any of the particulars which, under section 29, would have availed to prevent his discharge, and which were not, at the time of such discharge, known to the creditor or creditors seeking such impeachment.

The question now recurs—is the debtor liable to compulsory summary examination, four years after his discharge is granted? The question is not, whether the debtor is liable to be examined as a witness in any suit or proceeding in which, according to law or the usual practice, the examination of witnesses is allowed. That is not the claim here made. It is, that, without fee or allowance for his time, without the rights of a witness as such, without the power to use his testimony as he might if examined as a witness in an action or suit against himself, he can be compelled to give his time and submit, as the case may be, from time to time, to a course of examination, without ever being assured that proceedings against him are terminated, and that he is finally discharged from the summary jurisdiction of the court. In the course of the proceedings, from their initiation down to the debtor's discharge, it will be seen that there is the fullest and most ample opportunity to learn from the debtor all that he knows, all that he has done, or suffered or permitted to be done, which affects his property or his debts, which can assist the assignee or trustee in the administration, collection, disposition, or distribution thereof, and all of his life or conduct which can affect his title to a discharge. After that, in any controversy which arises either with himself, or with persons claiming to be creditors, or with persons supposed to have property of the estate in their pos-

session, he can, in the consequent litigation, be examined, as any other person or party whose testimony may be used on the trial.

But, the language of the 26th section, under which it is here sought to examine the bankrupt, is, "the court may, * * * at all times, require the bankrupt to attend and submit to an examination," &c., &c.; and, upon this especial stress is laid. The words "at all times" must, I think, be read in connection with the subsequent clauses of the same section. After saying that the court may require him to submit to examination, the section authorizes the examination of witnesses for the same purposes, on the examination touching the matters to which his examination is addressed; and it provides for the production of the bankrupt for such examination, if he be in custody, or for the examination to be taken in such manner as the court may deem proper. The section then declares that the bankrupt "shall, at all times, until his discharge, be subject to the order of the court, and shall * * * execute all proper writings * * * and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and, for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court." This clause precisely covers what it is sought to compel in the present proceeding. The same section, in subsequent clauses, plainly relates to proceedings prior to his discharge. He is permitted to amend his schedules of creditors and of property. His wife may be required to attend and be examined, and, if she do not, he "shall not be entitled to a discharge," unless he proves that he was unable to procure her attendance. All these provisions tend to show that it is only until his discharge that the bankrupt is under the summary jurisdiction of the court, to be proceeded against by order, in its discretion, and to be punished for neglect or refusal to obey, by imprisonment, as for a contempt of court; and that the words "may at all times require," in the first clause of the section, refer to and should be construed with the provision for such punishment for disobedience as is prescribed in the same section. The requirement of the court that he attend and submit to examination, is one of the orders to which he is declared subject until his discharge. The concluding sentence of this section is especially significant on this point. It declares that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless," &c., &c. What is meant by "during the pendency of the proceedings in bankruptcy?" Plainly, on referring to the previous words of the section, it is until the discharge of the bankrupt is granted or denied. It will hardly be claimed that the court has summary jurisdiction to order the examination of the bankrupt when the proceedings in bankruptcy are not pending; and this clause shows what, in the statute, is deemed the pendency of the proceedings in bankruptcy, namely, down to the granting of the discharge, if a discharge be granted. Why say, during such pendency, if that was not the meaning? As against the bankrupt, the proceedings are pending until his discharge, and, until that be granted or denied, he cannot be arrested in a civil action, for any debt or claim from which his discharge, when obtained, will release him. After that, his protection will depend upon the question to be raised in independent litigation, whether his discharge is valid. Certainly, it cannot be claimed that the exemption from arrest continues indefinitely, and, if the proceedings are not pending, as against the bankrupt, then he cannot be subject to summary orders. If, in this particular, the proceedings, as against the bankrupt, can be said to be inchoate and liable to be annulled, and, therefore, to be pending for two years after the date of the discharge, it would not sustain the present summary order; and yet it will hardly be insisted that the exemption from arrest declared in the section extends, by force of that declaration, through that period of two years.

The connection in which this 26th section stands, its relation to the provisions of the act which precede and which follow it, and which terminate in provision for a discharge, and the declaration of its effect, indicate, also, that it contemplates only things to be done and orders made in the course of proceedings which are to precede the discharge, and which prepare the way for the application therefor. Analogy to all actions and suits terminating in judgment or decree, in which parties may be subject to the summary power of the court, also suggests that the power ceases when the judgment or decree is pronounced. And it seems extraordinary, if congress intended that the debtor should continue subject to this power of the court, after his discharge was granted and his liability for the debts had ceased, that, in declaring the effect of such discharge from liability, it was not in that connection provided, that he should, notwithstanding such discharge, remain liable to the orders of the court, and to be proceeded against summarily, to compel his further examination, or otherwise to aid the assignee or creditors in the recovery and appropriation of property for the payment of debts.

Again, by section 4, the register in bankruptcy is required to make memoranda of his proceedings in each case in which he shall act, and forthwith to forward a certified copy of said memoranda to the clerk of the court, to be entered in the proper minute book; and, by the same section, he is authorized, whenever the assignee or a creditor do not oppose, to pass the last ex-

amination of the bankrupt. By the 7th of the rules and orders in bankruptcy, prescribed by the supreme court, it is required, that, "at the close of the last examination of the bankrupt, the register having charge of the case shall file all the papers relating thereto in the office of the clerk of the district court, and these papers, together with those on file in the clerk's office, and the entries in the minute book, shall constitute the record in each case; and the clerk shall cause the papers in each case to be bound together." What is the "last examination" here mentioned, unless it be an examination pending the proceedings? How else is it to form part of the record, and be bound with other papers, to constitute the record in each case? When should such record be made up? The argument here would require the answer, "never during the life of the discharged debtor."

I cannot, upon a review of all the provisions of the act, in connection with those to which I have particularly referred, resist the conclusion, that the summary jurisdiction of the court over the bankrupt had ceased before the present proceedings were taken. That there remains, after such jurisdiction of the person of the bankrupt has ceased, a jurisdiction of the assignee and of the creditors for the winding up of the affairs and the distribution of the property, is unquestionable; but that, after all the opportunities which have been had, which are freely given, for the examination of the bankrupt, for their information,—opportunities neglected, or, at least, not availed of,—he is to remain indefinitely liable to such summary orders, does not seem to me to accord with a just construction of the statute, nor to be required by any necessity or propriety.

It may plausibly be suggested, that it is right that the debtor should always be ready and willing to give all the information he possesses; that it is even his duty to do so, and to aid, in every way, so that his creditors may be paid; that it can do him no harm to be required to tell the whole truth, on the subject to be inquired of, at any or at all times; and that all the language of the statute should, therefore, be liberally construed, to this result. There are many rules of law, and many provisions of statutes, which might be modified or even disregarded upon like considerations. In a particular case, there may be no reason of justice or equity why the assignee in bankruptcy should not be permitted to sue for and recover property of the bankrupt in the possession of and claimed by a third person, notwithstanding two years have elapsed since his appointment. Section 2. There is no obvious reason, in justice and equity, why a preference given by an insolvent to a favored creditor four months before a petition in bankruptcy is filed should be avoided, but one given five months before should stand. Section 35. There may be no obvious reason why any citizen who possesses information, which would be useful and important to his neighbor, for the protection of his rights or for obtaining due redress or indemnity for a wrong, should not freely and voluntarily give it. It may be deemed his duty to do so, or it may do him no harm, to require him, by summary order of a court or judge, to appear and be examined in relation thereto. This is especially true where discovery of his own frauds, committed to the injury of others, are to be inquired of. Why should he not be summarily ordered to attend before some official and make disclosure? Such general views of right and duty will not dispense with due and orderly proceedings according to law. Still less will they modify the law itself. Parties can be compelled to make discovery which may affect themselves and benefit others, by a suit commenced for the purpose of establishing the right, and, in this state, may be examined as witnesses; and when the purpose is not to charge them, all persons can be compelled to attend and testify in a suit against third parties. So, here, the discharged bankrupt, in a proper suit, brought in due season, can be examined as a witness, either against himself or against other parties. But he will have the same protection, and the same benefit of his own testimony, that any other citizen has, when so examined. The latitude sought to be given, in the present case, to the power of summary examination, would tend to great abuse, against which it would be difficult, if not impossible, for the court sufficiently to guard; and the abuse of the proceedings, to great personal inconvenience and oppression, and even to extortion, would be a very great evil.

I do not deem it necessary to consider the objection, that the present proceeding is a useless one, because the time within which the assignee can bring suit against the alleged fraudulent grantee has elapsed, and such suit is barred by section two; nor to examine in detail the several other objections which were raised before the register and passed upon in the district court. My conclusion, that the order for the examination of the bankrupt Dole was improvidently made, and without jurisdiction for that purpose, disposes of the proceeding. This conclusion is sustained by the opinions in Re Jones [Case No. 7,449], and Re Dean [Id. 3,701]. The proceedings should be dismissed.

Case No. 3,965.

In re DOLE.

[7 N. B. R. 538;[1] 7 West. Jur. 629.]

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

BANKRUPTCY—EXAMINATION OF BANKRUPT AFTER DISCHARGE.

An order and summons were issued requiring a bankrupt to appear and be examined as a

[1] [Reprinted from 7 N. B. R. 538, by permission.]

witness. Under the advice of counsel he declined to be sworn until after the decision of the court. The preliminary objections were substantially as follows: First. That the order and summons were unauthorized by law. Second. That the name of the assignee is being used for the purpose of extorting a settlement of stale claims against the bankrupt, more than two years after he has received his discharge, when it is too late to vacate said discharge. Third. That the bankrupt cannot now be examined for the purpose of founding or aiding any prosecution to be commenced by the assignee against third persons other than the bankrupt. Fourth. That the bankrupt cannot now be examined for the purpose of instituting or aiding a proceeding to vacate his discharge. *Held*, that the second and fourth objections are well taken; that the first and third objections are not well taken; that on the second objection the register ought to suspend all further proceedings under the order and summons.

[Cited in Andrews v. Dole, Case No. 373; Cady v. Phenix Fire Ins. Co., Id. 2,284.]

[In bankruptcy. In the matter of Nathaniel Dole.]

I executed and delivered to the assignee the usual assignment under section 14, conveying to him all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and thereupon, by operation of law, the title to the property and estate, both real and personal, belonging to the said bankrupt, vested in the assignee from the date of the filing of the petition. No person but the assignee has any right to interfere with it, and to do so would be a contempt of the bankrupt court. 38 How. Pr. 396; In re Vogel [Case No. 16,9:3]; In re People's Mail Steamship Co. [Id. 10,970]; In re Kerosene Oil Co. [Id. 7,725]; on appeal [Id. 10,206]; Brock v. Terrell [Id. 1,914]; In re Wallace [Id. 17,094]. It then became the duty of the assignee to demand and receive from any and all persons holding the same, all the estate assigned to him by virtue of said assignment or intended to be assigned under the provisions of the bankrupt act, section 25. And he may proceed by an action at law, or in equity, or by a summary petition in the court of bankruptcy where the case is pending. Foster v. Hackley [Id. 4,971]; Bill v. Beckwith [Id. 1,406]. As to the assignee, the case is pending in relation to the effects of the bankrupt until the final discharge, by the court, of the assignee from his trust. The discharge of the bankrupt, does not, in any manner, affect the duties of the assignee in relation to his trust, and by section 26 of the act, "the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property; to his trade and dealings with others, and his accounts concerning the same; to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law; which examination shall be in writing and shall be signed by the bankrupt, and be filed with the other proceedings. And the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy for examination as such witness." On the 30th day of July, 1872, the assignee, by George W. Lockwood, Esq., his attorney, applied to me, upon affidavit of the assignee, to examine Nathaniel Dole as a witness in these proceedings, alleging that said Dole was the bankrupt, and was, on or about the 7th day of January, 1868, discharged by order of this court.

The material allegations in the affidavit of the assignee are as follows: "That deponent is informed and believes that said bankrupt, previous to the filing of his petition in bankruptcy, conveyed, in fraud of his creditors, large amounts of property to one Jules S. De La Croix, a brother-in-law of said bankrupt, which property said De La Croix held in secret trust for said bankrupt; that said property so conveyed vested by assignment in deponent as assignee; that the particulars of said conveyance and of said property are unknown to deponent, and deponent desires to examine said bankrupt and others in relation thereto, in order that suit may be instituted to recover the same, and also as to any consideration paid or agreed to be paid, or securities given by said bankrupt or by others at said bankrupt's request and in his behalf, to induce the creditors of said bankrupt to consent to his discharge, or not to appear in opposition thereto. Deponent further says that he had no knowledge of the aforesaid fraudulent conveyance until the month of June, 1872." On the 5th day of September, 1872, I issued the usual and ordinary summons, requiring Nathaniel Dole to appear and be examined as a witness in these proceedings, and in obedience thereunto said Dole appeared in person and also by counsel; was called as a witness. Counsel for the assignee applied to have the witness sworn, whereupon the said witness filed "preliminary objections" and other papers, and upon the statements contained in said papers and objections, raised the questions of fact and law, and requested the register to certify the same to the district court, with his opinion thereon, according to law, and, under the advice of counsel, declined to be sworn as a witness in the case until after the decision of the district court thereon. The preliminary objections are as follows: First. "That the said order and summons are unauthorized by law, and that no further proceeding should be had thereon." Second. "That the said G. W. Lockwood, Jr., is using the name of the said assignee for the purpose of extorting from this deponent a settlement

of stale claims against deponent, more than two years after deponent's discharge in bankruptcy, when it is too late to vacate said discharge." Third. "That deponent cannot now be examined for the purpose of founding or aiding any prosecution to be commenced by the assignee against third persons other than deponent." Fourth. "That deponent cannot now be examined for the purpose of instituting or aiding a proceeding to vacate deponent's discharge."

This case is pending before me at the chambers of this court. I certify that in the course of the proceedings in this cause, the above questions arose pertinent to the proceedings, were submitted in writing, opposed by the assignee, and were requested by the witness to be certified to this court. Counsel for the assignee moved for the usual certificate to the court, that the witness may be declared in contempt, in order that an attachment might issue against him. I denied the motion on the ground that the witness had a right to have the question decided, and that his declining to be sworn as a witness, after his raising the objections and filing the papers relating to the same, was not an act constituting a contempt of court by rule of law. The better practice would have been to have made a motion at special term of the district court to set aside and vacate the summons issued by me. That would have raised the issues at once; but the witness may plead his privilege, and also as to jurisdiction, and bring up the question in this way. Counsel for the assignee objects to the filing of the papers and to my entertaining the application for the certificate until after Mr. Dole is sworn; that until then the witness has no standing in court. I decided that as the witness had obeyed the process of the court, had placed himself within its jurisdiction, the mere fact as to his being sworn, either before or after the decision of the district court, of the questions raised, was wholly immaterial, and did not prejudice any right of the assignee or witness, although as a mere witness he could not refuse to be sworn; but in this case, the witness and the bankrupt being the same person, I allowed him to plead his discharge as well as to the jurisdiction of the court as to his refusal not being contumacious. To the assignee, application for the examination of the witness to show what property the bankrupt had at the time of the filing of his petition; what property passed to the assignee; whether the legal title was in the bankrupt at that time and passed to the assignee; as to property which the bankrupt had conveyed to his brother-in-law, and with property and business connected with the same, and as to property belonging to the bankrupt which passed to the assignee by virtue of the said assignment, although the property was in the name or names of other persons, and in relation to the business done by the witness with the property belonging to the assignee, by virtue of the assignment, was an application he had a right, and it was his duty to make. In re Rosenfield [Cases Nos. 12,058 and 12,059]. The examination of such witness was an independent proceeding. In re Ellis [Case No. 4,400]. The examination may be had before the register (In re Tanner [Id. 13,745]; In re Lanier [Id. 8,070]); as the register has the same power as the district judge "except that he is not empowered to commit for contempt, or to hear a disputed adjudication or any question of the allowance of or suspension of an order of discharge" (In re Louis Hyman [Id. 6,984]). By rule 19 of the general orders in bankruptcy, the duties of an assignee are defined, and his actions governed by the orders of the court. In a recent decision of the supreme court of the United States, Chase, C. J., says in the opinion of the court, all the justices concurring: "That an assignee must do his duty," and it is but fair to hold, that if he neglects or refuses to do his duty, the court will, on motion, compel him to do so, which can be done by the judge or register, as the circumstances require.

After the assignee received the information as set forth in his affidavit, it became his duty to take the step he did to inquire into the facts as stated. If he had not done it, any person, either a creditor or a person interested, could have made a motion before me to compel him to do so; and also, to have him removed for not doing his duty. In re Blaisdell [Case No. 1,488]; 18 Wend. 652; 1 Denio, 659; 11 Johns. 254; 1 Grah. Pr. (3d Ed.) 661, 675; Gazz. Bankr. Dig. The application for the examination of the witness was properly made to me as the court before whom the testimony should be taken having charge of the case. In re Carrow [Case No. 2,426]; In re Heller [Id. 6,339]; 42 How. Pr. 274 [In re Blaisdell, Id. 1,488]. It was not necessary for the assignee to have stated in his affidavit the particular matters, nor to have shown any grounds for the proposed examination of the witness, as the assignee is a quasi officer of the court in this case, and that the court was satisfied of the good faith of the assignee's application. In re Lanier [Id., 8,070]; In re McBrien [Id., 8,665]. The summons was properly issued. In re Macintyre [Id., 8,821]; In re Lanier [Id., 8,070]; In re Brandt [Id., 1,813]; In re Vetterlien [Id., 16,926]. A witness may be examined in regard to property in which the bankrupt may, possibly, have an interest, and as to any property that the bankrupt owned or had a right, title, or interest to or in at the time of the filing of his petition in bankruptcy. In re Bonesteel [Id., 1,628]; In re Carson [Id., 2,461]. The power of the register in this case is the same as given to United States commissioners by act of congress, February 4th, 1872, which provides "that the commissioners who now are, or hereafter may be appointed by the circuit courts of the United States to take acknowledgment of bail and for other purposes, may and shall

exercise all the powers conferred on any court, judge or other magistrate, by the act." The granting of the discharge of the bankrupt does not oust the register of his jurisdiction of the cause. The discharge of the bankrupt is a mere incident in the proceedings. The marshaling and distribution of the estate is the subject matter before the court. The cause proceeds before the register until the final discharge, by the court, of the assignee from the trust. In re Puffer [Id. 11,459], Hall, J. By section 26 of the bankrupt law [of 1867 (14 Stat. 529)], the bankrupt is at all times subject to the order of the court. In re Lanier [Case No. 8,070]; In re McBrien [Id. 8,665]. Such control of the person of the bankrupt enables the court to enforce a distribution of a bankrupt's estate, and is from the first an ex parte adjudication upon his petition, subject to any and all orders that may be deemed necessary under the act to secure such distribution to the creditors. In re Bromley, 3 N. B. R. 169; 36 How. Pr. 53. It is also among the inherent powers of the court to exercise an equitable jurisdiction over its suitors, as well as the subject matter of the action in proceedings before it. 18 Wend. 652; 1 Denio, 659; 11 Johns. 254; 1 Grah. Pr. (3d Ed.) 671–675.

In 1848 a law was passed entitled "An act to simplify and abridge the practice, pleadings and proceedings in the courts of this state." [Act April 12, 1848, p. 497, c. 379.] "Whereas it is expedient that the present forms of actions and pleadings in cases at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceedings, in all cases, should be established." This law is familiarly known as the "Code of Practice on Procedure," and by its provisions the practice of the courts of this state is regulated. Paragraph 6 of section 91 of the Code is as follows: "An action for relief on the ground of fraud in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such cases not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." Martin v. Smith [Case No. 9,164]. And is conclusive as to the objection as to the right of the assignee to commence these proceedings, and also an action. In an action for fraud, the statute does not commence to run until knowledge of the fraud is brought to the plaintiff. 37 N. Y. 657, unanimous decision, and the cases there cited. The act of congress, June 1, 1872 [17 Stat. 196], completing what the acts of February 28, 1839 [5 Stat. 321], February 3, 1853 [10 Stat. 153], and July 16, 1862 [12 Stat. 588], began, now conform the practice in the United States to the practice of the Code of Procedure, and adopt all of its provisions and the practice thereunder. In re Safe Deposit & Savings Inst. [Id. 12,211]. By section 91, the assignee can commence an action upon the grounds set forth in his affidavit. Martin v. Smith [Id. 9,164]. The time when an assignee must commence an action, as per section 2 of the bankrupt act, must be governed by the nature of the action. If on a civil contract, within the two years named in the act. If on a matter where fraud is alleged, then from the time the knowledge of the commission of the fraud by the bankrupt, or from the date of the information of the commission of the acts constituting the fraud. Thus by the laws of the state of New York, "an action for relief on the ground of fraud in cases which, heretofore, were solely cognizable by the court of chancery, the cause of action in such cases is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." Code, § 91, p. 80. In this case, under the bankrupt act, the assignee must be considered the aggrieved party and his information of the alleged fraud was obtained, viz.: June, 1872. In this case, as in the cases mentioned by the act of congress, April 5, 1866, § 2 [14 Stat. 13], state laws must be construed as applicable, also as to the act of congress, April 9, 1866, § 3 [Id. 27], known as the "Civil Rights Bill." Where the laws of the state "shall be extended to and govern said (United States) courts in the trial and disposition of such causes." The act of congress, July 16, 1862 [12 Stat. 588], provides "that the laws of the state in which the court shall be held shall be the rules as to the competency of witnesses in the courts of the United States." By this act the witness is competent to testify, as he is the party to the record in the bankruptcy proceedings in which this assignee was appointed.

By act of congress, February 28, 1839 [5 Stat. 321], "no person shall be imprisoned for debt in any state, on process arising out of the district court of the United States for the District of Columbia." As to District of Columbia, see act of February 3, 1853 (10 Stat. 53), "a court of the United States, where by the laws of such state, imprisonment for debt has been abolished and where by the laws of a state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States and the same proceedings shall be had therein as adopted in the courts of such states." On the 1st day of June, 1872, congress passed a law entitled "An act to further the administration of justice," section 5 of which is as follows: "That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleading and forms existing at the time in like causes in the courts of record of the state within which

such circuit or district courts are held, any rule of court to the contrary notwithstanding." The word "forms" in this act is used instead of the word "proceedings" in one part of the act, but the word "proceedings" makes the sentence more full and complete than the phrase used in the Code, thereby, including proceedings by petition, all summary proceeding as well as those by suit or action. The act of congress, June 1, 1872, is but the enacting of the rule of law as established by the courts of the United States and at once conforms the practice and pleadings as to the time of the commencement of action in the United States court, to the laws of state in which the action is commenced, and in this case, section 91, par. 6, of the Code must govern as to when an action may be commenced. The federal courts have very generally held that the statute did not commence to run until the fraud was discovered. Mr. Justice Story states the doctrine of equity thus: "If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." Story, Eq. Jur. § 1521. "The question often arises in cases of fraud or mistake, under what circumstances and at what time the bar of the statute begins to run. In cases of fraud and mistake it will begin to run," he says, "from time of the discovery of such fraud or mistake, and not before." Id. § 1521a. That as fraud is a secret thing and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate, because until discovery the title to avoid it does not completely arise, &c. Pending the concealment of the fraud, the statute ought not in conscience to run, &c. Hovenden v. Lord Annesley, 2 Sch. & L. 624.

GRIER, J., speaking of this point when delivering the opinion of the supreme court, says: "Especially must there be a distinct allegation as to the time when the fraud was discovered and what the discovery is, so that the court may see whether by the exercise of ordinary diligence it ought not have been before made." Carr v. Hilton [Case No. 2,437]; Fisher v. Boody [Id. 4,814]; Moore v. Green [Id. 9,763]; Id., 19 How. [60 U. S.] 69. And the bill, it has been said, should negative laches in not making the discovery. Mayne v. Griswold, 3 Sandf. 463; Field v. Wilson, 6 B. Mon. 479. As to what amounts to a discovery within the meaning of the equity rule. This is regarded as so important that it must with all necessary circumstances be distinctly stated in the bill. Lord Erskine, in one case, declared that "no length of time can prevent the uncovering of a fraud." Forester, 66. Lord Worthington, said, with emphasis, in Alden v. Gregory, 2 Eden, 285, "Never, while I sit here, will delay purge a fraud." The title to avoid the fraudulent transaction does ordinarily arise as soon as the fraud is perpetrated (26 Eng. Law & Eq. 425; J. J. Marsh. 445; 33 Miss. 233; 20 Johns. 33, supra), but substantially it does not, because the fraud is not known, and hence the fraudulent wrong doer is estopped, while the aggrieved party is kept ignorant of his rights from setting up against him the bar of the statute.

This subject was discussed by a truly great judge in the case of Carr v. Hilton [Case No. 2,436], which was a suit in equity by an assignee in bankruptcy to recover of the defendant, lands fraudulently conveyed to him by the bankrupt. The defendant relied on the statute of limitations found in the bankrupt act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, Curtis, J., says: "Statutes of limitations do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the cause of action was fraudulently concluded. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, is a fraudulent concealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point. The right of the assignee to commence an action or proceedings, or take any legal steps to possess himself of, or to recover from others the property of the bankrupt to which he is entitled by virtue of the proceedings in bankruptcy, does not terminate, if at all, until two years after the knowledge of the existence of such property and rights of the bankrupt which vested in the assignee, in a manner and with sufficient certainty, that it may be called due legal notice. Martin v. Smith [Case No. 9,164]; [Gates v. Andrews] 37 N. Y. 657. Such notice, I hold, the assignee had in the month of June, 1872, and that the limitation, if any, since the act of congress, June 1, 1872, commenced to run from that date. The practice of the courts of this state in relation to actions in relation to fraud in the conveying of real estate must govern in this matter.

The decision of the United States supreme court in [U. S. v. Wilder] 13 Wall. [80 U. S.] 254, upon limitations in certain actions, does not in any way or manner affect the question of practice or the rights of the assignee. Upon the application of the assignee and upon the affidavit heretofore mentioned, I issued an order for the examination of the bankrupt, dated and returnable the same day as the summons heretofore mentioned, upon which order the same proceedings were had, the same objections were made and the same rulings made as in the case of the summons. As to the question of the right of the assignee to examine the bankrupt after two years have expired from the discharge of the bankrupt, under section 26 of the bankrupt act, it cannot now be considered an open question. The decision of this court in the Case of Heath & Huges [Case No. 6,304] has settled the rules of practice in this district, that

a bankrupt may be so examined. The assignee has a right to employ an attorney and also counsel to bring any action or to conduct any proceeding in relation to the estate, and when he employs licensed practitioners it is not the province of the bankrupt to question the right of the assignee so to do, or to object to the person or persons so employed. The more energetic and efficient the persons employed, the more commendable and proper is their selection by the assignee. It is the duty of the register having charge of the case to see that none but fit and proper persons are employed by assignees as attorneys; and should an assignee improvidently employ an unfit, improper or dishonest attorney, it would be the duty of the register to certify that fact to the court, in order that the assignee might be directed by the court to dismiss such attorney, and employ a proper person.

I decide: First. That the summons was authorized by law; that the assignee was in duty bound to apply for and obtain it, as he did upon ascertaining the facts as set forth in his affidavit; that the proceedings are correct and should be proceeded under; that the act of congress, June 1, 1872, controls the practice as to the time of the commencement of an action in a case like this, and the limitation of two years in section 2 of the bankrupt act does not apply in this case, and that clause 6 of section 91 of the Code of Practice on Procedure of this state does. Second. That an assignee has a right, subject to the approval of the register, to select an attorney to aid him in the prosecution of claims due an estate. It is his duty to do so, and so long as he employs a fit and proper person as his attorney, the motive of such attorney either in accepting or procuring such employment is not a matter to be taken into consideration by the court. Third. That Mr. Dole can be examined as a witness, upon the application of the assignee, in relation to any property or effects of his estate, and to discover what, if any, effects of said Dole passed to the assignee under and by virtue of the assignment. That the assignee was in duty bound to do so, after the facts set forth in his affidavit came to his knowledge. That he has a right to take the examination of the bankrupt as a witness; and also may examine witnesses in order to discover any property or effects of the bankrupt, to the possession of which he was entitled by virtue of the assignment, and should he, upon such examination, discover property to which he is entitled as assignee it will be his duty to apply to the court for an order that it be delivered to him, or he may commence an action therefor according to the facts. And the assignee, after he has taken this examination, if he shall find that any person other than the bankrupt is possessed of property which should have passed to him under the assignment, it will be his duty to possess himself of the same without legal proceedings if he can, with legal proceedings if he must, from the person having the property. That the discharge of the bankrupt does not prevent the assignee from following the estate of the bankrupt, which should have passed to the hands of the assignee, in whomsoever, or wherever, it may be found, in the same way or manner as an executor, trustee or receiver could, except in all matters relating to the bankruptcy he must apply to the United States courts. That the declination on the part of Mr. Dole to be sworn as a witness, previous to the final decision of the legal question raised by the filing of the preliminary papers, does not in any way or manner constitute a contempt of court as contemplated by law. That the order for the examination of Mr. Dole, as a bankrupt, although made more than two years subsequent to his discharge, was properly issued in accordance with the law and the rules and practice of this court. That Mr. Dole must be sworn under either or both of the proceedings.

BLATCHFORD, District Judge. The second and fourth objections are well taken. The first and third objections are not well taken. Nothing is intended to be decided hereby as to the point respecting the statute of limitations. It is not proper to decide that point until it is raised directly in a formal suit. On the second objection the register ought to suspend all further proceedings under the order and summons. No ground is shown for now permitting the submission of affidavits on behalf of the assignee.

(Subsequent to this decision, on a motion to amend the order as to the second objection, Judge BLATCHFORD directed the issuing of a new order, which was issued in accordance with his order.)

[NOTE. See In re Dole, Case No. 3,964.]

DOLE, Ex parte. See Case No. 9,181.
DOLE (ANDREWS v.). See Case No. 373.

Case No. 3,966.

DOLE et al. v. NEW ENGLAND MUTUAL MARINE INS. CO.

[2 Cliff. 394.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1864.

MARINE INSURANCE — CONSTRUCTION OF POLICY — CAPTURE AND BURNING BY REBEL PRIVATEER — PREDOMINATING CAUSE OF LOSS.

1. Where a ship was taken and burned by the commander of a rebel privateer, during the late Rebellion, *held*, that the capture was not a taking by pirates or assailing thieves, inasmuch as it appeared that the policy upon the vessel was executed before the Rebellion broke out, and that the commander acted under a commission in due form issued by the government of the rebellious states.

[Cited in Ford v. Surget, 97 U. S. 619; The Ambrose Light, 25 Fed. 422.]

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

2. Construed separately from the marginal clause, the terms of the policy would entitle the plaintiff to recover, but the legal effect of the marginal words, "warranted free from capture, seizure, or detention," &c., is, that the insurers are no more liable for a loss occasioned by those perils, than they would have been if the body of the policy had contained no stipulation to that effect, or if the stipulation therein had been that they should not be liable for such losses.

3. Loss by capture not being included in the policy, it is clear that the plaintiff cannot recover, unless it can be held that the fire, and not the taking of the ship, was the proximate cause of the loss.

4. Seizure of ships at sea by the ruling power of a country in a time of territorial war is a capture within the meaning of the law of insurance, although the war is waged on one side by a rebel government and people; and it seems also that the word "capture" is sufficiently comprehensive to include a taking by pirates.

[Cited in The Ambrose Light, 25 Fed. 416, 431.]

5. When different causes concur in occasioning a loss, the rule is, that the loss must be attributed to the efficient predominating peril, whether that peril was or was not in activity at the final consummation of the disaster.

[Cited in The Ontario, 37 Fed. 224; Northwest Transp. Co. v. Boston Marine Ins. Co., 41 Fed. 802.]

Action of assumpsit [by Charles E. Dole and others] on a policy of insurance. Facts agreed: The policy described in the declaration was dated on the 19th of November, 1860, and purported to insure the ship Golden Rocket, for one year, "against the perils of the seas, fire, enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, and people, of what nation or quality soever, barratry of the master (unless the insured be master of the vessel) and of the mariners, and all other losses and misfortunes which have or shall come to the damage of the said ship, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston." The stipulation in the policy also was, "that in case of capture or detention, the insured shall not have the right to abandon therefor until proof is exhibited of condemnation or of the continuance of the detention (by capture or other arrest) for at least ninety days." There was also an agreement inserted into the policy "that the insurers should not be answerable for any charge, damage, or loss which might arise in consequence of a seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The margin of the policy contained the following clause: "Warranted free from capture, seizure, or detention, or the consequences of any attempt thereat, the clause herein embodied touching said perils or adventures to the contrary notwithstanding."

The agreed statement showed that the Golden Rocket was an American merchant vessel of six hundred tons' burden, and that she was insured for the sum of $10,000. It was also agreed that the vessel was in good condition; that she had no armament; and that the ship's company consisted of the master, two mates, and eleven men; that on the 3d of July, 1861, off the Isle of Pines, she met with the Sumter, an armed steamer, with the American flag and a pennant set, commanded by Raphael Semmes, a citizen of Maryland, and previously an officer in the United States navy, but not at that time commissioned or authorized by the government, who, upon the Golden Rocket's setting her colors in answer, and while nearly a mile off, fired a shotted gun across her, and then boarded her with an armed boat, and with a force which the officers and crew of the Golden Rocket were unable and did not attempt to resist, plundered her of the ship's papers, some sails, spars, provisions, and other articles, took out her officers and crew, and set the ship on fire, by which she was totally destroyed. The interest of the plaintiffs in the vessel, due notice, proof of loss, abandonment, and demand of payment as for a total loss, were admitted.

The plaintiffs insisted that the text of the policy already referred to, had respect chiefly to two classes of marine risks, as appeared from the words of the provision. First, risks of capture or detention arising from acts of government, as shown by the words "enemies' restraints, and detentions of all kings, princes, and people of what nation or quality soever," for which, if irregular or unlawful, the citizen may have redress through his own government. Second, such risks as arise from the lawless depredations of individuals, as shown in the policy by the words "pirates and assailing thieves," against which the contract of insurance is the only security. They contended that the marginal clause did not import a warranty, but only that the insurers should not be liable for the losses specified in the clause, just as if such losses had not been included in the body of the policy. Again, they contended that the loss in this case having arisen from a taking by rebels on the high seas, was a loss by pirates or assailing thieves, and not one arising from capture, seizure, or detention, within the meaning of the policy described in the declaration. But if the court ruled otherwise, then they contended that the proximate cause of the loss was not the taking set forth in the agreed statement, but the fire, which, as they insisted, was not "the consequence of any attempt thereat," as described in the marginal clause.

The date of the policy showed that it was executed when the United States were at peace with all the world, and one month before the so-styled Confederate States, or any of them, had made any attempt to secede or withdraw from the Union. When the loss occurred, on the 3d of July, 1861, those states, as the parties agreed, had organized a Confederacy of said states, and a government for the Confederacy, and had established for the same a written constitution. The record also showed that such form

of government was in fact organized in all its departments, legislative, executive, and judicial; that they had raised and organized an army and created a navy; and that on the 6th of May, 1861, a body of persons acting as the congress of such Confederate States published an act, which they had passed, declaring that war then existed between the Confederate States and the United States, and providing measures for its vigorous prosecution. They had not only made provision for the prosecution of the war, but the agreed statement also showed, that those states at the time of the loss were carrying on hostilities against the United States by land and sea, and had for that purpose an army of over fifty thousand men in the field, and that they had possession of and exercised all the functions of government over all the territory included within the limits of those states, except a few military posts which were held by the military power of the United States. It was also agreed that the Sumter was purchased, armed, equipped, and manned by such Confederate States as and for a public armed vessel, with officers commissioned in due form, and was cruising under a commission from said Confederate States, to attack, capture, or destroy the vessels belonging to the government of the United States or to any citizens thereof, and none other. Furthermore, it was agreed that her commander had a commission as captain in such navy, and was prevented from taking the Golden Rocket into port by the danger and difficulty arising from our blockade; and that whatever was done by the officers and crew of the Sumter was done under the assumed authority of such Confederate States, and for the purpose of prosecuting the war, so declared to exist, and with the sole design and intent of coercing the government of the United States to acknowledge the independence of the Confederate States.

R. H. Dana, Jr., and H. Gray, Jr., for plaintiffs.

The clause in the body of the policy specified two classes of risks:—

First, from acts of governments, "enemies," "restraints and detainments of all kings, princes, and people, of what nation or quality soever," for which if irregular or unlawful the citizen may have redress through his own government.

Second, from individual depredation, "pirates and assailing thieves," against which "assurance is the only security." The first of these classes would not, the second would, if not specified, be included in "the perils of the sea." 3 Kent, Comm. (6th Ed.) 303; 1 Phil. Ins. §§ 1106, 1108; Arn. Ins. §§ 303, 305, 306; Maude & P. Shipp. 23, 231, 232; 2 Pars. Mar. Law, 236, 246; Nesbitt v. Lushington, 4 Term R. 788; 3 Kent, Comm. (6th Ed.) 216, 300; 2 Moll. De J. Mar. c. 7, § 14; Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 314.

"Enemies" are evidently governments, vested according to the law of nations and in the view of our own government, with belligerent rights. If "enemies" included those acting under no national authority, the addition of the word "pirates" in the policy would be superfluous.

It is perfectly well settled that the words "arrests, restraints, and detainments of kings, princes, and people, of what nation, condition, or quality soever," extend only to acts of "nations in their collective capacity." M'Call v. Marine Ins. Co., 8 Cranch [12 U. S.] 66; Olivera v. Union Ins. Co., 3 Wheat. [16 U. S.] 189, 190; Bradlie v. Maryland Ins. Co., 12 Pet. [37 U. S.] 402; Gracie v. New York Ins. Co., 13 Johns. 170.

The only opinion in favor of a wider signification is in South Carolina. Simpson v. Charleston F. & M. Ins. Co., Dud. (S. C.) 243.

The clause in the margin of the policy—"warranted free from capture, seizure, or detention, or the consequence of any attempt thereat; the clause herein embodied, touching said perils or adventures, to the contrary notwithstanding"—does not import a "warranty," in the sense of the law of insurance; but only that the insurers shall not be liable for the losses specified in the exception, just as if such losses had not been included in the body of the policy. 1 Phil. Ins. § 1150.

This clause is to be interpreted with reference to the text of the policy, and, being introduced by the insurers and for their benefit, is in case of doubt to be construed most strongly against them, and so as to give fair effect to the general words of the policy. Yeaton v. Fry, 5 Cranch [9 U. S.] 341; Palmer v. Warren Ins. Co. [Case No. 10,698]; Blackett v. Royal Exchange Assur. Co., 2 Cromp. & J. 251; Bullen v. Denning, 5 Barn. & C. 843; Western Ins. Co. v. Cropper, 32 Pa. St. 351; Lawrence v. Aberdein, 5 Barn. & Ald. 108; Gabay v. Lloyd, 3 Barn. & C. 793; Suckley v. Delafield, 2 Caines, 222; American Ins. Co. v. Dunham, 12 Wend. 463; Havelock v. Hancill, 3 Term R. 277; Bowne v. Shaw, 1 Caines, 489; Cucullu v. Louisiana Ins. Co., 8 Mart. (La.) 613; Johnston v. Ludlow, 1 Caines, Cas. xxix; Smith v. Delaware Ins. Co., 3 Serg. & R. 82; Faudel v. Phoenix Ins. Co., 4 Serg. & R. 59; Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 518, 524.

The words "capture, seizure, and detention," taken together, and with reference to the body of the policy and the mode of their insertion, are confined to the acts of governments only. They are generally called the "war clause," and have long been in common use. Green v. Brown, 2 Strange, 1199; O'Reilly v. Royal Exchange Assur. Co., 4 Camp. 246; Hahn v. Corbett, 2 Bing. 205; McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 313.

Even the word "capture," standing alone, though sometimes loosely used to include any forcible taking from without, more appropriately and naturally denotes, and is lim-

ited to a capture jure belli, whether lawful or unlawful in the particular case, made by a power authorized to wage war. Wheat. Mar. Capt. 52, 54; 1 Harg. Collect. Jurid. 137; 1 Park, Ins. 66; 2 Arn. Ins. 807; 1 Kent, Comm. 100, 101; Phil. Ins. § 1110; 3 Kent, Comm. 303.

A taking by pirates has none of the effects of such capture. Tirrell v. Gage, 4 Allen, 249; Barney v. Maryland Ins. Co., 5 Har. & J. 139; Williams v. Armroyd, 7 Cranch [11 U. S.] 423; The Nueva Anna, 6 Wheat. [19 U. S.] 193; Case of Piracy, 12 Coke, 73; Greenway v. Baker, Godb. 193; The Hercules, 2 Dod. 372; The Calypso, 2 Hagg. Adm. 213; 1 Phillim. Int. Law, 379; 1 Kent, Comm. 184.

Seizure, though sometimes applied to any act of seizing, especially when accompanied by "piratical," "mutinous," "barratrous," or other similar adjective, commonly means in a policy of insurance an arrest by act of government, either by municipal law or the law of prize. But when used in connection with capture, as in this marginal clause, it is ejusdem generis, though it may include cases in which no condemnation to change the title is looked for. The Caledonian, 4 Wheat. [17 U. S.] 103; The Apollon, 9 Wheat. [22 U. S.] 372; Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 518; Bradstreet v. Neptune Ins. Co. [Case No. 1,793]; Higginson v. Pomeroy, 11 Mass. 110; Mellish v. Andrews, 15 East, 15; The Diligentia, 1 Dod. 405; The Amor Parentum, 1 C. Rob. Adm. 303; The Eagle, 1 W. Rob. Adm. 245; Lubbock v. Potts, 7 East, 449; Black v. Marine Ins. Co., 11 Johns. 292; Jecker v. Montgomery, 13 How. [54 U. S.] 515; 2 Arn. Ins. § 306.

A taking by rebels on the high seas is a loss by "pirates or assailing thieves," not a "capture, seizure, or detention." within the meaning of this policy. 2 Seld. Mare Claus. c. 10, 1313; Ducange, Gloss. voce "Pirata;" 3 Co. Inst. 113; Co. Litt. 391a; Calvinus, Lexicon, voce "Pirata;" 1 Hawk. P. C. c. 37, § 4; 1 Russ. Crimes, 94; 3 Chit. Cr. Law, 1127; 1 Stat. 114; U. S. v. Palmer, 3 Wheat. [16 U. S.] 610; U. S. v. Hutchins [Case No. 15,429]; U. S. v. Tully [Id. 16,545]; U. S. v. Klintock, 5 Wheat. [18 U. S.] 151; U. S. v. Brailsford, 5 Wheat. [18 U. S.] 188; [Act of May 15, 1820] 3 Stat. 600; 1 Kent, Comm. 186.

By the laws of England, France, and Holland, as well as our own, a citizen cruising against his own government with an armed vessel under a commission from a foreign state is a pirate. 2 Valin, Ord. de la Marine, 235; Bynk. Qu. Jur. Pub. lib. 1, c. 17; 1 Hume, Cr. Law, 477; Trial of Golding, 12 How. St. Tr. 1269; 1 Phillim. Int. Law, 406; 1 Hawk. P. C. c. 37, § 4; 1 Moll. De J. Mar. c. 4, § 24; Evans' Case, 2 East, P. C. 798; Prov. St. 8 Wm. III.; 4 Mass. Col. Rec. pt. 2, 563; 7 Dane, Abr. 90; St. 11 & 12 Wm. III., §§ 1, 14, 15; 2 Chalm. Op. 202, 219, 221; Trial of Quelch, 14 How. St. Tr. 1067; Const. Mass. 1780, c. 6, § 6; 1 Stat. 114; 1 Kent, Comm. 191; 10 Am. Jur. 267.

By the most eminent civilians and writers on the law of nations, piracy is defined to be "the offence of depredating on the high seas without being authorized by any sovereign state or with commissions from different sovereigns at war with each other." Wheat. Int. Law, pt. 2, p. 89; Bynk. Qu. Jur. Pub. lib. 1, c. 17; Du Ponceau, Law of War, 127, 128, note; 2 Azuni, Del Diritto Marittimo, pt. 2, c. 4, art. 7, §§ 2, 5; Casaregis, De Commercio, disc. 24, § 25; Id. disc. 64, §§ 4, 5; Moll. De J. Mar. c. 4, §§ 18, 20; 2 Browne, Civ. & Adm. Law, 461; Emerig. Assur. c. 12, sect. 28, § 1; Dawson's Trial, 13 How. St. Tr. 454; Vaughan's Trial, Id. 525.

"Hostis humani generis" is no part of the definition of a pirate, but merely indicative of what is likely to be his character. 1 Phillim. Int. Law, 402; The Serhassan, 2 W. Rob. Adm. 357; The Malek Adhel, 2 How. [43 U. S.] 232. See 1 Hume, Cr. Law, 477; 1 Hawk. P. C. c. 37, § 1; 3 Chit. Cr. Law, 1127; 1 Russ. Crimes, 100.

Rebels are not entitled by the law of nations to any rights as belligerents against their own country. Klauber, Droit des Gens, 235; Gro. De J. B. proleg. 9, § 25; Id. lib. 1, c. 3, arts. 1, 4; Id. lib. 3, c. 3; 2 Ruth. Inst. lib. 2, c. 9, p. 438; Hall, Int. Law, c. 14, §§ 9, 25; Tirrell v. Gage, 4 Allen, 249; The Venus, 8 Cranch [12 U. S.] 280; 3 Co. Inst. 11; 1 Hale, P. C. 159; U. S. v. Chenoweth [Case No. 14,792].

The manner of the taking of the Golden Rocket was piratical; she was taken under false colors; despoiled without being condemned. The Peacock, 4 C. Rob. Adm. 187; Hall. Int. Law, c. 16, § 24; U. S. v. Klintock, 5 Wheat. [18 U. S.] 150; Jecker v. Montgomery, 13 How. [54 U. S.] 516; The Elsebe, 5 C. Rob. Adm. 183; 1 Wheat. [14 U. S.] Append. 496; 2 Wheat. [15 U. S.] Append. 2, 3, 81; Hall. Int. Law, c. 30, §§ 5, 28; Id. c. 31, §§ 14, 22; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; 1 Moll. De J. Mar. c. 4, §§ 18, 20.

The treasonable intent does not make the act less piratical. 1 Hawk. P. C. c. 29, § 11; Trial of Woodburne and Coke, 16 How. St. Tr. 81; Com. v. McPike, 3 Cush. 181; Com. v. Burke, 14 Gray, 100; 1 Moll. De J. Mar. c. 4, §§ 9, 10.

How can a citizen of the United States, committing acts of hostility upon the high seas against other citizens of the United States, find protection under a commission, from an organization claiming to be an independent government within the territory of the United States, which he is bound to know, and our courts are bound to hold to be illegal? Church v. Hubbart, 2 Cranch [6 U. S.] 236; Haven v. Foster, 9 Pick. 130; 4 Bl. Comm. 27; In re Barronet, 1 El. & Bl. 1; Rex v. Bailey, Russ. & R. 1; The Ann [Case No. 397]; Fisher v. McGirr, 1 Gray, 48; Kelly v. Bemis, 4 Gray, 83; Little v. Barreme, 2 Cranch [6 U. S.] 179; Mitchell v. Harmony, 13 How. [54 U. S.]

137; U. S. v. Jones [Case No. 15,495]; Com. v. Blodgett, 12 Metc. [Mass.] 91.

The court must look to the political department, for a rule, upon the effect of the exclusive occupation by the rebels of a part of the dominion of the United States; upon the recognition of the rebels as belligerents by Great Britain and France, upon the position of the government towards rebel cruisers. Gelston v. Hoyt, 3 Wheat. [16 U. S.] 324; Rose v. Himely, 4 Cranch [8 U. S.] 241; U. S. v. Palmer, 3 Wheat. [16 U. S.] 634; Hardy's Trial, 24 How. St. Tr. 1371; Halleck, Int. Law, c. 3, § 22; The Hercules, 2 Dod. 360; Kennett v. Chambers, 14 How. [55 U. S.] 38; The Pelican, Edw. Adm. Append. D; Dudley v. Folliott, 3 Term R. 584; Ogden v. Folliot, Id. 726; Barclay v. Russell, 3 Ves. 424; Dolder v. Huntingfield, 11 Ves. 294; Hogsheads of Sugar v. Boyle, 9 Cranch [13 U. S.] 195; U. S. v. Hayward [Case No. 15,336]; U. S. v. Rice, 4 Wheat. [17 U. S.] 246; Cross v. Harrison, 16 How. [57 U. S.] 191; Gro. De J. B. lib. 3, c. 6, §§ 4-27; Puffendorf, lib. 4, c. 9, § 8; Id. lib. 7, c. 7, § 5; Id. lib. 8, c. 11, § 8; The Dart and The Happy Couple, cited 1 Edw. Adm. 1; The Gerasimo, 11 Moore, P. C. 96; The Hercules, 2 Dod. 360; The Lilla [Case No. 8,348]; Proclamations of April 15, 19, 27, May 3, and August 16, 1861, and July 25, 1862; 11 Stat. 268, 281, 283-285, 295, 311, 314; President's Messages of July and December, 1861, and December, 1862; Judge Sprague's Charge upon the Law of Piracy [Fed. Cas. Append.]; The Amy Warwick [Case No. 341]; The Lilla [supra]; Smith's Trial,[2] Cir. Ct. U. S. (Pa.) Oct., 1861; Trial of Savannah Privateersmen [Case No. 12,386]; Mr. Seward to Mr. Adams, May, 1862; Report of Committee on Commerce of United States Senate, June 21, 1862, adopted by the senate.

This branch of the case stands thus:—

These acts in their physical character are sufficient to constitute piracy.

If not done in acknowledged warfare, these acts are piracy; and this not by municipal law of the United States, but by the general law of nations.

To take these acts out of the category of piracy, the political government to which the court looks must have recognized the actors as belligerents.

A neutral government, as it claims no sovereign authority, recognizes an insurgent power as belligerent once for all, for all cases and under all circumstances.

Not so the sovereign. The object of his war is to enable himself to exercise sovereign power. He never, therefore, intermits that, de jure. He never intermits it de facto, prospectively, or in all cases and for all purposes. He intermits it only de facto in such cases, to such extent, and for such purposes, as policy dictates.

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

In this case, the acts in question having been committed by and upon citizens of the United States, the contract in suit having been made here between citizens, and the forum being a court of the United States, the only government to which the court can look is the political government of the United States.

The rebels doing these acts cannot be deemed belligerents, unless it be true either that the government has made a general recognition of belligerent rights in the rebels, or that the government has treated the rebels as belligerents in fact, in any case, or for any purposes, they must as matter of law be adjudged belligerents in all cases and for all purposes.

The first would make the very exercise of belligerent rights by the government deprive it of its rights of sovereignty. The second would transfer the conduct of public policy from the political to the judicial department.

The source of the rebels' commissions is not recognized as sovereign by any nation of the world. The rebels have been recognized as belligerents by two nations only, against the protest of the United States. Those recognitions are conclusive on the courts and citizens of those nations. But on the question of the status of citizens, in arms against their government, or the character of their acts, the policy of one or two neutrals cannot furnish the law for a tribunal of this government.

The government of the United States has done no act, amounting to a general recognition of belligerent rights in the rebels. It has protested against such a recognition by neutrals. Its proclamations before the destruction of the Golden Rocket had declared them to be insurgents, and their cruisers pirates. It has since the taking of the Golden Rocket ordered trials, and allowed a conviction, for piracy, of such cruisers.

The exchange of prisoners, and practice of the usages of civilized warfare, are, on the part of the sovereign, matter of policy from day to day, and do not warrant his courts in holding that the rebels have in a court of law the status of belligerents. Vattel, lib. 3, §§ 294, 295.

If the taking of the Golden Rocket was a "capture, seizure, or detention," within the meaning of the exception, still the proximate cause of the loss was not such taking, but the fire, which was not "the consequence of any attempt thereat," but which occurred after the taking was complete, and all the officers and crew had been taken out of her.

If the taking was a "capture, seizure, or detention," it was illegal, and not followed by lawful condemnation, and for each of these reasons did not divest the plaintiffs of their property, nor take away their insurable interest in the ship. 1 Phil. Ins. § 194; 2 Pars. Mar. Law, 78, 79, and cases cited.

If this was a belligerent capture, it had not been completed by condemnation, so as to

divest the plaintiffs' title; if it was a piratical taking, their title, of course, remained good.

The omission of a belligerent captor to send in a prize for adjudication, by reason of the maritime superiority of the enemy, though it may justify the captor and his government in destroying or abandoning her, does not, as between third parties, make the mere taking, equivalent to a condemnation, in changing the title and divesting interest.

No capture or taking is of itself an actual total loss of the ship either in fact, or by the law of insurance, before entire destruction or lawful condemnation. Although it is a constructive total loss which the owners may, by abandoning their interest to the underwriters while the detention continues, make an actual total loss, yet they are not obliged to make an abandonment, but may retain their interest and recover for a total or partial loss, according to the injury actually proved. 2 Phil. Ins. § 1493; 2 Arn. Ins. 998.

Fire is a distinct risk, to which the underwriters remain liable while exempt from losses for other perils, although such other perils have exposed the ship to the loss by fire. Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 314; Airey v. Merrill [Case No. 115]; Pelly v. Royal Exch. Assur. Co., 1 Burrows, 341; Emerig. Assur. c. 12, sect. 17, § 1; Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 236.

The fire not having been a means used in attempting to take or actually taking possession of the ship, but having occurred after the taking was complete, and after her assailants had obtained undisputed possession of her, and taken out her officers and crew, was the proximate and efficient, and by law the sole cause of the loss, according to the familiar maxim, "causa proxima non remota spectatur." Gordon v. Rimmington, 1 Camp. 123; Jones v. Schmoll, 1 Term R. 130, note; Forster v. Christie, 11 East, 209; Rice v. Homer, 12 Mass. 234; Livie v. Janson, 12 East, 648; Hodgson v. Malcolm, 2 Bos. & P. (N. R.) 340; Redman v. Wilson, 14 Mees. & W. 476; Ionides v. Universal Mar. Ins. Co., 8 Law T. (N. S.) 705; Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 219; Lovering v. Mercantile Mar. Ins. Co., 12 Pick. 369.

To sum up the whole matter, the plaintiffs contend:—

1. The loss was by "pirates and assailing thieves," within the term of the policy; and therefore total, as soon as the ship was taken.

2. The case is not within the excepted risks, in the margin, of "capture, seizure, detention, or the consequences of any attempt thereat."

3. If this taking was a loss within the exception, it was not total without condemnation, or continuance of the detention for ninety days; and, before either of those contingencies happened, she was totally lost by fire, a distinct peril, for which the insurers are liable.

4. If the defendants are neither liable for the loss of the ship by fire, or not liable for her loss at all, they are liable, as under a loss by "pirates and assailing thieves," for the tackle, apparel, and other articles of which the Sumter's men plundered the ship, and which they took no steps to have condemned. Phil. Ins. §§ 463, 1223.

B. R. Curtis and J. J. Storrow, for defendants.

This was not a loss by "pirates," within the meaning of these policies.

The word "pirates" may be used to designate either of two distinct classes of persons: the first being those deemed pirates by the law of nations; the second, those required by the municipal law of some particular country, to be adjudged to be pirates for the purposes of criminal procedure and punishment. Append. 5 Wheat. [18 U. S.] 8; U. S. v. Smith. 5 Wheat. [18 U. S.] 153; [Act March 3, 1819] 3 Stat. 513; [Act April 30, 1790] 1 Stat. 114; U. S. v. Pirates, 5 Wheat. [18 U. S.] 196; The Antelope, 10 Wheat. [23 U. S.] 122; 1 Kent, Comm. 186; 7 Dane, Abr. 94; Bynk. Jus. Priv. lib. 1, c. 117; Le Louis, 2 Dod. 244.

These policies use the word "pirates" in that simple and ordinary sense in which it now is and immemorably has been known to the general commercial law of the civilized world; and not to describe offenders against some municipal criminal law, of some particular country.

The peril of pirates was to be encountered on the high seas, where the common law of nations prevails, and declares who are "pirates."

The sole office of these municipal laws is to prescribe criminal procedure and punishment in certain cases which are not piracy, as if they had been piracies. But a policy of insurance has no connection with criminal procedure, or the punishment of offenders. U. S. v. Pirates, 5 Wheat. [18 U. S.] 196.

The interpretation and effect of policies of insurance belong to another system of law, existing before these statutes were passed, and not intended to be affected by them. This system of law is not merely a branch, or division of municipal law; but belongs to and is part of the common law of nations which defines piracy. 1 Marsh. Ins. 19; 1 Duer, Ins. 2; Warren v. Manufacturers' Ins. Co., 13 Pick. 518; Deshon v. Merchants' Ins. Co., 11 Metc. [Mass.] 199; The Malek Adhel, 2 How. [43 U. S.] 232; The Antelope, 10 Wheat. [23 U. S.] 122; 3 Kent, Comm. 342, 343; 1 Phil. Ins. Pref. 7, ad fin., and 77; 1 Arn. Ins. 12, and citations passim; U. S. v. Smith, 5 Wheat. [18 U. S.] 162.

Policies of insurance have no reference to the legality of governments; they refer always to de facto authority, of king, princes, and people; and an interpretation which

should make a risk depend on the legality of an actual government, under whose authority the property had been captured, seized, or detained, would be unprecedented and dangerous. Nesbitt v. Lushington, 4 Term R. 783.

The acts of the Sumter were not the acts of pirates under the law of nations. 1 Kent, Comm. 183; Warburton, 368-376; Append. 5 Wheat. [18 U. S.] 8; U. S. v. Smith, Id. 153, and note; U. S. v. Pirates, Id. 196; The Malek Adhel, 2 How. [43 U. S.] 211; Davison v. Sealskins [Case No. 3,661]; 1 Lemonier, Ins. 251.

The facts find the existence of a commission, and that the capture was made in pursuance of it.

They find that the commission was to cruise against the commerce and property of the United States and of its citizens only.

The executive government of the United States has by public proclamations and messages to congress, and in other appropriate public documents, recognized and affirmed the existence of open and public war existing between the United States and a de facto government of the so-called Confederate States. President's Proclamation of April 19, 1861; President's Reply to the Virginia Commissioners; President's Proclamation of April 27, 1861; President's Message to Congress, July 4, 1861; President's Proclamation of August 12, 1861; President's Proclamation of August 16, 1861.

The United States has, in respect to the government and people of the so-called Confederate States, both sovereign and municipal rights; under the first they wage war; under the second they hold all persons, property, and acts subject to constitutional criminal laws of congress. Rose v. Himely, 4 Cranch [8 U. S.] 272; Halleck, Int. Law. 344.

But the existence of these laws of congress and the illegality of the acts of the Confederate States and their people, when tested by them, can have no bearing on the question whether the law of nations has been infringed. The Antelope, 10 Wheat. [23 U. S.] 122; 1 Stat. 114.

And the United States cannot at the same time insist that they have the belligerent rights which by the law of nations belong to a sovereign waging public war, and yet assert that there is no such public war as is known to the law of nations.

That it is a civil war does not change the rule of the law of nations respecting those who carry it on.

Modern writers, and the settled usage of civilized states, including the United States, and the repeated decisions of their highest court, allow to each party in a civil war full participation in the rights of war; and among others, the right to cruise on the high seas against the commerce and property of its enemy. Vattel (Chitty's Ed.) 424; Wheat. Int. Law. pt. 2, c. 2, § 15; Halleck, Int. Law, 333; The Santissima Trinidad, 7 Wheat. [20 U. S.] 283; U. S. v. Palmer, 3 Wheat. [16 U. S.] 610; The Neustra Senora, 4 Wheat. [17 U. S.] 497.

The fact that it is a civil war, and a rebellion against the lawful government of the United States, renders a commission to cruise against the commerce of the United States, derived from the Confederate government, utterly void as an answer to an indictment for an offence against municipal criminal law; but the existence of such an authority, from such a government, prevents those acting under it from being pirates, under the law of nations.

The warranty by the assured, against "capture, seizure, and detention," and the consequences thereof, takes this loss out of the policy.

Any capture or seizure, whether rightful or wrongful, and whether made under a commission from a de jure, or de facto government, or made by mere pirates, is equally within this warranty. 2 Marsh. Ins. 422; 1 Phil. Ins. 1110; Emerig. Assur. c. 12, sect. 18, § 1; 3 Kent, Comm. 304; Poth. Ins. No. 54; Valin, Comm. arts. 26, 46; 2 Boulay-Paty, § 16, p. 102; Goss v. Withers, 2 Burrows, 694; Powell v. Hyde, 5 El. & Bl. 607; Kleinwort v. Shepard, 1 El. & El. 447; Id., 32 Law T. 313; McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202; McCargo v. Merchants' Ins. Co., Id. 334, 349; Tirrell v. Gage, 4 Allen, 245; Lee v. Boardman, 3 Mass. 238, 245; Abb. Shipp. 33; Halleck, Int. Law, c. 12, § 14; 1 Kent, Comm. 108; 2 Wood. Lect. 255; 2 Arn. Ins. 813, 1115-1117; The Hercules, 2 Dod. 359; The Helena, 4 C. Rob. Adm. 5; The Dickenson, 1 Hay & M. 46; Nesbitt v. Lushington, 4 Term R. 787; Naylor v. Palmer, 8 Exch. 739; Mellish v. Andrews, 15 East, 15; U. S. v. Klintock, 5 Wheat. [18 U. S.] 150; Davison v. Sealskins [Case No. 3,661]; Parsons v. Massachusetts F. & M. Ins. Co., 6 Mass. 208; The Wanderer [Case No. 17,139].

The 3d section of the act of March 3, 1819 [3 Stat. 513], enacted by the congress of the United States, reads as follows:

"And be it further enacted, that the commander and crew of any merchant vessel of the United States, owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same," &c.

By section 2, the president is authorized to cause to be subdued, &c., any armed vessel "which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure." 3 Stat. 513.

By a Massachusetts colony law of 1673, piracy in harbors or at sea by piratically seizing a vessel, &c., was punished with death.

4 Mass. Col. Rec. pt. 2, p. 567; 7 Dane, Abr. 90. See The Malek Adhel, 2 How. [43 U. S.] 233; Josefa Segunda, 5 Wheat. [18 U. S.] 338, 353, 357; Dias v. The Revenge [Case No. 3,877]; U. S. v. Jones [Id. 15,494]; Holt, Shipp. 191.

It has been suggested by the plaintiffs, that the de facto Confederate States occupy the same position towards the United States that the latter occupied towards Great Britain in our war of the Revolution, and that our courts are to take the same view of questions growing out of the contest that the English courts then took of similar questions. During that war we find that the most eminent English jurist was accustomed to use the word "capture" to describe the acts of American privateers. Milles v. Fletcher, 1 Doug. 231. See Miller, Ins. 299; Tyrie v. Fletcher, 2 Cowp. 666.

Judge Nelson, in his charge to the jury upon the trial of the crew of the Savannah, gave the following definition of a pirate:—

"A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet."

There was no loss by fire within the meaning of the policy.

The hostile acts of the officers and crew of the Sumter were the efficient and prevailing cause of the loss and destruction of the vessel, and those acts were put at the risk of the owner by the marginal clauses, which warrant the insurer against loss or expense arising from capture.

The taking and the burning were parts of one and the same act of hostility; to attempt to separate them and consider them as distinct, independent, and unconnected perils or causes of loss, is a metaphysical refinement and subtlety which is contrary to the obvious truth of the case, and therefore has no place in the law of insurance.

The rule, "Causa proxima non remota spectatur," does not refer to the cause nearest in point of time, but to that which is most nearly and essentially connected with the loss as its efficient cause. Vos v. United Ins. Co., 2 Johns. Cas. 180; Suckley v. Delafield, 2 Caines, 222; American Ins. Co. v. Dunham, 12 Wend. 463; Havelock v. Hancill, 3 Term R. 277; Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 213, 219; Grim v. Phoenix Ins. Co., 13 Johns. 451; Montoya v. London Assur. Co., 4 Eng. Law & Eq. 500; Magoun v. N. E. Ins. Co. [Case No. 8,961]; Savage v. Pleasants, 5 Bin. 403; Coolidge v. New York Firemen Ins. Co., 14 Johns. 308.

These cases, and all the cases above cited, are put upon the ground, that all the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself; that a loss which may fairly be considered to be exclusively and solely occasioned by a peril insured against, without regard to distance of time, is a loss by that peril; that the loss is to be attributed to the efficient, predominating, operative peril. See, particularly, Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 219; Magoun v. New England Ins. Co. [Case No. 8,961]; Phil. Ins. pp. 655, 677, §§ 1115, 1132; Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 108; Montoya v. London Assur. Co., 4 Eng. Law & Eq. 500; McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 327, 328; Lawrence v. Aberdein, 5 Barn. & Ald. 108.

It would be a mere metaphysical nicety to hold otherwise, and the law, as a practical science, does not indulge in such niceties; the law of insurance, like all commercial law, requires the application of sound common sense and practical reasoning, for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. It has become a practical and convenient system, because it studiously avoids subtle and refined reasoning, however logical it may seem, and has guided itself by safe practical rules. Magoun v. New England Marine Ins. Co. [Case No. 8,961]; Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 108; General Mut. Ins. Co. v. Sherwood, 14 How. [55 U. S.] 363; Rhinelander v. Insurance Co., 4 Cranch [8 U. S.] 29.

The cases claimed as giving countenance, in this part of the case, to the theory of plaintiffs, resolve themselves into these classes:—

Cases where, after one peril has ceased to act, another independent and distinct peril, having no necessary or natural connection with the first, supervenes and causes the loss; in these, though the property might not have been exposed to the second peril, or might not have been so injuriously affected by it, without the concurrence of the first, the second is deemed in law to be, as it is in fact, the cause of the loss. See Jones v. Schmoll, 1 Term R. 130, note; Delano v. Bedford Ins. Co., 10 Mass. 353; Law v. Goddard, 12 Mass. 113; Livie v. Janson, 12 East, 653; Rice v. Homer, 12 Mass. 234; Forster v. Christie, 11 East, 205.

Another class embraces cases, where the underwriters have alleged that the negligence of the agents or servants of the assured, not amounting to barratry, led or contributed to the loss. Formerly it was held that the assured should not recover for losses to which his own negligence or that of those under his control had contributed. General Mut. Ins. Co. v. Sherwood, 14 How. [55 U. S.] 364.

There are some that turn on a question of pleading. Hagedorn v. Whitmore, 1 Starkie, 157; Gordon v. Rimmington, 1 Camp. 123.

The opinion of the supreme court of Massachusetts in this case furnishes a conclusive answer to the plaintiff's claim and argument on this point. Dole v. New England M. M. Ins. Co., 6 Allen, 395.

CLIFFORD, Circuit Justice. The defendants contend that the loss in this case, under the circumstances disclosed in the agreed statement, was not a loss by pirates within the meaning of the policy as understood in the law of insurance.

The theory of the defendants is, that the word "pirates" is used in the policy in the ordinary sense in which it is understood in the general commercial law of the civilized world; and they accordingly contend that the acts of the Sumter in taking the ship, having been committed when she was engaged in open and actual war, under a commission issued by a de facto government, as shown in the agreed statement, were not the acts of pirates, as assumed by the plaintiffs, but were the acts of persons having under the law of nations certain limited and qualified belligerent rights.

In the third place, they contend that the warranty in the marginal clause, against capture, seizure, and detention. or the consequences of any attempt thereat, takes the loss in this case out of the policy, and that any capture or seizure, whether rightful or wrongful, and whether made under a commission from a de jure or de facto government, or made by mere pirates, is equally within that provision.

Finally, they contend that the acts of the Sumter in taking the ship were the efficient and prevailing cause of the loss and destruction of the vessel, and that those acts were expressly put at the risk of the owner by the marginal clause.

The effect of the first proposition submitted by the plaintiffs, if admitted to be correct in its full extent, is the same as that of the third; and the two, therefore, in their application to this case, may be regarded as identical. Authorities cited by the plaintiffs in support of their first proposition show that the words "arrests, restraints, and detainments of kings, princes, and people, of what nation or quality soever," as a general rule, apply only to the acts of nations in their collective capacity; but they leave the question, whether the same rule shall be applied to the words "capture" and "seizure," quite undetermined, which is the question in this case. Stipulations of indemnity against takings at sea, arrests, restraints, and detainments of all kings, princes, and people, says Chancellor Kent, refer only to the acts of governments for government purposes, whether right or wrong; but the same learned author says that every species of capture, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy. 3 Kent, Comm. 303. Speaking of the clause under consideration, Mr. Phillips says it is more generally understood to apply to captures, seizures, and detentions by the commissioned officers and agents of some lawful and acknowledged government, but he admits in the same section, that the word "capture" is of itself broad enough to comprehend any forcible seizure or arrest which may occasion a loss to the insured. 1 Phil. Ins. (4th Ed.) § 1110, p. 664. Capture, properly so called, says Arnould, is a taking by the enemy, as prize in time of open war, or by way of reprisals, and with intent to deprive the owner of all dominion or right of property over the thing taken; and no doubt is entertained that the word in legal acceptation is used in that sense more frequently than in any other. But the same author admits that the legality or illegality of the taking does not affect the liability of the underwriter as against the assured; and such, it is believed, is the well-settled law upon the subject. Whether lawful or unlawful, or however made, capture, when the proximate cause of the loss, renders the underwriter liable under a policy against such a loss, though other causes may have contributed to the result. 2 Arn. Ins. § 303, p. 808. When a vessel previously forced by stress of weather to put into a port of distress was violently boarded by a mob, who took the control of her from the master and crew, and ran her on a reef of rocks, whereby the cargo was damaged, and then forced the master to sell the cargo at a low price, Lord Kenyon held that the loss fell within a capture by pirates, and consequently that the assured might have recovered under a count so alleging it, had not the underwriters been exempted by the memorandum, from all average loss. Nesbitt v. Lushington, 4 Term R. 787; 2 Arn. Ins. § 306, p. 817. The usual phrase, "against all captures at sea, or arrests, restraints, or detentions of all kings, princes, or people," says Mr. Parsons, "covers captures, detentions, or arrests by public enemies, by belligerents, or in certain cases by the government of which the assured is himself a subject;" but he does not say that it does not also cover takings by pirates. 2 Pars. Mar. Law, 246. The remaining authority cited by the plaintiffs in support of their first proposition approaches more nearly to their views. Maude & P. Shipp. 232. Pirates, say those writers, are considered hostes humani generis, and therefore are never recognized as enemies, nor are they included in the expression "kings, princes, and people." Referring to that entire phrase, they remak that the words are properly applicable only to the ruling power of a country, and not to pirates or any other lawless power; but the only authority cited in support of the latter branch of the proposition is the case of Nesbitt v. Lushington, 4 Term R. 787, which is rather the other way. Plainly, therefore, the authorities cited are not sufficient to establish the proposition that the word "capture" is not broad enough to include the taking in this case; but the point will be further considered in examining the third proposition submitted by the plaintiffs.

The marginal clause, it is contended by the plaintiffs, is not a warranty in the sense in which that word is usually known and understood in the law of marine insurance.

The general rule is, that any statement of a fact in the policy is a warranty of that fact, though neither the word "warrant," nor any formal expression of like import is used. Such a formal expression is not in general requisite to constitute a warranty, as has been held in repeated cases. On the other hand, it is equally clear that there is frequently a warranty in form of expression, inserted in the policy or in the margin, where such is not the intention of the parties, and where there is none in fact. 2 Phil. Ins. (4th Ed.) § 760, p. 428. The instance put by Mr. Phillips is where the assured warrants the property free from average detention or capture, or from other losses or perils, which he well says is no more than an agreement that those shall not be among the perils and losses insured against, and for which the underwriter is to be liable. Palmer v. Warren Ins. Co. [Case No. 10,698]; Martin v. Fishing Ins. Co., 20 Pick. 389. The legal construction of the clause is that the underwriter is liable for the direct effects of the perils insured against, while the assured stipulates to bear the direct effect of those perils which are excepted. 1 Phil. Ins. (4th Ed.) § 2151, p. 708; McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 313. Granting the correctness of the proposition, it is not perceived that it affords much assistance in disposing of the controversy, because the other questions remain to be determined.

The third proposition of plaintiffs is, that the loss in this case having arisen from a taking by rebels on the high seas is a loss by pirates, and not one arising from capture or seizure within the meaning of the policy. Obviously, there are two questions involved in the proposition, and it may well be admitted that they are important, and that neither is unattended with difficulty. They are as follows: 1. Whether the acts of the officers and crew of the Sumter in the taking the ship under the circumstances set forth in the agreed statement were piratical acts within the meaning of the policy; and if so, then, 2. Whether the meaning of the words "capture or seizure" is or is not broad enough to include the taking by pirates. Standard writers upon criminal law in defining piracy say it "consists in committing those acts of robbery and depredation upon the high seas which, if committed on land, would have there amounted to felony." 1 Russ. Crimes (Shars. Ed.) 94; 2 Whart. Cr. Law (5th Ed.) § 2830, p. 541; 4 Bl. Comm. 72; 2 East, P. C. 796; 1 Hawk. P. C. c. 37, § 4.

Punishment of death is denounced against any person, by the act of congress of the 3d of March, 1819, who shall, upon the high seas, commit the crime of piracy as defined by the law of nations. 3 Stat. 513. The supreme court held, in the case of an indictment under the fifth section of that act, that the definition given of piracy was a constitutional one, and that the crime was defined by the writers on the law of nations with reasonable certainty. U. S. v. Smith, 5 Wheat. [18 U. S.] 159. All writers, say the court, in that case, concur in holding that robbery or forcible depredation upon the sea, animo furandi, is piracy. Judge Story gave the opinion in that case, and he proceeds to say that the same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt; and he further shows that the common law, as it existed at the date of the Revolution, recognized and punished piracy as an offense not against its own municipal code, but as an offence against the law of nations, which is a part of the common law. Until the statute of 28 Henry VIII. c. 15, piracy was punishable in the parent country, only in the admiralty as a civil-law offence; and it is well-settled law that that statute, in changing the jurisdiction to the courts of common law, made no change in the nature of the offence. Robbery on the high seas, say the same court in U. S. v. Pirates, 5 Wheat. [18 U. S.] 197, is considered as an offence within the criminal jurisdiction of all nations. The reason of the rule undoubtedly is, that it is an offence against all nations, and consequently is punishable by all; and there can be no doubt that the plea of autre fois acquit is a good plea in any civilized nation, though resting on a prosecution instituted in the courts of a foreign jurisdiction. Modern writers also, upon the law of nations, maintain the same views. Piracy is robbery, says Chancellor Kent, or a forcible depredation on the high seas without lawful authority, when done animo furandi, and in the spirit and intention of universal hostility. His definition is that it is the same offence at sea as robbery on land; and he remarks that all writers on the law of nations and on the maritime law agree in that definition. Every nation has a right to attack and exterminate pirates without any declaration of war; and the universal rule is that they acquire no rights by capture, but that the true owner may reclaim his property wherever it may be found. 1 Kent, Comm. 184. Another modern writer upon international law says piracy is a crime not against any particular state, but against all states and the established order of the world. Wools. Int. Law, § 137, p. 232. The same learned author defines piracy as robbery on the sea or by descent from the sea upon the coast, as committed by persons not holding a commission from or at the time pertaining to any established state. He mentions three classes of persons whose depredations upon the sea amount to the crime under consideration: 1. Depredations of persons who form an organization for the purposes of such plunder, but who, inasmuch as such a body is not constituted for political purposes, cannot be said to be a body politic. 2. Acts of persons who having, in defiance of law, seized possession of a chartered vessel, use it for the purpose of robbery. 3. Similar acts

of persons who have taken and hold commissions from two belligerent adversaries. Such a crime being one committed against all nations, may be brought before the proper tribunal of any civilized nation, no matter what may be the nationality of the prosecutor or what may be the origin or domicile of the person committing the offence. The legislative authority of a state may doubtless enlarge the definition of the crime of piracy, but the state must confine the operation of the new definition to its own citizens and to foreigners on its own vessels. Two states also may agree by treaty to regard as piracy a particular crime which is not so defined in the international code, and the stipulation will be obligatory upon the contracting parties. The effect of such a treaty is in general to give to both the contracting parties jurisdiction over that offence for the trial and punishment of such of the citizens of the two countries as commit the offence, but the operation of such a treaty has no bearing on other nations. Wools. Int. Law, § 137, p. 233.

Actual robbery on the high seas is piracy under the law of nations by all the authorities, and so also is the act of cruising upon the high seas without a commission and with the intent to rob, especially if the charge be accompanied by proof of unsuccessful attempts about the same time to commit the primary offence. Such robbery is piracy, because the criminal act is committed against all nations, and therefore is punishable by all. Undoubtedly a statute may declare any offence piracy committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation as an offence against the municipal authority. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable. Append. 5 Wheat. [18 U. S.] 8, per Marshall, C. J. The offence of piracy at common law, says Mr. Roscoe, is nothing more than robbery upon the high seas; but by statutes passed at various times, and still in force, many artificial offences have been created which are to be deemed to amount to piracy, and the remark is undeniably correct, if applied exclusively to the municipal law of the nation where such statutes were passed and are in force. Rosc. Cr. Ev. (Shars. Ed.) 832; U. S. v. Palmer, 3 Wheat. [16 U. S.] 626. The controlling purpose of such municipal laws is to denounce certain acts as piracy not before known as such, and to make provision for the trial and punishment of such offenders, as if the acts committed were piracy at common law.

Offenders against such laws, if citizens or subjects of the nation passing the laws, are justly amenable to their penalties, as violators of the municipal law of the nation. Text-writers, says Mr. Wheaton, define piracy as "the offence of depredating on the seas without being authorized by any sovereign state or from commissions from different sovereigns at war with each other." Wheat. Int. Law, by Lawrence (2d Ed.) 246. The annotator shows conclusively that in applying the term "piracy" regard has not always been had to the distinction between the offence as known in the law of nations, which is justiciable everywhere, and certain offences created by the statutes of particular nations, for which the same nomenclature has been arbitrarily adopted, but which are only cognizable before the municipal tribunals of such nations having jurisdiction either territorial, actual, or implied, or over the person of the offender. Id. 247. The proposition that pirates are the common enemies of all mankind must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. The former offence may be tried and punished in the courts of justice of any nation by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that state within whose territorial jurisdiction, on board of whose vessels, the offence thus created was committed. Id. 256; U. S. v. Klintock, 5 Wheat. [18 U. S.] 144. Similar views also are expressed by Mr. Phillimore in his very learned commentaries upon international law. He says piracy is an assault upon vessels navigating the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. Courts of all nations have jurisdiction of the offence, or in other words, the pirate is "justiciable everywhere;" and the learned commentator remarks, that the detestable occupation of the pirate has made him hostis humani generis, and that he cannot upon any ground claim immunity from the tribunal of his captor. 1 Phillim. Int. Law, 379. Contracts of marine insurance, however, have in general no connection with criminal procedure, or with the laws of a state making provision for the punishment of offenders. The interpretation and effect of marine policies of insurance must be governed by the rules of the commercial law, which is a system of law known to all nations, and which in general is wholly unaffected by the criminal law of any particular country. Warren v. Manufacturers' Ins. Co., 13 Pick. 518; Deshon v. Merchants' Ins. Co., 11 Metc. [Mass.] 199. Treating of marine insurance, a learned commentator says that maritime law in general partakes more of the character of international law than any other branch of jurisprudence; and the reason assigned for the conclusion is, that it pervades everywhere the institutions of that vast combination of civilized nations, which constitute one community for commercial purposes and social intercourse. 3 Kent, Comm. 342; The Antelope, 10 Wheat. [23 U. S.] 122. No branch of the law, says Mr. Phillips, can more proper-

ly be denominated a science than insurance; and he holds in effect that the decisions of the courts of other countries, and the opinions and reasons of foreign writers upon the subject are equally applicable to it with those of our own courts, because the contract is everywhere known and is substantially the same throughout the civilized world. Phil. Ins. (pref.) vii; The Malek Adhel, 2 How. [43 U. S.] 233; U. S. v. Smith, 5 Wheat. [18 U. S.] 162.

The defendants insist that a capture made under a commission to cruise against its enemies, and its enemies only, issued under a regularly organized de facto government, engaged in open and actual war, is not piracy under the law of nations. But they do not controvert the fact that such a commission, derived from the Confederate States under the circumstances disclosed in the agreed statement, would be utterly null and void as an answer to an indictment for an offence against our municipal criminal law. Such a proposition, if submitted, could not, in the judgment of this court, be maintained for a moment, as it would involve the question whether those states had a right to secede. They had no such right express or implied. Secession is a wicked heresy, which has no foundation whatever in the federal constitution. Nothing of the kind is pretended by the defendants; but what they contend is, that the exercise of such an assumed authority under such a government as that disclosed in the agreed statement, prevents those acting under it from being pirates under the law of nations. The commission in this case was to attack, capture, or destroy American vessels, and none others; and the agreed statement shows that the attack, capture, and destruction of the ship was by the described persons, acting by virtue of such commission, and under the assumed authority of such Confederate States. The concession of the defendants is, that the facts stated would constitute no defence to an indictment alleging an offence against our municipal criminal law; and they also concede affirmatively that the United States have, in respect to the government and people of the so-called Confederate States, sovereign as well as municipal rights; that under the first they may wage war to suppress the rebellion, and that under the second they may hold persons engaged in it subject to the criminal laws of the United States. Rose v. Himely, 4 Cranch [8 U. S.] 272; Halleck, Int. Law, 344. Granting all this, still they insist that the existence of such criminal laws, and the illegality of the acts of the Confederate States and people, when tested by such laws, have no bearing whatever on the question, whether in the case under consideration the law of nations has been infringed. The Antelope, 10 Wheat. [23 U. S.] 122; The Marianna Flora, 11 Wheat. [24 U. S.] 1. Such a question came before the supreme court under the following circumstances. U. S. v. Klintock, 5 Wheat. [18 U. S.] 151. The statement of the case shows that in the trial of an indictment for piracy, it appeared that the defendant had been cruising on the high seas under a commission from a person having no authority to issue commissions for the capture of vessels at sea; that the defendant, as first lieutenant of the vessel in which he sailed, aided in capturing the vessel described in the indictment. The defence, among other things, was that the acts proved did not amount to piracy, because the defendant had acted in good faith under the commission. The answer of Marshall, C. J., to that proposition deserves consideration. He said whether a person acting in good faith under such a commission may or may not be guilty of piracy, we are all of the opinion that the commission can be no justification of the facts stated in this case. The decision turned wholly on the fact stated by the court, that the whole transaction, taken together, demonstrated that the vessel had not been captured jure belli, but was seized and carried into port animo furandi; that it was not a belligerent capture, but a robbery on the high seas, which, by all the authorities, is piracy under the law of nations. Unlike what was stated in that case, the agreed statement in this case shows that the capture of the ship was for the purpose of prosecuting said war so declared to exist, and with the sole purpose and intent of coercing the government of the United States, as before explained.

The policy in this case was executed, and the contract was completed, as the parties agree, previous to the president's proclamation establishing the existing blockade; and it also appears that since the beginning of hostilities our public armed ships have claimed and exercised the right to visit neutral ships on the ocean, and that many such have been captured, and with their cargoes condemned for having contraband of war on board destined to some port in the control of the rebels. Property also belonging to persons resident in any place in the possession and control of the rebels, and found on the high seas, has been, pursuant to the orders of the president, captured and condemned as lawful prize of war, upon the ground that it was enemies' property. Looking at the whole case, it is evident that the question under consideration has been fully settled by the supreme court. The Amy Warwick. 2 Black [67 U. S.] 665. Neutrals, say the court in that case, have a right to challenge the existence of a blockade, de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion for the purpose of subduing the enemy.

Right of prize and capture has its origin, say the court, in the jus belli, and is gov-

erned and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against property or territory in possession of the other. Parties belligerent in a public war are independent nations. But it is not necessary to constitute war, say the court, that both parties should be acknowledged as independent nations or sovereign states; and the court added that a war may exist where one of the belligerents claims sovereign rights against the other. "When the party" in a civil war "occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." They claim to be in arms to establish their liberty and independence in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason. Parties to a civil war, say the court, usually concede to each other belligerent rights. They exchange prisoners, and adopt the other customs and rules common to public international wars. The true test of the existence of civil war, say the court, as found in the writings of the sages of the common law, may be thus summarily stated:—

When the regular course of public justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposed to the government were foreign nations invading the land. The court expressly say in that case that it is not necessary that the independence of the revolted province or state should be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Reference is then made to the fact that the queen of England, on the 13th of May, 1861, issued her proclamation of neutrality, recognizing hostilities as existing between the United States and the so-styled Confederate States; and then the court say that after such an official recognition by the sovereign, a citizen of such foreign state is estopped to deny the existence of a war with all the consequences as regards neutrals. Congress recognized the existence of war on the 13th of July, 1861; and the minority of the court held that a civil territorial war in the international sense did not exist until that act of congress was passed. Two answers were made by the court to that objection: 1. That a prior declaration of war was not necessary to constitute that relation; and, 2. If it was, that the subsequent acts of congress had a retroactive effect, and operated to cure the defect. A minority of the court denied that the acts of congress would have any such operation; and the majority of the court, in replying to that objection, admit that it might possibly have some weight in the trial of an indictment in a criminal court, but say that precedents from that source cannot be received as authoritative in a tribunal administering public and international law, which is undoubtedly correct. The conclusion is that the president had a right, jure belli, to institute a blockade of the ports in possession of the states in rebellion which neutrals were bound to regard. The next question in the case was, whether the property of all persons residing within the territory of the states in rebellion, if captured on the high seas, was to be treated as enemies' property, irrespective of the question whether the owner was or was not in arms against the government. Responding to that inquiry, the court say that all persons within that territory whose property may be used to increase the resources of the hostile power, are in the contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors. The produce of the hostile territory, say the court, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength are always regarded as legitimate prize without regard to the domicile of the owner, and much more so if he resides and trades within their territory. The supreme court, therefore, has decided that the present civil war is of such a character and magnitude as to give to the United States the same rights and powers which they might exercise in the case of a national or foreign war; that they have a right, jure belli, to institute a blockade of any ports in the rebellious states; that the proclamation of blockade was of itself conclusive evidence that a state of war existed which authorized and demanded such a measure, and that it made all persons residing in the territory liable to be treated as enemies, though not foreigners. Such conclusions are utterly irreconcilable with the proposition, that the taking of the ship in this case, under the circumstances described in the agreed statement, was a taking by pirates, as contended by the plaintiffs. The same views have also been expressed by the supreme court of Massachusetts in this very case, as may be seen by referring to the very able opinion of the court pronounced by the present chief justice. Dole v. New England M. M. Ins. Co., 6 Allen, 392. The opinion of the court was that it could not be maintained on the facts offered in proof, which were substantially the same as those agreed in this case, that the persons who seized and burned the ship were to be regarded as pirates within the ordinary signification of that word as used in the law of na-

tions, or as commonly understood and applied in maritime contracts and adventures. They were not common robbers and plunderers on the high seas. Continuing, the court go on to show that their acts were unlawful, and such as cannot be justified in our courts, but say, that on the facts offered to be proved, it appeared that they sailed under a commission issued by a government de facto claiming to exercise sovereign powers, and to be authorized to clothe their officers and agents with the rights of belligerents, and to send out armed cruisers for the purpose of taking enemy's vessels jure belli. Facts offered to be proved further showed, say the court, that "this de facto government had proceeded to raise armies, and had put them into the field, by which an actual state of war was created." Referring to those additional facts the court say, in this state of the case, it would be going very far to say that the taking of a vessel by an armed cruiser by such de facto government cannot properly be designated as a capture. Indeed, such an interpretation, say the court, would limit the meaning of the word as applied in mercantile contracts, to acts of forcible taking of ships or vessels on the high seas by duly established and recognized governments, acting according to the laws of war, and would exclude all such acts if unlawful or unjustifiable, or contrary to the municipal law of the country in which the contract was made, and to be performed, although done under an authority purporting to come from a government de facto engaged in actual war, and claiming to exercise belligerent rights. The decision of the cause, however, was not placed entirely upon that ground; but the court also held that the word "capture" was broad enough to include the taking in this case, even though the officers and crew of the steamer were regarded as pirates in the international sense. Suit was also commenced in the supreme court of Maine upon another policy on this same vessel for the same loss. Parties to that suit are Dole v. Merchants' M. M. Ins. Co. [51 Me. 465], and the opinion was given by Davis, J. He places the decision upon the second ground assumed by the supreme court of Massachusetts; but he admits that the decision might perhaps have been based upon a different ground. He goes on to say that war in fact existed at the time of the loss. Hostile forces were arrayed against each other in actual conflict. Its existence would not have been more palpable or real if it had been recognized by any legislative action, and though it was a civil war, the taking was not the less a capture for that reason.

The decision of the tribunal of commerce of Marseilles is to the same effect. 1 Lemonier, 251; Journal de Jurisprudence Commercial et Maritime de MM. Girod et Clariond, T. V., 235. Use will be made of the translation furnished at the argument, as it is believed to be correct. The case as stated shows that insurance was caused to be made in behalf of the owner of a certain amount of specie, laden on board a certain brig. The policy warranted the underwriters free from all casualties of war. hostilities, or reprisals by any maritime power whatsoever. The agent of the owners of the specie subsequently caused insurance to be effected by other underwriters, and solely against risks of war. The vessel sailed and loss occurred, and the master made a protest, from which it appeared that the brig was met by a privateer of Colombia, arrested and carried to Cumana, where the capture of the cargo was declared lawful, because a part was recognized as Spanish property, and the neutrality of the remainder was not sufficiently proved. Said agents of the owners of the specie afterwards made an abandonment to the underwriters who had assumed the risks of the sea, and also to the underwriters who had assumed the risks of war. The underwriters agreed, in their defence, that the abandonment was not valid upon several grounds not material to the present investigation, but they were divided on the question who ought to pay the loss in case the abandonment should be held valid. Those first mentioned maintained that the capture was a casualty of war, and therefore that the loss was not at their expense. The second underwriters contended that the capture could not constitute an act of war or of hostility arising on the part of a recognized maritime power, and consequently that the case came within the class of ordinary risks of the sea, piracies, aggressions. and the like, which were not assumed by them. The judgment given is too elaborate to be reproduced. The questions as stated are as follows: 1. Whether the capture made by the armed cruiser could be likened to acts of piracy. 2. Whether the loss ought to be considered a casualty of war or of the sea. The conclusions were: 1. That revolted colonies, established as a de facto government, were not to be considered as pirates under the circumstances, which showed that they only attacked the flag and property of the mother country, and respected the flag and property of other powers. 2. That the underwriter who insured against the risk of war was liable. and that the warranty took the risk out of the other policy.

War having been recognized as existing between Spain and her colonies by our government, the supreme court of the United States held that it was the duty of the federal courts, when a capture was made by either of the belligerent parties, without any violation of our neutrality, and the captured prize was brought innocently within our jurisdiction, to leave the property in the same condition as they found it, or to restore the same to the state from which it had been forcibly removed by the act of our own citizens. The Neustra Senora, 4 Wheat. [17 U. S.] 497. The colonies of Spain during the existence of war

between them and the parent country, and before the existence of the war had been recognized by the United States, were deemed by our government as belligerent nations, and entitled to all the rights of war as against the enemy. The Trinidad, 7 Wheat. [20 U. S.] 337. Judge Story said, in U. S. v. The Malek Adhel, 2 How. [43 U. S.] 232, that a pirate is deemed, and properly deemed, hostis humani generis, because he commits hostilities upon the subjects and property of all nations without any regard to right or duty, or any pretence of public authority. The evidence in this case shows no such state of the case, nor any pretence that the act of taking was committed animo furandi, as all the commentators agree that it must be, in order to amount to evidence of piracy as understood in the law of nations. Certain old writers upon the law of nations regarded a civil war as public on the side of the established government, and private on the part of the people resisting its authority; but Mr. Wheaton says that the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations. Wheat. Int. Law, by Lawrence (Ed. 1863) 522, and note 171; Vattel, bk. 3, c. 18, p. 424. International law, says Woolsey, comes in contact with internal wars so far as the laws of war, that is, of humanity and natural justice, are concerned, and also in the bearings of the war upon the interests and rights of foreign states. The same rules of war are followed in such a war, says the same author, as in any other—the same ways of fighting, the same treatment of prisoners, of combatants, of noncombatants, and of private property by the army where it passes. Nations thus treating rebels by no means, however, concede thereby that they form a state or have the remotest claim to such a concession. Wools. Int. Law (2d Ed.) § 136. p. 231; Halleck, Int. Law, 333; Davison v. Sealskins [Case No. 3,661]; 6 Webst. Works, 256, 257; U. S. v. Baker, Warb. 370. For these reasons I am of the opinion that the taking of the ship in this case, under the circumstances disclosed in the agreed statement, was not a taking by pirates, as understood in the law of nations or within the meaning of the policy.

Suppose it were otherwise, however, still the question remains to be considered whether the meaning of the words "capture or seizure" is or is not broad enough to include a taking by pirates under the circumstances disclosed in the agreed statement. The supreme court of Massachusetts held, in the case of Dole v. New England M. M. Ins. Co., before cited, that the word "capture," as applied to the contract of insurance, was broad enough to include within the exception in the policy a taking by pirates in the most enlarged sense in which that term is used; that is, a taking by common depredators and plunderers who do not merely make war on the vessels of a particular country, or seek to destroy or take forcible possession of the property only of the citizens of any one nation or government, but who commit robbery and pillage upon all persons and property found on the high seas lucri causa, and who may therefore properly be designated as hostes humani generis. Since that opinion was delivered, the same question has been very thoroughly examined in the case before mentioned, by Davis, J., as the organ of the supreme court of Maine. Suffice it to say, that the court, after a careful revision of the authorities, came to the conclusion that the word "capture" was broad enough to include a taking by pirates, and held that the plaintiffs were not entitled to recover. Those two learned judges have examined most of the authorities referred to on this point, in the argument of this case. A repetition of those citations is unnecessary, as they are as open to scrutiny in those opinions, as they would be if made the subject of further comment. Exception may well be made to two or three of the cases, as it may be that the volumes in which they are contained were not accessible at the time those opinions were prepared. Comment will first be made upon the case of Kleinwort v. Shepard, 1 El. & El. 447, because it must hereafter be regarded as a leading case upon the subject. The declaration was on a voyage policy from Macao to Havana, "warranted free from capture and seizure and the consequences of any attempt thereat." The policy contained the usual clause stating the perils insured against, which included "enemies, pirates, robbers, thieves, reprisals, takings at sea, and barratry of the master and mariners." Insurance was declared to be on a certain sum expended in provisions for the use of Chinese emigrants, and in advances on freights. The emigrants assaulted the master and crew, and took, stole, and carried away the ship. The defence was, that a forcible taking possession of the ship in the manner stated was a seizure within the meaning of the warranty. Judgment was delivered by Lord Campbell, C. J. He said it became necessary for the plaintiff to show that the word "seizure" was used in the warranty in some peculiar and restricted sense; and he admitted that it was sometimes introduced into policies where there was an apprehension of war, with the view to protect the underwriter, and to make him content with a peace premium.

But when it was introduced, the learned judge said there was no decision that it must be confined to belligerent seizure; and he added, that "we clearly think it would extend to captures and seizures by pirates." Exactly the same point was ruled by the same court in Powell v. Hyde, 5 El. & Bl. 607; and the ruling was the same way. The ruling was, that the exception introduced by the warranty was not confined to legal cap-

ture or seizure, but that an illegal capture or seizure was also within both the exception and the perils enumerated in the policy. Case of McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 334, is to the same effect. Naylor v. Palmer, 8 Exch. 750; Mellish v. Andrews, 15 East, 15. Brief reference will also be made to some of the continental writers, as translations were furnished at the argument which are believed to be correct. Ordonnance of 1681 upon this subject is as follows:—

Insurers are to bear all losses " . . . . from pillage, captures (prises), arrests of princes, declarations of war, reprisals, and generally all other perils of the sea." Pothier, De Contr. d'Ass. 49, p. 68. The insurer is liable whether the capture was lawful or unlawful according to the laws of war, whether it was an act of hostility or brigandage; for however suffered, it is a peril of the sea, and the insurers are liable for all perils of the sea. 54, p. 79.

"Assured may abandon," says Valin, "only in cases of capture (prises), shipwreck," &c. Article 46 of Ordonnance.

Referring to that article the commentator says: "In the first case, that of capture, it is immaterial whether the capture be legal or illegal; neither this article nor article 26 (above cited) makes any distinction, and in both cases it is a peril of the sea."

The commentator then cites an opinion prepared by Emerigon, upon the distinction between a capture and an "arrest of princes." Page 121. "A capture," he says, "is when a vessel is taken as prize of war in a spirit of depredation, with a design to deprive the owner of it."

It is either lawful or unlawful; lawful when made by a declared enemy, and according to the laws of war; unlawful when made by a pirate, a friend, or a neutral. or contrary to the law of nations. But whether the capture be lawful or unlawful the insurers are liable. This word "capture" as used in the ordonnance, without any qualification, must be taken in a general sense, and as including all captures, lawful and unlawful, for both generally lead to the same result.

The Roman law enumerates among the perils the attacks of enemies, hostium incursus.

"Whether the capture be lawful or unlawful, the insurers are none the less responsible. They insure, not only against captures made by enemies or pirates, but also against such as are improperly made by friends, allies or neutrals; in a word, against all captures in the way of hostilities, brigandage, or otherwise. Whoever commits depredations, says Targa, is a corsair, and becomes an enemy." 2 Boulay-Paty, p. 102.

Taken together, the authorities cited support the views of Mr. Marshall, in his treatise on the law of marine insurance. He says that capture is where a ship is subdued and taken by enemies in open war, or by way of reprisals, or by pirates, and with intent to deprive the owner of it. Marsh. Ins. 422. The weight of authority is adverse to the views of the plaintiffs; and in the judgment of this court the meaning of the word "capture" is broad enough to include a taking by pirates.

The fourth proposition of the plaintiffs is, that it is not the taking of the ship, as set forth in the agreed statement, but the fire which was the proximate cause of the loss described in the declaration. The facts are that the ship was boarded "with a force which her officers and crew were unable and did not attempt to resist. The assailing force plundered her of her papers, some sails, spars, provisions and other articles, and took out her officers and crew; and after her officers and crew had been taken out of her, she was set on fire by those who took her, and was thereby totally destroyed." The rule is, that where different causes concur, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or not in activity at the consummation of the disaster. 1 Phil. Ins. § 1132. The argument for the plaintiffs is, that the fire not having been a means used in taking possession of the ship, but having occurred after the taking was complete, and after her assailants had obtained undisputed possession of her and taken out her officers and crew, was the proximate and efficient cause, and by law the sole cause, of her loss. They deduce that conclusion by virtue of the maxim, "causa proxima non remota spectatur," and by virtue of the assumed theory that the fire was a separate and distinct peril from the capture. But the defendants contend that the hostile acts of the officers and crew of the Sumter were the efficient and prevailing cause of the loss and destruction of the vessel. and that the taking and the burning were parts of one and the same act of hostility.

The agreed statement shows that the steamer was cruising under a commission to attack, capture, or destroy the vessels belonging to the government and citizens of the United States, and none others. Semmes had such a commission, and the agreed statement shows that he was prevented from taking the ship into a port of the Confederate States by the danger and difficulty of our blockade. The clear inference, therefore, from the agreed facts is, that the capture was made for the purpose of destroying the vessel. The design and intent of the capture, as agreed by the parties, was to coerce the government of the United States to acknowledge the independence of said Confederate States. The danger and difficulty of taking the ship into port deterred the captor from making the attempt. Nothing else remained for him to do, consistent with the purpose for which he was cruising, but to attack and destroy the vessel. The attack

was made for the purpose of destroying the vessel; and under such circumstances it must be apparent that the capture and burning were parts of one and the same act of hostility. The maxim, "causa proxima non remota spectatur," is a rule in the law of insurance, but it does not necessarily refer to the cause nearest in point of time to the loss. But the true meaning of that maxim is, that it refers to that cause which is most nearly and essentially connected with the loss as its efficient cause. Case of Magoun v. New England Marine Ins. Co. [Case No. 8,961] is a direct adjudication to that effect. All the consequences, said Judge Story in that case, naturally flowing from the peril insured against or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire or accident, or negligence of the captors, it would be clear, said that learned judge, that the whole loss is properly attributable to the capture. The law of insurance does not indulge in unsubstantial distinctions. On the contrary, it seeks to administer justice according to the fair interpretation of the intentions of the parties, and deems that to be a loss within the policy which is a natural consequence of the perils insured against. Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 109. The loss in this case was the natural effect of the capture, and under the facts disclosed in the agreed statement, it may be regarded as the inevitable consequence of the hostile seizure. Such losses are held by all the writers as fairly attributable to the original taking. Coolidge v. New York Firemen Ins. Co., 14 Johns. 316; Savage v. Pleasants, 5 Bin. 411. Where the master, in violation of his duty, wilfully undertook to run a blockade, or to engage in illicit trade, and was captured, barratry, and not capture, was held to be the cause of the loss in determining whether it shall be borne by the underwriter who takes the risk of capture, but does not insure against barratry. American Ins. Co. v. Dunham, 12 Wend. 463; Id., 15 Wend. 11; Suckley v. Delafield, 2 Caines, 222; Havelock v. Hancill, 3 Term R. 277. Cases undoubtedly arise, where, after one peril has ceased to act, another independent and distinct peril, having no necessary or natural connection with the first, supervenes and causes the loss; and in that class of cases, though it be true that the vessel might not have been exposed to the second peril, or might not have been so injuriously affected by it without the concurrence of the first, the second is deemed to be in law, as it is in fact, the cause of loss. Jones v. Schmoll, 1 Term R. 130, note; Delano v. Bedford Ins. Co., 10 Mass. 353; Law v. Goddard, 12 Mass. 113.

Several cases also are cited, where a peril insured against, put the vessel in such a position that she was acted upon by another peril, distinct in its origin and character; and which was not insured against; but it is not perceived that such cases can have any bearing upon the question before the court. Livie v. Janson, 12 East, 653; Rice v. Homer, 12 Mass. 234. But where a fire arose from the barratry of the master or crew, it was held that the loss was by barratry, and was not chargeable to an insurer who insures against fire, but not against barratry. Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 219; Grim v. Phoenix Ins. Co., 13 Johns. 457. So where the vessel was sunk by a shot fired from a battery, the loss was held not to be by sinking, but by the hostile act of the soldiers, and therefore within a waranty against capture and seizure, like the one in this case. Powell v. Hyde, 5 El. & Bl. 607.

Defendants also refer to the case of Naylor v. Palmer, 8 Exch. 739, which is a leading case. Insurance was on advances to be repaid on the safe arrival of certain emigrants at their port of destination. They seized the vessel on the voyage, compelled the crew to work her to another port, and there, without doing any injury to the vessel, left her. The claim was, that their failure to arrive, and the consequent loss was owing to the unwillingness of the emigrants to proceed; but the court held that the proximate and efficient cause was the seizure, and that the loss was total. See, also, General Ins. Co. v. Sherwood, 14 How. [55 U. S.] 364, 367.

The present case, however, does not depend upon any very critical application of the doctrine deducible from the maxim under consideration, because the agreed statement shows that the capture and burning were parts of one and the same acts of hostility. Looking at the whole case, it is clear that the plaintiffs cannot recover, and there must be judgment for the defendants.

DOLE, The LOUIS. See Case No. 8,534.

DOLICK (LANE v.). See Case No. 8,049.

Case No. 3,967.

Ex parte D'OLIVERA et al.

[1 Gall. 474.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

FOREIGN SEAMEN—STATUTORY REGULATIONS.

The act of 20th July, 1790, c. 29 [1 Stat. 131], regulating seamen in the merchants' service, does not apply to foreign seamen on board of foreign ships.

[Cited in Grant v. U. S., 58 Fed. 696.]

On a former day of this term, Samuel D. Parker, as counsel for [Antonio] D'Olivera and others, moved the court for a writ of habeas corpus, directed to the keeper of the gaol in Boston, to bring up the bodies of D'Olivera and others with the cause of com-

[1] [Reported by John Gallison, Esq.]

mitment, upon a petition stating, that they were confined under color of the authority of the United States. The habeas corpus was granted. And now at this day, the gaol keeper produced the prisoners in court, and made return of the writ. By the return it appeared, that the prisoners were in custody under a warrant of commitment from a justice of the peace, alleging that they were Portuguese seamen, belonging to a Portuguese vessel now in Boston, and that they had been convicted, before him, of a desertion from the vessel. The warrant was directed to the keeper of the gaol, requiring him, in the name of the commonwealth of Massachusetts, to keep the bodies of the petitioners, "that they may be secured, and forth coming, to proceed on the voyage in said ship, according to their agreement, and to be delivered thence for that purpose by some justice of the peace, &c. unless otherwise delivered by due course of law."

The cause was shortly argued by Parker for the petitioners, and by William Sullivan for the master of the vessel, upon whose complaint they had been committed.

STORY, Circuit Justice. The only difficulty, which the court has felt in this case, has been from the warrant of commitment being in the name of the commonwealth of Massachusetts, and not of the United States of America. That the justice meant to act under the authority of the United States, and in a case, which he supposed to be within the 7th section of the act of the 20th of July, 1790, c. 29 [1 Stat. 131], for the government and regulation of seamen in the merchants' service, is conceded on all sides, and can admit of no reasonable doubt. Desertion from a merchant ship is no offence, either by the common or the statute law of Massachusetts; and it would be hard to presume, that the magistrate meant in this case to act without color of jurisdiction, and for purposes of wanton oppression. The warrant ought undoubtedly to have been in the name of the United States, and not of the commonwealth of Massachusetts. It was a strange mistake, but such as we have been informed has prevailed in practice in this place, almost ever since the existence of the act. Upon an attentive examination of the whole papers submitted to our consideration, notwithstanding the above error, we think that sufficient is apparent upon the face of them, to show that the magistrate did commit the party under color of the authority of the United States. We feel ourselves bound to presume, that he meant to commit in exercise of a lawful jurisdiction, (applied, however, to wrong objects), rather than to assume a jurisdiction, which under no circumstances could receive a shadow of authority from the laws of the state.

Having disposed of this objection, we are of opinion, that the act for the regulation of seamen exclusively applies to seamen engaged in the merchants' service of the United States. It may be a serious inconvenience, that congress has not extended the provisions to cases of foreign seamen in foreign vessels, in compliance with that comity, which it is understood many foreign nations exercise in favor of this country. Whatever may be the evil, we can only regret it; it is for another tribunal to apply the remedy. We order, therefore, that the prisoners be discharged; and upon the payment of the costs of this application and the gaoler's fees, we shall direct an officer to deliver them to the master on board of his vessel. We think ourselves bound to do thus much, from a desire not to encourage desertion among foreign seamen, there appearing no reason to suspect the master of any improper conduct.

Case No. 3,968.

Ex parte DOLL.

[27 Leg. Int. 20;[1] 7 Phila. 595; 11 Int. Rev. Rec. 36.]

District Court, E. D. Pennsylvania. 1870.

UNITED STATES COMMISSIONERS—POWER TO COMMIT FOR CONTEMPT.

A commissioner of a United States court has not power to commit a citizen for an alleged contempt.

[Cited in Re Mason, 43 Fed. 515.]

The relator [George Doll] in this case was duly assessed by the assistant assessor of his district in the early part of the year 1868, upon his sworn return for an income tax, due the United States for the year 1867; this return was not subjected to contestation of any character, was returned to the collector, and the tax paid. The same thing occurred in 1869, in relation to the tax for 1868. On October 20th, 1869, Peter Lane, a special assistant assessor of incomes in the district in which the relator resided, called at the place of business of George Doll and Co. (of which firm the relator was a member) and demanded an inspection of their books for the purpose of verifying the returns of income aforesaid. All the books he desired to see were shown him, and he was permitted to make extracts from them ad libitum. The next day William B. Elliott, the assessor of the same district, issued his summons requiring the relator, on the 26th day of October then next, to appear before him at his office, to give evidence concerning his income for the years 1867 and 1868, and to produce all books of account relating thereto; this summons on its face charged that the returns of income aforesaid, "in the opinion of the assessor, were false and fraudulent, or contained an under-statement of under-valuation." It was disregarded. On the 12th day of November following, the assessor made complaint before Henry Phillips, Jr.,

[1] [Reprinted from 27 Leg. Int. 20, by permission.]

a commissioner appointed by the circuit court of the United States for this district, who issued a warrant for the apprehension of the relator, reciting that he was "charged on oath" with having delivered to an assessor of internal revenue of the United States a return, in the opinion of the assessor, false and fraudulent, and that after being duly summoned to appear, testify and produce his books in relation thereto, he had neglected and refused so to do. The proceedings on the hearing of the case were simply the examination of Peter Lane as a witness, and the making of an order by the commissioner on December 1, that the relator produce his books to the assessor, before noon, on December 4th, "or be committed for contempt." With this order the relator refused compliance, and was committed. A writ of habeas corpus was at once obtained and served, and upon its immediate return the relator bailed till the hearing, without objection by the district attorney.

Upon the hearing, Nathan H. Sharpless, Esq., for the relator, made the following points: 1st. That the 116th section of the act of June 30th, A. D. 1864 [15 Stat. 281], under which the income tax is levied, is unconstitutional and void, as undertaking to levy a capitation, or, at all events, a direct tax, by the rule of uniformity, and not that of apportionment. 2nd. That so much of the 14th section of the same act as invests the assessors with power to compel a citizen, who has once made his return of income under oath, to produce his books and give evidence in regard to the same after its correctness had been challenged by the officer, is unconstitutional and void, as infringing upon the provision (article 5, amend. 1789, Const. U. S.): "Nor shall any person * * * be compelled in any criminal case to be witness against himself." 3d. That the power sought to be conferred upon the assessor by the last section is really the "judicial power of the United States," which by the constitution can only be exercised by judges holding their offices for the term of good behavior, and not by officers who are removable at any moment, probably at the discretion of the president, certainly at that of the president and senate. 4th. That the proceedings authorized by the same section are an infringement of the citizen's constitutional right of trial by a jury in every criminal case. The federal legislature cannot create a new criminal offence unknown to the common law or our statute law at the time of the adoption of the constitution, and which was not then punishable summarily by "attachment as for contempt," and provide for its ascertainment and punishment now by any other than the ordinary machinery of a trial by jury at common law. 5th. The extraordinary remedies provided by the same section are not to be used in re-assessing income duties; if there is any occasion to re-assess them, it is to be done under the 118th section of the same act, which contains no provision for an "attachment as for a contempt." 6th. If the five preceding points are all decided against us, the proceedings here are so radically defective and hopelessly incurable that the relator must be discharged.

Aubrey H. Smith, Dist. Atty. for the United States.

CADWALADER, District Judge, said that some of the constitutional questions argued in this case on the part of the relator were scarcely open ones at this day. Upon one point, as to the irregularity of the proceedings before the commissioner, he had relieved the counsel for the relator from argument until he had heard the district attorney in support of them, and what had followed from the district attorney had not changed his original impressions on that point, and the relator must be discharged. He would further say that he very much doubted the power of congress to invest a commissioner with the authority in a proceeding originally instituted before him, to summarily commit a citizen for an alleged contempt. This was an exercise of the judicial power of the United States, which, under the constitution, could not be entrusted to an officer, appointed and holding his office in the manner in which these commissioners were appointed and held their offices.

Case No. 3,969.

DOLL v. EVANS et al.

[29 Leg. Int. 116;[1] 11 Am. Law Reg. (N. S.) 315; 15 Int. Rev. Rec. 143; 9 Phila. 364; 4 Leg. Gaz. 113.]

Circuit Court, E. D. Pennsylvania. April 1, 1872.

INTERNAL REVENUE—INCOME TAX — FRAUDULENT RETURN—REASSESSMENT AND PENALTY — CONSTITUTIONAL LAW.

1. An assessor of internal revenue has power to reassess the income tax of a citizen who has already paid the tax first assessed against him.

2. The imposition of an addition of one hundred per centum as a penalty for the return of a false or fraudulent valuation is constitutional.

[This was an action by George Doll against George C. Evans, collector of internal revenue.] Demurrer to plea.

N. H. Sharpless, for demurrer.

Aubrey H. Smith, Dist. Atty., contra.

McKENNAN, Circuit Judge. This demurrer presents only two questions which it is necessary to consider: 1. Has an assessor of internal revenue power to reassess the income tax of a citizen, who has paid the tax first assessed against him? And, 2. Is the act of congress, which imposes an addition of one hundred per centum to the tax, as a penalty for the "return of a false or fraudu-

[1] [Reprinted from 29 Leg. Int. 116, by permission.]

lent list or valuation," constitutional? The defendants' plea avers, that the plaintiff made a return of his income for the year 1868, to the assessor of the third collection district of Pennsylvania; that he was thereupon assessed with an income tax of $95.60, which was placed by the assessor on the annual list; that this list was delivered to the collector, to whom the plaintiff paid the tax so charged against him; that afterwards and within fifteen months after the delivery of said list to the collector, to wit, on the 21st October, 1869, the assessor duly summoned and required the plaintiff to appear before him at his office in Philadelphia, on the 25th October, 1869, to produce all books of accounts, containing entries of profits from business, rents, &c., relating to his income and business from January 1st, 1868, to December 31st, 1868, which he had in his power, custody, or care, and to give evidence according to his knowledge respecting his liability to an excise or tax, under the internal revenue laws; that the plaintiff did not appear in pursuance of said notice, whereupon the assessor proceeded to make, according to the best information he could obtain, and to his own view and information, a list or return of the income, gains and profits of the plaintiff for the year 1868, and did assess thereupon and charge to the plaintiff the sum of $482.64, in addition to the $95.60 before assessed, as his income tax, and did further add thereto the sum of $482.84, being one hundred per centum, as and for a penalty for having made the false and fraudulent list, statement, or return as aforesaid; that afterwards to wit, on the 20th day of April, 1870, the said assessor certified and delivered to the defendant, George C. Evans, as collector, a certain list, called the "monthly list," for the month of March, 1870, on which was charged to the plaintiff the sum of $965.68, being the additional amount of his income tax for the year 1868, so reassessed, and the penalty aforesaid; that the said collector duly notified the plaintiff of the said charge, and demanded payment thereof on or before the last day of April, 1870; that the plaintiff did not pay the same; and that the defendant afterwards, on the 9th day of May, 1870, proceeded to collect the same by distraint of the goods and chattels mentioned in the declaration.

The demurrer admits the truth of these facts, and the sufficiency of the plea, therefore, depends upon the legal authority of the assessor to reassess the plaintiff's income tax, and to add one hundred per centum thereto. If the law conferred this power upon the assessor, the list made out, certified, and delivered by him to the collector was a sufficient warrant to the latter to demand and collect the tax charged therein, and constituted a complete justification of the seizure of the plaintiff's goods. The collector is responsible only for the possession of authority by the assessor to make the reassessment, not for his conformity to the directory provisions of the law, as to the mode of its exercise. This question is to be solved by the construction of the internal revenue act of June 30, 1864 [13 Stat. 229]. The 20th section of that act authorizes an additional or reassessment of income tax, within fifteen months after the delivery of the annual list to the collector, in all cases in which it is incomplete, or imperfect, in consequence of any omission, understatement, undervaluation, or false or fraudulent return made by any person liable to said tax. The terms of this section are certainly broad enough to embrace the case stated in the plea, but it is urged that it was not intended to apply to the case of persons who have paid the amount of the original assessment.

The only limitation of the power of the assessor relates to the period within which it is to be exercised, and the cases to which it is to be applied. Within the prescribed period and in the specified cases, it is coextensive with the power vested in him in reference to the original assessment. The object of the law is to confer upon him ample corrective cognisance of all omissions, understatements, undervaluations, falsehood or fraud in income returns, upon which the tax has been assessed and charged in the collector's list, within fifteen months, to the end that every taxpayer may be subjected to his proper proportion of a public burden. To make the payment of less than this effective as a discharge from liability for a further sum, which ought rightfully to have been paid, and which has been avoided by the fraudulent act of the person subject to taxation, would be to circumscribe the scope of the law, against its obvious intent. An express restriction alone could have this effect, and that is not to be found in the act. But it is evident from the tenor of the act, that it contemplates the exercise of the power of reassessment after the payment of the tax first assessed. It is made the duty of the assessor to require a return of income on or before a fixed day in each year, and to make out, certify, and deliver to the collector a list of the taxes charged therein. This is called the "annual list," and after its delivery to the collector, it is in nowise subject to the control of the assessor. It is then the duty of the collector to proceed at once to the collection of the tax charged on this list, and to enforce prompt payment of it. The whole process of assessment and collection is intended to be completed within the year in which the assessment is made. Now, at any time within fifteen months after the annual list is delivered to the collector a reassessment may be made, and only the additional tax thus ascertained is to be charged and put on another list called the "monthly list." By this extension of the period for reassessment beyond the time when the original tax must be paid, and the provisions for the collection of the additional tax only upon the

monthly list, it is apparent that the assessor's power of reassessment is to be exercised independently of the fact of the payment or non-payment of the tax charged in the annual list. It follows, therefore, that the additional tax assessed upon the plaintiff was authorized by the act of congress. And the return made by him having been found to be false, it was the imperative duty of the assessor to add one hundred per centum, as directed by the 14th section of the act.

The remaining cause of demurrer is, that the act of congress, in so far as it imposes a penalty for a false or fraudulent return, is unconstitutional. The act does not invest the assessor with power to "sentence" anybody; it does not even allow him any discretion as to the penal increase of the tax. It authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add one hundred per centum to the tax. This is not conferring judicial power upon him, within the meaning of the constitution. It is simply empowering him to ascertain a fact, according to which he is to adjust the amount of the tax imposed by law. That this function is judicial in its nature there is no doubt, but so are many like functions committed to public officers, as essential to the performance of their official duties. They are within the competency of congress to confer, as necessarily incident to the execution of its expressly granted powers.

The acts of congress furnish many examples of this. They are to be found especially in the laws relating to the collection of customs; and the validity of such legislation has never been denied. A single illustration will show this. By act of congress collectors of customs are authorized to assess an additional duty of twenty per cent. upon goods valued by the appraisers at ten per cent. or more in excess of the value declared by the importer in the invoice and entry. The validity of an appraisement made and an additional duty imposed under this act, was before the supreme court in Bartlett v. Kane, 16 How. [57 U. S.] 269. Judge Campbell, delivering the opinion of the court, said: "The plaintiff contends that the rule of appraisement by which the dutiable value of the goods was raised and the importer was subjected to the additional duty prescribed by the 8th section of the act of 1846 [9 Stat. 43] was illegal and void, and the duties thus claimed and paid under said appraisement were illegally exacted. * * * The appraisers are appointed 'with powers, by all reasonable ways and means, to ascertain, estimate, and appraise the true market value and wholesale price' of the importation. The exercise of these powers involves knowledge, judgment, and discretion." And again: "An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. * * * They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice." And the legality of the appraisement and of the imposition of the penal duty was sustained. That the powers thus exercised by the appraisers are judicial in their nature is beyond question, for so the court distinctly treats them. They decided the fact that the importer's invoice was false, and thereupon the collector imposed upon him a penal duty of twenty per cent. And yet the court upheld the exercise of these powers by the appraisers and collector, without intimating a doubt of the validity of the law conferring them. Their conclusion is a most expressive affirmance of the validity of such legislation. So also, in the present case, the investiture of the assessor with analogous functions must be sustained, as auxiliary to the execution of the same constitutional grant of power to congress.

Judgment upon the demurrer will, therefore, be entered for the defendants.

DOLLAR SAVINGS BANK (UNITED STATES v.). See Case No. 14,979.

Case No. 3,970.

DOLLNER et al. v. GARCIA et al.

[N. Y. Times, Dec. 5, 1859.]

District Court, S. D. New York. Dec. 3, 1859.

COLLISION—LIBEL BY CONSIGNEE — PENDENCY OF ANOTHER ACTION.

[1. Consignees of a cargo may maintain a libel in personam against the owners of a vessel for a loss sustained by collision.]

[2. The pendency of a suit by the consignees in another district against the vessel is no bar to such proceeding.]

This was an action by [Harold Dollner and others] the owners of cargo shipped on board the schooner Julia Frances against [John Garcia and others] the owners of the steamer Cristoval Colon, for the loss of the cargo by a collision between the schooner and the steamer during the night of Dec. 21, 1856, off the capes of Delaware. The respondents denied any negligence in the steamer, which occasioned the collision, and set up moreover that the libelants had no right to sue, being only consignees of the goods, and that a suit was previously commenced against the steamer, in rem, in the district court for the eastern district of Virginia, to recover the same damages claimed in this action.

Beebe, Dean & Donohue, for libelants.

Mr. Cutting, for claimants.

HELD BY THE COURT: That the libelants, as consignees, are competent parties to maintain the action. That the pendency of the action in rem in another district against

the steamer, in the name of the libelants or for their benefit, is no bar in law to this action against the owners in personam. That the collision was occasioned by the misconduct and negligence of those in charge of the steamer, and was not produced or promoted by any culpable conduct on the part of the schooner. Decree for libelants with a reference.

Case No. 3,971.

DOLNER et al. v. The MONTICELLO.

POTTER et al. v. SAME.

[1 Holmes, 7.][1]

Circuit Court, D. Massachusetts. Sept., 1870.[2]

COLLISION BETWEEN STEAM AND SAIL — FOG — "MODERATE SPEED" — FOG-HORN — MUTUAL FAULT.

1. The act of 1864, c. 69, art. 10 (13 Stat. 60), requires a fog-horn to be sounded on a sailing-ship under way, when there is fog enough by day to shut out the view of the sails or hull, or at night the lights, of vessels within the range of the sound of the horn.

2. "Moderate speed," within the meaning of the act of 1864, c. 69, art. 16, requiring steamships to go at moderate speed in a fog, is a speed sufficiently moderate to enable the steamer, under ordinary circumstances, when approaching another ship so as to involve risk of collision, seasonably and effectually to slacken her speed, or, if necessary, stop and reverse.

[Cited in The Cambridge, Case No. 2,334; The City of Panama, Id. 2,764; The Pennsylvania, 12 Fed. 917; The Rhode Island, 17 Fed. 558; The State of Alabama, Id. 853; The Alberta, 23 Fed. 812; The Nacoochee, 28 Fed. 467.]

3. The lookout of a steamer at sea in calm weather, running at night in a fog not less than eight miles an hour, discovered the port light of a schooner having little headway, about two hundred feet distant and about a point on the starboard bow. The steamer's helm was ported, and orders given, before collision, first to slow, and afterwards to stop, the engine. The steamer struck the port side of the schooner, cutting her down below the water-line, and kept on her course for a considerable distance. No fog-horn was sounded on the schooner. *Held*: 1. That the steamer was in fault for porting, instead of starboarding, her helm. 2. That the steamer was also in fault for going at more than the moderate speed directed by the act of 1864, under such circumstances. 3. That the schooner was in fault for not sounding a fog-horn, as required by the act of 1864.

4. Both vessels being in fault, and the faults of both contributing to cause the collision, the damages were divided.

Admiralty appeals from the district court of Massachusetts in cases of collision. The libellants [Harold Dolner and others] in the first case were the owners of the schooner Phebe; in the second [Gilbert Potter and others], the owners of the cargo on board the Phebe; and claimed, respectively, to recover the value of the schooner and cargo, alleging that the Phebe "was run down and sunk by the fault of the steamer Monticello, whereby the schooner and cargo were totally lost." The claimants contended that the collision was caused by the fact that there was a thick fog at the time, which made it impossible to see the schooner's lights, and by the neglect of the persons in charge of the schooner to sound a fog-horn, as required by law. In the district court, the damages were divided, on the ground that both vessels were in fault [Case No. 9,739]; and the parties appealed.

C. T. & T. H. Russell, for libellants.

John C. Dodge, for claimants.

SHEPLEY, Circuit Judge. The schooner Phebe, on the sixth day of March, left the port of Havana, Cuba, laden with a cargo of fruit, bound for the port of New York. Proceeding on her voyage, about ten o'clock on the night of the 11th of March the schooner was from thirty to forty miles south by west from Cape Lookout, with a light wind from the north-east, sailing on her larboard tack, heading east by south, and close-hauled upon the wind. The breeze was so light that the schooner had scarcely any headway, barely enough to give her steerage, and was nearly becalmed. The port watch was upon the deck and on the alert, and the regulation lights were properly displayed. The course of the schooner was not changed until after the collision.

The steamer Monticello being on a voyage from Boston to Savannah, and running not less than eight miles an hour, the man on the lookout on the steamer discovered the red or port light of the Phebe, about one point on the steamer's starboard bow. The wheel of the steamer was thereupon put to port and orders given, first to slow, and afterwards to stop, the engine. The steamer struck the schooner upon the port side, between the fore rigging and the cat-head, cutting her down below the water-line. By the force of the collision the schooner was thrown round so as to head about west-south-west, and the steamer kept on her course for a considerable distance. The schooner immediately filled with water, capsized, and was totally lost, with all her cargo, tackle, apparel, and furniture.

When the steamship struck the schooner, four of the schooner's crew jumped on board of the steamer. The remainder of the crew were taken off by a boat from the steamer, when the schooner, having capsized, was all under water except her starboard rail. The testimony introduced by the libellants and that on the part of the claimants thus far is not in conflict.

The claimants contend that the collision was caused by the facts that there was a thick fog at the time, which made it impossible to see the schooner's light sooner than it was seen; and that the persons on board of, and in charge of, the schooner neglected to sound a fog-horn, as by law they were bound to do, or to give any timely notice, by any other means, of her presence. The an-

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

[2] [Affirming Case No. 9,739.]

swer also alleges that the schooner did not carry lights of the strength and brilliancy required by law. This last point was not much relied upon in the argument, and is not supported by the proofs in the case.

The libellants claim that, at the time the steamship was descried from the schooner, she was about a mile distant and under good headway, and ought to have, and easily could have, changed her course and passed the schooner.

There is much conflict in the testimony as to the density of the fog, and as to the distance at which the lights of either vessel could be seen from the other. Some of the witnesses speak of the night as merely "misty," or "hazy," and "smoky;" while others testify that the fog was so dense that "you couldn't see any thing;" others, according to their respective powers of description or accuracy of recollection or force of imagination, testifying to every intermediate state, from impenetrable fog and murky darkness as stated by one witness, which is "nothing more than dew, and a kind of smoke over the water," as described by others. Taking into consideration the fact that all the witnesses substantially admit the existence of a fog, mist, or haze of some kind, and also those undisputed facts in the case where the unpremeditated acts of parties at the time speak louder than words,—such as the request of the mate of the steamer to the master to keep the whistle blowing, when he was going out a short distance in the boat to rescue the crew of the schooner, the suddenness with which the lights of the respective vessels glanced out of the fog when first visible from the deck of the other vessel, and many other equally convincing facts and corroborating proofs not necessary to recapitulate,—there can be no difficulty in arriving at the conclusion that the fog was sufficiently dense to shut out the view of the lights of the schooner within the range of the limit of the sound of the fog-horn; in other words, that, at the time immediately preceding the collision a fog-horn could have been heard at a greater distance from the schooner than the regulation lights of the schooner could have been seen.

Chapter 69, art. 10, Act 1864 (13 Stat. 60), provides that, "whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes; viz.: Steamships under way shall use a steam-whistle placed before the funnel, not less than eight feet from the deck. Sailing-ships under way shall use a fog-horn. Steamships and sailing-ships, when not under way, shall use a bell."

The Phebe was under way, and no fog-horn was sounded that night. If she had been stationary, she was without any bell; and it is doubtful if she had any fog-horn on board capable of being used when under way.

Although we do not find that this omission to comply with the requirements of the statute was the cause of the collision, we are not prepared to say that it did not contribute in some degree to bring it about. The testimony entirely fails to convince us that the hailing or shouting of the men on the schooner was any substitute for the horn required by law. The schooner's men did not commence to hail the steamer until after the steamer's lights were seen through the fog. The statute contemplates that a horn could be heard at a greater distance than the lights could be seen. To admit this hailing as a valid substitute for the fog-horn, under the circumstances of this case, would be to repeal the plain provisions of the statutes. The true rule in relation to the density of a fog which would require the use of the statute fog-horn, is well stated by the learned district judge in his opinion in this case: "By day, there must be fog enough to shut out the view of the sails or hull; or by night, of the lights within the range of the horn, whistle, or bell."

It would require very clear and positive proof that the omission to comply with the statute did not in any way contribute to the collision to authorize a court to say that the vessel thus neglecting was free from fault, especially in a case like this, where the vessel had made no suitable provision for giving the signal by a horn when under way, or by a bell when stationary, neither horn nor bell being in readiness for use.

The officers and crew of the schooner testify, without an exception, that the steamer's lights were seen at a distance of a mile. The lights of the steamer were very brilliant, and in a night like this, when the fog was more dense near the surface of the water, the mast-head light of the steamer could undoubtedly be seen at a much greater distance than the lights of the schooner. Opinions as to the distance of an object seen through a fog upon the water are always more or less unreliable, and a more satisfactory result as to the intervening space between two vessels approaching each other is attained by ascertaining their rate of progress and the time intervening between the time when first seen and the time of collision. Applying this test to the evidence, while it would show that the steamer's lights were not probably seen at the distance of a mile from the schooner, they were seen at such a distance that if the fog-horn had been then at hand and immediately sounded it would have been heard from the deck of the steamer before the lower and less brilliant lights of the schooner were perceptible from the steamer.

Although a steamer is by law required to keep out of the way of sailing-vessels, this does not authorize a sailing-vessel to needlessly or wantonly put herself in danger, or by her own negligence to deprive the steamer of any reasonable opportunity of

being informed of the position and course of the sailing-vessel, so as to enable those in charge of the steamer to avoid a collision by changing or arresting the steamer's course when necessary.

It is contended on the part of the libellants that the steamer was in fault in not sounding her steam-whistle, and in not having a lookout on each bow. The evidence is very contradictory on these points; and, for the reasons given below, it becomes unnecessary to decide them, especially as it does not appear if there were any omissions of duty in these respects that they contributed in any way to cause the collision. It is also alleged against the steamer that she was running too fast, and that there was fault in porting the helm of the steamer when it should have been put to starboard.

"When two ships, one of which is a sailing-ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship." 13 Stat. 60. "When two sailing-ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other." The rule is the same in the case of two ships under steam meeting; but not so when a ship under steam and a sailing-ship are proceeding in such directions as to involve risk of collision. In such a case, the sailing-ship is required "to keep her course" (Act 1864, c. 64, art. 18); and the ship under steam is "to keep out of the way of the sailing-ship," which she may do by stopping and reversing, or by putting her helm to port or to starboard: the statute, while requiring her under such circumstances "to slacken her speed, or if necessary stop and reverse," not enacting any rule requiring the helm to be put either to port or to starboard, merely requiring the vessel under steam to keep out of the way of the vessel under sail, leaving her free to adopt the most practicable and seaman-like mode of doing it, by stopping and allowing the sailing-vessel to pass, or by passing across her bows or under her stern, or on either hand, so that she keeps out of her way. Some of the experts examined in the case do not appear to understand that the rule of porting the helm, applicable to the case of two vessels both under sail and of two vessels both under steam, meeting each other end on, or nearly so, is not applicable to the case of such a meeting where one is under sail and the other under steam.

But nine witnesses—all of whom have been masters of ocean steamers, and whose opinions are certainly entitled to great consideration—all agree that, supposing a steamer proceeding at the rate of eight or ten knots an hour in a fog, the weather being calm, suddenly makes a red light close to, or about two hundred feet off, and bearing one-half point on her starboard bow, she ought to put her helm to starboard. Some of them adding, very properly, to the answer, "Put my wheel hard to starboard," the words, "and stop the engine."

Their opinion is sustained by the result in this case. The order was to port the helm, and the steamer fell off a point and a half at least, and struck the schooner at or very near the fore rigging. Now, taking the shortest distance, and suppose the vessels only two hundred feet apart at the time the helm was ported, and it is mathematically demonstrable upon the facts in this case, that, if the helm had been put to starboard and the steamer had come up a point and a half, she would have passed in advance of the schooner and cleared her. The schooner was making little headway. Some of the experts think the steamer would have cleared her by keeping her course. All the experts examined in the district court concurred in putting the steamer in fault in porting when she should have starboarded. Although some expert testimony is introduced in this court not heard before the district judge, the great preponderance of proof in this court is to the same effect.

The claimants contend, that if, sitting calmly in judgment on this case, and looking at it in the light of results,—a light which, before the event, the mate could not have,—it should appear that on the whole the chances of avoiding the schooner would have been better if the helm had been starboarded, it does not follow that the mate of the steamer was culpably negligent because he ported the helm. They contend that he had no time for deliberation; and the fact that the steamer was in such dangerous proximity as to compel him to hasty action, was the fault of the schooner. This position was presented in an argument of great clearness and power. It would be tenable, we think, if we were satisfied of one of the premises; that is, that the fact that the steamer was in such dangerous proximity as to compel hasty action, was the fault of the schooner alone. But we do not think the steamer can be considered free from fault in this respect.

A steamship, when approaching another ship so as to involve risk of collision, is bound to slacken her speed, or, if necessary, to stop and reverse. When in a fog, she is required to go at a moderate speed. "A moderate speed" is a term used in the statute not capable of any definition which would apply it to a speed of any given number of miles an hour alike under all circumstances. What would be moderate speed in the open sea would not be allowable in a crowded thoroughfare or a narrow channel. And under the same circumstances, in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog

requires a speed sufficiently moderate to enable the steamer under ordinary circumstances, seasonably, usefully, and effectually to do the other things required of her in the same clause of the statute; viz., to slacken her speed, or, if necessary, to stop and reverse.

In the case of The Batavia, 40 Eng. Law & Eq. 25, Sir John Patterson said, "At whatever rate the steamer was going, if going at such rate as made it dangerous to any craft which she ought to have seen, she had no right to go at such a rate. At all events, she was bound to stop, if it was necessary to do so, in order to prevent damage being done to the craft in the river." Dr. Lushington, in the case of The Juliet Erskine, 6 Notes Cas. 633, says, "If in a dark night the vessel was proceeding at such a rate that those on her deck had not sufficient command over her so as to avoid all reasonable chance of accident, then that was too expeditious a rate, because it was the duty of those who navigate the commercial marine of the country to take care that they do not, for the sake of expedition, injure the property of other people." In the case of The Jane v. The Great Eastern, carried to the judicial committee of the privy council on appeals, reported in 11 Law T. (N. S.) 5, the superior court say, "The witnesses on both sides state that it was a dark night, hazy weather, and that a drizzling rain was falling. Their lordships do not mean to lay down any rule, beyond that expressed in the regulations themselves, as to the occasion where a steam-vessel is bound to moderate her speed, or as to the rate which, in the circumstances described in the evidence, she ought not to exceed; but their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." Holt's Rule of the Road, 167–180.

Considering that the steamer was proceeding at a rate of not less than eight miles an hour, "with the throttle open" and the "cut off" on the engine, and that under such circumstances, according to the testimony of her assistant-engineer, she could not be brought to a full stop under four or five minutes, and at a less distance than half a mile, it can hardly be considered that the dangerous proximity of the steamer to the schooner, which involved the risk of hasty action when the schooner was first seen, was not, at least in part, the fault of the steamer.

Under these circumstances, both vessels being in fault, and the faults of both contributing to cause the collision, the damages must be divided.

Decree of district court affirmed, with costs.

DOLPH (LANNING v.). See Case No. 8,073.

Case No. 3,972.

The DOLPHIN.

[6 Ben. 402.][1]

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

SEAMEN'S WAGES—EVIDENCE—DAMAGES.

1. Sailors were shipped in New York for a voyage to San Domingo, at $25 a month. They went on board the vessel and went to work, and were afterwards told to go home to their boarding house for meals. On their return they were told that other men had been shipped in their place, and they filed a libel to recover damages for the loss of the voyage. On the trial, the three libellants testified that they returned the next day after they had been told to go home. The master testified that they did not return till the second day, and until after he had obtained other men in their places: *Held*, that as the master could have called his mate and the shipping master to sustain him, and had failed to do so, without the suggestion of any difficulty in so doing, the question would be determined according to the statement of the greater number of witnesses.

2. That, on the evidence, therefore, the men were discharged without reason, and were entitled to recover damages for the loss of the voyage.

[Cited in The Acorn, 32 Fed. 638.]

3. That half a month's wages was sufficient compensation.

Henry Morris, for libellants.

Beebe, Donohue & Cooke, for claimants.

BENEDICT, District Judge. This is a cause of subtraction of wages. There is no doubt, upon the evidence, that these libellants were hired for a voyage to St. Domingo, at $25 per month; that they rendered themselves on board the schooner and went to work, and that they were afterwards told to go home to their boarding house for meals, because they could not procure the meals on board. The men left the ship, therefore, by permission, and, as they say, returned the next day ready to continue their labors, when they were informed that other men had been shipped, and their services were not required. The master, however, says, that the men did not return the next day, nor until the day after, and until after he had shipped other men, supposing that the libellants had abandoned the voyage. Upon this question of fact in dispute, there are, on the one side, three witnesses, the libellants, and on the other side the master. It lay in the power of the master to remove any doubt by calling his mate, and also the shipping master, who was his agent, and who not only engaged the libellants for him, but also engaged one of the men taken in place of the libellants; and as he has omitted to produce those witnesses, without the suggestion of any difficulty in obtaining their testimony, he cannot complain if the question at issue between him and the men be determined according to the statement of the greater number of witnesses. It must, therefore, be held, that the weight of

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evidence is, that the men were discharged without reason, and consequently that they are entitled to recover damages sustained by the loss of the voyage. Half a month's wages will compensate them for this loss, and they may therefore take a decree for $12.50 each, with costs to be taxed.

Case No. 3,973.

The DOLPHIN.

[1 Flip. 580; 5 Ins. Law J. 931; 8 Chi. Leg. News, 401; 3 Cent. Law J. 628.][1]

District Court, E. D. Michigan. June 12, 1876.[2]

MARINE INSURANCE—LIEN FOR PREMIUMS—WHAT THE LIBEL SHOULD AVER.

1. There is a lien in favor of an underwriter against a ship for premiums due upon marine policies. He is entitled to have this paid out of proceeds of sale.

[Cited in The Theodore Perry, Case No. 13, 879; The Illinois, Id. 7,005; The Jennie B. Gilkey, 19 Fed. 131; Re Insurance Co., 22 Fed. 115; The Hope, 49 Fed. 279. Disapproved in Insurance Co. v. Proceeds of The Waubaushene, 24 Fed. 559; The Daisy Day, 40 Fed. 541, 604.]

2. The petition or libel should aver the amounts and dates of the policies, the names of the parties insured, and the extent and character of their interests in the vessel. It should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation.

This cause was heard on exceptions to the libel of the Orient Mutual Insurance Company. The libellant stated that this was a New York corporation; that the Dolphin was a vessel used in navigating the Great Lakes and waters connecting the same, and was over twenty tons burthen; that the master and owners, on the 6th day of March, 1875, represented to the libellant that the vessel stood in need of insurance, and that in pursuance of their representations libellant furnished insurance on said vessel in the sum of $4,000; that there was due to libellant on premiums $277.38, and for which libellant claimed a lien against the vessel. Stephen B. Grummond, who had also filed a libel against the vessel for salvage, excepted, insisting that a claim for premiums was not within the jurisdiction of the admiralty court, and that such claim was not a lien upon the vessel such as the court would enforce in rem. The vessel had been sold on account of other claims, and the proceeds were in court awaiting distribution.

W. A. Moore, C. E. Warner and F. H. Canfield, proctors, represented a number of libellants.

J. J. Atkinson, for the insurance company.

BROWN, District Judge. The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the supreme court in the case of Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 1, that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other.

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case, nor in any other, where actions have been sustained in the admiralty upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the supreme court in the opinion above cited (page 30), the lien would follow as a necessary consequence. It is described in the opinion as a "contract or guaranty on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and many casualties to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported, dangers of the sea excepted, from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea; the contract of the other from loss from all other dangers. * * * The object of the two contracts is in the one case maritime service, and in the other maritime casualties." If in the one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight, though for reasons applicable to the character of this property, this lien is dependent upon possession, it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium.

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance. In the case of The Williams [Case No. 17,710], perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 8 Chi. Leg. News, 401, and 3 Cent. Law J. 628, contain only partial reports.]

[2] [Affirmed in The Dolphin, Case No. 3,974.]

law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did per se hypothecate the ship; and that those of affreightment, insurance, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority. General Interest Ins. Co. v. Raggles, 12 Wheat. [25 U. S.] 408; Foster v. United States Ins. Co., 11 Pick. 85. Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance. Bell v. Humphreys, 2 Starkie, 345; Finney v. Warren Ins. Co., 1 Metc. (Mass.) 16.

The case of The Williams was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. Referring to the case of Bearse v. Three Hundred and Forty Pigs of Copper [Case No. 1,193], he observes: "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding in rem; but it quite as fully sustains the broader proposition, soon to be considered, that all authorized maritime contracts pledge the vessel for their performance." Again, he says: "The wider principle that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision." Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime law of this country by the supreme court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority, it is certainly an authority for the lien of the underwriters.

The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the high court of admiralty in England at the time of the adoption of our constitution, is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction in rem of the admiralty over maritime contracts is that of supplies furnished domestic vesels, established in the case of The General Smith [4 Wheat. (17 U. S.) 438], and recently recognized in the case of The Lottawana, 21 Wall. [88 U. S. 654] and that of master's wages, held not to be the subject of a lien in the case of The New Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. Contracts for the construction of vessels which are recognized as maritime by the continental codes, and a lien given thereby, were also held by the supreme court, in the case of Roach v. Chapman, 22 How. [63 U. S.] 129, not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favor of the underwriter, it is well to consider the source of the doctrine, that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of Insurance Co. v. Dunham [11 Wall. (78 U. S.)] 31–38, and the court remark: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. * * * These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically, that its first appearance in any code or system of laws was in the law maritime, as promulgated by the various maritime states and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence, and Antwerp; and the court further observe: "But an additional argument is founded on the fact that in all other countries except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. * * * It is also clear that, originally, the English admiralty had jurisdiction of these as well as of other maritime contracts. * * *" This last remark is corroborated, not so much by positive adjudications to that effect as from the language of the commissions issued to the early vice admiralty courts, which authorize them to take cognizance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the high court of admiralty in England.

Tracing, then, the jurisdiction of the admiralty over contracts of insurance to the continental law, it is pertinent in this connection to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums

Article 16 of the marine ordinance of Louis XIV., tit. "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters; but Va-

lin, in commenting upon this ordinance (book 1, lib. 14, § 16) says: "If this article had not mentioned them (the underwriters), it is probably because the ordinance takes it for granted, in many articles under the title of 'Insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

A privilege is defined by article 2095 of the Civil Code as "a right which the character of a credit gives to a creditor to be preferred to other creditors, even mortgages (hypothecaries)." If not analogous in all respects to our "lien," it authorizes the like preference in payment to claims within its scope from the proceeds in court.

Emerigon treats the contracts of insurance as analogous to that of maritime loan or bottomry, and observes (Emerig. Mar. Loans, c. 1, § 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the 'price of the peril,' and this term corresponds with the premium which is paid in the other. In either case, it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit, it lies upon the lender, in order to render the contract of maritime loan executory, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance, it lies upon the assured to prove the loss, capture, or shipwreck of the vessel. * * * The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts." Again, in his work upon the Contract of Insurance (chapter 3, § 9), Emerigon says: "The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16, 17, tit. 'Seizure of Vessels.' From this silence, it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is stricti juris (droit etroit), it is necessary they be expressly bestowed (deferes) by law, and it is never permitted to extend them from one case to another, because of equal or superior qualities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing insured, which by this means is presumed to have an increased value (valoir davantage). Consequently, the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium."

In support of this doctrine the learned author cites several decrees of the tribunal of commerce. So, also, Alauzet, Des Assurances, pt. 2, § 2, c. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called 'premium notes' (billets de prime), the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (quittance) be not absolute, and the origin of the notes not doubtful." See, also, Cleirac, pp. 237, 318, 323, 363; Pothier, Des Assurances, c. 3, art. 3, § 2; 1 Boulay-Paty, tit. 1, § 2.

If any doubts, however, ever existed in the law of France with regard to this lien they are put to rest by article 191 of the Commercial Code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed: 1st. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price. 2d. The charge for pilotage, tonnage, hold fees, mooring and dockage. 3d. The wages of the keeper, and the expenses of guarding the vessel from the time of her entrance into port to the sale. 4th. The storage of her rigging, tackle, and apparel. 5th. The expenses of repairing the vessel, rigging and apparel since her entrance into port from her last voyage. 6th. Wages and pay of the captain and crew employed in the last voyage. 7th. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage. and the reimbursements of the price of goods sold by him for the same purpose. 8th. The sums due to the vendor, material men and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labor, and for refitting, victualing, outfits and equipments before the departure of the vessel, if she has already made a voyage. 9th. The sums loaned on bottomry, on the rigging and apparel for repairs, victualing, outfit, equipment before the departure of the vessel. 10th. The amounts of the premiums of insurance effected on the hull, rigging, apparel, outfit and equipment of the vessel for her last voyage. 11th. The indemnity due to the freighters for not delivering goods laden on board, or for the losses which the goods may have sustained from the default of the captain or crew. The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and, in case of insufficiency, the price of the vessel shall be divided equally among them (i. e., those

of the same class) in proportion to the amount due each." In a recent work upon the Commercial Code of France, by Edmund Dufour (Paris, 1859), in speaking of this article (section 115), the author observes: "We see that if the Code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked by the material men, who are placed two degrees above them in the scale of liens. They are also distanced by lenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For the truth is, insurance is only a private affair of the insured; it is a very proper act of prudence; it certainly merits and it possesses all the sympathies of the law; but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them by its efforts. It is otherwise with the material men, as well as with lenders upon bottomry. It is the labor of one, and the goods or the money of the other, which permits the vessel to undertake its voyage. There is then in their favor a reason for preference, which is not wholly arbitrary, and the Code has done well in recognizing it." The nature of this lien is discussed at length, and is applied as well to time policies as to policies for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont (Paris, 1867), under the head of "Marine Insurance" (section 141), the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from articles 191 and 192, exists whenever there is a policy executed. The insured, who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed. Any number of voyages made during the time fixed for the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the res. In case where an insurance upon the hull has been made for a limited time, the underwriters hàve a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of article 191, the author cites opinions of the court of cassation, of the imperial courts of Bordeaux, and Rouen, and Aix, and of the tribunal of commerce of Marseilles.

From these authorities I gather the following summary of French law upon the subject: 1st. That the Marine Ordinance of Louis XIV. did not expressly recognize the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt. 2d. That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage is expressly recognized by article 191 of the Code of Commerce, and that such privilege is also extended to time policies. 3d. That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged. Now, if the supreme court have adopted the continental law in respect to jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal? It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of The Williams [supra].

It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs, and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver of lien. There is no doubt of the existence of such lien in favor of seamen, although hired by the owner in person; nor in favor of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made with the owner. In the nature of the contract itself, I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognized as maritime until the opinion was pronounced in Insurance Co. v. Dunham [supra].

Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium; although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens.

I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation.

I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter would be the subject of admiralty jurisdiction. The above quotation from Caumont, citing a judgment of the tribunal of commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable, and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are illy adapted. Upon this ground, the exceptions to the libels must be sustained, with leave to amend.

[NOTE. On the libellant's appeal, this decree was affirmed by the circuit court, held by Swayne, Circuit Justice, who expressly indorsed the foregoing opinion. Case No. 3,974.]

Case No. 3,974.

The DOLPHIN.

[1 Flip. 592; 9 Chi. Leg. News, 337; 6 Ins. Law J. 528; 24 Pittsb. Leg. J. 187.] [1]

Circuit Court, E. D. Michigan. 1876.[2]

MARINE INSURANCE — LIEN IN FAVOR OF UNDERWRITER—WHAT THE LIBEL SHOULD AVER.

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

[For opinion of the district court, see Case No. 3,973.]

W. A. Moore, C. E. Warner, and F. H. Canfield, for a number of libellants.

J. J. Atkinson, for insurance company.

SWAYNE, Circuit Justice. I have listened with great attention to the arguments submitted by counsel upon both sides of this case, and I have since read with care the opinion of my learned brother, the district judge. It is careful, able, learned, and well considered.

The profession and the courts are very much at sea as to many questions touching liens upon admiralty. Different district and circuit judges, and judges of the supreme court on the circuit are constantly deciding the same questions differently, all over the country where such questions arise. It has been expected confidently that congress would interpose, and by a law remedy all such doubts and difficulties. This has not yet been done, but it is hoped that it will be done at an early day. My first impulse was to take this case home with me and prepare an elaborate opinion, but reflection has brought me to a different conclusion. In such an opinion my brethren of the supreme court might not concur, and I have thought it best, therefore, to keep my mind, as far as it might be consistent with the performance of my duties, uninfluenced by the consideration of such cases, except as they may come before the full court. As regards this case, there are two obstacles in the way to a different conclusion than has been reached already. I should have decided the case in the same way, and as at present advised, I am willing to indorse and stand by Judge Brown's opinion. I am not prepared to say that he has committed any error; I think he has not.

The decree of the district court is affirmed.

NOTE. The meaning of this would seem to be that while the impressions of the judge were with the writer of the opinion in The Dolphin [Case No. 3,973], he reserved to himself the right to change, alter, or modify his own after argument of a case in the supreme court and consultation with his brother judges.

No one has a higher respect for the great learning and acute intellect of the district judge for the eastern district of Michigan, than the writer. Whatever has been said or written by this magistrate is justly entitled to the most respectful and thoughtful consideration. But the law is the science of reason and justice, and the humblest member of the profession has, as to any question, the right to enter a plea for the right, if he shall do so in a becoming manner.

The supreme court in Vandewater v. Mills, 19 How. [60 U. S.] 89, set their faces against the oft-recurring attempts to enlarge the limits of admiralty liens. They say, by Grier, J.: "The maritime privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a jus in re without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are undoubtedly not within the category. But this privilege or lien, though adhering to the vessel is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore stricti juris, and cannot be extended by construction, analogy or inference. "Analogy," says Pardassus (3 Droit Civ. 597), "cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of the debtor, and an exception should be declared and described in express

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[2] [Affirming The Dolphin, Case No. 3,973.]

words. We cannot arrive at it by reasoning from one case to another." "These cases will be found stated, and fully vindicated in the case of The Young Mechanic [Case No. 18,180]; The Kearsarge [Id. 7,633]; and Harmer v. Bell, 22 Eng. Law & Eq. 62."

"Now," continues Judge Grier, at another place in the same opinion, "it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, * * * hypothecates the vessel for its performance." Though stated in The Williams [Case No. 17,710] differently, viz., that all contracts including insurance, made by the master, bind the ship (Brown, Adm. 208), the learned district judge admits that this principle is in one particular incorrect. He says that the part referring to insurance is erroneous, because contracting for that is not within the province of the master—it rests with the owners. Here he is undoubtedly correct. And why has the master no such power? For the simple reason that he cannot bind the ship except for such supplies as are absolutely necessary to enable it to properly discharge its functions in commerce and navigation. He may, when he can raise money in no other way, hypothecate the ship on bottomry or borrow money by respondentia. He can charge the ship for all needful supplies and equipment, as seamen, wharfage, provisions, repairs, etc.; but they must all fall within the line of strict necessaries, for which the boat needs credit.

The reader, in the foregoing extract taken from Vandewater v. Mills, will notice how the court speak of deducing principles from analogy. They refer to that case again on page 91 of the opinion, paragraph 3. Now, in The Dolphin decision, an attempt is made to trace an analogy between the contract of affreightment and that of marine insurance. In the former the cargo is bound to the ship and the ship to the cargo. The contract is reciprocal. In the latter case, how are the insurers bound to the ship? The contract is made between the owners and the insurers, and not with the ship at all. In the admiralty it is well understood that the ship is one person and the owner or owners other and distinct persons. Moreover, the lien goes along hand in hand with the service, supply or benefit conferred on the vessel (Vandewater v. Mills, 19 How. [60 U. S. 89], and passim); and if it be admitted for the sake of argument that marine insurance is a supply, (which is not the case,) the benefit derived from supply must be immediate in order to draw along the lien. If any benefit can be derived from this so-called supply by the vessel, it cannot be immediate but is in futuro; for the benefit, if at all, must be in the payment of the premium, the contingency for which may, or may not happen.

If the vessel be a total loss, of what service would the premium, when collected by the owners, be to the wholly lost or ruined ship? The owners might or might not purchase or build another, but if they did there could be no notion of a lien connected therewith, for the additional reason that owners have no liens; only third parties. If the boat were partially injured, the owners might or might not repair, and to that the same argument might be added as in the case of total loss. Nor can it be a benefit or service of any kind to the vessel. There is another feature inseparably connected with liens on ships—that is, credit to the vessel. Here the credit is wholly to the owners, and if there be no credit to the vessel there is no lien. Even supplies furnished in a foreign port where the owner may happen to be at the time, or his agent, or where he has credits, or if the captain be supplied with funds, create no lien. It is for the furnisher to see that the vessel needs the credit, and it is for this reason that in the home port, where supplies are furnished or repairs made, there is no lien on the vessel because it is supposed that the owner has credit. There is an exception where it appears that he is wholly insolvent, or a special contract has been made to charge the vessel. The law does not presume the credit; acts or facts must prove it.

The reasoning of the judge is almost wholly by analogy, and the grounds he bases his decision upon are: 1st—That, as the contract is maritime, therefore a lien follows; and 2d—It is a supply, and therefore is entitled to rank as a lien. As is well known there are contracts that are maritime which do not carry a lien with them. If you go to that question—or the one of supply—where can a better illustration be found than in the master of a ship? His contract with the owner for the sailing of the boat pertains to, and is to be performed upon, or in connection with, the sea or public watercourse, and strictly falls within commerce and navigation; hence it is a maritime contract. Yet he has no lien; no, not even for advances that he may make, or articles he may purchase as necessaries for the ship. This is the well settled law in England, and the weight of authorities is the same way in this country. See 2 Pars. Shipp. & Adm. p. 24. Why? Because he does not contract with the ship, but with the owners, and the articles he furnishes are supposed to be furnished upon the understanding either that he has money or credits of the owners, and that he does not in any case look to the ship, but solely to them; and, perhaps, also, another reason may operate to a certain extent, he is the general agent of the owners, and on board represents them. Go to the question of supply. Let it be answered, where is there a supply or service so necessary to a ship as the master of the vessel? He is as necessary, as much so, as seamen who have liens—as necessary as provisions or repairs. He is the eye, the life, the soul of the ship. It is he who directs her course through the sunshine as well as the storm, and without him the vessel could not fulfill its mission of moving upon the waters and plying in the marts of trade. And yet he has no lien. The judge seems to have overlooked the decision made by Mr. Justice Story—that great master of admiralty law—in De Lovio v. Boit [Case No. 3,776], a case decided in 1815. It was then ruled that the contract of insurance taken on a vessel was a maritime contract. And the other decision made by the same judge, reported in Hale v. Washington Ins. Co. [Id. 5,916], decided in 1842, in which he refers to the previous case and re-affirms the decision, remarking at the same time that he had wished to have the supreme court pass upon the question; that an opportunity was on one occasion about to be offered, and he believed, had not the case been dismissed, that his brother judges, Marshall and Washington, would have expressed themselves in accordance with his views. Here then for sixty years previous to the 11th Wallace case the law was so ruled. Is it not to be supposed that it was well understood by the profession, and for that reason acquiesced in rather than that the question was new and admitted of considerable doubt? Moreover, the proceeding in Insurance Co. v. Dunham [11 Wall. (78 U. S.) 1] was in personam, not in rem. Does any one doubt that the master of a ship may proceed likewise in personam in a court of admiralty for wages and advances? The analogy would seem to hold good between his case and that of a marine policy—both being maritime contracts and neither having liens, and the contract in each case being with the owners. Hammond v. Essex Fire & Marine Ins. Co. [Case No. 6,001]; Willard v. Dorr [Id. 17,679].

Let this be said: The decision in the John T. Moore [Case No. 7,430], decided by one of the present associate justices of the supreme court (then circuit judge), seems to rest alone upon true grounds—the policy is taken out for the benefit and indemnity of the owner, and is of no service or benefit to the vessel. However ingenious the argument, the judge has failed to show that the continental law of Europe sup-

ports his view. The ordinance of Louis XIV. does not recognize a lien in marine insurance, and however fine-spun the reasoning of those great men, Valin and Emerigon, may be, the fact is patent from the opinion that the authority for the principle announced in it is derived from the Code of Commerce of France, a merely local law, which binds no other nation. That law is very different from ours. There marine insurance is ranked as a lien in the scale as No. 10, only one other lien being lower. There the master of a vessel takes No. 6 as his lien-rank, four degrees above the insurer, while (as heretofore shown) in our law he has no lien at all. Moreover, it is not stated in the opinion, as the writer understands the fact to be and as is the law in Louisiana, that the "privilege" in the French law is to be recorded, so that the liens are not as ours, secret, but known to all the world. And if not recorded, it is for the reason that the contract is acknowledged before, and authenticated by, a notary, and there is as much publicity in this as an acknowledgment or other act done in our courts of record; for it is a well known fact that, in all ports in countries where the civil law holds sway, during business hours the offices of the notaries are filled with brokers, ship owners, lawyers, merchants and others. The contract when it leaves the notary's hand in France is termed the acte, and in no sense can be considered secret. These actes are official, and executed in a public manner.

Taking this to be so, the French law is certainly not so objectionable, because no one would be so readily prejudiced thereby. The great objection to liens under our system is—they are secret and prejudice general creditors. How unjust that the insurer, who has rendered the vessel no service, should step in ahead of the master, who has given his time, his money, and exposed his life in behalf of the ship; and of the builder, who has no lien (Roach v. Chapman, 22 How. [63 U. S.] 129), neither one of whom, as general creditors, in all probability will receive a dollar of the proceeds. Secret liens injure commerce, for reasons apparent to every one, and our policy has been to fetter navigation and trade as little as possible. No doubt this is the reason why the greatest commercial nation of ancient or modern times—England—has never accepted or declared the doctrine of lien in such case—that nation which may be almost literally said to have a ship in every port, bay, harbor and navigable river in the world, for wherever men live, whether civilized or savage, off their coasts may be seen the flag of St. George floating in the breeze.

How far, or whether to any extent, her policy has been adopted on the continent of Europe, the writer is not prepared to say. He has a copy of the Italian Codice Civile, with the royal imprint, A Torino (Turin), but finds no such title as "Assicurazione" (insurance) in it. He regrets not being able to lay his hand upon the Codigo de Comercio of Spain, and the works of her writers on this branch of the law. It appears that marine insurance took its origin at Barcelona, and it is possible that this subject has been thoroughly discussed. Nor has he been able to ascertain the law in the Baltic provinces and German empire, or of other portions of Europe. Is it necessary? The supreme court of the United States, in The Lottawana Case, 21 Wall. [88 U. S.] 577, have laid down the following rule for our guidance. They say:

"Perhaps the maritime law is more uniformly followed by the commercial nations than the civil and common laws are by those who use them. But like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them. * * * No one doubts that every nation may adopt its own maritime code. France may adopt one, England another, the United States a third; still the convenience of the commercial world, bound together as it is by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in contact there should be a uniform law founded on natural reason and justice. Hence, the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. * * * Each state adopts the maritime law, not as a code having any independent or inherent force proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be the law. And thus it happens that from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world. * * * The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of congress can make it broader, or, it may be added, narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it. To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed, but we must have regard to our own legal history, constitution, legislations, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed. But we must always remember that the court cannot make the law; it can only declare it. If within its proper scope any change is desired in its rules other than those of procedure, it must be made by the legislative department."

On maritime contracts, see De Lovio v. Boit [Case No. 3,776]; Hale v. Washington Ins. Co. [Id. 5,916]; on analogy in maritime liens, Vandewater v. Mills, 19 How. [60 U. S.] 89, 91; on secret liens, same authority, and Steele v. Franklin Ins. Co., 17 Pa. St. 290; Turner v. Stetts, 28 Ala. 420; Stilwell v. Staples, 19 N. Y. 401; and 2 Cush. 412.

Case No. 3,975.

The DOLPHIN.

[Betts, Pr. Cas.]

District Court, S. D. Florida. 1863.

PRIZE—BLOCKADE—CONTRABAND — ILLEGAL VOYAGE—STOP AT NEUTRAL PORT—EVIDENCE.

[1. The act of knowingly sailing for a blockaded port, with intent to enter therein, is an attempt to break the blockade, rendering the ves-

sel and the cargo liable to capture in any part of the voyage.]

[Cited in The Stephen Hart, Case No. 13,-364.]

[2. The offense of attempting to carry contraband of war to the enemy is complete at the moment when a vessel begins her voyage for that purpose, and she is from that time liable to capture.]

[3. The voyage of a vessel to a blockaded port, although broken by a stop at a neutral port, is one continuous illegal voyage.]

[4. A vessel suited by size and construction for blockade-running was captured on her way from Liverpool to Nassau with arms (described in the freight list as "hardware") and cotton cards, as a part of her cargo. Her master, mate, and cook swore that the voyage was to end at Nassau, and the vessel to be turned over to the consignees, and that the crew were engaged for only three months. Letters from the owner to the consignees, found on board, indicated that she was to be used between Nassau and Mexico, or Nassau and Canada or New York. Another letter was discovered, directing consignees not to discharge any of her cargo at Nassau, but to put on more. The cargo was of a kind not marketable at Nassau. *Held*, that the evidence showed an intent to carry the cargo to a blockade port in the rebellious states, and that vessel and cargo were lawful prize.]

[Prize proceedings by the United States against the steamer Dolphin and her cargo (William J. Grazebrook, claimant). Decree of condemnation.]

MARVIN, District Judge. This steamer, of the net burthen of one hundred and twenty-nine tons, Eustace, master, was captured by the United States vessel Wachusett, near the island of Porto Rico, while ostensibly prosecuting a voyage from Liverpool to Nassau. A claim to the vessel and cargo has been exhibited by the master, on behalf of William J. Grazebrook, a merchant, residing in Liverpool, who, it appears, shipped the whole cargo, and consigned it, by the bills of lading, to his own order, and, by the freight bill accompanying it, to Messrs. Chambers & Raw, of Nassau. Surveyors, appointed by the court to examine the cargo, which consists of a general assortment, report that it corresponds, in the number of packages, their marks and contents, with the freight list found on board, except as to forty-six cases, which contain rifles, and twenty cases, which contain cavalry swords, all of which are classed in the freight list as "hardware." Each case of rifles contains twenty rifles, and each case of swords one hundred and twelve swords. Thirteen small boxes, containing cotton cards, were found on board, which are not on the freight list; also, one box of paint brushes. If we suppose the vessel and cargo to be owned as claimed, and that there was no intention on the part of the owner that the vessel should proceed with the cargo to a port of the enemy, then there would be no ground whatever to justify the capture or condemnation of either of them. Subject to the right of belligerent cruisers to visit and search merchant vessels, to ascertain their neutral or hostile characters, and the characters of their cargoes, and the legality of their voyages, neutrals possess an undisputed right to trade and carry on commerce among themselves in any kinds of merchandise they please, whether of the nature of contraband of war or not. Indeed, there can be no such thing as articles contraband of war in a strictly neutral trade. But if, on the other hand, it was the intention of the owner that the vessel should simply touch at Nassau, and should proceed thence to Charleston, or some other port of the enemy, then the voyage was not a voyage prosecuted by a neutral from one neutral port to another, but was a voyage to a port of the enemy, begun and carried on in violation of the belligerent rights of the United States to blockade the enemy's ports and prevent the introduction of munitions of war. The act of sailing for a blockaded port, with the knowledge of the existence of the blockade, and with an intent to entér, is itself an attempt to break it, which subjects the vessel and cargo to capture in any part of the voyage. The Columbia, 1 C. Rob. Adm. 154; The Neptunus, 2 C. Rob. Adm. 110. So, also, the offence of attempting to carry articles contraband of war to the enemy is complete, and the vessel liable to capture, the moment she enters upon her voyage. The Imina, 3 C. Rob. Adm. 167. The offence consists in the act of sailing, coupled with the illegal intent. The cutting up of a continuous voyage into several parts, by the intervention, or proposed intervention, of several intermediate ports, may render it the more difficult for cruisers and prize courts to determine where the ultimate terminus is intended to be; but it cannot make a voyage which, in its nature, is one, to become two or more voyages, nor make any of the parts of one entire voyage to become legal, which would be illegal if not so divided. When the truth is discovered, it is according to the truth, and not according to the fiction, that the question is to be determined. The Maria, 5 C. Rob. Adm. 365; The William, Id. 385; The Richmond, Id. 325; The Thomyris, Edw. Adm. 17.

It is argued, that it was lawful for the vessel to go to Nassau, notwithstanding the existence of an intention that she should proceed thence to Charleston; for the reason that, until after she had entered on the last stage of her voyage, the whole matter rested in possibility merely,—in intention only, and not in act,— and that the intention to commit an offence in futuro is not tantamount in law to its actual commission in praesenti. But this argument begs the whole question. It was not lawful for the vessel to go to Nassau, with an intention of continuing the voyage thence to Charleston in a direct course, without going to Nassau at all. The fallacy consists in supposing, that there is something in the intention to stop at a neu-

tral port, which, in itself, is innocent enough, that will extinguish the illegality of an additional guilty intention to proceed on, beyond such a port, to a blockaded port, and thus legitimatize the first stage of the voyage. But the voyage is one, from the port of lading to the port of delivery, and, if unlawful in any part, is unlawful throughout.

It is also argued, that a locus penitentione existed until the vessel had departed from Nassau, on her voyage to a blockaded port; and that the voyage might be ended there, or changed to a lawful port. But this argument will apply with equal force to a voyage in which no intermediate port is intended to be interposed. The owner or master may, in any case, in port or in the middle of the ocean, abandon the illegal purpose, and change the voyage. If this be done voluntarily, before capture, the original offence is extinguished, and the vessel will be restored; but, if the illegal purpose exists at the time of capture, the vessel is taken in delicto, whether the voyage is prosecuted in a direct course or circuitously. If the illegal purpose is shown to exist at the inception of the voyage, it will be presumed to exist up to the time of capture, unless it is satisfactorily shown that the purpose had been abandoned and the voyage changed. The Imina, 3 C. Rob. Adm. 167.

Let us see now what the testimony is in relation to the fact of the existence of an intention, at the time of capture, that the vessel should proceed to a blockaded port. The master, in his affidavit made in support of the claim, swears, "that said voyage, of his own positive knowledge, would have terminated at Nassau, N. P., had said voyage not been arrested by the capture aforesaid; that this deponent's instructions were positive and unconditional, requiring him to proceed to Nassau, and deliver said steamer to Chambers & Raw; that, when he had so delivered said steamer, this deponent's connection with said steamer ceased; that he had no further command or control over the same; and he further says, that, of his own knowledge, said voyage was to end at Nassau." Prize courts often have occasion to echo the remark made by Sir William Scott, in delivering his opinion in the case of The Odin, 1 C. Rob. Adm. 252: "It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment." The master does not tell us how he acquired such positive knowledge of the intentions of the owner, nor show us any written instructions to end the voyage at Nassau, or to deliver the vessel to Chambers & Raw, nor tell us what disposition or use was to be made of the vessel or cargo after arriving at that port. Vincent Lazzalo, the mate, swears that the voyage would have ended at Nassau, had the vessel not been captured. Banning, the purser, swears that the vessel would have been subject, at Nassau, to the orders of Chambers & Raw, the consignees. Leefe, the cook, thinks the vessel would have returned from Nassau to Liverpool. The other witnesses generally concur in saying, that they do not know what port the vessel would have gone to, after leaving Nassau. The captain says that "the crew were shipped in Liverpool for a voyage to Nassau, to be thence sent home to England, for a period not exceeding three months." The mate says that the captain hired him at Liverpool, for a voyage from Liverpool to Nassau, for twelve pounds per month and his passage home, the wages to go on until he arrived back in Liverpool. The shipping agreement states that the voyage was to be "from Liverpool to Nassau, calling at any ports and places in the Atlantic ocean and West Indies, and back to a final port of discharge in the United Kingdom, the term not to exceed three months." Now, it is hardly credible that this vessel was to end her voyage at Nassau. For what was she going, and how was she to be employed there? It is not suggested that she was going there for sale. Was she to be employed in making short voyages, suited to her capacity, to and from blockaded ports, which so many or all of the other steamers of about her size, which have lately come out from England to Nassau, have been employed in making, until captured? Except such voyages, it would be difficult to think of any trade she could engage in at Nassau, or at any other port in the West Indies, by which she could defray the expenses of running. What was to be done with the cargo. It was to be delivered to Chambers & Raw. But what were they to do with it? Nassau furnishes no market for any such cargo as this. It is a small town. The adjacent islands possess but a small population, dependent on it for supplies. Probably not three merchant steamers ever arrived at that port from any part of the world until after the present blockade was established, except the regular government mail steamers. Was her cargo to be sold in Nassau, including the 920 rifles and the 2,240 swords? These are questions which it is not unreasonable that a prize court should ask, and expect some reasonable solution of, in a case like this.

But, fortunately, the court is relieved of the labor of considering any further the testimony furnished by the shipping agreement and by the depositions of the master and crew; or of weighing any more accurately the presumptions and probabilities which arise in the case, as to the ulterior destination of the ship and cargo. There is other testimony in the case, furnished by Mr. Grazebrook himself, which seems to the court to be conclusive. Three letters of his were found on board, and are in evidence before the court. One of them is as follows: —"Per Dolphin, Liverpool, Feb. 6, 1863.—Messrs. Chambers & Raw, Nassau: Dear

Sirs,—This will be handed you by Captain Eustace. I hope the cargo will have arrived in good condition. and will be found suitable for the requirements of the place. I have sent more crockery than we intended, and it has filled up the ship. I think they have sent too many chambers for the assortment. However, the goods are very much according to your specifications sent me from time to time. I am a little afraid your market may be overdone from New-York and the states. If the French charter for the army stores, rum, &c., has fallen through, I fancy a fine trade is to be done between Nassau and Boston and New-York, or it may be the Canadas, if this war continues, and coal must be greatly wanted for the blockade runners. You might arrange for a return cargo of coal from Prince Edward's Island. I have no doubt you will find plenty of good employment for my steamer. If the Federals, or any one, will pay a right down handsome sum for her, I might sell her; but I will have none of your Federal or Confederate paper in exchange for my tight little ship. It must be hard cash. Yours truly, W. J. Grazebrook."

One of the letters, bearing the same date as the above, was addressed to the master; and, after instructing him upon the subject of procuring coals at Maderia and St. Thomas, for his voyage out to Nassau, the writer says: "I expect the French army at Vera Cruz will want rum and many articles which you may obtain, after discharging at Nassau. I am sure good trade is to be done in those latitudes, after we have got rid of your present cargo. Coals, also, are sure to be wanted at Nassau, and the coals at Prince Edward's Island are good and cheap—cost fifteen shillings per ton. Messrs. Chambers & Raw will probably have the charter arranged for the French government they wrote about; if not, you must find, in concert with them, some profitable employment. Perhaps trading between Boston or New-York, with goods for the Nassau market, would pay well."

Now, these two letters do not say a word about ending the voyage at Nassau, or paying off the crew, or returning them to England. They were evidently given to the master, not as instructions to him, or to Messrs. Chambers & Raw, but in order to be shown to cruisers, in case the vessel should be visited by any of them. They were a blind, a pretence, intended to deceive, and to convey the idea that the vessel was to be employed in some lawful trade. But the intention of the writer was not cleverly executed. Very few, if any, of our cruisers, would be apt to believe that a steamer no larger than this was to be employed in carrying coals from Prince Edward's Island to Nassau,—a voyage on which she could hardly carry coals enough for her own consumption,—or in carrying rum to the French army, or in trading between Boston or New-York and Nassau.

But there was a third letter, which was not intended to be shown to the cruisers, dated four days later, and addressed to Messrs. Chambers & Raw. Its contents were probably unknown to the master, for, had he known the contents, it is quite likely it would not have fallen into the hands of the captors. It reads as follows: "Per Steamer Dolphin, Liverpool, Feb. 10, 1863. Messrs. Chambers & Raw, Nassau, Dear Sirs: I addressed you the 6th of February, for a certain reason. I now beg to cancel those instructions entirely, and, of course, my vessel is not to be sold to any one. I shall be sending you a power of attorney, for certain purposes, by next mail this week. I hope you will be able to get some more goods on, instead of taking any off, and at good rates. I am, dear sirs, yours truly, W. J. Grazebrook. P. S.—I send various letters to forward." So, it appears, that Mr. Grazebrook did not intend that his vessel should be sold at Nassau. nor that she should end her voyage there. She was to go from Nassau somewhere. More goods were to be put on, instead of taking any off. The studied effort to conceal the ulterior destination; the swords and rifles found on board, and denominated. in the freight list, "hardware;" the almost certain impossibility of employing a steamer of this class and size in any trade in this part of the world, by which she could earn even her expenses, other than in the trade and business of violating the blockade; all point, with unerring certainty, to Charleston or Wilmington, as the ulterior destination of the vessel and cargo. Condemnation of ship and cargo follows, of course.

The view that I have taken of the case renders it quite unnecessary to call for further proof of neutral ownership, or to inquire whether this cargo, or a large part of it, may not be owned by enemies. The fact that there are twenty-three different sets of bills of lading among the papers of the vessel, and as many different shipping marks upon the packages and in the freight list, raises a supicion, to say the least, that Mr. Grazebrook is not the sole owner. No invoices of the cargo were found on board, nor the various letters referred to in the postscript to Mr. Grazebrook's letter. The claimant may be allowed any reasonable length of time to consult counsel, and determine whether he will appeal or not.

DOLPHIN, The (CROSS v.). See Case No. 3,-432.

Case No. 3,976.

DOLTON v. NELSON et al.

[3 Dill. 469.][1]

Circuit Court, D. Iowa. 1873.

ADMINISTRATOR'S SALE—NOTICE—JURISDICTION—ORIGINAL AND AUXILIARY ADMINISTRATION.

1. The provision in the statutes of Iowa that "administration shall not be originally granted after the lapse of five years from the death of the decedent," etc., does not apply to an administration which is merely auxiliary to one originally granted in another state, and hence such administration may legally be granted and an administrator appointed after the lapse of five years.

[Cited in Miller v. Sullivan, Case No. 9,592.]

2. Under the circumstances, a sale of real property by an administrator was *held* valid upon notice of the petition to sell, served upon the widow and heir of the intestate, although they had before that time, but after the appointment of the administrator for the purpose of having the land subjected to the payment of debts, conveyed the lands to a third person, who was not notified of the petition of the administrator to sell.

3. Whether notice to the heir or his grantee of an administrator's petition to sell real estate of the intestate is in any case jurisdictional and essential to the validity of an administrator's sale in Iowa, quaere. See Good v. Norley, 28 Iowa, 188, and cases cited.

[This is a bill in equity by Samuel Dolton against L. B. Nelson and Thomas A. Graham.] On final hearing on bill, answer, cross-bill, and proofs. The bill was brought to quiet title. No question arose concerning the frame of the bill or the equity jurisdiction.

Brown & Campbell, for plaintiff.
James T. Lane, for defendant.

MILLER, Circuit Justice. Two questions are presented by this record, neither of which is free from difficulty, and both dependent upon the construction of Iowa statutes on points which have not been decided by the supreme court of the state.

I. Both the parties claim under Pendergrast, who died the owner of the land, and intestate, domiciled at the time in the state of New York. Plaintiff claims by conveyances from his heirs, and defendant, Nelson, by purchase at an administrator's sale. If this latter was valid, then defendant must succeed, but it is charged that the grant of administration was void under section 2357 of the Iowa Revision of 1860, and that if this point be not sound the sale was void for want of notice of the application to sell. That section, which was also a part of the Code of 1851, enacts that "administration shall not be originally granted after the lapse of five years from the death of decedent, or from the time his death was known, in case he died out of the state." Pendergrast, the intestate, died in the state of New York, on the 9th day of March, 1863. Administration was duly taken out in that state shortly after and on the 18th day of May, 1868, a petition was filed in Tama county, Iowa, for the appointment of an administrator here, and Graham was appointed on the 28th of that month. It will thus be seen that more than five years had elapsed from the death of decedent in New York before any movement was made to appoint an administrator in Iowa. But it is claimed that the administration in the state of New York was the original one and that the Iowa administration was auxiliary to it and is not original within the meaning of the statute. This view receives support from other parts of the same chapter, on the estate of decedents, in which it is provided that where an administrator has been appointed in another state, where the decedent resided, such administrator may be appointed on his own application in Iowa, but in order that this may be done section 2342 requires that "the original letters testamentary or of administration, or an attested copy thereof," must be filed in the office of the probate court here. We have here in the same statute, only a few sections apart, the only other use of the word "original," as applied to letters of administration.

The case before us comes very nearly within the precise terms of the section last cited, for though Graham, the administrator in Iowa, was not the person who was administrator in New York, he was appointed at the request and on the petition, in writing, of the New York administrator, setting out that there were assets in Iowa, necessary to pay the debts of the decedent, those in New York being exhausted. I am therefore of opinion that the appointment of Graham was not an original administration, and that it was a valid appointment.

II. The question of notice raised by plaintiff is based upon the fact that on the 5th day of March, 1869, the heirs of Pendergrast sold and conveyed the land to Maunsell F. Miller, who afterwards sold and conveyed to plaintiff, and that the petition to the county court for the sale of the land was filed on the 12th of March, some days after that sale. And the only notice of the application to sell was served on the widow and daughter, the heirs aforesaid of the said Pendergrast, a few weeks later; the said Miller, who then had the legal title, not being served at any time.

A question somewhat similar to this came before the supreme court of Iowa, in Good v. Norley, 28 Iowa, 188, in which the judges of that court were equally divided. The question there was, whether a sale was void where no notice had been served on the infant heir, but for whom a guardian ad litem had been appointed and appeared, and the question arose between the purchaser, at the administrator's sale, and this minor heir. I think that whatever may be the rule in such cases, that when a party in good faith and for value without notice of any debt or proceeding to subject the land to its payment, buys of the heirs, an administrator's sale

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

without any notice of the proceedings to such a party, presents a stronger case for denying its validity than in case of the heir. The latter takes ex gratia, pays nothing, parts with nothing and by the law of the land inherits subject to the payment of debts. The other parts with his money for a title which is certainly in the heir, and which seems to be clear and valid if he has no notice, actual or constructive. I should feel strongly inclined in such a case to protect the purchaser, as the holder of the better title. But that is not this case. Mrs. Pendergrast was one of the administrators in New York, and joined in the application to have Graham appointed auxiliary administrator in Iowa. In the petition for his appointment, filed on the 18th day of March, 1868, it is alleged that all the assets in New York had been exhausted, that the decedent died owning lands in Tama and other counties in Iowa and prayed for the appointment of an administrator, and that those lands might be subjected to the payment of debts yet unsatisfied. This was a public record, part of the proceeding, by which the land was finally subjected to sale, and I think Miller was bound to take notice of it when he took his deed, knowing as he did that his vendors held as heirs to Pendergrast and that the law made the title in their hands liable by a proper proceeding to the debts of the decedent. It was not requiring too much of him to ascertain if there was any administration in the county where the lands lay, and if so, were there any debts unpaid, or any steps taken to subject the lands to such debts. If he had made this inquiry at the proper place he would have seen that there were debts unpaid and that for the very purpose of subjecting these lands to their payment an administrator had been appointed nine months before. When we reflect that the deed to Miller was dated on the 8th of March, 1869, that the petition for the sale of the lands was filed four days thereafter, that Mrs. Pendergrast must have known of the intended application to sell, we must believe that the purpose was to defeat the sale or render it invalid, and this, coupled with Miller's carelessness about the record in Iowa, goes far to prove that he knew of this purpose and was willing to aid in it. Under these circumstances I do not think he was entitled to be served with notice of the petition to sell, and that the notice having been served on the party who might well be presumed to have the title, the sale is valid against Miller, who was not a purchaser without notice in the proper sense of that term.

The plaintiff's bill must be dismissed with costs, and defendant's title quieted and confirmed on his cross-bill. Decree accordingly.

NOTE. An appeal was prayed and allowed. [There appears to be no report on appeal.] As to validity of administrator's sales: Cornett v. Williams (Sup. Ct. U. S. Oct. term, 1873) 20 Wall. [87 U. S.] 226.

DOMAN (UNITED STATES v.). See Case No. 14,980.

DOMESTIC SEWING-MACH. CO. (SPRING v.). See Case No. 13,258.

DOMINGO, The (GOODRICH v.). See Case No. 5,543.

DOMINGUEZ (GRAHAM v.). See Case No. 5,664.

Case No. 3,977.

DOMINY et al. v. ANCHORS, SAILS, ETC., OF THE D'ALBERTI.

[1 Ben. 77.][1]

District Court, E. D. New York. Oct., 1866.

SALVAGE AGREEMENT—TENDER—WEIGHT OF EVIDENCE—COSTS.

1. Where several wreckers were engaged by parties who had bought a wreck, to assist in saving the materials, and libelled the property saved to recover salvage compensation, the claimants insisting that the work was done under an agreement for a stipulated price, made with Dominy, one of the libellants, whose special authorization to make the agreement was disputed, *held*, that in a conflict of positive statements, the surrounding circumstances become of great importance, and that under the circumstances the agreement for a stipulated price must be held to have been made.

2. Even if there was no formal authorization of Dominy to make such an agreement for all the libellants, the evidence showed that he was the head and spokesman of the libellants, and they must have been cognizant that some agreement had been made by him, and must be deemed to have acquiesced in it.

3. No tender of the amount remaining due of the stipulated price, nor any payment into court with a plea of tender having been made, the libellants are entitled to a decree for that amount with their costs.

The libellants [Nathaniel Dominy and others] in this case were wreckers near Sag Harbor. The brig D'Alberti, having been driven ashore, was bought as a wreck by the claimants in this case, and the libellants did work in saving the rigging and other material of the wreck. They thereupon filed this libel against the articles saved, claiming to recover salvage. The claimants, on the other hand, insisted that the work was to be done for $75, under an agreement made by the libellants, through the libellant Dominy.

Mr. Gardiner and Mr. Scudder, for libellants.

Mr. Gleason and Mr. Benedict, for claimants.

BENEDICT, District Judge. This action is brought by several wreckers to recover salvage compensation for services performed by them at Montauk, in stripping and landing from the brig D'Alberti, certain anchors, chains, spars, sails and rigging, of the value of some fourteen hundred dollars. Upon the hearing, it was conceded on both sides, that no question as to the saving of the anchors and chains arises in this cause, the libel-

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

lants claiming them as owners by purchase, and that title being in process of adjudication before a court of this state.

The only question before me, then, is as to the compensation for labor performed in saving the residue of the property. For this labor the libellants claim to be paid as salvors acting without any agreement as to price, while the claimants insist that the price was fixed by agreement before the work was undertaken.

I have examined with care, the very contradictory evidence introduced by the respective parties, and while endeavoring to give due weight to the arguments advanced on the part of the libellants, am constrained to hold that the weight of the testimony is in favor of the claimants. In such a conflict of positive statements in regard to matters of fact where there should be no dispute, the surrounding circumstances become of great importance. The circumstances attending this transaction, about which there is little or no dispute, seem to me to go far to sustain the theory of the defence. It can hardly be deemed probable that the claimants, having just bought this wreck in the manner described in the testimony, for the sole purpose of realizing a profit from the sale of the articles which could be saved from it, would, at the same time, request or allow a company of wreckers to perform the labor without some agreement as to the expense. Such an agreement is testified to by several witnesses, who swear with great distinctness to the details of the occurrence, and although positively denied by Dominy, must, upon the evidence, be held to have been made.

But it is insisted that if an agreement was made by Dominy, it cannot be binding upon the other libellants, in view of the positive evidence of Dominy and others of the libellants, that no authority to make such an agreement was ever conferred upon Dominy. Now, while it may well be that no formal or definite authorization of Dominy to make this contract in behalf of himself and his associates was ever given, still it is quite manifest that the actual relation of the libellants, as understood and acted on by them throughout the whole transaction, was that of a company of persons associated together for a common temporary purpose, with Dominy as their head and spokesman. Thus Dominy, acting for all, received money earned by the company in labor performed about the brig for the insurance company. He also received the money earned by the company in labor performed for Rockwell about the cargo. He not only received for all the money paid for labor performed by them on the brig, on the day of and before the sale to the claimants, but, acting for all, arranged to take the credit of these very claimants for it, and subsequently received it from them instead of from the master. When, during the performance of the work in question, money was needed to pay a man taken in to help them, Dominy was requested to apply, and did apply, to the claimants for $20, and received it on account of the work. Moreover, the job was undertaken by the libellants without any communication between the claimants and any of them, except Dominy, either as to rate of wages, number of men, or extent of the labor to be required, while at the same time it is not pretended that it was to be performed at day's wages. These and other circumstances in the case have convinced me, that the members of the company must have been cognizant of some agreement having been made by Dominy, which they are to be deemed to have acquiesced in, and under which they performed the services in question. Without, therefore, considering the evidence offered to show that $75 would be full compensation for the labor performed, I must hold that the compensation was fixed at that sum by agreement.

It does not appear that all of this price has been paid; the evidence shows payments amounting to $53.80, but fails to show more.

The libellants are therefore entitled to a decree for the balance, $21.20, against the property, excluding the anchor, and as there was no legal tender or payment into court with plea of tender, the libellants are entitled to their costs.

Case No. 3,978.

DONAHAY v. HOWLAND et al.

[44 Hunt, Mer. Mag. 623.]

District Court, D. Massachusetts. Jan. 31, 1861.

SEAMEN—WHALING VOYAGE—COOPER'S LAY—DISRATING—EVIDENCE.

[Libel in admiralty by John Donahay against Weston Howland and others.]

F. M. Stetson, for libellant.

R. C. Pitman, for respondents.

SPRAGUE, District Judge. This was a libel by the cooper of the whale ship Manuel Ortis, of New Bedford, for his lay, which, by the shipping articles, was fixed at 1-55. The defence alleged incompetency in the libellant and disrating after a trial and examination by the master. It appeared that after about three months of her voyage the vessel arrived at New-Zealand, where the master disrated the libellant, and shipped one —— Fox, a cooper, at a 1-40 lay. Fox remained on board about a year.

Held, this is an issue of fact upon evidence very conflicting. My result may surprise both parties. I am not satisfied that the master gave Donahay a fair trial, within the meaning of the articles, but this is not very important, as the articles provide that in case of a disrating the man shall receive the lay his services merit, so that I must inquire as to the actual competency of the libellant.

I think the conflicting evidence may be reconciled by supposing the respondents' witnesses to refer to the cooper's acts during the early part of the voyage, and the libellant's to the latter part. In the latter part came the coopering of the oil more particularly, while at the beginning of the voyage the cooper occupies himself more with the line-tugs, boat-buckets, and what is called "small work." He made some defective small work certainly, but it is not so clear that he could not attend to the substantial and heavy work of the ship. At the shipment he told frankly the ship agent that he did not know how to do "small work." It favors also the position of the libellant, that he was a New-Bedford man, and his qualifications were entirely open to inquiry and information before the contract of shipment was made. I am satisfied that the libellant acted honestly and with no intent to mislead. On the other hand, I think the master acted honestly, though not on sufficient inquiry and trial, for the evidence indicates no inducement or provocation to disrate Donahay, and employ a more expensive cooper. I consider the evidence afforded by the act of the master as weighty, though not conclusive. While Fox was on board it appears that Donahay worked with him, and after he left there was, until the return voyage, no one rated in the ship as cooper, but Donahay. During this time the casks were well made and tight—though there is some doubt as to who made particular casks. Without re-stating the evidence, I am, upon the whole, of opinion that the libellant, after the practice and training of the first year, was a competent cooper, and that he was not before. I therefore allow him a 1-50 lay as cooper's assistant, up to the end of the fourteen months when Fox left, and for the residue of the voyage (eighteen months) I allow the lay fixed by the articles, (1-55,) with costs to the libellant.

Unless the counsel, upon taking time, can agree as to the amount to be decreed upon the above principles, the case will go to an assessor to report the particulars of the proceeds of the voyage, etc.

Case No. 3,979.

In re DONAHOE et al.

[8 N. B. R. 453.][1]

District Court, E. D. Michigan. Sept. 20, 1873.

MILEAGE AND FEES OF UNITED STATES MARSHALS —INTEREST.

1. A United States marshal is authorized to charge for all necessary travel in serving papers, but the language of section 47 of the bankrupt act [of 1867 (14 Stat. 540)] precludes all constructive mileage; therefore, it is essential that he should name the place of service in his return, in order that the correctness of the mileage charged may appear upon its face.

2. If he has two or more processes in his hands at the same time, and in the same matter or proceeding, he can charge mileage but once.

3. Should the service of any one of such processes make additional travel necessary, such additional travel may be charged for in the return.

4. A marshal is not entitled to charge interest upon fees earned, but when his expenditures exceed the amount of money paid to him in advance on account of costs, justice requires that he should be compensated by allowing the usual rate of interest on the excess.

[In bankruptcy. In the matter of Patrick Donahoe and John Page.]

LONGYEAR, District Judge. By section 47 of the act the marshal as messenger is expressly allowed fees "for all necessary travel, at the rate of five cents a mile, each way." The last clause of that section provides, it is true, that the judges, in framing general rules and orders under section 10, may prescribe a tariff of fees for "all other services" of the officers of the courts of bankruptcy, and also that they may reduce "the fees prescribed in this section in classes of cases to be named in their rules and orders." It will be observed that the authority conferred upon the judges is to prescribe a tariff of fees for all "other services," that is, for services other than those for which provision is made in that section; and also, that it is limited to the reduction only, and does not extend to the entire abolition of the fees for which provision is so made. It was held, in Re Talbot [Case No. 13,727], that general order 12 had the effect to do away with fees for travel under section 47. I disagree entirely with that construction of the order. The only requirement of general order 12 not fully comprehended under and contemplated by section 47 (see the fourth clause as to marshal's fees) is, that the marshal shall accompany his return as to his actual and necessary expenses, "with vouchers therefor whenever practicable." The marshal must fully comply with the requirements of section 47 in making his return, and in addition thereto he must accompany the same with vouchers whenever practicable, as required by general order 12; and this, in my opinion, is all the effect that can be given to the order, so far as it relates to marshal's fees. It may be asked, why then did the judges, by order 12, require the marshal to make return of his expenses in serving every warrant? Is it contemplated that the marshal is to have his expenses paid in addition to his traveling fee of five cents a mile each way? The "warrant" mentioned in the first clause of section 47, relating to marshal's fees, and for the service of which a fee of two dollars is prescribed, and the "warrant" mentioned in general order 12, and the expenses in the service of which are required to be returned, is undoubtedly the warrant provided for by sections 10 and 42, to be issued after adjudication, and perhaps it may include the provi-

[1] [Reprinted by permission.]

sional warrant provided for by section 40. It therefore becomes entirely unnecessary to answer the above queries in this connection, because I do not find that the marshal's fees for travel, charged in his bill, necessarily relate in any manner to the service of the warrant in this case. It may not be improper, however, to suggest the probability that in framing general order 12 the judges understood that clause 1 of section 47, providing a fee of two dollars for service of warrant, without adding "and travel," would preclude any charge for travel in serving that particular process, but that the payment of the marshal's actual and necessary expenses in making such service was intended to be provided for by the fourth clause under the phrase "and other services." I can at present conceive of no other construction of the clause of general order 12 requiring the marshal to make return "of his actual and necessary expenses in the service of every warrant addressed to him," that will make it consistent with the purpose of its enactment, and bring it within the authority of the judges in the premises.

The items charged in the marshal's bill for travel are, first, in serving order to show cause; second, injunction, and third, the adjudication. As to each of these the marshal has the undoubted right to charge, in the language of section 47, "for all necessary travel at the rate of five cents a mile each way." The travel so charged for, however, must be necessary travel. The language of the act precludes all constructive mileage whatsoever. Hence it is essential that the marshal should state the place of service in his return, in order that the correctness of the mileage charged may appear upon its face. If he has two or more processes in his hands at the same time and in the same matter, or proceeding, which may be served at the same time and place, he can charge mileage but once. If the service of any one of such processes, however, makes additional travel necessary, he may charge for such additional travel, but no more. In this respect the provision of section 47 of the bankrupt act controls, and the general act of congress of February 26, 1853 (10 Stat. 164), allowing the marshal to charge mileage on two such processes, has no application to proceedings in bankruptcy. In this matter it appears that the order to show cause and injunction were in the marshal's hands and were served by him at the same time, and, for aught that appears, at the same place, and he has charged mileage on both, relying, no doubt, upon the act of 1853. This, as we have seen, is wrong, and one of these items, amounting to fifty-one dollars and fifty cents, must be rejected.

It was conceded in the argument that the services of the different processes for which mileage is charged was made in each case at Marquette, in the upper peninsula, and that the distance is correctly stated. It was also conceded that the service in each instance was made by a deputy marshal residing at Marquette, the processes having been sent to him from the marshal's office at Detroit by mail, and returned by him to the office in the same manner, and it was contended that no mileage can be allowed for a service so made. To this I do not agree. I think that the distance by the nearest traveled route, from the place of service to the place of return, is the "necessary travel" meant by the act. The manner of getting the process there and back is a matter purely of the marshal's own concern, and something with which the court has nothing to do in this connection or any other, so long as there is no complaint of any consequent failure of official duty.

The question is submitted by the register whether such travel can be allowed without an affidavit that the same was necessary and actually performed. To this I answer in the affirmative. All that is necessary is that the place of service be stated in the return, so that the correctness of the distance charged for may be ascertained, if disputed. The marshal's travel fees are not included among the items as to which he is required to make oath by the fourth clause of section 47, relating to marshal's fees, or the last clause of general order 12. Those requirements relate exclusively to disbursements of money by the marshal in the manner and for the purposes named. In all other respects his official return is prima facie sufficient.

Second. The remaining question submitted is: "Is the marshal entitled to charge interest upon fees earned or expenditures made from the time that the charge was incurred to the time of payment?" I know no law or custom allowing interest on marshal's fees for services, before the same have been duly taxed and allowed, in this or any other court. His expenditures, however, stand upon a different footing. They are often necessarily large, and far beyond the amount required to be deposited, and it is a matter of but simple justice that he should be compensated, by way of an allowance, at the usual rate of interest or otherwise, for such advances. In this instance it appears that the marshal's expenditures did not exceed the amount of money paid to him in advance on account of his costs, wherefore there is no occasion for any allowance to him in this case beyond the sums actually paid out. All the items charged in the bill for interest must therefore be disallowed. The items credited by the marshal for interest on the money advanced to him on account of his costs must also be stricken out.

I should have referred this matter back to the register for correction of the marshal's return so as to show the place of service in each instance, and to have the marshal's oath added as to expenditures as required by section 47, and vouchers for the same produced or their absence explained as required by general order 12, but for concessions made before me avoiding that necessity.

It results that the marshal's bill as presented assumes the following aspects:

	Disallowed.	Allowed.
Oct. 31st, 1870, serving order to show cause	$	$ 4 00
Serving petition		4 00
Travel to serve, 515 miles, at 5c. per mile each way		51 50
Interest on $59 50, 2 years and 7 months, at 7 per cent	10 72	
Nov. 1, 1870, serving injunction. "three services"		6 00
Travel to serve, 515 miles at 5c. per mile each way	51 50	
Interest on $57 50, 2 years and 7 months, at 7 per cent	10 31	
June 8, 1871, serving warrant		4 00
Serving adjudication		4 00
Travel to serve, 515 miles at 5c. per mile each way		51 50
Advertising first meeting of creditors in the "Detroit Post"		8 40
Advertising first meeting of creditors in the "Advertiser and Tribune"		8 40
Interest on $66 30, 1 year 8 months and 24 days	10 01	
Total amount allowed		$131 80
Cr.		
Oct. 31, 1870, by cash		25 00
Balance due		$106 80

The clerk will certify the foregoing decision to the register, Hovey K. Clarke, Esq.

Case No. 3,980.

DONAHOE et al. v. KETTELL et al.

[1 Cliff. 135.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1858.[2]

SHIPPING—CHARTER-PARTY—WHEN A DEMISE OF THE VESSEL AND WHEN A CONTRACT OF AFFREIGHTMENT—WHO ARE CARRIERS—RIGHT TO CHARTER MONEY—CONSTRUCTION OF CONTRACTS.

1. By the terms of a charter-party, the owners engaged that the vessel during the voyage should be kept sea-worthy, and should be furnished with necessary men and provisions, and that the whole of the vessel under the deck, with the exception of the cabin, accommodations for the men, and storage of sails and provisions, should be at the sole use and disposal of the charterers during the voyage. *Held*, that the instrument was a contract of affreightment, and not a demise of the vessel.

[Cited in Shaw v. U. S., 93 U. S. 241; The T. A. Goddard, 12 Fed. 178.]

2. When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board; and in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the owners of the vessel; and the latter, consequently, cannot be made responsible for the loss of the goods shipped on board, or for injury to the same under such contracts. But when the charter-party operates merely as a contract between the charterer and the ship-owner for the conveyance, by the latter, of goods and merchandise to be shipped on board by the charterer, the owners of the vessel are the carriers of the goods, and will in general be responsible to the charterer for the non-conveyance of them, according to their contract.

[Cited in Reed v. U. S., 11 Wall. (78 U. S.) 601; Richardson v. Winsor, Case No. 11,795; Leary v. U. S., 14 Wall. (81 U. S.) 611; Hagar v. Clark, 78 N. Y. 50.]

3. Where the language of a contract is plain and clear, it must be understood that the parties mean what they have plainly expressed; but if, from a view of the whole instrument, the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it should appear to be inconsistent with such particular part, because the construction of the contract ought not to depend upon any formal arrangement of words, but should be collected from every part of the same as applied to the subject-matter to which it relates.

4. In this case the vessel was chartered for a voyage from Boston to Port au Prince, and back to Boston,—the charterer agreeing to pay a round sum for the voyage, all foreign port charges, pilotage, and lighterage, and to advance at the outward port only what the master might require for the disbursements of the vessel, not to exceed one half the charter. These advances having been made, and the voyage not completed, no proportionate part of the charter money was due the owners, or could be received by them from the charterers.

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

The respondents [John B. Kettell and others] chartered the brig Erie, at Boston, for a voyage to Port au Prince and back to Boston. By the terms of the charter-party, the whole of the vessel under the deck, with exception of the cabin, and necessary room for the crew, and storage of the sails, cables, and provisions, was to be at the disposal of the respondents, and no merchandise was to be laden on board except for them; they were to pay eighteen hundred dollars for the charter, as well as all foreign port charges, pilotage, and lighterage, and agreed to advance the master what money he might require to disburse his vessel at Port au Prince, not to exceed half the charter.

The owners [Cornelius Donahoe and others] covenanted to keep the vessel stanch, well fitted, tackled, manned, and provisioned for the voyage. Stipulations were also inserted in the charter-party, allowing a certain number of running lay-days, for discharging and loading the vessel at the outward port, and reasonable time for the same purpose at Boston, and also providing that the respondents should pay a specified demurrage in case the detention of the vessel should happen through their default or that of their agent.

The brig sailed from Boston on the 25th of October, 1856, arrived at Port au Prince, safely delivered her outward cargo, and took in full cargo for return, but on the homeward voyage was totally lost by a peril of the sea. A libel in personam was filed by the owners in the district court to recover the stipulated sum for the hire of the vessel. A decree was entered in favor of the libellants for the sum of nine hundred and eight

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

[2] [Reversing The Erie, Case No. 4,512.]

dollars and eighty-four cents damages, with costs of suit. [Case No. 4,512.]

William Brigham, for appellants.

The contract is not a letting of the ship, but a contract of affreightment. This is evident from the whole contract. The vessel was under the control of the owners, who appointed the master and crew, and only the parts of the vessel destined for the taking of freight were under the control of respondents. They were required to load within a limited time. The contract provides for a round sum for freight; the only question, therefore, is, whether the contract was entire or divisible.

The language of the charter-party indicates but one voyage, viz. "from Boston to Port au Prince and back to Boston." The respondents agree to pay for the voyage $1,800, when completed, unless required to make advances to disburse the vessel at Port au Prince.

There is no case in law or admiralty which has held that a contract of this kind can be divided. Barker v. Cheviot, 2 Johns. 352; Penoyer v. Hallett, 15 Johns. 332; Blanchard v. Bucknam, 3 Greenl. 1; Hamilton v. Warfield, 2 Gill & J. 486; Towle v. Kettell, 5 Cush. 18.

There is good reason for the rule. Libellants could have insured their freight, but respondents could not thus have protected themselves.

F. E. Parker, for libellants.

CLIFFORD, Circuit Justice. Three grounds are assumed by the counsel of the libellants in support of the claim set up in the libel. In the first place, he insists that the charter-party in this case is a letting of the vessel, and not a contract of affreightment. He contends, in the second place, that if the contract is a letting of the vessel, her loss only exempts the charterers from their obligation to return her, but not from the payment of the freight. Thirdly, it is insisted that, if the contract is one of affreightment, still the libellants can recover a proportion of the charter money for the outward voyage, on the ground that the contract is divisible both at common law and in the admiralty. All of these propositions, or certainly the first and third, are denied by the counsel of the respondents, and they present the principal matters to be determined at the present time.

Whether the charter-party in this case is a letting of the ship or a contract of affreightment must depend upon its terms and conditions. Upon that subject the rule is, as established by the supreme court, that a person may be the owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In the first case the general freighter is responsible for the conduct of the master and mariners during the voyage, while in the latter case that responsibility rests on the general owner. Marcardier v. The Chespeake Ins. Co., 8 Cranch [12 U. S.] 39; Hooe v. Groverman, 1 Cranch [5 U. S.] 214. There are two kinds of contracts, says Judge Ware, passing under the general name of "charter-party," differing from each other very widely in their natures, their provisions, and in their legal effect. In one the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. Under such a letting of the ship the master is the agent of the owner, and the mariners are in his employment, and he is answerable for their conduct. By such a contract the charterer obtains no right of control over the vessel, but the owner is, in contemplation of law and in fact, the carrier of whatever goods are conveyed in the ship, for the reason that the charter-party is a mere covenant for the conveyance of the merchandise, or the performance of the service which is stipulated in it. In the other class of cases the vessel herself is let to hire, and the owner parts with the possession, command, and management of the vessel, the hirer thereby becoming the owner during the term of the contract, and, if need be, he appoints the master and mariners, and becomes responsible for their acts. Drinkwater v. The Spartan [Case No. 4,085] 1 Conk. Adm. 178. When goods and merchandise are carried by sea from one place to another, they are usually shipped on board a vessel under a charter-party or bill of lading. A charter-party is a contract whereby the ship-owner or master covenants or agrees for the use of the ship by the charterer for a particular voyage or adventure, or for some specified period of time. Although the ship-owner expressly grants the vessel to be used by the charterer, the contract will nevertheless not amount, in general, to a demise or bailment of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew, unless from the construction of the whole instrument it appears that the owner has surrendered the possession, command, and navigation of the vessel. If the end sought to be accomplished by the charter-party can conveniently be accomplished without the transfer of the vessel to the charterer, courts of justice are not inclined to regard the contract as a demise of the ship, although there may be express words of grant in the formal parts of the instrument. Christie v. Lewis, 2 Brod. & B. 410; Saville v. Campion, 2 Barn. § Ald. 510; Certain Logs

of Mahogany [Case No. 2,559]. On the other hand, if the nature of the service, and the due attainment of the object sought to be accomplished by the charter-party, requires the vessel to be absolutely under the control, and subject to the orders and directions of the charterer, as if she is to be employed for transporting troops in time of war, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at the general disposal of the charterer to sail upon any service that he may require, courts of justice will, as a general rule, give effect to the contract as a demise of the ship. In such cases the services of the master and crew, unless others are appointed by the charterer, pass as merely accessorial to the principal subject-matter of the contract, and they attorn to it, as it were, to the charterer, and become temporarily the servants of the charterer, and as such, for the time being, are bound to obey his orders. Similar views are held by Judge Story in the case of The Volunteer [Id. 16,991], and by Judge Betts in The Aberfoyle [Id. 16]; and such appears to be the general course of the décisions in this country. Gracie v. Palmer, 8 Wheat. [21 U. S.] 605; Webb v. Peirce [Case No. 17,320]; Clarkson v. Edes, 4 Cow. 470; Taggart v. Loring, 16 Mass. 336; Raymond v. Tyson, 17 How. [58 U. S.] 63; Pickman v. Woods, 6 Pick. 254; Vallejo v. Wheeler, Comp. 143; Holmes v. Pavenstedt, 5 Sandf. 100; Perkins v. Hill [Case No. 10,987]. In this case the owners did not charter the whole vessel, and they expressly stipulated with the charterers that she should be kept tight, stanch, well fitted, and provided with every requisite, and with men and provisions necessary for the voyage. They did not, therefore, part with the possession, command, or navigation of the vessel, and, without referring to any other provisions of the charter-party, suffice it to say that there can be no doubt, from the whole tenor of the instrument, that it is a contract of affreightment, and not a demise of the vessel.

Such being the fact, it becomes unnecessary to consider the second proposition assumed by the libellants. To prevent misconstruction, however, it may not be amiss to remark, that, when a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board, and, in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the owners of the vessel: and the latter consequently cannot be made responsible for the loss of the goods shipped on board, or for any injury to the same under such contracts. But when the charter-party operates merely as a contract between the charterer and the ship-owner for the conveyance by the latter of goods and merchandise to be shipped on board by the charterer, the owners of the vessel are the carriers of the goods, and will in general be responsible to the charterer for the non-conveyance of them according to their contract.

More reliance is placed upon the third proposition assumed by the counsel for the libellants, and it deserves to be more carefully considered. It is predicated upon the fact that the passage of the vessel out was completed, and that she was lost on her return, and affirms that by the true construction of the contract the service stipulated to be performed is divisible. Assuming that the service in the outward passage was precisely equal to what the service would have been on the return passage if the vessel had not been lost, the counsel of the libellants insist that they are entitled to recover a moiety of the round sum which the charterers stipulated to pay for the voyage from Boston to Port au Prince and back to Boston. That view of the contract was sustained in the court below, and it was solely upon that ground that the decree was made. Decisions by that learned judge are entitled to very great respect, but in this instance I have not been able to concur in the conclusion to which he came in passing the decree. Whether the contract is entire or divisible must depend upon the terms and conditions set forth in the charter-party. Parties have a right to make their own contracts, and when they are fairly made and do not contravene any positive law or rule of public policy, they must be carried into effect according to the intention of the parties, to be derived from the language employed, the surrounding circumstances, and the subject-matter. Certain rules have been established for the interpretation of contracts, which a learned commentator says are the conclusions of good sense and sound logic applied to the agreement of the parties. Their object is to ascertain with precision the mutual understanding of the contract in the given case, and, like other deductions of right reason, they have been quite uniform in every age of cultivated jurisprudence. Those rules for the construction of contracts are the same in the courts of law and of equity, and it is a great mistake to suppose that they are not equally applicable in the admiralty. Eaton v. Lyon, 3 Ves. 692; 2 Kent, Comm. (9th Ed.) 756; Seddon v. Senate, 13 East, 74. Charter-parties are frequently informal instruments, sometimes having inaccurate clauses, and on that account must have a liberal construction, such as mercantile contracts usually receive in furtherance of the real intention of the parties and the usages of trade. In the construction of such instruments, as well as other mercantile contracts, the general rule is, that the construction should be liberal, agreeable to the real intention of the parties,

and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Raymond v. Tyson, 17 How. [58 U. S.] 59; Abb. Shipp. (5th Am. Ed.) 250; 3 Kent, Comm. (9th Ed.) 276. Where the language of a contract is plain and clear, whether it be a charter-party or other written agreement, it must be understood that parties mean what they have plainly expressed, and in such cases there is nothing left for construction. But if from a view of the whole instrument the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it may appear to be inconsistent with such particular part, for the reason that the construction of the contract in the case supposed ought not to depend on any formal arrangement of the words, but should be collected from every part of the same as applied to the subject-matter to which it relates. Words are to be taken in their popular and ordinary meaning, unless some good reason appear to show that they were used in a different sense, and the whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. As a general rule, the delivery of the goods at the place of destination, according to the charter-party, is necessary to entitle the owner of the vessel to freight. Conveyance and delivery of the cargo form a condition precedent, and must be fulfilled in order to entitle the owner to freight, unless such delivery is prevented by the default of the shipper or his agent. A partial performance, says Chancellor Kent, is not sufficient, nor can a partial payment or ratable freight be claimed, except in special cases, and those cases are exceptions to the general rule, being such only as are called for by the principles of equity. 3 Kent, Comm. (9th Ed.) 298; The Nathaniel Hooper [Case No. 10,032]. Still, if the outward and homeward voyages be distinct, in a case like the present, freight is recoverable for the one though the other be not performed. But if by the terms of the contract they be one voyage, and the ship performed the outward and fails to perform the homeward voyage, no freight is recoverable. Mackrell v. Simond, 2 Chit. 666; 18 E. C. L. 454. Upon this subject the law is well settled, that if one entire voyage or whole service is stipulated for in the charter-party, the ship-owner cannot recover on the contract, unless the entire voyage or whole service is performed. It was so held by Parsons, C. J., half a century ago, in Coffin v. Storer, 5 Mass. 252; and such has been the settled law in this district from that period to the present time. In that case the ship was chartered for a voyage from Biddeford, in the state of Maine, to Surinam and a market, and back to Biddeford; and being wrecked on her homeward passage, it was held that no freight was earned under the charter-party, for the reason that the voyage was an entire voyage, and the hire was not payable until the voyage was completed. That decision was followed by the supreme court of Maine in Blanchard v. Buckman, 3 Me. 1, and is still the law in the courts of that state. So in Barker v. Cheviot, 2 Johns. 352, where a vessel was chartered for a voyage from New York to Martinique, and back to New York, it was held that no freight was due, although the vessel delivered the outward cargo, but was captured on her voyage home. Thompson, J., said in that case, which was decided in 1807, that the rule was too well settled to admit of being questioned. Scott v. Libby, Id. 336. Numerous decisions have been made to the same effect since the date of those last cited, and there are none to be found in the books which support the opposite view of the question. All of these cases have recently been reviewed by the supreme court of Massachusetts, in the case of Towle v. Kettell, 5 Cush. 20, and that court has again affirmed the same doctrine. Most of the adjudged cases were examined by the learned judge, who gave the opinion on that occasion, and those which are now supposed by the counsel for the libellants to be inconsistent with the general doctrine upon the subject were satisfactorily explained. Those explanations will not be repeated, and under the circumstances any further reference to authorities is deemed unnecessary. In that case the charter-party was for a voyage from Boston to Wilmington, in the state of North Carolina, and from thence to Cape Haytien, in the island of Hayti, and from thence to Boston, the charterers engaging to pay to the owner for the charter or freight of the vessel during the voyage in manner following, that is to say, fifteen hundred dollars, payable so much in Hayti as the master might want for the disbursement of the vessel, together with the foreign port charges, lighterage, and pilotage, and the balance on the discharge of the cargo in Boston. After arriving at Wilmington and loading, the vessel proceeded to Hayti; and having discharged her freight there, and taken on board her return cargo, she sailed for Boston, but was lost on the return passage. On that state of facts the court held that the charter-party was for one entire voyage, and as the vessel was lost on her return home the owner was not entitled to recover for the outward freight of the vessel. At the argument in this court it was suggested that the present case might be distinguished from the one just mentioned, on the ground that the balance of the freight in that case, beyond what was necessary for the disbursements of the vessel, was made payable at the home port. But the suggestion cannot have weight, for the reason that by necessary implication the same requirement is contained in the charter-party

under consideration. Beyond question such is the legal construction of the provision upon that subject, and whatever is contained in a written agreement by necessary implication is as much a part of the instrument as if it were written out in words. Unless that distinction can be upheld, and it is clear it cannot be, it is difficult to see upon what ground it can be supposed that any exists, as in all other respects save one the two instruments are substantially alike. Some stress is laid upon the fact that the charter-party in this case contains a provision that the charterers should advance what money the master might require for the disbursements of the vessel at the outward port, not to exceed one half the charter. No such limitation was annexed to that provision of the charter-party in the other case, but the owner agreed to pay so much of the amount stipulated to be paid for the charter of the vessel as the master might want at Hayti, for such disbursements without any limitation whatever, except the necessary wants of the vessel. Whatever distinction, therefore, exists between the two cases makes against the theory of the libellants, rather than in their favor, assuming that the other case was well decided. That provision, however, in my opinion, has nothing to do with the question under consideration, as it is one usually to be found in charter-parties of every description, and is carefully limited to the amount necessary to accomplish the purpose for which it was inserted. Whether the sum paid was more or less than might have been required is immaterial in this investigation, and cannot affect the liability of the owners in this suit. They paid what was demanded of them for that purpose, and in so doing they performed that part of the contract, and that provision is fully executed. Without doing violence to the language of the charter-party. I can form no other conclusion than that the contract in this case is for a voyage from Boston to Port au Prince and back to Boston. For the charter of the vessel to make that voyage the charterers agreed to pay the round sum of eighteen hundred dollars, and all foreign port-charges, pilotage, and lighterage. By the legal construction of the contract no part of the charter money except what the master might require for the disbursements of the vessel was to be paid until the voyage was completed; and having made these advances to the master for that purpose, according to the terms of the contract, and the voyage not having been completed, there is nothing remaining due from the charterers to the owners of the vessel. For these reasons the decree of the district court is reversed, and the libel must be dismissed with costs.

DONAHOO (UNITED STATES v.). See Case No. 14,982.

DONAHUE, In re. See Case No. 3,979.

Case No. 3,981.

Ex parte DONALDSON.

[1 N. B. R. 181;[1] 6 Phila. 443; 7 Am. Law Reg. (N. S.) 213; 1 Am. Law T. Rep. Bankr. 5; Bankr. Reg. Supp. 39; 24 Leg. Int. 380; 6 Int. Rev. Rec. 199; 15 Pittsb. Leg. J. 125.]

District Court, E. D. Pennsylvania. 1867.

BANKRUPTCY — ENFORCEMENT OF LIENS IN STATE COURTS—INJUNCTION.

1. An unimpeached creditor's lien having, before the commencement of voluntary proceedings in bankruptcy, attached upon part of bankrupt's estate, no consideration of probable sacrifice of the subject of the lien under judicial proceedings for its enforcement in a state court, will induce a court of the United States to restrain, delay, or hinder the creditor from prosecuting them.

2. No equity of the general body of the bankrupt's creditors can be asserted for their common, equal benefit, on the mere ground of doubtfulness of his title to the subject of his lien and the danger of consequent sacrifice at a forced sale.

3. Quaere, whether such an equity can be asserted on their behalf in any case without such a payment of his demand as may substitute the assignee in bankruptcy for him as to the lien.

[4. Cited in Re Muller, Case No. 9,912, to the point that the provision in the judiciary act of 1793 (1 Stat. 73) forbidding an injunction to be granted in a suit in equity without notice to the adverse party does not apply to proceedings in the district court under the bankrupt law (14 Stat. 522)].

A petition is this day presented by a voluntary bankrupt whose original petition for adjudication and relief was filed on the 6th of the present month. He was adjudged a bankrupt by the register on the 12th, when a warrant was issued appointing the first meeting of creditors for 16th of September next. The present petition referring to a judgment obtained in April last under adversary proceedings against the petitioner, and to an execution under it, asserts that real estate already sold by the sheriff under this excution is alleged by the plaintiff to be the petitioner's, but is denied by the petitioner to be his property. Having been advised that should it ultimately be determined to be his property, it "should go to the benefit of all his creditors in bankruptcy," he presents this petition. The sheriff's deed of conveyance had not been acknowledged. The prayer is for an injunction to restrain the plaintiff from proceeding further on the judgment and execution, "and from having the deed for said property acknowledged by the sheriff." The petition does not expressly state that the plaintiff is the purchaser.

Mr. Parsons, for petitioner, urged the hardship of permitting such a sale, under a doubtful title, to be made, as it must inevitably be at a sacrifice. He submitted to the court the question whether it would not be proper to interfere for the protection of the general body of the creditors. He referred

[1] [Reprinted from 1 N. B. R. 181, by permission.]

to the Case of Reed [Case No. 11,637], a bankrupt, on whose petition Judge Blatchford, in the district court of the southern district of New York, had, by injunction, restrained a plaintiff in a judgment and execution against the bankrupt in the supreme court of New York from proceeding with an examination of him as a judgment debtor in that court under a law of the state.

CADWALADER, District Judge. The case before Judge Blatchford which has been cited, has no apparent applicability. There was no question of an existing lien of whose fruits the creditors, holding it, were to be deprived. Here the equity of the general body of the creditors might be to require the proceedings, against the land in question, to be for common benefit subject to the lien of the judgment creditor. But in asserting this equity, the general creditors must not frustrate the right of the judgment creditor to his lien. If there was any probability of a proceeding for common benefit at the suit, either of the future assignee or of a provisional assignee, to establish the title of the bankrupt's general creditors to the land subject to the judgment creditor's lien, I might, under some circumstances, restrain him from selling, in the mean time, at a sacrifice under his execution. This would be a jurisdiction to exercise with great caution; and might, in some cases perhaps, be exercisable under a bill in equity in aid of the proceedings in bankruptcy rather than under these proceedings themselves. The case may stand over for further consideration. In the mean time, if reason be shown, I may appoint a receiver to act as provisional assignee until the complete qualification of an assignee under the provisions of the act of congress [of 1867 (14 Stat. 522)]. Such an assignee could inform himself as to the true interests of the general body of creditors. If a mode can be suggested of promoting their interests, without other injury to the judgment creditor than mere delay until a decision upon the title of the bankrupt, an injunction might possibly be proper. But under what circumstances this might thus be proper, cannot be suggested beforehand.

The foregoing opinion having been filed. the judge added:

My last remarks are made only because I do not wish to preclude further argument if it should be desired. At present, I do not see how I can possibly interfere unless upon an offer on the part of the general creditors to make such payment of the judgment creditor's demand as may substitute the assignee in bankruptcy for him as to the lien of the judgment; nor how even this can be done after an actual sale by the sheriff, though the purchaser's title may not have been consummated. I do not pause to consider whether the bankrupt is the party who should have presented the petition if it were otherwise a proper one. Perhaps before assignment, it may, under this act of congress, be necessary in some cases to allow him to make certain applications which, after assignment, would be more proper on the part of the assignee.

The matter was not afterwards moved.

Case No. 3,982.

In re DONALDSON.

[2 Dill. 546;[1] 11 N. B. R. 460.]

Circuit Court, E. D. Missouri. 1873.

BANKRUPT ACT—DISCHARGE OF BANKRUPT—WHEN TO BE APPLIED FOR.

Under section 29 of the bankrupt act [of 1867 (14 Stat. 531)], where there are no assets, the district court may grant an application by the bankrupt for a discharge, although not applied for within a year, where the delay is satisfactorily excused.

[Cited in Re Lowenstein, Case No. 8,572; Re Watson, Id. 17,275.]

Petition for review, under section 2 of the bankrupt act, of an order of the district court refusing the bankrupt a discharge in a case where there were no assets.

Mason G. Smith, for petitioner for review.
Daniel Dillon, opposed.

DILLON, Circuit Judge. Petition for review, under section 2 of the bankrupt act, of an order of the district court [case unreported] refusing to grant the bankrupt a discharge because the application was not made within a year. I think the opinion of the district court, which accompanied the order under review, correctly construes section 29, as applied to all cases where some good reason is not shown why the application was not made within the year. The second petition by the bankrupt having been filed after the year, it ought to have stated the reasons for the delay, and these may be controverted. Where there has been no fraud on the part of the bankrupt, and his conduct is irreproachable, and no injury to creditors has resulted from the delay to make the application, it would be a hardship upon him to deny a discharge merely on the ground of a failure to ask for it within the year, or to apply rigorously an inflexible bar of one year to an application otherwise meritorious. Required in the exercise of supervisory jurisdiction to hear and determine the case "as a court of equity," I affirm the order under review; but on the payment of the costs by the bankrupt in connection with his application, the district court will give him leave, if he is so advised, to amend his petition for a discharge so as to present a case which, if equitable, will excuse the delay in not making the application within the year. Ordered accordingly.

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

Case No. 3,983.

DONALDSON v. FARWELL et al.

[5 Biss. 451;[1] 6 Chi. Leg. News, 101.]

Circuit Court, E. D. Wisconsin. Oct., 1873.[2]

FRAUDULENT PURCHASE BY BANKRUPT — WHEN VENDOR MAY RECOVER GOODS FROM ASSIGNEE —TITLE IS DEFEASIBLE.

1. A purchase of goods on credit by an insolvent man, with the intention of using their proceeds to pay other creditors, and never meaning or expecting to pay for them, is fraudulent, and the vendor has the right to recover them, even as against the assignee in bankruptcy, if he can identify the goods, and exercises his right of reclamation within a reasonable time.

[See note at end of case.]

2. Such a sale does not pass to the purchaser an absolute title, but only one defeasible at the option of the vendor.

3. Though the assignee holds the bankrupt's estate under a stronger right in many cases than the bankrupt himself could, he does not so hold it as to divest the right of reclaiming goods thus obtained by fraud.

This was an action of trover by Nathaniel Donaldson, assignee of Emanuel Mann, bankrupt, against John V. Farwell and his partners, to recover the value of certain goods sold by them to the bankrupt and afterwards reclaimed by them.

The bankrupt was, during the early part of 1872, a merchant in Richfield, near Milwaukee, Wisconsin, and on the 4th, 5th, and 17th days of April, 1872, purchased through his son, Washington L. Mann, of the defendants, merchants in Chicago, a bill of goods amounting to $5,073.49. At the time of this sale, Mann, the bankrupt, was largely indebted and insolvent, and his son made these purchases, which were on the ordinary terms of credit, with the knowledge that his father intended to convert the goods into cash, and use the money in paying certain farmers to whom he was indebted, and that he had not the means and did not expect to be able to pay for the goods. The son ordered the goods shipped, not to Richfield, but to Milwaukee, giving as a reason that they could be hauled from there by teams.

On the 24th of May following, Mann filed his petition in bankruptcy in the district court for this district, and was duly adjudicated a bankrupt, and the plaintiff elected his assignee.

The defendants knew nothing of Mann's insolvency, nor of the bankruptcy proceedings, until the 5th of June, when they took immediate steps to recover the goods, on the ground of fraud in their purchase, and on the 7th of June retook $3,500 worth of them from the warehouse where they were stored, and before they had come to the possession of the assignee. The balance the assignee allowed Farwell then to remove, they giving bond satisfactory to the district court to pay the assignee the value of the whole in case they were defeated in the action.

The case was first tried in October, 1872.

Finches, Lynde & Miller, for plaintiff.

1. The 14th section of the bankrupt law [of 1867 (14 Stat. 522)] declares that the assignee shall be vested with the title which the bankrupt had at the commencement of the proceedings in bankruptcy.

2. Mann had the legal title to the goods at the date of the commencement of the proceedings in bankruptcy. He had such a title that he could have made a bona fide sale of all the goods purchased from Farwell, to a third party.

3. No attempt was made by Farwell & Co. to rescind the contract of sale until after the assignee was appointed. It was then too late for Farwell & Co. to reinvest themselves with the title. The title, by force of the bankrupt law, had become vested in the assignee before any step was taken by Farwell & Co. to rescind the contract.

4. An assignee in bankruptcy, by the provisions of the bankrupt law, takes an entirely different interest from an assignee under a voluntary assignment. In re Joslyn [Case No. 7,550]; Ex parte Finds [Id. 6,516].

Mariner, Smith & Ordway, for defendants.

1. The purchase of goods upon credit with intent not to pay for them is a fraud which renders the sale void at the election of the vendor, as against the vendee and all others having no better title than such vendee. It is true that the title vests in the vendee, but it is a voidable title. Load v. Green, 15 Mees. & W. 216; Ash v. Putnam, 1 Hill, 302; Cary v. Hotailing, Id. 311; Dow v. Sanborn, 3 Allen, 181; Nichols v. Michael, 23 N. Y. 264; Hennequin v. Naylor, 24 N. Y. 139; Seligman v. Kalkman, 8 Cal. 207; Bowen v. Schuler, 41 Ill. 192; Bidault v. Wales, 19 Mo. 36; Kerr, Fraud & M. 110; Conyers v. Ennis [Case No. 3,149].

2. In order to establish fraud in the purchase of goods, it is not necessary that the purchaser should have made false statements concerning his pecuniary ability, by which the credit was obtained. The fraud consists in the purchase with intent not to pay, and this intent may be proved by facts and circumstances as well as by the affirmative declarations of the purchaser. Johnson v. Monell, 41 N. Y. 655; Brown v. Montgomery, 20 N. Y. 287; Durell v. Haley, 1 Paige, 492; Seligman v. Kalkman, 8 Cal. 207; Bidault v. Wales, 19 Mo. 36; Bowen v. Schuler, 41 Ill. 192; Bullock v. Narrott, 49 Ill. 62; Byrd v. Hall, 41 N. Y. 646.

3. A fraudulent suppression of the fact of insolvency is alone sufficient to avoid the sale. Johnson v. Monell, 41 N. Y. 655; Durell v. Haley, 1 Paige, 492; Powell v. Bradlee, 9 Gill & J. 220; Hennequin v. Naylor, 24 N. Y. 139; Seligman v. Kalkman, 8 Cal. 207; Bidault v. Wales, 19 Mo. 36.

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

[2] [Affirmed in 93 U. S. 631.]

4. The fraudulent intent may be found from acts of the purchaser after the sale. Bowen v. Schuler, 41 Ill. 192, and cases above.

5. The vendor may disaffirm the sale for fraud within a reasonable time after discovery thereof, and what is a reasonable time will depend upon the circumstances of each case. As a general rule, as against the vendee, and all who have no better title, he may elect to rescind so long as he has done nothing to affirm the sale after knowledge of the fraud. An execution creditor, a common-law assignee, one holding as collateral security merely, has no better title than had the fraudulent vendee. As to this there is no dispute, but our sixth proposition is disputed, and thereupon arises the principal difficulty in this case.

6. We maintain that an assignee in bankruptcy is not a purchaser for value, that he stands like a common-law assignee, in the bankrupt's shoes, and that the defrauded vendor may rescind, even after the goods have come to the possession of the assignee in bankruptcy, as in this case part of the property had, and that the right to rescind is not cut off by the adjudication of bankruptcy and appointment of an assignee. We claim that under such circumstances the defrauded vendor can reclaim his goods whenever he can identify them, or any of them, in the possession of the assignee, and until they have gone to a bona fide holder for value, exactly the same as at common law, and as a necessary result of this that he can claim of the assignee the proceeds of such goods which he may have sold, until in the regular course of executing his trust he has paid over and distributed the same among the creditors of the bankrupt. Such is the law as to common-law assignees, and we see no difference in principle between the two cases.

The plaintiff's counsel combat this proposition vigorously, their main reason being the inconvenience which will be introduced by such a rule into the administering the effects of bankrupts.

Section 14 of the bankrupt act vests in the assignee "all the estate, real and personal, of the bankrupt * * * and all * * * right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same as the bankrupt might or could have had if no assignment had been made, * * * And he may sue for and recover the said estate, debts and effects * * * in the same manner and with like effect as they might have been prosecuted or defended by such bankrupt."

So far the assignee represents the bankrupt, but beyond this by the same section he is made to represent the creditors of the bankrupt, and is given greater rights than had the bankrupt. "All the property conveyed by the bankrupt in fraud of his creditors * * * shall in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

By this section just what the bankrupt had, no more, is vested in the assignee, by this we understand, all the property, rights, and equities of the bankrupt, which in law or equity belonged to his creditors—no more, no less, not the estate or property of others.

The bankrupt law of 1841 [5 Stat. 442] was not materially different from that of 1867, both substantially like the English bankrupt act of 6 Geo. IV. c. 16, § 63. Under both these statutes there are decisions which we submit fully and fairly rule this case.

The decisions in Massachusetts under their insolvent law are also the same. Pratt v. Wheeler, 6 Gray, 520. Under the bankrupt act of 1841 there are four cases giving the same construction for which we contend. Ex parte Newhall [Case No. 10,159]; Winsor v. McLellan [Id. 17,887]; Fletcher v. Morey [Id. 4,864]; Mitchell v. Winslow [Id. 9,673].

Under the English act cited, the case of Load v. Green, 15 Mees. & W. 215, is exactly in point. A bought goods from B, with the fraudulent intention of not paying for them, and kept them until his bankruptcy, when they were taken possession of by his assignees in bankruptcy. The defrauded vendors, after demand and refusal to deliver, brought trover against the assignees, and the action was sustained. The court says, "As the goods were obtained by a fraudulent purchase, the plaintiffs had a right to disaffirm it, to revest the property in them, and to recover its value in an action of trover against the bankrupt; and as the assignees take, by virtue of the assignment, such interest only as the bankrupt has, the plaintiffs had the right to recover the value of the goods in the hands of the assignees in the same form of action on a conversion by them, unless they were entitled to the goods under the 72nd section."

Tenneys, Flower & Abercrombie and E. A. Storrs, of counsel.

DRUMMOND, Circuit Judge, charged the jury as follows:

This is a case of a sale to an insolvent person, who was supposed by the vendor to be solvent, with the expectation and belief by the purchaser that the goods would never be paid for.

There were also some facts connected with the transaction which it is proper for the jury to consider, as perhaps adding evidence to what is claimed to be a fraud on the part of the vendee at the time of the sale, namely, that the bankrupt, residing at a little village some few miles from Milwaukee, where he had transacted business for several years, and where under ordinary circumstances, the goods would be sent, requested the goods to be shipped to Milwaukee, for the reason, as the witness (his son) stated, that they could

be hauled from Milwaukee to the bankrupt's place of business.

This, under the conceded facts of the case, may perhaps be assumed to be a false representation made by the witness.

The goods were shipped by the defendants as directed. They came into the possession of the bankrupt. Nothing had occurred to create any suspicion on the part of the defendants until the last of May or the first of June following, when, on the 5th of June, measures were taken to reclaim the goods, on the ground that the sale was fraudulent, and that the right existed on the part of the vendors, to make a reclamation. The goods, with the exception of about $100 worth, were accordingly reclaimed by the defendants and taken possession of by them.

Now, under the facts of the case, the question is whether the action is maintainable by the assignee.

The main ground upon which it is said the action could not be maintained, is that by the filing of the petition in bankruptcy and the appointment of an assignee, he became the representative of the creditors, and that it was not competent for the vendors, notwithstanding the fraud that had been committed, to reclaim the goods, because it would be interfering with the rights of the general creditors; that other parties might have sold goods to the bankrupt; that these goods might have been disposed of or the proceeds of them have been distributed in various ways to the creditors of the bankrupt or otherwise, and that therefore to allow a person to come in under such circumstances and to reclaim the goods because he could identify them, would be giving him an unjust advantage over other creditors who had sold goods under similar circumstances, who would not have the power, owing to what might have occurred after the sale, to reclaim the goods or their proceeds.

That is substantially the ground upon which the case is placed on the part of the plaintiff, and as constituting the reason why the rights of the defendants are not the same as they would have been if no petition in bankruptcy had been filed.

The assignee in bankruptcy undoubtedly takes and holds the property in many respects differently from the bankrupt. The assignee has a right, as to the property, to do many acts which the bankrupt himself would not have the right to do. And it is not therefore true, absolutely and without qualification, that an assignee takes property precisely as the bankrupt held it at the time the petition was filed. He takes it with stronger right, and as representing all the creditors of the bankrupt. And the question is whether, under the circumstances of this case, he takes it so as to divest the right which the vendors would undoubtedly have had, as against the vendee, to reclaim the property.

The sale made by the defendants passed the title in the property to the bankrupt, but it passed only a defeasible title. That is to say, it could be rendered inoperative at the instance of the vendors, J. V. Farwell & Co. It was competent for the vendors to allow the bankrupt to retain possession of the property, and if before reclamation the bankrupt had parted with the property to a person who purchased it in good faith for value, that destroyed the right of reclamation by the vendors. So that it was a transfer of the title which might become absolute only at the option of the vendors. If the bankrupt retained the property at the time of the filing of the petition in bankruptcy, the title passed to the assignee in bankruptcy, and as we think the weight of authority is, it passed not as an absolute, but as a defeasible title, with the right still on the part of the vendors to reclaim the property, provided that it was done within a reasonable time after the sale and after knowledge of the fraud which had been perpetrated. Therefore, if you believe the facts stated by the witnesses, and if you believe that within a reasonable time after knowledge of the facts, the vendors reclaimed the goods, or took effectual measures for their reclamation, then we think that the action can not be maintained against the defendants.

It is, as I have said, substantially a question of law. We know there are many considerations which lead to an opposite conclusion. But looking at the case in all its aspects, and in view of the great weight of authority upon the subject, we feel inclined to give you this instruction, knowing that it is competent for the plaintiff, if he shall think that the view of the court is erroneous, to have it reviewed by the supreme court of the United States.

The jury found a verdict for defendants.

NOTE. For an elaborate discussion of the rights of the creditor, where the purchaser, at the time of the purchase, had no intention of paying for them, consult Stewart v. Emerson [52 N. H. 301], and numerous authorities there cited. The supreme court of Illinois has just decided that where goods have been obtained by fraudulent representations, they can be reclaimed at the option of the vendor, unless they have passed into the hands of an innocent purchaser, without notice, and that an attaching creditor is not such a purchaser, but takes them subject to all equities. Schweizer v. Tracy [76 Ill. 345].

[NOTE. On plaintiff's appeal the judgment entered in this case was affirmed by the supreme court. Donaldson v. Farwell, 93 U. S. 631. Mr. Justice Davis, delivering the opinion of the court, said: "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. Byrd v. Hall, *41 N. Y. 647; Johnson v. Monell, Id. 655; Noble v. Adams, 7 Taunt. 59; Kilby v. Wilson, Ryan & M. 178; Earl of Bristol v. Wilsmore, 1 Barn. & C. 514; Stewart v. Emerson, 52 N. H. 301; Benj. Sales, § 440, note of

the American editor. Here the defrauded vendors exercised the right of rescission shortly after the sale, and as soon as they obtained knowledge of the fraud. If, therefore, this controversy were between Mann and them, it is clear that he would not be entitled to recover. The assignee has no right of action. It is true that the assignment relates back to the commencement of the proceedings in bankruptcy, and vests, by operation of law, in him with certain specified exceptions, the property of the bankrupt, although the same is then attached and dissolves any attachment made within four months next preceding the commencement of the bankruptcy proceedings. But, if there be no such liens, and the property has not been conveyed in fraud of creditors, the assignee has no higher interest in or better title to it than the bankrupt. Only the defeasible title of the latter to the goods in controversy vested in the assignee, and we think that the exception to the charge of the court is not well taken."]

Case No. 3,984.

DONALDSON v. HAZEN.

[1 Hempst. 423.][1]

Circuit Court, D. Arkansas. April, 1840.

JURISDICTION OF FEDERAL COURTS—PLEADING—PRACTICE.

1. Where a demurrer was sustained to a declaration, on account of a failure to show a case within the jurisdiction of the court, and the declaration was afterwards so amended as to cure that defect, it becomes substantially a new suit, and the defendant may interpose a plea to the jurisdiction of the court, averring that both parties are aliens.

2. The facts and circumstances upon which jurisdiction over the case depends, must be set forth in the declaration or pleadings.

3. Various examples given, and cases cited to illustrate this rule.

4. And where the jurisdiction does not appear on the face of the declaration, such omission may be taken advantage of by motion to dismiss the suit, at any time before final judgment, or after verdict, by motion in arrest of judgment or by bringing a writ of error and having the judgment reversed.

[This is an action for debt by Wellington Donaldson against Thomas Hazen.]

A. Fowler, for plaintiff.

Albert Pike, for defendant.

Before JOHNSON, District Judge.

OPINION OF THE COURT. This action of debt was brought by the plaintiff against the defendant, upon three promissory notes, alleged to have been executed by the defendant to Laughlan Donaldson, and by him assigned to the plaintiff. In his declaration the plaintiff failed to aver the citizenship of the assignor of the notes, and at the last term of this court the defendant filed a general demurrer to the declaration, which was sustained by the court, on the ground that the plaintiff had failed to state a case of which the court could take cognizance. The plaintiff then, with the leave of the court, amended his declaration by averring L. Donaldson to be a citizen of the state of Kentucky. On the 28th October, 1839, the defendant filed a plea to the jurisdiction of this court, averring both the plaintiff and defendant to be aliens. The plaintiff now moves the court to strike out this plea, and whether the motion should be sustained is the only question now to be considered.

The plaintiff contends that the defendant, by a general demurrer to his declaration, has waived the question of jurisdiction, and is no longer at liberty to raise it by plea. It may be conceded for argument, that if the demurrer to the original declaration did not reach the question of jurisdiction, but went only to the merits of the case, that even to the amended declaration the defendant would not be permitted to file a plea to the jurisdiction of the court. But this would not help the case, because the demurrer was sustained on the sole ground that the plaintiff had failed to state a case in his declaration of which the court could take cognizance. That this judgment of the court upon the demurrer was in accordance with the well-settled principles of law, can hardly admit of a doubt.

It is settled by uniform and repeated decisions of the supreme court, that the facts or circumstances upon which the jurisdiction over the case depends must be set forth in the declaration. Thus, in a suit between an alien and a citizen, the alienage of the one and the citizenship of the other must be stated. Hodgson v. Bowerbank, 5 Cranch [9 U. S.] 303; Jackson v. Tentyman, 2 Pet. [27 U. S.] 136. When the suit is between citizens of different states the citizenship of the parties, to show not only that they are citizens of different states, but also that one of them is a citizen of the state where the suit is brought, must be stated. [Bingham v. Cabot] 3 Dall. [3 U. S.] 382; [Abercrombie v. Dupuis] 1 Cranch [5 U. S.] 343; [Wood v. Wagnon] 2 Cranch [6 U. S.] 9, 126; [Winchester v. Jackson] 3 Cranch [7 U. S.] 515; [Hope Ins. Co. v. Boardman] 5 Cranch [9 U. S.] 57; [Sullivan v. Fulton Steamboat Co.] 6 Wheat. [19 U. S.] 450; [Breithaupt v. Bank of Georgia] 1 Pet. [26 U. S.] 238. And in a suit to recover the contents of a promissory note, or other chose in action, except foreign bills of exchange and debentures, brought by an assignee of such note, it is necessary to aver that the original promisee, through whom the plaintiff claims to recover, is an alien or citizen of another state, as the case may be, so as to show that he also might have maintained the action in the court to recover such contents. Montalet v. Murray, 4 Cranch [8 U. S.] 46. And when the want of jurisdiction is apparent upon the face of the declaration by reason of the omission of a statement of the facts requisite to bring the case within the cognizance of the court, it is well settled that the defendant may take advantage of such omission, either by motion, at any time before judgment, to dismiss the suit, or after verdict he may move in arrest of judgment, or after judgment he may bring a writ of error

[1] [Reported by Samuel H. Hempstead, Esq.]

and have the judgment reversed. Lanning v. Dolph [Case No. 8,073]; [Mollan v. Torrance] 9 Wheat. [22 U. S.] 537; Shute v. Davis [Case No. 12,828]; [Hope Ins. Co. v. Boardman] 5 Cranch [9 U. S.] 57; [Abercrombie v. Dupuis] 1 Cranch [5 U. S.] 343; [Jackson v. Twentyman] 2 Pet. [27 U. S.] 136. If, then, the omission is a good ground to arrest the judgment, or to reverse it on a writ of error, it can admit of no doubt that it is a good ground of demurrer; for no principle is better established, than that a demurrer will reach every defect in the pleadings, which would be fatal on a motion in arrest of judgment, or on a writ of error to reverse the judgment. The defendant, then, by demurring to the original declaration, did not admit the jurisdiction of the court; for indeed the decision upon the demurrer was given upon the express ground of want of jurisdiction. The plaintiff then amended his declaration, and for the first time stated a case within the jurisdiction of the court, and which became, as it were, a new case. The defendant could then only call in question the jurisdiction of the court by an appropriate plea, traversing the facts alleged by the plaintiff. Shall the defendant be precluded from filing a plea denying the facts upon which the jurisdiction of the court rests, because he demurred to the original declaration on the ground that it failed to state a case within the cognizance of the court? I think not. Such a rule would be unjust. The motion to strike out the defendant's plea to the jurisdiction of the court is overruled.

Case No. 3,985.

DONALDSON et al. v. McDOWELL et al.

[Holmes, 290.][1]

Circuit Court, D. Massachusetts. Dec., 1873.[2]

DEMURRAGE—BILL OF LADING.

The ship has a privilege against the cargo for damages in the nature of demurrage, enforceable in the admiralty, when the cargo has not been received within a reasonable time, through fault of the consignee, although the bill of lading contains no demurrage clause.

[Cited in Sheppard v. Philadelphia Butchers' Ice Co., Case No. 12,757; Irzo v. Perkins, 10 Fed. 781; Hawgood v. 1,310 Tons of Coal, 21 Fed. 686; The William Marshall, 29 Fed. 329.]

Admiralty appeal from a decree of the district court [of the United States for the district of Massachusetts].

The claimants [Walter Donaldson and others] shipped at Elizabethport, N. J., on the brig Hyperion, a cargo of coal, owned by them, and to be delivered to them as consignees at Phillips' wharf in Salem, Mass. The bill of lading contained no demurrage clause. The brig arrived at Salem July 26, and on the same day the master notified the consignees' agent, at Phillips' wharf, of his arrival and readiness to discharge, and demanded a berth. Another notice was given to the consignees in person, July 28. No berth was furnished till Aug. 2, when the brig began to discharge. The discharge continued at a very slow rate, owing to the negligence and delay of the consignees, (the coal being removed from the wharf as soon as discharged), until Aug. 6, when the cargo was libelled for freight and demurrage. On the 10th it was released, and discharge was completed on the 12th. In the district court a decree was entered for the libellants [James E. McDowell and others (Case No. 6,987)], and the claimants appealed.

Joseph Nickerson, for appellants.

F. L. Hayes, for libellants.

SHEPLEY, Circuit Judge. This appeal from the decree of the district court in admiralty presents the question, whether the ship has a privilege against the cargo for damage, in the nature of demurrage, when the cargo has not been received within a reasonable time, through the fault of the consignee. The consignees in this case, although not nominally in the bill of lading, yet, in fact, were the shippers of the cargo. Appellants contend that as the bill of lading contains no express contract concerning demurrage, the law will not imply one against the consignee.

When the bill of lading contains no provision for the payment of demurrage, courts of common law have generally held that the consignee, or his assignee, is not liable for demurrage, even after receipt of the goods. Smith v. Sieveking, 5 El. & Bl. 589; Young v. Moeller, Id. 755; Gage v. Morse, 12 Allen, 410. But when the bill of lading has contained a stipulation for demurrage, either expressly or by reference to the charter-party, the acceptance of the goods has been held to be evidence of an agreement by the consignee to pay demurrage as well as freight. Chief Justice Mansfield said, in Jesson v. Solly, 4 Taunt. 52, "If the consignee will take the goods, he adopts the contract." The reason given in the cases first cited is, that as the consignee is not a party to the contract in the bill of lading, and is only liable upon the contract, which may be implied upon the actual delivery of the cargo and waiver of his lien by the master, he is not bound to accept the cargo at any particular time, and incurs no responsibility by a refusal or delay in accepting it; and that the contract implied from its acceptance can extend no further than the conditions upon which its delivery is made dependent by the bill of lading. This enables the consignee unreasonably to refuse or delay to receive the goods when the master tenders delivery, and thus subject the ship to expense and delay; while the consignee may subsequently claim

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

[2] [Affirming Case No. 6,987.]

the goods on payment of the stipulated freight, and receive them without any liability to pay the damages occasioned by his own neglect or refusal. The reasoning in these cases is not very satisfactory, and the result is to exempt the consignee from liability to an action at law for the consequences of his own neglect. Since the decisions in the English courts relied upon in support of this doctrine, the English bills of lading act, 18 & 19 Vict. c. 111, § 1, provides that "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of the goods therein mentioned shall pass, upon and by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Under this statute the assignee who receives the cargo has all the rights and bears all the liabilities of a contracting party. See Smurthwaite v. Wilkins, 11 C. B. (N. S.) 842. Independent of the bills of lading act, the English and American courts have held, that, where the consignee is the freighter, he is held liable to the vessel for any unnecessary detention in loading or unloading, although no express contract is made on the subject. Sprague v. West [Case No. 13,255]; Holt, Shipp. pt. 3, c. 1, § 25.

In Horn v. Bensusan, 9 Car. & P. 709, it was admitted that the ship-owner, on a special count in the declaration for not loading or unloading in a reasonable time, could recover damages for detention of the ship against the consignee. In the case before the court, it clearly appears that the title of the coal was in the claimants, and that they were in fact the freighters of the coal. The master testifies that he received his order for the coal from the claimants in New York; that he delivered that order to the Scranton Coal Company, and they gave him orders to take to Elizabethport, to the Scranton coal dock. Upon this state of facts, the consignees being also the shippers of the cargo, I see no reason why the ship-owner could not recover, by a libel in personam, against the consignee, demurrage occasioned by his neglect in the unlivery of cargo. Under such circumstances, in the case of Crerar v. Montreal Ocean Steamship Co. [Case No. 3,385], Judge Fox awarded damages for demurrage of the ship, occasioned by the delay of the defendants as consignees to take delivery seasonably of a cargo of coal which the ship-owner was ready and offered to deliver; and the decision was affirmed on appeal to the circuit court by Mr. Justice Clifford.

Whatever the personal liability of the consignee, simply as consignee receiving the cargo, may be in a court of common law, there can be no reasonable doubt of the liability of the cargo in a proceeding in rem in the admiralty for demurrage, when the delay is occasioned by the freighters of that cargo, or the consignees who receive that cargo. Demurrage is only an extended freight or reward to the vessel, in compensation for the earnings she is improperly caused to lose. Every improper detention of a vessel may be considered a demurrage, and compensation under that name be obtained for it. 2 Hagg. Adm. 317. It is a maxim of the general maritime law, that the ship is bound to the merchandise, and the merchandise to the ship. Valin, Comm. bk. 3, tit. 1, art. 11; Id. tit. 3, art. 24; Pard. Droit Com. arts. 709, 961. The law-merchant considers that the master contracts rather with the merchandise than the shipper, and it necessarily follows from this, that the merchandise is liable for whatever the shipper is liable. As in this country courts of admiralty have frequently exercised their jurisdiction to enforce the privilege where the cargo has been libelled for freight, general average, and other charges, there seems to be no just ground for making an exception, and refusing a remedy for a violation of duty and right in the case of demurrage, which, under circumstances like those in the present case, is as much a charge or damage which the master may lawfully demand, and for which he has a privilege against the cargo, as the freight itself, of which demurrage is only an extension.

Decree of district court affirmed, with interest and costs.

DONALDSON (POLLOCK v.). See Case No. 11,254.

DONALDSON (UTLEY v.). See Case No. 16,807.

DONAN (UNITED STATES v.). See Case No. 14,983.

Case No. 3,986.

The DON JUAN.

[8 Ben. 489.][1]

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

COLLISION AT PIER—TUG AND TOW.

A tug, in the employ of the Erie Railway Co., was towing a schooner on a hawser astern, out from a slip at Jersey City. The superintendent of tugs for the company was on the pier directing the movements of the tug and schooner. The tide was flood, and a line was got out from the schooner to the pier on the lower side of the slip, which was shorter than the pier on the upper side, to hold her up against the tide. This line was cast off, by order of the mate of the schooner, before she had cleared the pier on the upper side, and her rigging caught on a yard of a bark lying alongside of the upper pier and broke it: *Held*, that the tug was not responsible to the bark for the damage done.

This was a libel by the owner of the bark Francisco Bellagamba to recover damages for the breaking of one of her yards by its being caught by the rigging of the schooner

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

Moss Glen, while in tow of the tug Don Juan. The bark was lying at the lower side of a pier near the end. The next pier below was a shorter pier. The Moss Glen was being towed out of the slip between the piers astern of the Don Juan, on a hawser.

F. A. Wilcox, for libellants.

R. D. Benedict, for respondents.

BENEDICT, District Judge. The damage complained of consists in the breaking of the yard of the bark Francisco Bellagamba, by the fore-rigging of the schooner Moss Glen. The bark was moored alongside a pier, and the schooner was passing by the bark, going out of the slip in tow of the tug Don Juan, upon a hawser. The proofs show that the cause of the schooner's coming in contact with the bark was the slacking of a line, which had been run from the schooner to the other side of the slip for the purpose of keeping the schooner up against a strong flood tide then running through the slip, and which, as soon as the line was slacked, carried the schooner upon the bark. The slacking of this line was not the act of the tug, but of the mate in command of the schooner. The injury that followed was done by the schooner and not by the tug, and the negligence of her mate in directing the line to be cast off was the cause of her doing it. For such an act of negligence, not possible to be prevented by the tug, and which brought the schooner in contact with the bark in spite of all care and effort on the part of the tug, the tug is not responsible.

It is stated in the answer that the tug was in the service of the Erie Railway Company, and that Homans, the superintendent of tugs for said company, had charge of the movements of the tug and of the schooner; but Homans did not have charge on board the schooner at the time the line was thus slackened. The mate of the schooner had charge there. He gave the order to slack the line and so brought his vessel in contact with the bark, in spite of the efforts of Homans and of the tug to keep her clear. This act of the mate of the schooner is not made the act of the tug by the circumstance that Homans had charge of the movements of the tug and schooner. The act was an independent act of negligence, committed by the person in that particular responsible for what was done on board his vessel, which resulted in damage being caused by his vessel to the bark, and is not in law an act of the tug for which she can be held responsible in this action. Whether as between the schooner or the bark the responsibility is upon the schooner or the bark by reason of the condition of the yards of the bark is a question unnecessary to determine here. The libel must therefore be dismissed with costs.

DONN (GANNON v.). See Case No. 5,211.

Case No. 3,986a.

Case of DONNELL.[1]

District Court, D. Maine. June, 1876.

BANKRUPTCY—SALES BY ASSIGNEE—CONFIRMATION.

[It is not the practice in the first circuit to confirm sales by assignees, as the rights of third parties are liable to be compromised thereby.]

[Cited in Re Alden, Case No. 151.]

In the matter of Thomas E. Knight, a bankrupt.

A sale of real estate was made, at public auction, after the notice by the assignee of said Knight, to William E. Donnell, of Portland. Said Donnell filed a petition to confirm said sale, upon which is endorsed in the handwriting of FOX, District Judge, the following: "It appears not to have been the practice in the first circuit to confirm sales by assignees; and on account of rights of third parties being liable to be compromised thereby, I decline to adopt such practice, and refuse to pass upon the matter of the confirmation of the sale in this cause."

Case No. 3,987.

DONNELL et al. v. COLUMBIAN INS. CO.

[2 Sumn. 366.][2]

Circuit Court, D. Massachusetts. May Term, 1836.

EXCEPTIONS TO MASTER'S REPORTS — PRACTICE — MARINE INSURANCE — PRESUMPTION OF SEAWORTHINESS — CONSTRUCTION OF POLICY — COMMERCIAL USAGES — STATE DECISIONS.

1. A party should require the master, or auditor, to report specially such evidence, as furnishes the ground of any exception. And the court will not open the facts of the report, unless to correct some unquestionable error.

[Cited in Greene v. Bishop, Case No. 5,763; Hart v. Shaw, Id. 6,155; Welling v. La Bau, 34 Fed. 42; Tilghman v. Proctor, 125 U. S. 150, 8 Sup. Ct. Rep. 901.]

2. There is no rule or presumption of law, which makes the seaworthiness of a vessel at the commencement of the voyage prima facie evidence, that the subsequent repairs, necessary to be made during the voyage, arose from some extraordinary peril. Otherwise, the underwriters might be made liable for losses for mere wear and tear.

[Cited in Higgins v. Moore, 34 N. Y. 422.]

3. The necessity of repairs, in the course of the voyage, on account of mere wear and tear, does not impair the original warranty of seaworthiness.

4. Where a verdict was taken against the defendants by consent, subject to the report of auditors, in order to ascertain the amount of the loss suffered by the plaintiffs, *held*, that the defendants, by this course, only admitted, that the plaintiffs had some cause of action, and did not preclude themselves from any inquiry into the cause and nature of the loss, and the amount, which was attributable to the perils insured against.

5. A payment of money into court admits the contract and damages only pro tanto; and,

[1] [Not previously reported.]

[2] [Reported by Charles Sumner, Esq.]

if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him.

6. In a policy of insurance, it was stipulated, that the underwriters shall not be liable "for any partial loss of other goods, or on the vessel and freight, unless it amount to five per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss;" *Held*, that the words "in each case," in the foregoing clause, do not mean "at each time of loss," but that they refer to the three several subjects insured, goods, freight, and vessel, and require a damage of five per cent. to justify a claim in each case.

[Cited in Airey v. Merrill, Case No. 115.]

7. Successive losses on the cargo, in the course of the voyage, each less than five per cent. but in the aggregate amounting to more than five per cent., are not within the exception, and are to be borne by the underwriters.

8. Semble, that the same rule prevails with regard to losses on the ship.

9. Semble, that this rule prevails among the commercial states of the continent of Europe.

10. Usages among merchants should be sparingly adopted as rules of law by courts of justice, as they are often founded in mere mistake, and in a want of comprehensive views of the full bearing of principles.

[Cited in Palmer v. Warren Ins. Co., Case No. 10,698; Citizens' Bank v. Nantucket Steamboat Co., Id. 2,730; The Sydney, 27 Fed. 127.]

11. Semble, that in questions of commercial law, the courts of the United States are not concluded by the local construction proceeding from the state courts.

12. Quaere — If a distinction exists between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage.

Assumpsit on a policy of insurance, dated on the 23d of June, 1828, whereby the plaintiffs [John S. Donnell and others] caused themselves to be insured, lost, or not lost, "$4,500 on the ship United States, and $10,500 on property on board said ship, valued at 5 per cent. above the costs and charges, per invoice, at all periods of the voyage, at and from Baltimore, to, at, and from all ports and places, in any order of succession, one or more times to the same, between Valparaiso and Guayaquil, both inclusive; at and from thence to port or ports in Manilla and Java, and at and from thence to port of discharge in Europe or the United States, either, but not both, with liberty to stop on her passages for advice, trade and refreshment; risk to commence May 9, 1818, at noon. In case the United States returns from the Pacific to Baltimore, the risk to be covered by the policy;" at a premium of 5 per cent. per annum, to add one per cent. if said ship should be north of the straits of Dover between the first of November and the first day of March. Ship valued at $15,000, not including premium. The policy, after enumerating the usual risks, contained the following, among other provisos; "Provided, that the assurers shall not be liable for any partial loss on sugar, &c., unless the loss amount to 7 per cent.; nor for any partial loss on salt, &c., or other goods, which are esteemed perishable in their own nature, unless it amount to 7 per cent. on the average value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel or freight, unless it amounts to 5 per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average." The declaration alleged, that in the course of the voyage insured, and while the ship, with her cargo (of coffee) on board, was proceeding from Batavia to Antwerp, she was greatly injured by stormy and tempestuous weather, &c., and was compelled to put away for the Isle of France, where she arrived; that the cargo was wetted and damaged by the storm, and the plaintiffs put to great expense in saving and unlading the cargo, and repairing the ship; and part of the cargo was spoiled; that the ship, after she was repaired, sailed, with the residue of the cargo, for Antwerp, and on the 15th of December, 1829, was, by the force of the winds and waves, and ice and currents, driven on certain shoals in the river Scheldt, and was thereby greatly injured, and the cargo greatly wetted and damaged, &c. At the trial on the general issue, a verdict was, by consent, taken for the plaintiffs, for the sum of —— dollars, subject to the opinion of the court upon the report of auditors appointed by the court. The auditors made a special report, in which they disallowed certain charges, ranked by them, as class fifth of charges for repairs on the ship, viz. materials for the deck, stanchions, rails, wales, &c., and labor incident thereto. The following extract from their report, in relation to these items, will elucidate the opinion of the court. "The evidence in relation to this class of charges is very imperfect. If the admission or proof of seaworthiness establishes every part of the vessel to be sound at every stage of the voyage, injury by perils insured against excepted, then the fact, that the stanchions and rails were broken, and the deck planks and side planks near the wale needed replacing or repairing, might of itself be considered to be evidence of some extraordinary peril, for which the underwriters are answerable. But if the establishment or admission of the seaworthiness of the ship, at the commencement of the voyage, still leaves open the inquiry, whether particular repairs in the course of the voyage were rendered necessary by the perils insured against, or by decay or by defects, or by wear and tear, as the auditors suppose to be the case, then the establishing of the fact of the necessity of the repairs does not, as the auditors suppose, throw upon the underwriters the burthen of proving that the necessity for the repairs arose from some other cause than the perils insured against; but on the contrary, they presume, that the assured must show, by some further evidence than the

mere fact of the necessity of the repairs, that they were rendered necessary by the damage occasioned by the perils insured against. In regard to the present class of charges, the auditors do not find any evidence in the log-book or deposition of the master, or other documents, that these repairs were of damage occasioned by perils of the seas, other than the evidence, if any, arising from the kind of injuries or defects, which required repairs. Had the vessel been new, the mere fact of these repairs being needed, might itself have been sufficient ground of inference, that a peril within the policy was the cause. But considering, that she was eighteen years old; that neither the log-book, nor the captain's deposition state that these parts of the vessel were damaged in consequence of a storm or by perils of the sea, nor state any fact from which such cause of damage can be inferred; and considering, that holes were picked in the waterways by the carpenter, before going into Mauritius, showing, as the auditors suppose, the defective or decayed state of the part of the vessel in which some part of these repairs were made, and considering also the apprehension of the men in regard to going on in the vessel, the auditors conclude, that this cless of charges is not shown to have been incurred in consequence of the operation of any peril within the policy."

And now, at this term, the case was argued upon certain exceptions taken to that report.

Benjamin R. Curtis and Mr. Fletcher, for plaintiffs.

Mr. Hubbard, for insurance company.

STORY, Circuit Justice. No question is now before the court, as to any loss on the ship, as far as it is allowed by the auditors, or as to any general average, both of these having been admitted or adjusted between the parties. But the auditors have disallowed certain charges, enumerated in their report, as class fifth of charges for repairs on the ship, viz. materials for deck. outside, stanchions, rails, wales, &c., and labor incident thereto. Upon these items the auditors, in their report, made the following remarks. (Here the judge repeated them.) Now, in this view of the matter, the counsel for the plaintiffs object to this part of the report, upon two grounds: First, that the auditors have drawn a wrong conclusion, in point of fact, from the evidence submitted to them on these charges; secondly, that, in point of law, the seaworthiness of the vessel at the commencement of the voyage is prima facie evidence, that all subsequent repairs, necessary to be made during the voyage, did arise from some extraordinary peril; and, therefore, the auditors were bound so to consider it, at least in the absence of all contradictory and controlling evidence. Unless these items of charges are allowed, there is no loss exceeding 5 per cent. on the ship; and hence arises the importance of considering them in the cause.

As to the first point, it is not now properly before this court upon the report. The auditors have not reported, what the evidence was before them upon this matter; nor did the plaintiffs require them to report it specially, as they ought to have done, if they meant to bring the conclusion of the auditors under the review of the court. The report of the auditors is in the nature of a report of a master in a suit in chancery; and, when exceptions are to be taken to the latter. the evidence, which furnishes the ground of the exceptions should be required, by the party excepting, to be stated by the master; for otherwise the court will not wander at large into the evidence in order to ascertain, whether, by possibility, the master was wrong in his conclusion or not. Still, however, as this is a mere mistake in practice, if the court were now satisfied, that the auditors had committed a gross and palpable error in any matter of fact to the injury of the plaintiffs, I should feel it a duty to recommit the report, in order that such an error might be corrected. But if it be a matter of fair doubt, or a conclusion upon evidence in its own nature ambiguous and uncertain, upon which different persons, equally impartial and intelligent, might entertain different opinions; there the court will not substitute itself for the judgment of the auditors, any more than it would for the judgment of a jury, even though it might not perhaps have originally arrived at exactly the same conclusion. It is sufficient for the court to abstain from any interference, as to a matter of fact, that it is not clearly satisfied, that there has been an unquestionable error. My opinion is, in the present case, that there is no such error.

Then, as to the point of law. I agree, that the verdict admits the seaworthiness of the ship for the voyage from Batavia to Antwerp. But, in my judgment, it furnishes no sufficient ground to say, that all repairs, which may incidentally become necessary or proper in the course of the voyage, are therefore to be attributed to the extraordinary perils insured against. It is clear, that the underwriters are never liable for losses occasioned by the mere wear and tear of a ship during a voyage. Unless it can be established, that no losses by mere wear and tear can occur during a voyage, which it may be necessary or proper to repair, consistently with the warranty of seaworthiness, there is an end of the argument. I know of no such presumption of evidence, and no such principle of law. On the contrary, I have always supposed, that there may be many small repairs, necessary and proper in the course of a voyage, from mere wear and tear, the existence of which would not impair the warranty of seaworthiness. Suppose some of the timbers of a ship are decayed, and yet not to such a degree as to destroy her seaworthi-

ness; and repairs should be necessary in that part of the ship from any extraordinary peril, without absolutely requiring that timber to be removed; it might be matter of great propriety, and in a general sense necessary and proper. to take out such timber; and yet the underwriters might not be liable for the loss. As I understand the law, the underwriters are not liable for any repairs or losses on a ship, not properly occasioned by, or attributable to some peril insured against. The mere fact, that repairs are made by a master in the course of a voyage, in the exercise of his discretion (which discretion is always confided to him to some extent by law), can furnish of itself no proof, that those repairs were indispensable, and far less, that they were required by some extraordinary peril. Such repairs must often be made in the exercise of a sound discretion, and with a prudent view to the interests of the owner. In every case, in which the assured seeks to recover for such repairs against the underwriters, he must show, not only that they were proper and necessary, but that they became so from the extraordinary perils of the voyage within the policy. The loss is like every other loss within the policy. The onus probandi is on the assured to establish it by competent and satisfactory proofs, before he is entitled to recover it. It appears to me, therefore, that the auditors were, under these circumstances, perfectly correct in their view of the law.

But it is said, that the defendants have precluded themselves from any inquiry of this sort, by consenting to take a verdict against them; for that admits, that the plaintiffs have sustained some loss; and if so, then the only thing for the auditors to do, was to ascertain the amount of the loss, not to ascertain the cause of the loss; for the verdict admitted that. The case has been likened to the case of payment of money into court upon a policy, which not only admits the loss, but the cause of the loss as stated in the declaration; and for this the case of Waldron v. Coombe, 3 Taunt. 162, has been relied on.

It appears to me, that the argument is not maintainable, either upon principle or upon authority. By consenting to take a verdict against them, subject to the report of auditors, the defendants have done no more than admit, that the plaintiffs had some cause of action against them, and had sustained some loss or damage within the perils of the policy. The quantum of that loss or damage is precisely what the auditors were appointed to ascertain, as substitutes for the jury. The latter, upon the trial, would have been bound to find, not only that there was some loss, but the nature and extent of that loss. If the defendants had admitted, before the jury, that the plaintiffs were entitled to recover some loss or damage, the inquiry would still have remained, what loss, and what damage; and that could be ascertained only by ascertaining the loss and damage properly attributable to the perils of the sea. The very same duty has now devolved upon the auditors. They are to ascertain, not what loss or damage has been sustained by the plaintiffs, but what loss or damage by the perils within the policy, and for which the underwriters are properly answerable. By referring the amount to the judgment of the auditors, it could never be supposed, that the defendants intended to make themselves liable for losses or damages not within the scope of the policy.

As to the case of Waldron v. Coombe, 3 Taunt. 162, it turned upon other considerations, and does not in any manner touch this doctrine. It is admitted, that payment of money into court admits, that the plaintiff has a good cause of action to that amount upon the peril specified in the declaration. Thus, for example, the payment of 50 per cent. into court upon a declaration on a policy, alleging a loss by perils of the seas, admits a loss by such perils to that amount; but not beyond it. The argument in Waldron v. Coombe was not, that the plaintiff, without proof, could recover beyond the 50 per cent. paid into court; for proof was offered of that. But the argument for the defendant was, that the plaintiff "had not, in fact, even proved, that there had been a storm or an hour's foul weather during the voyage." Now, the declaration averred a loss by perils of the seas. And Lord Chief Justice Mansfield said, in answer to the argument, "The payment of money into court admits the storm." He did not say, that the payment admits all the loss claimed to have been by storms. And Lawrence and Heath, Justices, added, with reference to the evidence; "No facts are laid before the court, from which we can infer, that the defendant could put himself in a better situation, if he had the advantage of a new trial." So that the court did not touch the point now in judgment; but the verdict was confirmed upon other grounds. Nothing, indeed, is better settled than the rule, that payment of money into court admits the contract and damages only pro tanto; and if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him. Rucker v. Palsgrave, 1 Taunt. 419; Gutteridge v. Smith, 2 H. Bl. 374. The case of Rucker v. Palsgrave, 1 Taunt. 419, is a direct authority to this very point of payment of money into court for a loss upon a policy. My judgment is, therefore, with the auditors on this point; and this disposes of the partial loss on the ship; for, under these circumstances, it does not amount to 5 per cent.

We come, in the next place, to the consideration of the real and difficult question in the cause; and that is, whether, under the exception in this policy, the plaintiffs are entitled to recover for two partial losses occurring to the cargo at two different points of the return voyage, each less than 5 per cent.,

but in the aggregate amounting to more than 5 per cent. The language of the policy is, that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel, or freight, unless it amount to 5 per cent., exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss." In the argument at the bar, some criticism has been employed to establish, that the words "in each case," in the clause, mean "at each time of loss," but, in my judgment, entirely without success. These words, in their true and proper meaning, apply to goods, vessel and freight, and require 5 per cent. damage to justify a claim in each case, that is, in case of an insurance on goods, on vessel, and on freight. If all three are insured in one policy, a loss of 5 per cent. on the cargo will not authorize a recovery for a loss on vessel, or on freight, unless the loss on them be also 5 per cent. What then is the true interpretation of this clause? Does it mean, that each single loss accruing at one and the same time, and, as it were uno flatu, should amount to 5 per cent., or only that all the aggregate losses on the subject-matter during the voyage should amount to that sum? If I had been called upon to give a construction to this clause, wholly independent of authority or usage, I confess, that the strong inclination of my mind is, that I should hold it to apply to an aggregate of losses during the whole voyage, and not to a loss of 5 per cent. at any one time, or by any one continuous peril. My reason is, that the general words of the policy apply to all losses, during the voyage, from the perils insured against. The exception is, of all losses not amounting to 5 per cent., which (it seems to me) naturally means all losses during the voyage, not all losses at a particular time, or on a particular occasion in the course of the voyage. The exception is carved out of a general liability for all losses. It is an exception of the same nature as the general liability; and it saves the party from all such losses, if they do not amount to 5 per cent. There are no qualifying phrases, as to the time, or manner, or occasion of the loss; and I do not well see, upon what grounds a court can add to, or qualify the words. The general words make the underwriters liable for all losses, however numerous, in the voyage; not for each separately, as an independent loss; but for all in the aggregate. The exception (as I think) excepts all losses ejusdem generis below 5 per cent., that is, not amounting in the aggregate to 5 per cent. If the exception meant to cover a particular class of losses, different from those included in the general words in any respect, it would have been natural, that some qualification should have accompanied them. The absence of such a qualification negatives any intention to make it. I agree, that the intention of the exception was, to guard the underwriters against trifling losses occurring in the voyage, which should be borne by the assured, as coming within the common meaning of wear and tear. But I think, also, that it was the very basis of the exception, that the aggregate of losses, not exceeding 5 per cent. in the whole voyage, were fairly attributable to mere wear and tear. But if the other view of the exception is to prevail, the assured might in a long voyage, as for instance, to India, meet with losses from four or five successive storms, each of which might be less than 5 per cent. damage; but the aggregate of which might amount to nearly 20 per cent. It appears to me incredible, that a succession of losses of this sort should not be intended to be covered by the risks of the policy. A ship, valued at $20,000, might, in a succession of gales, be stripped of most of her sails, and even lose her masts, and yet no one gale might have done damage equal to $2000, while the aggregate might be $5000 or $6000. But the case does not stand unaffected by usage and authority; and therefore, it is necessary to consider the question with reference to both. As to the usage in this state, there is no evidence before the court; and the statements at the bar are of opposite characters, leading to the conclusion, that there is no uniform and well established usage in our mercantile community. And, if there were, I am among those judges, who think usages among merchants should be very sparingly adopted, as rules of law, by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views, of the full bearing of principles. The usage in England, or rather, as it should be stated, at Lloyd's in London, is, as we are informed by Stevens and Benecke, to construe the words of the memorandum in English policies, "And all other goods, also the ship, and freight, are warranted free of average under three per cent., &c.," to mean, three per cent. by one accident or at one time (see Stev. Av. p. 401; Benecke, Av., Phil. Ed., Boston, 1833, p. 426); though it is by them, in terms, exclusively applied to averages on the ship. We shall presently see, how little that usage has been adhered to in the English courts of justice.

In the case of Brooks v. Oriental Ins. Co., 7 Pick. 259, which was an insurance on ship, with the usual exception of any partial loss, unless it should amount to five per cent., the supreme court of Massachusetts held, that the meaning was, that there must be five per cent. damage from disasters happening at one time, or in one continued gale or storm, considered by itself. And the court seem to have founded themselves mainly in this decision on the English practice, as stated by Stevens in his work on Average. Now, although questions of commercial law are generally considered, as not justly included in that branch of local law, which the courts of the United States are bound to administer, as the state courts hold it to be; yet, such is my respect for the learning and ability of

that court, and my anxiety to follow the current of decisions upon commercial questions (as to which Lord Mansfield's remark is well founded, that it is less important, how they are settled, than that they should be settled), I should implicitly have adopted this doctrine on the present occasion, if it had been applicable to it. But my distress is, that the court in that case expressly save the very point now in judgment; or rather, lead us to the conclusion, that this construction of the exception applies to the ship only, and not to the cargo. The court said: "But it may be otherwise in regard to the cargo; because the actual damage received at different times cannot be ascertained during the passage, or when it happens; but only when the cargo is unladed." Now, the reason, thus given for the distinction does not seem to me entirely satisfactory; nor can I well see, how the same words are to receive an entirely different construction, as to the different subject-matters of insurance, stated in the exception. The language is, that the underwriters are not to be liable, "for any partial loss on other goods, or on the vessel, or freight, unless it amount to five per cent." The loss then, must be five per cent. on the ship, five per cent. on the freight, five per cent. on the cargo. How it is to be ascertained; when it must occur; and whether at one time, or in the whole voyage; is not stated in the one case, any more than in the other. The difficulty of establishing in proof the nature or extent of the loss at any one time has nothing to do with the rule of construction of the words of the instrument. The question is not, how the loss is to be established in either case; but whether it does in fact amount to five per cent. If, indeed, the intrinsic difficulty of ascertaining the damage at any one time to the cargo be a sufficient ground in point of general convenience, to repel the construction above stated, as to the cargo, it should repel it also, as to the ship and freight; for the words apply with the same force, and in the same connection to each. Besides; it is often quite as difficult to ascertain the damage done at any one time to the ship, as to the cargo. The injury to the ship, done by a succession of gales, is often impracticable to be ascertained at sea, and, especially where there has been great straining, until after she has been overhauled in port. And where the direct damage done to a ship in a single gale is visible, and afterwards in other gales other injuries occur to the same things, or in the same places, it is, practically speaking, extremely difficult to ascertain the precise amount of the mischief done at any one time. Yet the injury may be of such a nature, as clearly to establish, that it is not mere wear and tear; and to avoid the latter, is what the learned court thought was the true object and foundation of the exception. With the greatest deference, therefore, to the learned court, I confess, that the reason assigned for the distinction rather leads me to doubt, whether the construction ought to have been adopted in regard to the ship. The rule, it seems to me, ought to work throughout, or not at all. Its inconvenience and difficulty, in application to the cargo are admitted; nay seem insuperable. Why, then, if not intended to be applied to the cargo, should we presume an intention to apply it to the ship, when in many cases the same inconvenience and difficulty would apply to the ship?

Mr. Phillips, in his excellent treatise on insurance (volume 1, c. 18, pp. 493, 494, lays it down as clear, that in practice, the doctrine is not applied to the cargo; but that successive losses in the voyage may be added to make the five per cent. His language is: "The amount of damage upon goods is usually ascertained at the port of delivery; and no distinction can ordinarily be made in regard to the damage occasioned at different periods. If the whole damage exceeds the rate per cent. of the exception, the insurers are considered to be liable. It would, in general, be impracticable to distinguish damage to goods by the same peril, as perils by the seas, for instance, at different times." I agree to this reasoning; and it seems to me, in general, equally applicable to the ship. No one will pretend in regard to the ship, that if the degree of damage, done at any time to the ship, can be ascertained, one rule shall prevail; and if it cannot be, that a different rule shall prevail as to the ship. That would be, to make the rule depend upon the proof, and not the proof upon the rule. It would be to make the underwriters liable for successive losses on the ship during the voyage, where you could not ascertain the precise amount each time, or in each gale; and not liable, where each admitted of a distinct valuation, though the aggregate of the latter might be treble the former. Mr. Phillips, also, states a distinction between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage. With that distinction, I do not now intermeddle; for it is not before the court. All I can say is, that it is not pointed at by the words of the exception, however reasonable it may be. But the question as to the ship has recently undergone a solemn adjudication in England. I allude to the case of Blackett v. Royal Exchange Assur. Co., 2 Cromp. & J. 244, where the court of exchequer held, that, under the usual words of the memorandum in English policies, "free from average under three per cent.," successive losses on the ship, at different periods of the voyage might be added, to make up the amount. Lord Lyndhurst, in delivering the opinion of the court, put the case upon a general ground in the exposition of all instruments, and very properly applied to policies, that words of exception in an instrument are to be taken (if doubtful) most strongly against the party, for whose benefit they are introduced (Earl of Cardigan v. Amitage, 2 Barn.

& C. 197, 206; Shep. Touch. 100; Bullen v. Denning, 5 Barn. & C. 847, 850, 851; Lofield's Case, 10 Coke, 107b); and, according to that rule, held the underwriters liable. Now, this is a case, in its reasoning directly applicable to the present. The case (it is true) was that of the ship; but a fortiori the same considerations must, upon the grounds already suggested, apply to the cargo. I should have been glad, indeed, to have found the doctrine established upon some broader ground than that of a mere technical rule of construction, satisfactory in itself, but still in my judgment, sustained by more enlarged considerations. It has been intimated, that the clause in our policies differs from that in the English policies. In form it does; in substance it is the same, as to all the purposes of this exception. A similar clause exists in foreign policies, and especially in policies in France. I have been induced, on this account, to examing the writings of the maritime jurists of that country, to see, if a different rule prevails there. I cannot find, that it does. The point does not indeed seem ever to have been directly made. But this very silence, in a case of such common occurrence, is of itself expressive. Valin, Pothier, and Emerigon (2 Emerig. Assur. c. 12, § 44, note 4, p. 3; Poth. Assur. note 165; 2 Valin. Comm. B. 3, tit. 6, art. 47, p. 113; Poth. Assur. note 162) all use language, which leads to the conclusion, that the exception does not apply to successive losses to the stipulated amount, occurring at different periods of the voyage; but that the underwriters would be liable therefor; for they do not distinguish between cases of a single average, and cases of several averages in the voyage. The only practical point, which they discuss approaching near this, is, whether in case of an exception of losses, not exceeding three per cent. (or any other rate), if the loss in the voyage exceeds that sum, whether the whole loss is to be paid, or only the difference after deducting the three per cent. They agree, that the whole must be paid, for the reason given by Pothier, that the words, not exceeding three per cent., express only the condition, on which the underwriters are to pay the averages, (les avaries) or the case, in which they ought to be held liable. If there had been an exception, as to losses at different periods of the voyage, it would have been natural for us to have found it here stated. The modern Commercial Code of France (article 408) provides, in exact conformity to the 47th article of the Ordinance of Louis XIV. on the same subject (2 Valin, Comm. liv. 3, tit. 6, art. 47, pp. 108, 113, 114), that, unless the parties have otherwise agreed, a demand of average losses (avaries) is not admissible, if the general average do not exceed one per cent. of the total value of the ship and cargo; and if the particular average do not also exceed one per cent. of the value of the article damaged. All the commentators upon this article agree, that, when the underwriters are liable at all under this clause, they are liable for the full amount of the average without deduction. 3 Pard. Droit Comm. pt. 3, tit. 5, c. 3, § 4, note, 860, p. 427; 2 Locre, Esprit de Code de Commerce, B. 2, tit. 11, art. 408, pp. 535, 536. None of them make the slightest allusion to any distinction between the aggregate averages of the whole voyage, and an average loss at a particular period. I have, therefore, silently drawn the conclusion, that in the commercial states of the continent of Europe the distinction is unknown, although most of their policies contain an exception similar in its principles to ours.

Upon the whole, my opinion is, that successive losses on cargo during the voyage, amounting in the aggregate to more than five per cent., are to be borne by the underwriters, and are not within the scope of the exception. The plaintiffs are accordingly entitled to judgment, in conformity to the auditors' report for these partial losses on the cargo. And, upon the principles already stated, they are not entitled to any partial loss on the ship, the aggregate not amounting to five per cent.

DONNELL (RAY v.). See Case No. 11,590.

Case No. 3,988.

DONOGHUE'S CASE.

[2 Cranch, C. C. 466.][1]

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

INSOLVENCY — FRAUDULENT DISPOSITION OF PROPERTY—CONFINEMENT OF DEBTOR.

If an insolvent debtor, upon allegations filed, be found guilty of having disposed of his property with intent to defraud his creditors, he will be ordered into close custody, and precluded from any benefit under the insolvent act [3 Stat. 682].

Allegations were filed by Mr. Wallach, for a creditor of Daniel Donoghue, (who had applied to be discharged under the 7th section of the insolvent act,) charging that the petitioner had disposed of his stock of goods with intent to defraud his creditors. Having been found guilty by a jury,

THE COURT ordered him into close custody, and adjudged that he should be precluded from any benefit under Act June 1, 1824.

Case No. 3,989.

DONOHOE v. MARIPOSA LAND & MIN. CO.

[5 Sawy. 163;[2] 6 Cent. Law J. 457; 1 Pac. Coast Law J. 211.]

Circuit Court, D. California. May 6, 1878.

FORECLOSURE OF MORTGAGE—REMOVAL OF CAUSES —CROSS-BILL.

1. Where D., a citizen of California filed a bill to foreclose a mortgage against M. the

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

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

mortgagor, also a citizen of California, and F., a subsequent incumbrancer and a citizen of New York, there can be no final determination of the controversy between D. and F. without the presence of M., and the suit is not removable by F. to the circuit court of the United States under section 639 of the Revised Statutes.

[Cited in Goodenough v. Warren, Case No. 5,534; Dormitzer v. Illinois & St. L. Bridge Co., 6 Fed. 218.]

2. Neither in such case where the only controversy is as to the validity of the mortgage, and whether there is anything due on it, is there "a controversy which is wholly between citizens of different states," or "which can be fully determined as between them," within the meaning of section 2 of the act of March 2, 1875 (18 Stat. 470), and the case can not be removed to the national courts under the provisions of that act.

[Cited in Bybee v. Hawkett, 5 Fed. 10.]

3. Where a cross-bill filed by one defendant against complainant and its co-defendant only sets up the same matter as that set up in the respective answers of the defendants to the original bill, it is merely matter of defense, and in no way affects the right of removal under the statutes cited.

[Cited in Maish v. Bird, 48 Fed. 608.]

Motion to remand cause to state court.

This suit was brought in a state court by the complainant [Joseph A. Donohoe], a citizen of California, against the Mariposa Land and Mining Company of California, a corporation created under the laws of California, and the Farmers' Loan and Trust Company, a corporation created under the laws of New York. The object of the suit is to recover a balance of something over one hundred and forty-five thousand dollars and interest alleged to be due complainant from the Mariposa Land and Mining Company of California, upon certain promissory notes, and to foreclose a mortgage given by said defendant upon large landed estates situated in California to secure the payment of said sums so alleged to be due. The bill alleges that the Farmers' Loan and Trust Company has, or claims, some interest by way of lien or mortgage upon the same premises, which is subsequent and subject to the mortgage of complainant, and on that ground prays that said corporation be made defendant. Each defendant answered separately, and each, so far as the matters in contest are concerned, set up the same defense; which is in substance as follows: That a corporation existed in New York, created by the laws of that state, named the Mariposa Land and Mining Company of New York, having its property in this state, to wit: the Mariposa mine; that the embarrassments arising in a case where a corporation and its property were thus divided led to the necessity of discontinuing the New York corporation, and establishing a new corporation in California, where the property is, as its successor; that, accordingly, a new corporation was created in the latter state named the Mariposa Land and Mining Company of California, one of the defendants; that to this corporation the New York company transferred its property on condition that it should assume the payment of the New York company's indebtedness; that Donohoe, the California plaintiff, was the partner of Eugene Kelly in New York; that between Kelly and the said New York company a fraudulent agreement was made, to which Donohoe was privy, whereby, in consideration of Kelly's previous relations with that company, and his control over its interests, a fraudulent and collusive indebtedness from the New York company to him was pretentiously created; that this spurious claim was presented to the new California organization as one of the honest debts which it had assumed to pay; that in ignorance of its true character the California company, defendant herein, executed to Donohoe, as trustee for himself and said Kelly, and at the instance of the latter, a mortgage for the said pretended debt; that this debt included certain other moneys advanced by Donohoe and Kelly for the payment of the expenses incurred in the organization of the company in California; that so far as that item of the mortgage was concerned it constituted a true and valid debt; that for the entire indebtedness thus created said mortgage and promissory notes of the California corporation in suit were given; that certain of these notes embraced the amount advanced as above mentioned for the payment of the expenses of organization; and that these notes have all been paid, and by plaintiff are admitted to be paid.

The Farmers' Loan and Trust Company further sets up in its answer, that after the making of said notes and mortgage, the defendant, the Mariposa Land and Mining Company of California, executed in its favor another mortgage to secure an indebtedness for five hundred thousand dollars, the validity whereof is not yet disputed. But whether disputed or not is a matter of no interest to the complainant which is the first incumbrancer, and there can be no controversy between the complainant and the Farmers' Loan and Trust Company on that point. The Farmers' Loan and Trust Company then removed the case from the state court to the United States circuit court, and after such removal filed its cross-bill against the complainant, Donohoe, and its co-defendant, the Mariposa company, in which it alleges with more fullness of detail the said matters before alleged in the answers of the respective defendants to the original bill, and asked that the matters be adjudicated, the complainant's mortgage canceled, and for a foreclosure of its own mortgage.

The complainant now moves to remand the cause to the state court on the ground, among others, that it is not a case which the statute authorizes to be removed.

Doyle & Barber, for motion.

J. W. Winans, S. Heydenfeldt, and McAllisters & Bergin, contra.

SAWYER, Circuit Judge. The counsel of the defendant removing the cause, insist that the case is one for removal both under section 639 of the Revised Statutes, embodying the provisions of the act of July 27, 1866 [14 Stat. 306], and under section 2 of the act of March 3, 1875 (18 Stat. 470). In the petition it is stated, in express terms, that the application is made under the act of 1875, but it is insisted that the facts make a case for removal under either. It seems to be assumed in the brief filed, that there is no difference in the requisites with respect to the character of the controversy for removal under either act; and that the only difference is in the consequences—under the Revised Statutes the action being divided into two parts, one part being removed and the other remaining in the state court, while under the act of 1875 the whole suit is removed. The provision of the Revised Statutes, so far as applicable, is: When a suit is by a citizen of a "state against a citizen of the same, and a citizen of another state, it may be so removed, as against * * * said citizen of another state, upon the petition of such defendant * * * if so far as relates to him it * * * is a suit in which there can be a final determination of the controversy, so far as concerns him without the presence of the other defendants as parties in the cause." Section 639. For the purposes of the decision, I shall assume, without deciding the point, that this provision is not repealed by subsequent acts.

The provision of the act of 1875 invoked is: "When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then, either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," etc. 18 Stat. 470.

The construction of the act of 1866 (section 639, Rev. St.) upon this point in a very similar case, has already been determined by the supreme court. Gardner, a citizen of New York, conveyed lands in Tennessee to Walker, a citizen of Tennessee, in trust by way of mortgage to secure moneys due to Vassar, who afterwards died, and Brown, a citizen of Tennessee, became administrator. Brown, as administrator, filed a bill in the state court in Tennessee against Gardner of New York, the debtor, and Walker, the trustee, of Tennessee, to foreclose the mortgage. Thus, as in this case, in an action to foreclose a mortgage, the complainant and one defendant were citizens of the same state, and the other defendant a citizen of another state. The case having been removed by Gardner, the defendant, who was a citizen of an other state, to the United States circuit court, under the act of 1866, it was by that court remanded. An appeal having been taken to the supreme court, that court, in deciding the case, speaking by the chief justice, says: "The motion of Gardner, the mortgagor, to transfer the cause, as to himself, to the circuit court, under the provisions of the act of July 27, 1866, could not be granted unless there could be a final determination of the cause, so far as it concerned him, without the presence of the other defendant as a party. And we think that the circuit court was right in the opinion that Walker was a necessary party to the relief asked against Gardner, and in refusing to entertain jurisdiction and in remanding the cause. The bill prayed a foreclosure of the mortgage by a sale of the land. This required the presence of the party holding the legal title. The complainant had only the equitable title. Walker held the legal title. The final determination of the controversy, therefore, required his presence; and as the cause was not removable as to him, under the authority of Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172, it could not be removed as to Gardner alone." Gardner v. Brown, 21 Wall. [88 U. S.] 40. This settles the claim of the defendant under section 639 of the Revised Statutes.

The bill in this case prays a foreclosure of the mortgage by a sale of the land. This, in the language of the supreme court, "requires the presence of the party holding the legal title," and that party is the Mariposa Land and Mining Company of California. The complainant here, as in the other case, has only an equitable claim—a lien to secure his debt—and the other defendant has only a lien on the surplus. The case is, therefore, not within the act of 1866, or the corresponding provision of the Revised Statutes. See, also, Sewing-Machine Cases, 18 Wall. [85 U. S.] 583. If, as defendant's counsel seem to assume, the conditions upon which the transfer can be made under this branch of the statute in the two acts are the same, although expressed in different language, and only the consequences differ, then this decision under the act of 1866, also, settles the question under the act of 1875. But we will examine the provisions of the act of 1875 upon their own terms. There must be "a controversy which is wholly between citizens of different states, and which can be fully determined as between them." Now, what controversy is there in this case that is wholly between the complainant, Donohoe, and the New York defendant, which can be fully determined as between them? Donohoe is seeking a decree for a large sum of money, which he claims to be due from the Mariposa company, and to obtain the money claimed to be due, by a foreclosure of a mortgage and sale of the mortgaged premises, the legal title to which is in said Mariposa company. He does not claim anything from the other defendant, except to conclude it by the decree against the real defendant, and there is no interest whatever in the foreign defendant except a lien upon the surplus left after Donohoe's just demand, whatever it may turn out to be, is paid. The whole contest is primarily and re-

ally between complainant and the Mariposa company, the interest in the other defendant being only secondary. There is but a single indivisible controversy between the complainant and the Mariposa Company, in which the foreign defendant has a derivative interest merely. The controversy between Donohoe and the Mariposa company is the principal, direct, and only, controversy; while that of the other defendant is only incidental by reason of a relation to the debtor voluntarily assumed after the interest of Donohoe attached. The defense set up by the foreign defendant is precisely the same as that set up by the debtor and principal defendant, and must be sustained by the same evidence. Its own defense must be made through the Mariposa company, as its rights were derived through it alone. It succeeds to a lien upon what the Mariposa company had left after satisfying the claim of Donohoe—nothing less, nothing more. It stands to the extent of its lien in its predecessor's shoes. The Mariposa company is interposed between the complainant and the other defendant in the contest. There is no charge of collusion between Donohoe and the Mariposa company; and there is no defense set up which is not, also, the defense of the Mariposa company. The controversy, therefore, is one and indivisible, and not wholly or principally between the complainant and the foreign defendant, but the latter's controversy is merely incidental to the real substantial controversy, which is between Donohoe and the other defendant. Again the controversy cannot "be fully determined as between them," or determined at all without the presence of the Mariposa company. A decree in a proceeding between Donohoe and the Farmers' Loan and Trust Company, without the presence of the Mariposa company, would be futile. It would in no way conduce to the accomplishment of the object of Donohoe's suit. There would be no practical or useful result if Donohoe should succeed. How then can it be said that the controversy can be "fully determined as between them," when the determination, if in Donohoe's favor, would be fruitless? A decree between Donohoe and the Farmers' Loan and Trust Company alone would not affect the rights of the Mariposa company, and no effective sale of the premises under it could be had. No party would bid at such a sale, because a sale would transfer nothing tangible.

So a decree against the Mariposa Land and Mining Company alone would not affect the rights of the other defendant; and, as has often been held in this state, a clear title would not pass by sale under such a decree. The decree in neither case, therefore, would afford the remedy sought, and I do not know of any means by which parties could safely purchase under both. There could, then, be no separate determinations of the controversy which would afford either singly or together an effectual remedy to Donohoe. It is no answer to say, that the whole suit would be transferred, and that then there would be but one decree, which would bind all parties, for we are not discussing the question as to what would be transferred, but are dealing with the test which the statutes have prescribed, by which to determine whether anything can be transferred. And that test is that there must be a controversy which is wholly between the separate parties, which can be fully determined as between them so as to be effectual in separate actions. If such determination cannot be had separately and independently, then the case is not one which the statute authorizes to be transferred at all, either wholly or in part. Besides this case is not within the reason upon which the jurisdiction is based. The only real controversy being between citizens of the same state, the interposition of the Mariposa company between the complainant and the Farmers' Loan and Trust Company, which is only incidentally interested through its co-defendant, is presumed to be a sufficient safeguard against any prejudice that might exist. It is, doubtless, upon this very theory that the act is framed with the limitations found in it.

In my judgment the case clearly does not present a controversy, which is wholly between citizens of different states, which can "be fully determined as between them" within the meaning of the statute. Even the authorities cited by defendants' counsel properly considered sustain this view. For example, Judge Dillon's tract on Removal of Causes is cited, wherein he says (page 30): "If the substantial controversy is wholly between citizens of the same state, it is not, and cannot become, one of federal cognizance; but if the real litigation is between citizens of different states, the case is within the constitutional grant of federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same state with some of the plaintiffs." In this case the substantial controversy is between the complainant and the Mariposa company. So again, he cites Mr. Justice Davis's observation, from a note in Dill. Rem. Causes (page 35), "that the intention of congress, plainly expressed in the act of March 3, 1875, was, that where the main controversy in a case was between citizens of different states, it was removable, and carried with it all the incidents; and that a mere incident would not prevent the case from being removed." If this be true, and I have no doubt that it is, the converse of the proposition is equally true; and if the main controversy is between citizens of the same state, it is not removable, and the mere incident will not confer a right of removal. The incident must follow the real controversy to which it is inseparably annexed. In this case, there is but one indivisible controversy, and that is as to whether there is really any-

thing justly due from the Mariposa company to the complainants, and if so, how much. And that controversy is directly and primarily between the complainant and his alleged debtor and mortgagor. There is no subordinate, independent, or other controversy between the complainant and the foreign defendant. Its interest in this same controversy is only incident to the main controversy by reason of its relation to the debtor and real party. These views appear to me to be sustained by the current of decisions on the circuit. See Chicago v. Gage [Case No. 2,664]; Osgood v. Chicago, D. & V. R. Co. [Id. 10,604]; Arapahoe Co. v. Kansas Pac. R. Co. [Id. 502]; Cape Girardeau & St. L. R. Co. v. Winston [Id. 2,390]; Carraher v. Brennan [Id. 2,441]; Tyler v. Hagerty [Id. 14,308]; Latham v. Barry [Id. 8,102]; Peterson v. Chapman [Id. 11,042]; First Nat. Bank v. King Wrought-Iron Bridge Co. [Id. 4,803].

It is urged by defendants that, since the removal, the foreign defendant has filed a cross-bill against the complainant and its co-defendant, and that as to the cross-bill, there is a suit pending in which the complainant is a citizen of New York, and all the defendants are citizens of California, and that the suit for this reason is now properly in this court, whatever the case might have been at the time of the removal. But the cross-bill, so far as the complainants in the original and cross-bills are interested, sets up precisely the same matters as were set up by both defendants in the original bill. It is but a repetition of the defense already set up in the answers of both defendants. It could not go beyond the matters of the original bill. "A cross-bill is a defense." Gallatin v. Irwin, Hopk. Ch. 58, 59. "The original bill and the cross-bill are but one cause." 3 Daniell, Ch. (Ed. 1851) 1743. "Both the original and cross-bill constitute but one suit." Ayres v. Carver, 17 How. [58 U. S.] 595. "It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency on it." Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 809; Cross v. De Valle, 1 Wall. [68 U. S.] 5; Field v. Schieffelin, 7 Johns. Ch. 252. The dismissal of the original bill before a hearing would doubtless carry the cross-bill with it as a part of the suit. Slason v. Wright, 14 Vt. 209, 210; Huntington v. Central Pac. R. Co. [Case No. 6,911]. The fact, therefore, that a cross-bill has been filed setting up the same matters put in issue by the original bill and answers cannot change the character of the case, or affect the question of jurisdiction. The original bill is still the suit, the cross-bill being but an appendage constituting a part of it.

The view taken upon the main question renders it unnecessary to notice the technical objections taken to the removal.

The cause must be remanded to the state court with costs, against the party removing it, and it is so ordered.

Case No. 3,990.

In re DONOHUE.

[2 Hask. 17.][1]

District Court, D. Maine. Jan., 1876.

ATTORNEY AND CLIENT—BANKRUPTCY—PRIVILEGED COMMUNICATIONS.

An attorney at law is not privileged from disclosing facts relating to his client's cause not confided to him by the client.

[In bankruptcy. In the matter of John O. Donohue.] An attorney at law was sworn and interrogated concerning the disposition he had made of certain property, as attorney for his client, a bankrupt. He invoked the privilege of an attorney, and declined to answer unless compelled. The court directed the witness to answer, and afterwards filed an opinion.

FOX, District Judge. It is a mistake to suppose that an attorney is privileged from answering as to that which comes to his knowledge during his employment as attorney. The privilege only extends to information confided to him by the client. Information derived or obtained from other persons or sources is not privileged. Spenceley v. Schulenburgh, 7 East, 357. The rule does not apply to the discovery of facts within the knowledge of the attorney that were not communicated or confided to him by his client, although he became acquainted with them while engaged in his professional duty in his client's cause. In Coveney v. Tannahill, 1 Hill, 33, it was decided that if an attorney was present at the transaction of business between his client and another, he is not privileged as to what then took place. In Whiting v. Barney, 30 N. Y. 342, Judge Ingraham says: "If he was only the counsel of Barney, then the decisions settle, that the disclosures being made in presence of a third party, they are not privileged."

The answers to the questions put could not disclose any privileged communication. They only require him to disclose his own proceedings in disposing of a stock of goods, and what disposal he has made of the proceeds. His own acts are inquired about, not what his client may have communicated to him. These acts were not strictly in the line of his professional duties as an attorney; but such as any other agent could have performed. In Shaughnessy v. Fogg, 15 La. Ann. 330, the same line of inquiry was made to a witness, and he was required to answer who was his client, when that relation commenced and ended, what money he had received and paid over, and to whom.

Answers to stand.

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

Case No. 3,991.

DONOHUE v. CULLEY.

[Taney, 468.][1]

Circuit Court, D. Maryland. April Term, 1844.

GOVERNMENT CONTRACTS—CONTRACTOR AND SUB-CONTRACTOR—EXTRA WORK.

L. B. C. having contracted with the United States to build a government vessel, entered into a contract with J. D. for a portion of the work; certain extra work was done by J. D., by direction of the government superintendent: *Held*, that in order to charge L. B. C. for this extra work, J. D. must show, not only that the work was not embraced in the specifications in his contract with L. B. C., but also that it was embraced in the contract of L. B. C. with the government.

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

This libel in admiralty was filed by the appellant, James Donahue, against Langley B. Culley, owner of a new brig afterwards called the "United States Brig Lawrence," to recover the value of work done on, and materials furnished said brig, in the year 1843. The libel was filed on the 9th of October, 1843; the amount claimed was $1186 01. The respondent in his answer denied his indebtedness to the libellant, as set forth in the libel; or that he ever contracted with the libellant to do the work and furnish the materials, as described and alleged in the said libel. On the 21st of December, 1843, the district court passed a decree in favor of the libellant for $450 [case not reported], from which decree he appealed to this court. The amount for which the decree was rendered, with interest and costs, was paid into court by the appellee, to abide the result of the appeal.

William H. Watson, for appellant.

N. Williams and Jos. B. Williams, for appellee.

TANEY, Circuit Justice. The material facts in this case are as follows:

On the 23d of March, 1843, Langley B. Culley entered into a contract with the secretary of the navy, to build a brig (the Lawrence); the size of the brig, the manner in which she was to be built, and the materials to be used, being specified in the agreement. The secretary reserved the right of appointing one or more superintendents, with power to reject any materials or workmanship which he might deem insufficient; Captain Gardner was accordingly appointed by the government, and the vessel built under his superintendence.

Culley, after making his agreement with the secretary, entered into contracts with different workmen to perform different parts of the work. Graham & Spedden contracted for the joiners' work, for the sum of $1300, and after they had done some part of it, Captain Gardner informed Culley that he was not satisfied with their work, and that some other person must be employed; Graham & Spedden upon receiving this information, made an arrangement with Donahue, the present appellant, by which he agreed to furnish the work, under their contract; they to receive $450 for what was already done, and he to receive $850, the residue of the sum originally agreed upon. There is, indeed, some difference between the witnesses on this point, and it has been insisted on the part of the appellant, that he came in, under a contract with Culley, to finish the joiners' work specified, for the sum mentioned, and not as taking the place of Spedden & Graham under the original contract with them. But the language of the receipts given by the appellant is too explicit to leave any doubt on this question; and the court is satisfied, from the whole evidence, that he agreed to take the place of Graham & Spedden, and assumed all their responsibilities under their contract.

When the brig was finished, Donahue claimed a large sum of money over and above the $850, upon the ground that joiners' work had been required to be done, and materials to be used, which were not called for by the original contract with Graham & Spedden. He presented an account against the government, for certain work which he considered as extra, and this account included sundry items which are now charged against the appellee. A part of this account, amounting to $282, was allowed as extra work, for which the government admitted itself to be liable; another part, $83, was rejected, upon the ground that the prices charged were too high, and the residue of the account, amounting to $98.12, was rejected, upon the ground that the work was not extra, and was called for and required to be done by the contract with Culley. The last-mentioned items are included in the present account against Culley; and the appellant claims $443.40 against him, upon the ground that certain work was done by him on the brig, which was not required by the contract with Graham & Spedden, and for which, therefore, the appellant is entitled to a reasonable compensation over and above the sum stipulated in the agreement.

When the libel in this case was filed in the district court, and also at the time of the trial, the sum of $450, part of the contract price, was yet due and unpaid by Culley; and this sum, as well as the compensation for extra work, of course, claimed by the libellant in the suit in the district court. That court was of opinion that Donahue was not entitled to recover anything from Culley on account of extra work alleged to have been done upon the brig, and therefore, decreed the payment of the $450 admitted to be due, with interest and costs, but nothing more. The appellee thereupon paid into court the sum then decreed against him, and the controversy brought here by the appeal is con-

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

fined to the claim for extra work and materials. The questions which arise, therefore, are: 1. Whether the appellant is entitled to recover anything from the appellee, on account of extra work or materials: 2. If anything, how much?

According to the testimony of Captain Gardner, all of the joiners' work upon the vessel done by Spedden & Graham, or by Donahue, was, in his judgment, required to be done, by the contract of Culley with the government, and none of it was extra work with reference to this agreement. He does not speak of the contract beween Graham & Spedden and Culley, with which he had no concern, and does not state that there was any difference in those contracts in relation to the joiners' work specified in them.

Several witnesses who are workmen, have also been examined by the appellant, who prove that joiners' work to a considerable amount was done upon the vessel, which is not embraced in the contract between Spedden & Graham and Culley, and which ought to be regarded as extra work with reference to this contract; but they do not say that it would not be extra also, with reference to the agreement between the government and Culley.

Now, the work in question was all done by the direction of Captain Gardner; and in order to charge Culley, it ought to be shown, not only that the work was not embraced in the specifications in the contract with Spedden & Graham, but also that it was embraced in the contract with the government; upon the face of the contracts, however, there is no difference between them in this respect, and no difference is shown by the witnesses examined in the case. Captain Gardner, it is true, states that the work in question was required to be done by the contract with the government; and the other witnesses state that it was not required by the agreement of Graham & Spedden; but neither Captain Gardner, nor any of the witnesses, point out any difference between the two contracts with reference to the joiners' work. It appears to the court, that the captain and the other witnesses differ only in the construction which they put upon contracts, which are in this regard precisely alike; and that, if the work was extra with reference to Graham & Spedden's contract, it was extra also with reference to the contract with the government.

Certainly, if the contract with the government embraced the work, and that with Spedden & Graham did not, Culley would, in that case, be justly responsible; but the contracts are substantially the same as to the joiners' work. What is now claimed as extra, was done by the direction of Captain Gardner, the agent of the United States. If it was required by the fair construction of these contracts, then Donahue is entitled to no further compensation than the amount stipulated in the written agreement with Graham & Spedden; and if it was not required by these contracts, and was extra work, then the government, and not Culley, is responsible, unless, indeed, he had agreed with Donahue to become liable, of which there is no proof. The decree of the district court must, therefore, be affirmed, with costs, interest not to be charged upon the $450 after the amount decreed was paid into the district court.

DONOVAN (DAVIDSON v.). See Case No. 3,603.

Case No. 3,992.

DONOVAN v. DEAN.

[1 Flip. 182;[1] 4 Chi. Leg. News, 210.]

Circuit Court, W. D. Tennessee. March 28, 1872.

RIGHTS OF PRESIDENTS OF CORPORATIONS TO SUE IN THEIR OWN NAMES FOR ALLEGED INJURIES TO THEM AS SUCH OFFICERS, AND AS STOCKHOLDERS IN SUCH CORPORATIONS, DENIED.

One who claims to be the president of a gas company, and at the same time a stockholder and creditor, cannot sue in his own name for injuries done to him or to said gas company. The suit must, if brought, be in the name of the company or corporation.

[Thompson] Dean owned stock in the Memphis Gas Light Company, claiming that neither the officers of that company nor stockholders had taken, or were about to take, any steps to protect the right of his company, and insisting that it alone had the exclusive right to lay down mains and sell gas in the city of Memphis. He filed his bill to restrain the Gayoso Gas Company from proceeding with their works, and restraining the city of Memphis from subscribing $250,000 stock in the last named company. On the coming in of the answer, the injunction was dissolved; and thereupon [John] Donovan brought his suit as president, stockholder, and creditor of the Gayoso Gas Company against Dean for damages.

Van W. Anderson, Hon. T. W. Brown, and Col. Geo. Gantt, for plaintiff.

Humes & Poston, Judge Wright, Judge Ellett, and Col. McRae, for defendant.

WITHEY, District Judge. This suit was commenced February 7, 1871, in the state court, and removed to this court in March following. The declaration alleges in substance that Donovan was a stockholder and creditor and president of the Gayoso Gas Company at a large salary; that Dean, with intent to injure plaintiff and said gas company, and to prevent him from receiving what the company owed him, and from realizing profits on his investment in said company, and to prevent the construction of the works, maliciously and without probable cause, sued out an injunction restraining the

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

gas company from constructing their works, and restraining the city of Memphis from subscribing for stock, falsely pretending that his, the defendant's gas company—of which he was a stockholder—had the exclusive right, and that said company refused to take proper proceedings to protect the rights of its stockholders; that said Dean, well knowing that Donovan had embarked his capital, and was president of the Gayoso Gas Company at a large salary, and, as president, had made contracts for materials, and had employed laborers and had thereby risked his credit commercially and his character as a skillful manager of said company. Which acts of defendant delayed the plaintiff's company, and prevented it from completing its works, and from obtaining large incomes and revenues, and rendered its success doubtful, and prevented the city from subscribing $250,000 to the stock of said company; whereby the plaintiff has been greatly injured by the inability of plaintiff's company to repay him money advanced, breaking down his credit, with loss of time and labor, and by the failure to receive large emoluments and profits which he would have received had plaintiff's company gone into operation. And also was greatly injured in his credit, and lost the use of his capital and labor, and has been wholly ruined, etc., to his damage, $100,000.

A demurrer was filed to the declaration after the cause came to this court, the grounds of which are: 1st—That the plaintiff, neither as stockholder, officer, or creditor of the Gayoso Gas Company, can maintain an action to recover damages for the matters complained of. 2d—That the damages are not such as can be recovered in an action by this plaintiff, the same being remote, consequential, and speculative, and not immediate or proximate. 3d—The declaration is uncertain, indefinite, informal, and insufficient.

It is contended by the plaintiff that while this suit is based upon a cause of action both new and original in instance, it is not such in principle. New, because such a state of facts has never been presented in the transactions of life. That while the plaintiff was injured pecuniarily in common with and as a member of the Gayoso Gas Company, the act of the defendant in suing out the injunction against plaintiff's company, thereby preventing it from prosecuting its works, etc., injuriously affected the property and commercial rights of this plaintiff, and of every stockholder in plaintiff's company, and also of every one who, by the contract, was to receive values from the company; that such parties were all affected in matters of direct values, of which the law takes cognizance; that the injuries complained of are not in any sense damna absque injuria.

Especially is it claimed that, as the act of the defendant was willful and malicious, and as plaintiff held no contract relation with defendant in the corporation injured, this action may be maintained. Again, it is urged that even a shareholder in a corporation may maintain an action against the officers of his own corporation for a fraudulent over-issue of stock, citing Cazeaux v. Mali, 25 Barb. 578.

Hence, it is argued that, if defendant's act, charged to be willful and malicious, had the effect to reduce the value of the stock of plaintiff's company, to injure its credit, or render it unable to pay its officers' salaries, or its creditors, each and every such person has a right of action, as also the company, against the defendant, especially as he is not a stockholder in plaintiff's company.

The court is of opinion that the grounds urged by plaintiff to maintain his action have no foundation in law, and therefore the demurrer must be sustained. There are cases that by analogy and upon principle are decisive of this action. But, first looking at the case relied upon to some extent by plaintiff, of Cazeaux v. Mali, supra. Defendants were officers of a coal company, and fraudulently issued 128,000 shares of stock beyond what the company was authorized to issue. Plaintiff owned 800 shares of the stock of the company, and purchased 200 shares of the fraudulent issue. The over-issue was not a stock of the company, and the company was not liable for the same. The court expressly place the liability of the officers upon the ground that the company could not maintain an action against its officers for a damage to the individual holders of its stock, or of the fraudulent issue. The capital of the company was not impaired by the act of its officers in the over-issue, as it constituted no liability against it. Those who had sustained damages by reason of the over-issue could alone sue.

In Smith v. Hurd, 12 Metc. [Mass. 371], Shaw, C. J., held in an action brought by an individual stockholder of shares in an incorporated bank against the directors for various acts of negligence and malfeasance, in consequence of which the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value, that the action could not be maintained. 1st—Because there is no legal privity, relation, or immediate connection between the holders of shares in a bank, in their individual capacity on the one side, and the directors of the bank on the other. 2d—The individual members of a corporation, whether they all join or each act separately, have no right or power to intermeddle with the property or concerns of the corporation, or call any officer, agent, or servant to account, or discharge them from liability. They are not the legal owners of the property, and damage done to such property is not an injury to them for which they can sue. 3d—All sums which could be recovered for injury done to the capital stock by wasting, impairing, and diminishing its value, would belong to the

coporation as assets, and for which it alone may sue. Through it the stockholders would be entitled to receive any surplus remaining after paying its liabilities.

Neither can a creditor maintain a suit against the individual officers of a corporation for their negligence or malfeasance in managing the affairs of the corporation, resulting in injury to the stock and capital of the corporation, which is an indirect and contingent injury to the stockholder and creditor only. The statute might give a remedy by action to both stockholder and creditor.

Again, in Smith v. Poor, 40 Me. 416, it was held that, for the official misconduct of the officers of a corporation, and fraud in the discharge of their duties, they are responsible to the corporation and not to an individual contractor with the corporation, who has suffered damages in his contract through the fraudulent acts of its directors. His remedy is against the company.

Now, the facts of the case at bar disclosed by the declaration are, that plaintiff was president, stockholder, and creditor of the Gayoso Gas Company, of Memphis, and the injury complained of is, that defendant wrongfully procured from this court an injunction restraining plaintiff's corporation from proceeding to finish its work, etc., and resulting in injury to plaintiff in various ways by the inability of the company to repay him money advanced, breaking down his credit, loss of time and labor, and failure to receive large emoluments and profits which he would have received had the gas company gone into operation, etc.

If plaintiff can maintain this action, every stockholder in the plaintiff's company who has likewise been damaged, and every creditor and employee, may likewise bring suit for his damage, thus multiplying actions, limited only by the number of the stockholders, creditors and employees. The gas company has brought its action for the damage it has sustained for the act alleged in plaintiff's declaration, and may rightfully prosecute it against defendant; but there is no right of action in the plaintiff for the defendant's act in prosecuting his company. Demurrer sustained.

Case No. 3,993.

DONOVAN et al. v. DYMOND.

[3 Woods, 141.][1]

Circuit Court, D. Louisiana. April Term, 1878.

SHIPPING—PART OWNERS—INDIVIDUAL DEBTS—FREIGHT—JOINT LIBEL.

1. One of two part owners of a steamboat which is employed in the carrying business for their common profit cannot contract with a shipper to apply the freight earned in carrying his goods to the payment of an individual debt due such shipper from such part owner, without the consent of the other.

2. The part owners may jointly maintain a suit in admiralty to recover the freight, notwithstanding such contract.

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

This was a libel in a cause of contract of affreightment to recover the sum of $2,580 freight for carrying the goods of the respondent on the steamer Emma, for a period beginning November 28, 1876, and ending March 3, 1877. The vessel, during that time, was owned by Wm. Muller and Miss Jane Canton, and was commanded by Oliver Canton, Jr. It was admitted that the freight was carried, but it was contended, in the first place, that it was carried at a tariff rate somewhat lower than that charged in the bill, and the respondent claimed that it was settled for and paid by an arrangement made between him and Oliver Canton and his sister Jane Canton, whereby it was agreed that if he, the respondent, would advance money and indorse notes to enable Jane Canton to purchase one-half of the steamer, the amount so advanced should be credited on the freight to be carried for him by the steamer. This agreement was carried into effect, the respondent making the advances as agreed, and indorsing notes for the said Jane Canton, and the freight being carried for him in the vessel from and to his different plantations. The question was, whether an arrangement thus made by one of the part owners of a vessel, to credit the freight earned by the vessel in payment of his own indebtedness, was valid and binding on the other part owners, so as to prevent them or their representatives from collecting the freight.

B. Egan, for libelant.

J. D. Rouse and Wm. Grant, for respondent.

BRADLEY, Circuit Justice. Without stopping to inquire what a part owner might do in this direction, where he has the sole possession of the vessel and is running her on his own account, being responsible for her use to the other part owners, it is apparent that in this case no such state of things existed; the vessel was run and used for the mutual advantage of both the part owners; for, whilst Oliver Canton, as master of the vessel, may be considered as in some respects more properly to have represented Jane Canton, Muller was represented on the boat by the clerk, Donovan, who is now the receiver and libelant in this case. It was agreed that Muller should appoint a clerk to keep the books and otherwise to represent him in the steamer's transactions, and whilst Muller and Jane Canton, as part owners of the vessel, were not partners, yet, in conducting the business of carrying goods in the vessel for hire, they were in the strictest sense commercial partners, and the whole business of the boat was the subject of that commercial

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

partnership. It is further to be observed that Dymond, the respondent, was cognizant of the fact that the arrangement made between him and Jane Canton was for the private benefit of the latter, and not for the benefit of the partnership. The arrangement, therefore, was a fraud upon Muller, unless entered into with his consent, or subsequently ratified by him. It cannot be said to have been entered into with his consent for he knew nothing of the transaction until after the agreement was made.

It is claimed by the respondent that Muller was subsequently informed of it and acquiesced in it, and, as the case stood before the district court, there was strong evidence of that fact. Oliver Canton testified that when Muller, who resides in Vicksburg, came down to New Orleans to see about the boat, after he had heard of Jane Canton's purchase of one-half interest in her, he, Oliver Canton, informed Muller of the arrangement he had made with Dymond, and that Muller did not object to it; but since the decree of the district court was rendered, Muller has been sworn in reference to that point, and distinctly and positively denies that he was informed of the arrangement, or that he ever consented to it. Other evidence in the cause would seem to corroborate his assertion. It is hardly conceivable that he would give his assent to an arrangement that would practically subject the boat to the use of the other part owner, without any advantage to him. The burden of proof, that he acquiesced in the arrangement, rests upon the respondent, and the evidence to sustain it should be, at least, reasonably clear and satisfactory. I think it must be conceded that the arrangement in question did not have the consent, and never received the ratification of Muller. I conclude, therefore, that it was a fraud upon him.

The question still remains, whether an action can be maintained by Muller and his partner, Jane Canton, the latter having made the arrangement and being bound by it. There is a difference of opinion in courts of very high authority upon this subject. It was decided by the king's bench in England, in the case of Jones v. Yates, 9 Barn. & C. 532, that where one joint plaintiff is incapable of maintaining an action against a defendant, it is a defense against all; and although the result in such a case may be to defraud the other plaintiffs, yet, it was held that the action cannot be sustained because it would enable a plaintiff to recover who had precluded himself from the right of suing, and thus to rescind his own act. "The defrauded partner," said Lord Tenderdon, "may perhaps have a remedy in equity by a suit in his own name against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing, on the ground of his own misconduct."

This case has been followed by others. In Homer v. Wood, 11 Cush. 62, the question was elaborately discussed, and the decision in the case of Jones v. Yates, supra, was adhered to; but in New York, Pennsylvania and other states, a different rule has prevailed, and copartners have been permitted to recover against a separate creditor of one of their number whose debt has been settled with the partnership funds, by the partner who owed him, the separate creditor having knowledge that the funds of the partnership were being used for that purpose. Chancellor Kent says: "It is a well established doctrine, that one partner cannot rightfully apply partnership funds to discharge his own pre-existing debts, without the express or implied assent of the other partner. This is the case even if the creditor had no knowledge at the time of the fact of the funds being partnership property." 3 Kent, Comm. 43. This was held to be the law in the case of Rogers v. Batchelor, 12 Pet. [37 U. S.] 221. See, also, Dob v. Halsey, 16 Johns. 34; Gram v. Cadwell, 5 Cow. 489; Evernghim v. Ensworth, 7 Wend. 326; Purdy v. Powers, 6 Pa. St. 492; Minor v. Gaw, 11 Smedes & M. 322, and see Colly. Partn. §§ 492–501, particularly section 501.

It seems to me that this is the true doctrine, otherwise, the separate creditors of one partner could, in collusion with him, defraud the partnership to any extent, and compel the other partners to go into equity for relief. Where such separate creditors are cognizant of the misappropriation of the partnership funds, it seems to me more just that they should be compelled to go into equity for relief, than that the innocent partners should be compelled to do so. If the separate creditors choose thus to deal with one of the partners, they run the risk of his ability to protect them by securing the assent of the other partners—a risk which they can always avoid by requiring such consent in advance. But whatever may be the true rule in courts proceeding according to the course of the common law, I am satisfied that in a court of admiralty, where justice is administered upon the broadest principles, and where equitable as well as legal rights, incidentally arising, are maintained, it is unnecessary to turn the parties around to seek redress in a court of chancery. There is no good reason why their rights should not be ascertained and enforced by the court of admiralty itself. The rule adopted by the king's bench, besides being rejected by respectable courts in this country, as already shown, is even questioned by able writers who admit it to be the law. See 1 Lindl. Partn. 168–171, cited in note to Colly. Partn. § 643.

Now, in the present case, the respondent has no release, or discharge of his indebtedness for freight, even from Oliver Canton, or Jane Canton. He shows, at most, a settlement and a receipt from Oliver Canton, as master. The real basis of his defense is the agreement made by Jane Canton and Oliver Canton, that his freight should be paid by

the application thereto of the indebtedness of Jane Canton to him. That agreement surely is not binding on Muller, any more than a promissory note given by Jane Canton in the name of the partnership would have been. I am, therefore, of the opinion that the libelant is entitled to recover the amount of freight justly due in this case. I think, however, that the respondent is entitled to pay at the tariff rates agreed upon beween him and Oliver Canton. The latter, as master of the vessel, had plenary authority to make contracts of affreightment for the vessel. A decree will be made accordingly.

Case No. 3,994.

DONOVAN v. UNITED STATES.

[3 Dill. 53.][1]

Circuit Court, E. D. Missouri. 1874.[2]

COMPENSATION OF COLLECTORS AND SURVEYORS OF CUSTOMS.

1. As respects the compensation of collectors of customs, the legislation of congress divides these officers into two classes: 1st, collectors of the seven enumerated ports; 2d, all other collectors, i. e. collectors of non-enumerated ports. [U. S. v. Walker] 22 How. [63 U. S.] 299.

2. The acts of 1822, 1831, 1841, 1857, and of 1872, as to the compensation of collectors and surveyors of ports, construed, and it was held that the aggregate compensation of the surveyor of the port of St. Louis charged with the duties of the collector of customs, could not exceed the sum of $5,000 in any one year.

Writ of error to the district court [of the United States] for the eastern district of Missouri.

The error complained of is that the district court should have allowed compensation to the administrator's intestate (who was surveyor of the port of St. Louis under the act of congress of March 2, 1831, on whom was devolved the duties of collector) of $6,000 per year instead of $5,000.

Sharp & Broadhead, Mr. Noyes, and Mr. Wright, for plaintiff in error.

Wm. Patrick, Dist. Atty., for the United States.

DILLON, Circuit Judge. Daniel H. Donovan was surveyor of the port of St. Louis charged with the duties of collector of customs, and the administrator of his estate contends that in the accounting with the United States he should be allowed under the act of June 8th, 1872 [17 Stat. 336], compensation upon the basis of $6,000 per year, instead of $5,000 as determined by the district court. The provision of this act is that the compensation of such an officer shall be the same as that given to collectors by the fifth section of the act of March 3, 1841, not to exceed, however, the maximum amount therein allowed. In 1859 the supreme court of the United States construed the above mentioned act of 1841 [5 Stat. 431] in connection with the previous acts in pari materia, and decided that as respects compensation there were two classes of collectors: 1st, collectors of the seven ports enumerated in the 9th section of the act of May 7, 1822, whose total compensation from all sources might equal, but could not exceed, $6,000 in a year; and, 2d, all other collectors, i. e. collectors of the non-enumerated ports, whose aggregate compensation could not exceed the sum of $5,000 in any one year. U. S. v. Walker (1859) 22 How. [63 U. S.] 299.

I am unable to discover in the act of 1872 satisfactory evidence that it was thereby intended to abrogate in favor of surveyors discharging the duties of collectors this established distinction in respect to compensation between what is termed the enumerated and the unenumerated ports. The act of 1841, as authoritatively construed, limited the aggregate compensation of a collector of one of the enumerated ports to $6,000, and of a collector of any other port to $5,000, but while it did provide for the compensation of surveyors it did not provide a specific compensation for a surveyor who under the act of 1831 [4 Stat. 480] performed the duties of a collector of customs.

This was sought to be remedied by the act of March 3, 1857 [11 Stat. 229, § 8], but as its phraseology was not clear, and as complaints were made that it was illiberally restricted by the accounting officers at the treasury department to the surveyors of the principal ports under the 9th section of the act of 1822,—[3 Stat. 693;] Cong. Globe, 2d Sess. 43d Cong. pt. 4, p. 3409,—the act of 1872, upon which the plaintiffs in error rely, was passed. This last named act places "all surveyors of customs ports performing the duties of collectors" upon the footing, as respects compensation of collectors, under the act of March 3, 1841, for like services. St. Louis being a non-enumerated port, the maximum allowance to a collector can in no event exceed $5,000,—and this sum is in my judgment the limit of compensation to which the surveyor of the port of St. Louis is entitled. I concur in the opinion of the district judge, and the judgment below is accordingly affirmed. Affirmed.

NOTE. The judgment was affirmed by the supreme court, February, 1874 [Donovan v. U. S., 23 Wall. (90 U. S.) 383].

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

[2] [Affirmed in 23 Wall. (90 U. S.) 383.]

DOOD (GIDDINGS v.). See Case No. 5,405.

Case No. 3,995.

In re DOODY.

[2 N. B. R. 201 (Quarto, 74).][1]

District Court, S. D. New York. Oct. 19, 1868.

BANKRUPTCY—DISCHARGE OF DEBTOR.

Opposition to discharge grounded upon the fact of debt being fraudulently created is insufficient.

Warren S. Wilkey, a creditor of the said Michael Doody, having presented his claim against the said Doody, and the same having been duly substantiated according to law, comes in his proper person, and says: That the said Michael Doody ought not to be discharged of and from his said debt due by him to this said protestant, for the reason that the said debt did not arise upon contract. That the said indebtedness, by reason of the said Michael Doody having fraudulently, wrongfully and contrary to law, took, carried away and converted to his own use the personal property of this protestant, and for the taking, carrying away and the conversion thereof, this protestant recovered the judgment, transcript whereof has been submitted to and filed with Isaac Dayton, Esq., commissioner in bankruptcy for the —— district, state of New York.

W. S. Wilkey, in pro. per.

BLATCHFORD, District Judge. The specification filed, even if true, furnishes no ground for withholding a discharge. A discharge is granted.

Case No. 3,996.

DOOLEY v. GALLAGHER et al.

[3 Hughes, 214.][2]

District Court, E. D. Virginia. May, 1879.

SALE—IMPLIED WARRANTY.

There can be no implied warranty of the quality of goods which have been in existence and in the vendee's custody for some time before the sale, and are in his custody at the time of sale.

This was an action of trespass on the case brought by James H. Dooley, trustee in bankruptcy of Asa Snyder and Warner Moore, trading as Asa Snyder & Co., against the defendants, P. Gallagher, D. S. Peirce, and William Terry, trading as P. Gallagher & Co. The declaration contained two counts. The first count averred that August 26th, 1875, at Wythe county, Virginia, Asa Snyder & Co., at the special instance of defendants, agreed to buy 185 tons of charcoal pig iron at $30 per ton, or $5,450. That defendants by falsely and fraudulently warranting said iron to be an excellent article of cold-blast charcoal pig metal, suitable for making car-wheels, and that the same was of the first class of such metal, sold said iron to said Snyder & Co. for the price aforesaid, which was afterwards paid. Whereas said iron was not when so sold and warranted what it was represented to be, but was bad and inferior material, unfit for the purpose aforesaid. That the defendants in the sale thereof, falsely and fraudulently deceived Snyder & Co., whereby they were put to great expense, loss, and inconvenience, and the plaintiff was entitled to recover therefor. Snyder made payments on drafts hereafter mentioned. The second count averred that defendants being possessed of said iron, known as "Panic," and knowing the same to be of inferior and bad quality, nevertheless fraudulently, falsely, and deceitfully represented it to Snyder & Co. as above set out, and by means of such false, etc., representations induced Snyder & Co. to buy it at the price aforesaid, whereas the iron was not as represented, but was of bad and inferior material, unfit for the purposes above set out, as the defendants then and there well knew. And so the plaintiff averred that the defendants deceived and defrauded Snyder & Co. in said sale, and plaintiff sued for said deceit. The defendants demurred to the declaration, plead the general issue to both counts, and asked leave to file special pleas. At the trial the parties waived the demurrer, and by consent the whole matters of law and fact were submitted to the court, with leave to the defendants to introduce under the general issue any testimony, and to make any defence which could be made by special plea. It appeared from the evidence introduced on the trial that the negotiations leading to this suit were conducted on the part of Snyder & Co. by Asa Snyder, and on the part of the defendants by P. Gallagher. That they had never had business transactions with each other before, and their whole correspondence had been in writing, neither having ever seen the other prior to the day of trial. That in consequence of some newspaper notice of Asa Snyder, Gallagher wrote to him the following letter:

"Rural Retreat, Wythe Co., Va., August 21st, 1875. Asa Snyder, Esq.—Dear Sir: We are now making an excellent article of cold-blast charcoal pig metal, and are desirous of disposing of a lot at as early a day as possible. What can your market afford to do for us? Brands, as you know, from this Cripple Creek country are fine for car-wheel purposes. Hoping to hear from you soon, we remain, yours, etc., P. Gallagher & Co."

"Richmond, Va., August 23d, 1875. P. Gallagher & Co.—Gentlemen: I have your letter asking information about iron. Please advise me which of the Cripple Creek furnaces you are running. I must know your brand before giving quotations. If your iron is as good as the Wythe I can now sell it here at $32, four months. Very truly, Asa Snyder. Advances made of $25 per ton on consignments if warehoused."

Whereupon Gallagher replied:

[1] [Reprinted by permission.]

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

"Rural Retreat, Wythe Co., Va., August 26th, 1875. Mr. Asa Snyder, Richmond, Va.—Dear Sir: In answer to yours of the 23d would say that ours is a new furnace which went into blast on the 9th inst. With reference to the quality of the metal would say that in our judgment it is first class. Our founderer, Mr. Rodenhiser, who worked the furnace ('Wythe') sufficiently long to know the quality of its metal, when asked by us how ours would compare with it, remarked that 'the iron of Sayers, Oglesby & Co. ("Wythe") could beat us in nothing, and for general purposes he believed ours the best.' We could send you small quantities to try it. What can four months' paper be discounted at in your city, and will you please inform us what freights have been paid to your city by Sayers, Oglesby & Co. Yours truly, P. Gallagher & Co."

After sundry other correspondence, the following letter was written:

"Richmond, Va., January 31st, 1876. Gentlemen: Your letter asking permission to draw was not received till Saturday. This a. m. I am in receipt of your letter of the 29th from Wytheville and Rural Retreat. The customer to whom I expected to sell has not bought from me; but rather than you should be disappointed, I will take it on the terms offered him, $30, four months. The iron shipped in October I have included in this sale, and will give my paper for it, as of this date, when the acceptance given for that lot matures, etc. Very truly, Asa Snyder."

It appeared that after receiving the acceptances above named, Gallagher & Co. discounted them to the Farmers' Bank of Southwest Virginia; that the acceptance on the fifty-six tons sent in October was paid, and the first of the three, dated January 20th, January 31st, and February 10th, was paid. The last two were protested, but the bank sued Snyder and recovered them from him before his insolvency.

After the reading of the letters aforesaid the plaintiff introduced one Derbyshire, an employé of the Tredegar Iron Works, who testified that he had been handling iron over twenty-five years, and could tell by breaking a pig and other processes whether a particular iron would suit for car-wheels. That he had no recollection of the particular iron in controversy; but remembered that on several occasions said Snyder had sent iron to the Tredegar works, which on inspection was by him found unsuited to car-wheel manufacture. Asa Snyder, a witness for plaintiff, testified that his whole correspondence with Gallagher & Co. was embraced in the letters read. That he never had any verbal intercourse with the firm. That he had fifty-six tons of their iron in his possession from October until January 31st, when he bought. That so far as he knew it was of same grade as that subsequently sent. That he made no examination or tests of its quality before he bought. That he is a dealer in pig iron, and has been engaged in iron business for over twenty years. That he bought the iron on the faith of what he regarded as the assurances of Gallagher & Co. in the letters produced, but had no other assurances than they disclose. That he found after buying the iron that it was utterly unsuited to the wants of the market he was supplying, and that customers to whom he sold threw it back on his hands, and he was finally compelled to sell it, a portion at $21 and a portion at $16. A claim on the basis of these losses was produced by plaintiff.

On behalf of the defendants, P. Gallagher was introduced, who swore that he neither knew nor undertook to state to Snyder the real grade of said iron. That his whole representations appear in the letter. That he originally employed Snyder as his agent to effect a sale of said iron. That Snyder becoming purchaser was at his (Snyder's) own suggestion. That witness debated for some time before taking Snyder's offer. That the firm of P. Gallagher & Co. had sold all their "Panic" iron at from $32 per ton to $26 per ton. Never less than $26, and then when the market had greatly declined from what it was when Snyder bought. That witness believed the iron as good as any they made, and did not know why it was Snyder had sold so badly. That all the iron made by P. Gallagher & Co. was made on Cripple Creek, including this. That he never saw Snyder prior to day of trial.

Robert Ould, for plaintiff.
John S. Wise, for defendants.

HUGHES, District Judge. The only question here is, whether there was an implied warranty by Gallagher & Co. that the iron sent to Snyder in September and January was really of the quality described in their letters of the 21st and 26th August, and of later dates. None of these letters were written with a view to selling the iron to Snyder. They were the letters of consignors to a consignee, and not of a vendor to a vendee. The iron was the first that had been made at a new furnace, and the consignee was so informed. The consignors were confident of the truth of their representations of its quality, but they stated the grounds of that confidence, viz., that theirs was "Cripple Creek" iron, a species which had a good reputation; and that their founderer, who had made the best brand of the Cripple Creek iron at another furnace, and who was now making this iron of theirs, pronounced theirs to be as good as the "Wythe" iron. They made their statements not to a novice in the iron business, but to an expert, to a professional and experienced "dealer in pig iron." They describe the iron as a consignor would to a consignee, and their letters all implied that the consignee was expected to judge of the quality for himself; and they expressly requested him to get his customers

to test it. The description of an article, in good faith, to an agent, coupled with a delivery of it to him and a request that he and others shall take measures to inform themselves of its real quality, ought not, it seems to me, to be treated as implying a warranty of quality to any one who might months afterwards and after full opportunity for examination, conclude voluntarily and without solicitation to become the purchaser. There is no doubt that Snyder himself had confidence in the quality of the iron; and I infer from the evidence that his confidence was founded more on the fact that it was Cripple Creek iron than on other representations of Gallagher & Co. to him. That it was Cripple Creek iron in fact no one disputes, and has not been denied in evidence. That it was really worth from $26 to $32 per ton is proved by sales of it to other purchasers in other markets. This consignee, an experienced iron merchant and manufacturer, and a regular dealer in "pig iron," had fifty-six tons of it in his custody for more than four months before his purchase. It had been placed with him for sale coupled with a request to have it tested and tried. After this length of custody and the fullest opportunity of inspection, Snyder voluntarily proposed to purchase outright and unconditionally as to quality, all the iron that Gallagher & Co. had, up to the end of January, consigned to him. Certainly these are not circumstances from which the authorities allow us to infer a warranty of quality as part of the contract of sale. If Snyder, in his letter of the 31st of January, 1876, proposing to purchase, had said to Gallagher & Co. that he had not tested the quality of the iron, that he relied upon their representations made to him in the August preceding as to quality, and that he made his proposal to purchase on that basis, then an acceptance of his offer by Gallagher & Co. would have created a warranty, for then Gallagher & Co. would have been afforded the opportunity of electing whether or not to sell on such terms at all. It was too late for Snyder to attempt the interpolation of such a provision into the contract two weeks after his proposal had been accepted, and after Gallagher & Co. had lost control, not only of the terms of sale, but of the iron sold. Trade could not go on between man and man if bargains once made and executed could afterward be upset on the election of any one of the parties. Commerce would perish under the effects of such a license, and the courts would be crowded with suits. Unless the warranty is given at or before the time of the sale, it cannot be made to spring up afterwards at the will of either party as attempted here. Nor do I think it can be the policy of the law to hold that representations made to a consignor by a consignee long anterior to a sale, may be treated as representations of a vendor to a vendee, if the consignee in the course of events volunteers to become purchaser. In the first instance they are intended for mere purpose of description, and with no thought of their being made the elements of a future contract. Contracts ought only to be implied from language used in contemplation or in the act of making them.

So much for the equities of this case. Technically it is conclusively against the plaintiff. We must not confound the law of implied warranty in general with the law as it applies particularly to the quality of the article sold. Benjamin lays down the law of caveat emptor very strongly as to warranty of the quality of chattels. He says: "So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule, caveat emptor, admits of no exception by implied warranty of quality." The rule as to title is, of course, different; for the knowledge of title is more or less exclusively in the vendor. So also is the rule as to the soundness of an animal different; for the vendor is supposed to be fully informed on this subject, if he has custody and the purchaser has not custody of the animal. So also is the rule different as to chattels not yet in the custody of the buyer or not yet manufactured, but sold for future delivery; for there a warranty is implied that the goods will, when delivered, in all respects conform to the sample or description according to which they were purchased. In this case it is not shown or pretended that the iron delivered in January differed in quality from that delivered in September. But in the case put by Benjamin, which is our case, of a specific chattel, already existing, and which the buyer has inspected (much more has had in his custody for four months), the rule of caveat emptor admits of no exception by implied warranty. This is not only well-settled law, but it is sound, just, equitable law, and must govern this case. This doctrine is fully established in this state by Mason v. Chappell, 15 Grat. 572. It governs not only the sale of January, but also the consignments made before that time, and the acceptances given on the consignments. The finding of the court and the judgment in the case must be for the defendants. A finding may be drawn in accordance with the facts, and a judgment entered for the defendants.

DOOLEY (GORDON v.). See Case No. 5,607.

Case No. 3,997.

DOOLEY et al. v. The NEPTUNE'S CAR.

[Hoff. Op. 69.]

District Court, N. D. California. Sept. 10, 1860.

SEAMEN—DISCHARGE—SHIPPING ARTICLES—PROOF OF EXECUTION.

[1. Where seamen claim their discharge on arrival at a given port, the mere production of

shipping articles for a longer voyage, bearing their names, coupled with the fact that, on the reading thereof to them, they do not each for himself declare that they did not sign the articles, is not sufficient proof that the articles were originally explained to them, as against their testimony that they were told by the shipping master that the voyage was to the port in question.]

[2. When it appears that seamen have shipped at different dates, the fact that the name of the shipping master is written up and down opposite the column of signatures to the shipping articles, and not opposite any individual signatures, shows that their names were not affixed on the date of execution, and raises an inference that it was without their assent, and hence prevents the shipping master from being a competent attesting witness.]

[3. A master who intends to strictly enforce the terms of the shipping articles should, in order to avoid difficulties in the proof of execution, cause the same to be read and fully explained to the crew before sailing, and take their acknowledgment thereof in presence of his officers or other reliable persons on board.]

[Libel by Thomas Dooley and others for seamen's wages. Decree for libellants.]

E. H. Hodges, for libellants.

J. B. Manchester, for claimant.

HOFFMAN, District Judge. The libel in this case is for seamen's wages. The service is admitted. The defense set up is a forfeiture of wages by desertion. The men are shown to have left the ship immediately on her arrival. The shipping articles are produced, and the voyage is described therein as "from New York to San Francisco; thence to any port or ports in Pacific or Indian oceans, or China seas, or Europe, as the master may direct; and thence back to an Atlantic port of discharge in the United States, for the full term of eighteen months." Under this agreement, if signed and fairly entered into by them, the men were clearly bound to remain by the ship, under penalty of forfeiture of wages if they deserted. The question, therefore, is, are they shown to have made the contract?

The proofs of the execution of the articles offered by the claimants, consist of (1) their production and identification as the shipping articles for the voyage; (2) the fact that the men came in the ship in the capacities therein specified; (3) a kind of tacit admission claimed to have been made by them after the ship's arrival at this port. With respect to this last item of proof the facts appear to be as follows: On the morning after their arrival the crew came aft and demanded their discharge. This the master declined to give them, saying that he had fulfilled and should fulfill his part of the contract, and that he expected them to fulfill theirs; and that if they left the ship they would do so on their own responsibility. The articles were then read to the men. They did not deny having signed them, but some of them said that all articles read alike, and that it was customary to discharge the crews at San Francisco. The master also states that at the time the articles were sent to the shipping master, and before any of the crew were shipped, the heading was filled up precisely as it now appears. On the other hand several of the crew testify as to the mode in which their companions were shipped. It appears that Peterson and Brown shipped at the same time. They were passing by the shipping office, and were called in and asked if they wished to go in the Neptune's Car to San Francisco, and they replied that they did, and inquired the rate of wages. They were told that the wages were $12 per month. The shipping master or his clerk then wrote their names down, and they touched the pen. They were not asked to write their names, nor were the articles read to them. It was not stated to them that the voyage was to be continued beyond San Francisco, or that they were to remain by the vessel eighteen months. The manner of shipping Muntage and Rivers was, in all respects, similar, except that when these men touched the pen or made their marks, their names were written upon a paper which lay open before them, and which they supposed to be the articles. They did not read them, nor were they informed that their service was to be on any voyage but that proposed to them, viz. "From New York to San Francisco." Muntage also swears that when the captain read the articles to them on the morning they left the ship, they told him that they had not signed articles to that effect, and that they thought the voyage terminated at San Francisco. With regard to the execution of the articles by the other men, no proof whatever is produced other than the production of the articles, and the alleged tacit admission of their execution, as has been stated. No one of the libellants appears to have signed his own name. It is a fair presumption that a large majority of them are unable to read or write.

The question then arises, can the court enforce the forfeiture claimed in this case, on the ground that the crew has entered into a contract for a voyage which has not terminated, and that they have deserted? As this case is but one of a class which is frequently brought before the court, the occasion seems a fit one for the court to indicate what is the nature of the proof which should be offered as to the execution of these contracts. It is well known that the wages of seamen are much higher on this coast than on the Atlantic side of the continent. The temptation to desert and obtain greatly enhanced wages, rather than to continue a voyage around the world for a period of one or more years, at the wages at which the men were shipped, is great, and usually irresistible, to the seamen. For a crew to continue on board the vessel at the wages mentioned in the articles is a very rare occurrence. The master, knowing the men will desert, usually discharges them, and it has been for several years the general custom not to insist upon the forfeiture of

the whole wages, but merely on a deduction of a small sum to defray the expenses of shipping other men, if the old crew are unwilling to remain on board at port wages. It occasionally happens, however, that the master, as in this case, sees fit to insist on the forfeiture which the law decrees as the penalty for desertion. In the suit for wages, the defense of desertion is set up, and it is almost always met by the allegation that the articles were not read to the men, and that they were deceived as to the nature of the voyage. These allegations are in many instances supported by the testimony of numerous witnesses who swear to what was said and done at the time their companion shipped,—an accommodation which is reciprocated by his proving the mode in which they were shipped. Aware as the court is of the recklessness of this class of men, and the little reliance that can in general be placed on their oaths, especially when testifying for each other, it is frequently not easy to determine how far their statement is true. That they are often deceived by the shipping master is no doubt true. The anxiety on the part of the latter to obtain a crew; his knowledge of the usual indifference or recklessness of sailors; and perhaps the fact that crews are in a large majority of cases paid off and discharged at this port, whatever be the voyage stipulated for in the articles,—all these causes must frequently lead shipping masters to misrepresent the voyage to the men, and to procure them to affix their names or their marks to contracts which they do not understand, and into which they do not mean to enter. The facility for such practices in the case of an illiterate seaman, unable to read the articles, and the temptation to commit the fraud, are too great to permit us to hope that it is not of frequent occurrence. On the other hand, the notorious character of seamen compels us to admit that their testimony to the effect that the voyage was misrepresented would usually be forthcoming, whatever might be the true facts of the case, especially if it were once understood that such testimony would secure them their discharge and their wages.

It is much to be regretted that the mode of shipping seamen is not more carefully regulated by law. If every crew were required to be taken before an officer of the United States, appointed for the purpose, whose duty it should be to explain fully the contract to each of the men, to take his acknowledgment of its execution, and to certify those facts under his seal and signature, which certificate should be final and conclusive evidence, the seamen would obtain a protection which is often required by them, and the masters would have an assurance of their legal rights which at present it is difficult to obtain. But in the absence of such legislation it is the duty of the court to exact such proof of the execution of the contract, and to give to testimony, as to deception and fraud practiced upon the men, such weight, as the rules of law require. It is contended that this contract should be proved by the subscribing witness. Such undoubtedly is the general rule with regard to attested documents. But a subscribing witness is one who witnesses the execution of the instrument, and who affixes his name as a subscribing witness at the time of execution, and with the assent of the party whose signature he attests. A subsequent acknowledgment of the execution to a witness who thereupon, with the assent of the party, attests it, though long after the execution, will also, it seems, be sufficient to make the person so attesting a subscribing witness within the rule which requires him to be called. 3 Wash. C. C. 32, 42 [Munns v. Dupont, Case No. 9,926]; 9 Cow. 94, 113. But persons who put their names to an instrument subsequently to its execution, and without the assent of the parties, are not subscribing witnesses within the rule. On the articles in this case the name of the shipping master, Josiah N. Clark, appears twice, written in the column headed: "Witness to Signing." He seems to have signed in the double capacity of commissioner for the state of California and notary public, and his seal as commissioner is affixed to one of his signatures. The signatures are not written opposite the name of any particular seaman, but up and down the column. As the men appear to have shipped at different dates, it is obvious that their signatures, even if otherwise sufficient to make the person signing a subscribing witness to the contract, were not made at the time of its execution, nor probably with the assent of the seamen. I do not, therefore, think that even if the general rule which requires the subscribing witness to a private writing to be called, or his absence accounted for, applies to contracts of this class, the person who has affixed his name to these articles should be considered a subscribing witness within the rule. But even if he were adjudged to be a subscribing witness, such a ruling would in no way obviate the difficulties of the case; for, the witness being beyond the jurisdiction of the court, proof of his handwriting would be admissible. This proof could, in the case of a shipping master, doing a large business in New York, no doubt, be readily furnished. The technical proof of the execution of the instrument would thus be afforded, but the moral evidence of the fact that the men executed the contract with a knowledge of its contents would in no degree be strengthened by proving the handwriting of the very person by whom the alleged concealments or deceptions must have been practiced, if at all. It is, perhaps, doubtful whether the rule requiring an attesting witness to be called or his absence accounted for, and also that which admits evidence of his handwriting as the next best proof of authenticity, should be applied to this class of cases.

In Hall v. Phelps, it was held that in certain cases it was not necessary to call the

subscribing witness, but that other evidence of the existence of the instrument may be given in the first instance. 2 Johns. 451. And now if this principle be, as has been suggested (3 Johns. 478; 2 Wend. 576,) restricted in New York to negotiable paper, it would seem that for analogous reasons it ought to be extended to shipping articles. But, even if the instrument were in this case authenticated by proof of the handwriting of the subscribing witness, such evidence would not be conclusive. The inquiry would still be open, whether in fact the parties did sign the articles, or authorize their marks to be affixed to it, and whether its contents were misrepresented, or any other imposition practiced upon them. The master should therefore be prepared to produce satisfactory proof that the articles were fairly and intelligently executed by the men. Such proof can readily be furnished. If, before sailing, the articles are read over to each of the crew, their conditions and obligations fully explained, and an acknowledgment of their execution obtained by the master in presence of his officers or other reliable persons on board, and if one or more such persons thereupon sign them, with the assent of the men, as attesting witnesses, the master will always have all the proofs which the technical rules of law or which reason can require. When it is considered that the fulfillment of this contract can be exacted by force,—that the seaman is liable to imprisonment, and to be treated as a criminal, if he endeavors to evade the service he has contracted to perform; that that service is frequently to continue for two or even three years; and that, if he abandons it without justification, all his earnings up to the time of his desertion are forfeited,—it surely does not seem unreasonable to require of the cautious, or even just, master, who intends to enforce his rights, that he should satisfy himself and obtain evidence that the seaman has, in fact, agreed to the contract with a knowledge of its obligations and conditions, and not blindly to trust the assurances of the shipping master—who is certainly interested, and may be unscrupulous—that the men have been made to understand and have voluntarily executed the agreement. Aware, as the master is, of the strong temptation to impose on the men, to which the shipping master, interested in filling up the crew list, is subjected, and of the facility with which such impositions may be practiced, especially on illiterate men; conscious, too, of the rigor of the penalties he intends to enforce in case the contract be violated,—such a precaution would seem to be the dictate, not merely of policy, but of justice. The courts would thus be relieved of much doubt and embarrassment, and, in cases of violation of the agreement, could decree a forfeiture of wages with a reasonable certainty that the contract had been fairly entered into and willfully broken. In the case at bar no such proofs are offered. There is no evidence that the contract was explained to any of the men who appear to have made their marks, and the majority of whom were probably unable to read. There is no proof except as to four of them that they authorized any one to write their names to any paper, or that the marks were made by themselves. The only evidence offered is the fact that they composed the crew, and that on their arrival here, when the articles were read to them, they did not each for himself declare that he had not signed such a contract. No one acquainted with the habits of seamen could attach much force to their silence under such circumstances. Being illiterate, it was impossible for them to know what contract they had signed. The most they could say was that the shipping master had told them the voyage was to be to San Francisco; and this, one witness swears, they did state to the master.

Before the court can decree the wages to have been forfeited by desertion, it must be satisfied that the contract was really made by the men. The evidence on this point I find wholly insufficient. Nor can I conceive that when congress, solicitous for the protection of seamen, enacted "that no master should carry out any seamen without an agreement or contract being first made and signed by him," intended that the mere production by the master of articles bearing the names of his crew should be sufficient proof that the provisions of law had been complied with. The object of the law was to provide that a written contract should be entered into and signed by the persons composing the crew. Unless the signatures be proved, the document cannot be considered as shipping articles. To consider that a paper containing a list of names of persons who compose the crew is evidence, when produced by the master, who received it from a third person, that the men had signed it, would be to nullify the statute.

It was also contended by the counsel for the libellants that the men were justified in leaving the ship, on the ground that the master intended to proceed on a voyage to the Chincha Islands for guano, and that no such service was stipulated for in the articles. This point it is not necessary now to decide. It may be observed, however, that though the courts have in some former decisions considered such a voyage as so unusual and out of the common course of commerce, and as imposing such additional and severe labors on the crew, as to make it proper that it should be explicitly provided for, yet it would seem from the evidence that such voyages have recently become, especially at this port, the most common voyages undertaken by vessels arriving from the east. It is testified that more than half of the whole number that arrive here sail to the Peruvian or other islands in the Pacific for guano; that the duties of the crew are not more onerous than on other voyages, the cargo being always loaded by men hired for the purpose; that

the rate of wages is the same as on other voyages, and the service as readily undertaken by seamen as any other. If such be the facts, the reason for the former decisions would seem to have ceased. But all difficulty on the subject could be obviated by inserting in the shipping articles a provision for such a voyage, if required by the master. This, out of abundant caution, it would in all cases be advisable to do. A decree must be entered in favor of libellants for the wages due them separately.

DOOLEY (UNITED STATES v.). See Case No. 14,984.

Case No. 3,998.

DOOLEY v. VIRGINIA FIRE & MARINE INS. CO.

[2 Hughes, 482.][1]

District Court, E. D. Virginia. Aug. 8, 1877.

BANKRUPTCY—FORECLOSURE OF DEED OF TRUST—INJUNCTION.

Where a debtor who has made a deed of trust securing the payment of promissory notes is adjudged bankrupt after the notes have matured for payment, the custody of his estate passes to the bankruptcy court, the power of the trustees under the deed is dissolved, and there can be no sale for foreclosure except by the order of the bankruptcy court, or by leave given to sell by that court.

In equity. Bill of injunction [by James H. Dooley against the Virginia Fire & Marine Insurance Company]. Reasonable previous notice having been given, motion was made for a preliminary injunction; the bill being still at rules, and the cause not to mature until the fall term. The defendants filed their answer on the day of the motion.

The facts of the case, so far as bearing upon the motion now made, were as follows: On the 3d of December, 1872, Asa Snyder purchased a half-acre lot of ground in the "burnt district of Richmond," of Dunlop, Moncure & Co. They paid $10,000 thereon in cash, and gave five notes for about $2,000 each, payable at long intervals, for the residue of the purchase money. The notes were secured by deed of trust on the ground. The buildings of a large foundry have been erected on the lot by the firm of Asa Snyder & Co. Snyder and his firm have been adjudicated bankrupts, and the complainant, Dooley, was made trustee in bankruptcy of the estate of the bankrupts and their firm. There is a dispute whether the first four notes were paid at their maturity in such manner as to extinguish the lien of the trust deed. They are now held by the defendants in this bill, the Virginia Fire & Marine Insurance Company. The trustee claims that the notes were in fact extinguished; but that is the principal question to be determined at the hearing of the cause when it shall have matured for that purpose. On the 2d day of May, 1877, on the petition of creditors, the adjudication was made declaring the firm and its members bankrupts, and in due course of proceeding the complainant, Dooley, was appointed trustee of their estate in bankruptcy. Notwithstanding this adjudication, the trustees named in the trust deed securing the notes which have been mentioned, afterwards advertised the lot of ground to be sold on the 14th day of August, 1877, in pursuance of the terms of the deed, and for the purpose of satisfying its provisions. Whereupon the trustee in bankruptcy, Dooley, filed his bill of injunction on the equity side of this court, and after notice moves for a preliminary injunction to stop and prevent the sale.

HUGHES, District Judge. This is not a hearing of the case on its merits on the bill and answer. That cannot be until the cause is matured for the October term. This is simply a hearing of the motion for a preliminary injunction. The only matter before me now is the motion for a preliminary injunction. The property advertised to be sold is a part of the estate of the bankrupts, Asa Snyder & Co. As such it is in the custody of the district court. That court, under section 711, has exclusive jurisdiction of all matters in bankruptcy; and, under section 4972, the exclusive power of the court extends "to the ascertainment and liquidation of the liens and other specified claims" upon the property, which is the subject of controversy in the bill and answer. That being so, how could the trustees named in the deed of trust constituting a lien upon this property, with any shadow of legal propriety, have advertised it for sale without authority from the district court? Their sale would be invalid if it was made. If they had applied to the court, and there had been no objection made by the trustee in bankruptcy, it would, as a matter of course, have appointed them special commissioners, and directed them to sell as nearly as practicable according to the provisions of the trust deed. But, in the absence of such authorization from the court, they cannot sell; and, if they sold, the sale would be invalid. I must enjoin the sale, and then the question would be, whether a special order should be made appointing the trustees who have advertised, special commissioners of the court, with instructions to sell according to the terms of the deed.

But there is one objection to this course. An order of sale will be given, but now is not the proper time for it. Clear as the case of the defendant might now appear to me, I cannot prejudge it against the complainant, who may have important evidence to submit at the final hearing which may change its whole aspect. There is even now a question as to the amount of the lien existing on the property. While such question exists, we

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

are prohibited by the rules and usages of all equity courts from directing or authorizing a sale of the property. There shall be very little delay in ordering a sale, probably, by the trustees under the trust deed, as special commissioners; but we must have a hearing on the merits, on bill and answer, beforehand, based on a report settling the liens and their priorities. The preliminary injunction must be granted.

[For further proceedings in this cause, see Case No. 3,999.]

Case No. 3,999.

DOOLEY v. VIRGINIA FIRE & MARINE INS. CO.

[3 Hughes, 221.][1]

District Court, E. D. Virginia. 1880.

NEGOTIABLE NOTES — PAYMENT — SUBSEQUENT TRANSFER BY MAKER—LIEN.

Negotiable promissory notes, ranking as a first lien upon real estate, were deposited in bank by the payees for collection on their account. As they fell due they were paid by the maker (now the bankrupt), who used funds of a loan and insurance company for the purpose, and who afterwards gave the notes to the company, accompanied by writings, stipulating to pay two per cent. more than the legal rate of interest which the notes had borne, and also stipulating that the company should hold the notes as a first lien upon the property on which they had been secured, in the same manner as the payees of the notes had held them; all of which was without the knowledge or privity of the payees, who had collected the amount of the notes. *Held*, that the notes were extinguished, as such, when paid; that the obligation of the maker of them to the company was represented by the stipulations in writing which he had given it; and that these stipulations were new contracts of different tenor, form, and terms from the notes which had been paid, and were not first liens upon the property on which the notes had been secured, in the same manner in which the notes had been.

[This is a bill in equity by James H. Dooley, trustee in bankruptcy, against the Virginia Fire & Marine Insurance Company.] The property on which the liens mentioned in the proceedings rest consists of a lot of ground in the city of Richmond, on which are a large brick foundry and other buildings. This real estate was purchased on the 3d of December, 1872, by Asa Snyder, individually, from the firm of Dunlop, Moncure & Co., and was conveyed to him on that date. The sum of $10,000 was paid in cash, and for the balance of the purchase money Snyder executed his five negotiable notes, all dated December 3d, 1872, payable as follows, for the respective amounts named, viz.: 1st. Payable one year after date, for $2,230.15. 2d. Payable two years after date, for $2,127.-22. 3d. Payable three years after date, for $2,024.29. 4th. Payable four years after date, for $1,921.36. 5th. Payable five years after date, for $1,818.43. The notes were all calculated at the legal rate of six per cent. interest, fixed by the laws of Virginia. These notes were secured by deed of trust upon the property which has been mentioned, bearing even date with the notes. This deed was duly recorded, and constitutes the first lien upon the property in the proceedings mentioned. The controversy is confined to the first, second, and third notes, which are now in the possession of the Virginia Fire & Marine Insurance Company, the fourth note having been taken up by that company, and the fifth note still held by Dunlop, Moncure & Co., being admitted to be valid liens upon the property.

The facts in regard to the first three notes are as follows: The first note having been placed in bank for collection by Dunlop, Moncure & Co., and Snyder, the maker, being unable to pay it when it fell due, he obtained from the Virginia Fire & Marine Insurance Company their check for the amount of the note; giving his own note for ninety days, to bear 8 per cent. interest, upon the understanding that the Virginia Fire & Marine Insurance Company were to hold the original note against the real estate in the same relation that Dunlop, Moncure & Co., the original holders of the note, sustained in the trust deed. This understanding, however, was only known to Snyder and the company. This check of the Virginia Fire & Marine Insurance Company, dated December 6th, 1873, was deposited in bank by Snyder to his own credit, and checked upon by him December 6th, 1873, for the amount of the note; which was thus taken out of the bank by Snyder, and then delivered to the Virginia Fire & Marine Insurance Company, in compliance with the understanding, Dunlop, Moncure & Co., having nothing to do with the transaction. Ninety days afterwards Snyder executed the paper dated December 6th, 1873, filed with the depositions and marked "A," in which he recited the circumstances, and agreed that the note should be secured by the deed of trust, and should bear eight per cent. interest per annum. The facts in relation to the second and third notes are substantially the same. The second note was allowed by Dunlop, Moncure & Co., to be renewed for thirty days, at the end of which period it was taken out of bank and turned over to the Virginia Fire & Marine Insurance Company, in the same manner and upon the same understanding and agreement as the first note, except that the agreement marked "B" was executed on the day of the maturity of the note, and the money was advanced for no particular time. The third note also was transferred to the custody of the Virginia Fire & Marine Insurance Company in like manner essentially with the second note, the only difference being that this note was not renewed, and that the check of the Virginia Fire & Marine Insurance Company was passed and charged to the firm of Asa Snyder & Co., and it does not appear how its proceeds ever went into the possession of Asa Snyder

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individually. There was a similar agreement made in regard to it, marked "C."

The register, in his report of liens and their priorities, says: "Upon this view of the facts I am inclined to believe that the Virginia Fire & Marine Insurance Company are entitled to a lien upon the property in the proceedings mentioned, for the amount of the notes aforesaid, by reason of the deed of trust made to secure the holders thereof, and I do therefore report that the five notes, secured by the deed of trust aforesaid, constitute the first lien upon the property of said bankrupt, Asa Snyder. The interest on the second and third notes being usurious, nothing can be allowed."

The following is a copy of the agreement A referred to above, to which agreements B and C were similar in terms: "This certifies that the Virginia Fire & Marine Insurance Company have advanced to me the sum of twenty-two hundred and thirty 15-100 dollars, with which my negotiable note due this day has been paid to the holders thereof, and the said note has been delivered to the said Virginia Fire & Marine Insurance Company as my obligation for the said sum of $2,230.-15, on which I hereby obligate myself to pay from the date hereof, at the option of the said company, interest at the rate of eight per centum per annum so long as the said company shall forbear to collect the said principal sum. The said note is described in and secured by deed of trust executed by me, dated December, 1872, recorded in Richmond chancery court clerk's office, and given as part of the purchase price for real estate on Cary street in this city, conveyed to me by ——. Given under my hand at Richmond, this 6th day of December, 1873. (It was in fact executed on the 6th March, 1784.) Asa Snyder."

The following were the exceptions taken by the complainant to the report of the register in regard to the three notes: 1st. Because the commissioner reports that the three notes, dated December 3d, 1872, and payable respectively at one, two, and three years after date, for the sums of $2,230.15, $2,127.22, and $2,024.29, are liens under the deed of trust executed by Asa Snyder. The evidence establishes that these notes were all paid at maturity, and the lien for their payment was then extinguished. 2d. Because (even if the first note of $2,230.15 is a lien) no interest can be allowed thereon. It is shown that the note bore only 6 per centum interest. If paper (A) establishes that Snyder after its maturity and payment agreed to pay 8 per centum, surely the excess of 2 per centum interest would not be secured by the deed, and except on the ground that said excess over 6 per centum is reported as a part of the trust debt. But the law existing at the time (March, 1873) allowed only an excess over 6 per centum interest which may be agreed upon by the original parties to the contract, and be specified on the bond, note, or other writing, evidencing the debt. Acts 1872-73, p. 329, § 4. Section 5 provides for forfeiture of all interest if more than legal interest is contracted for. This defendant in one breath claims that this original obligation is unpaid. If so, it bore only 6 per centum interest, because no greater rate is specified in the note. In the next breath it claims that paper (A) shows a contract to pay 8 per centum interest on the amount of this note, which is recited to have been paid to the holders thereof.

If the first pretension is true, the debt is due on the note and bears 6 per centum interest. A greater rate is stipulated for, but not on the face of the note, and therefore no interest can be collected. If the last pretension is true, viz., that the obligation to pay arises from paper (A), the debt is not secured by the deed.

Ould & Carrington, for complainant.
Sands & Carter, for defendant.

HUGHES, District Judge. These exceptions raise a question between different lien creditors of the bankrupt, and not between the Virginia Fire & Marine Insurance Company and the bankrupt. I can treat it only as between different lien creditors. The three negotiable notes which are the subject-matter of this controversy were due from Snyder to Dunlop, Moncure & Co. They were never indorsed to a third person by the payees. They remained to the date of their maturity evidences of indebtedness from Snyder to Dunlop, Moncure & Co., the payees named in them. They could become evidences of indebtedness from Snyder to a third person only by the payees' indorsement of them before maturity, or their assignment of them after maturity. They were not indorsed over by Dunlop, Moncure & Co. They were placed in bank by them for collection on their own account. They were so collected by the bank on account of Dunlop, Moncure & Co. As to Dunlop, Moncure & Co. they were paid. As to the payees holding the notes at maturity they were paid. The checks which were used for paying them were presented by Snyder; and the notes were delivered to Snyder on payment. As to the only persons having the property in the notes at the time of their maturity, the notes were paid. If they, as notes, were paid to the only persons having a right to demand payment when they became payable, they were paid as to all the world. When received from the bank by Snyder they ceased to be notes due according to their tenor. They ceased to be obligations to any one according to their tenor. They ceased to be the property of the only persons who could own them, as obligations of Snyder according to their tenor; and they became the property of Snyder, not as his notes due according to their tenor and purport, but only as vouchers or evidence of a past transaction and an extinguished debt. As to effect of payment,

see Daniel, Neg. Inst. 250-253; Byles, Bills, 262; Story, Prom. Notes, § 453; Clevinger v. Miller, 27 Gratt. 740; Bank v. Winston [Case No. 944].

If they had not been paid at maturity, they would have remained the property of Dunlop, Moncure & Co.; and then Dunlop, Moncure & Co. might have assigned them to a third person. But they had been paid, and on their payment it had ceased to be competent for Dunlop, Moncure & Co. to assign them to a third person. The payment of them destroyed Dunlop, Moncure & Co.'s privity and property in them. They were never assigned by Dunlop, Moncure & Co., who were the only persons competent to assign them, and as evidences of debt according to their tenor, from Snyder to Dunlop, Moncure & Co., they were extinguished on the dates of their maturity. The present obligation of Snyder to the Virginia Fire & Marine Insurance Company arises upon the papers, of which Exhibits A, B, and C are copies. If Snyder's obligation to the Virginia Fire & Marine Insurance Company could have rested upon the three notes in question, then it would have been unnecessary to take these obligations, A, B, and C. The fact that it was necessary to take the stipulations, A, B, and C, shows that the notes themselves could not represent an indebtedness from Snyder to the company. The notes were attached to the papers really representing Snyder's obligation to the company only as a part of the res gestae of the new transaction, and as explaining the consideration of the new obligations. The checks of the company given to Snyder constitute the consideration of the new assumpsit; the paid notes do not.

The complainant's theory of a constructive assignment by Dunlop, Moncure & Co. of the three notes, being implied in their indorsement of them to the bank for collection, is not admissible. The holder of such paper has a right to indorse for collection without being held for the notes if paid or taken up by any one whomsoever acting without their knowledge or privity. An assignment in such a case must be express, so that the payee may assign with or without recourse, as he may choose.

For these and other reasons which might be stated, the exceptions of the trustee to the register's report in regard to the three notes are sustained and allowed.

Case No. 4,000.

In re DORAN.

[5 Cent. Law J. 260.][1]

District Court, E. D. Missouri. Sept. 8, 1877.

BANKRUPT LAW—FRAUDULENT PREFERENCE—EXCHANGE OF SECURITIES.

In this case the bankrupt, a merchant, doing business with a bank, had from time to time overdrawn his account with the knowledge of the cashier, but without the knowledge of any other officer of the bank. To secure these overdrafts the cashier procured from him a bill of sale of a portion of his stock in trade, which was not recorded, nor accompanied with possession, and the bankrupt continued his business as usual. This was more than two months prior to the commencement of the proceedings in bankruptcy. Subsequently, and within two months of the commencement of proceedings in bankruptcy, the overdrafts were disavowed by the managers of the bank, who, to secure the bank, procured a new bill of sale, caused it to be put on record, and took possession of the goods. *Held*, that although this was clearly a fraudulent preference within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], yet, under the rule of Sawyer v. Turpin, 91 U. S. 114, the transaction took effect by relation to the first bill of sale, and this having been given more than four months prior to commencement of proceedings in bankruptcy, the second bill of sale became a valid security.

TREAT, District Judge. The bank claims, as a secured creditor, the proceeds of certain assets pledged to it to meet its demands against the bankrupt. The facts, succinctly stated, are as follows: Doran, the bankrupt, doing business with the creditor (the bank) was in the habit of overdrawing, with the knowledge of the cashier, but of no other officer of the bank. The cashier who had tolerated such overdrafts, being anxious for security, procured, March 3, 1876, a bill of sale of goods in the store of the bankrupt for articles named in said bill. Said articles were never separated from the general stock, nor was said bill of sale recorded, though really a chattel mortgage. The bankrupt continued his business as theretofore. The principal managers of the bank having learned of said overdrafts, and of the facts concerning said bill of sale, insisted, on the 26th of May, upon a settlement with adequate securities. The debtor could not at that time pay what he owed. It was obvious that some of the directors knew his condition to be critical, and were eager for security. An arrangement was made whereby he gave a new bill of sale for certain goods of which the creditors took possession, and these are the goods, the title to which is in dispute. The creditor must have known from overdrafts for months that the debtor was not in a solvent condition. Those overdrafts were in the nature of past-due commercial paper. Being anxious to secure the same, the bill of sale, March 3, was procured. That bill was unaccompanied with delivery, separation of the goods from the general stock, or any record thereof. When the officers of the bank learned of the overdrafts and of the bill of sale, unaccompanied by delivery, they became anxious to have the indebtedness of the bankrupt evidenced more formally, and the securities therefor in due shape. Hence they caused the bill of sale, the validity of which is in question, to be made, and took possession of the goods enumerated in it. The latter bill of sale was to secure the past indebtedness mentioned, together with a further present advance. The

[1] [Reprinted by permission.]

sole proposition submitted is as to so much as relates to the past indebtedness. The bank had reasonable cause to believe the debtor insolvent. It was anxious to secure the indebtedness. It took out of the store current goods as security. It knew that the debtor had overdrawn for months (equivalent to over-due paper), and could not meet his obligations. The nature and quality of its collaterals show knowledge of the debtors' doubtful condition, and its course in the matter that it knew the necessity of securing a preference to avoid loss. The result is that when, in May, this security was obtained, the bank knew the insolvent condition of its debtor, and that, by taking out of his stock of goods the security relied upon, it was enabling him to practice a fraud on the bankrupt act—that is, to secure an advantage which the law forbade. The conclusion reached by the register would be correct, if the doctrine announced in Sawyer v. Turpin, 91 U. S. 114, did not control. That case, and the views of the United States supreme court therein stated, must be considered conclusive of this case, inasmuch as the facts are substantially the same. The proof of the debt must therefore stand as secured for the whole amount; or in other words, the proceeds of the collateral must be applied to the payment of the bank's entire demand, instead of a part thereof.

DORD (VAN LIEN v.). See Case No. 16,862.
DORE (MOORE v.). See Case No. 9,757.

Case No. 4,001.

DOREMAS et al. v. BENNET et al.

[4 McLean, 224.][1]

Circuit Court, D. Michigan. June Term, 1847.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

This action was brought to recover the amount due on a promissory note, made by Bennet & Ford, who were partners in trade, to the plaintiffs, citizens of New York. The declaration alleges one of the defendants to be a citizen of the state of Michigan, and the other to be a citizen of the state of New York. The defendant Bennet, who is averred to be a citizen of Michigan, and who is served with process, pleads to the jurisdiction of the court, setting forth, that the plaintiffs and defendant Ford, are citizens of the same state.

[Cited in Tobin v. Walkinshaw, Case No. 14,068; Sands v. Smith, Id. 12,305.]

[This was an action at law by Thomas C. Doremas and John M. Nixon, against Henry D. Bennet and others on a promissory note. Heard on a demurrer to a plea to the jurisdiction of the court.]

Mr. Wilson, for plaintiffs.
Mr. Hawkins, for defendants.

WILKINS, District Judge. The plaintiffs demur to the plea, and defendants join in demurrer. Is the plea to the jurisdiction well taken? The question is one of jurisdiction, involving a construction of the 11th section of the judiciary act [1 Stat. 78], and the 1st section of the act of the 28th of February, 1839 [5 Stat. 321]. In the case of Louisville R. Co. v. Letson [2 How. (43 U. S.) 497], the supreme court have no hesitation in saying, "that this last act was passed exclusively with an intent to rid the courts of the decision in the Case of Strawbridge and Curtis," 3 Cranch [7 U. S.] 267, which affirmed, "that where there are two or more joint plaintiffs, and two or more joint defendants, in the courts of the United States, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction." The act of February, 1839, in the opinion of the supreme court, enlarges the jurisdiction of the courts of the United States. Its first section provides, "that where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom, shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it: but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer." This provision was intended to remove the difficulties which occurred in practice, under the 11th section of the judiciary act, and embraces every suit at law or in equity, in which there shall be several defendants, "any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or, who shall not voluntarily appear thereto." The exception in the act, exempting parties defendant, who have not been regularly served with process, or who have not voluntarily appeared, protects them from being prejudiced by any judgment or decree rendered in such suits against joint defendants. The defendant Bennet is an inhabitant of the state of Michigan. Process has been served upon him. No process has been served upon Ford, the co-defendant, nor has he voluntarily appeared to the suit. Bennet is properly before the court. The rendition of a judgment against him can not conclude or prejudice Ford. It is therefore lawful for the court to entertain jurisdiction of the case as to Bennet. In the Case of the Louisville Railroad Company, the supreme court declare, that the cases of Strawbridge and Curtis [supra] and Bank of U. S. v. Devaux [5 Cranch (9 U. S.) 61] were carried too far, and not maintainable, upon the true principles of interpretation of the constitution and laws of the United States, and that the case of Commercial Bank of Vicksburgh v.

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

Slocumb [14 Pet. (39 U. S.) 60] was decided upon the authority of those cases. In the case of Morrison v. Bennet [Case No. 9,843], a case which occurred in Ohio circuit, in 1838, prior to the act of February, 1839, Mr. Justice McLean held, under the statute of the state of Ohio, regulating the practice of that state and authorizing the plaintiff to proceed to judgment against the defendant, on whom process had been served—that the court had jurisdiction as between the plaintiff and the defendant, on whom the process had been served. In the case of Emerson v. Genney [Id. 4,438], this court decided, on a demurrer to the declaration, in an action against joint defendants, one of whom was an inhabitant of this state, and on whom process was served, and the other a citizen of the same state with the plaintiffs, not served, and not appearing,—that the court would entertain jurisdiction. The demurrer sustained.

Case No. 4,002.

DOREMUS v. BURTON.

[5 Biss. 57.][1]

Circuit Court, D. Wisconsin. Jan. Term, 1860.

NOTE FALLING DUE ON SUNDAY.

Where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday are good to hold the indorsers.

[This was an action at law by Thomas C. Doremus against William A. Burton. Heard on a motion for a new trial.]

MILLER, District Judge. At the trial of this cause, which is a suit against the defendant as indorser of several promissory notes, it was objected that one of the notes became payable on Sunday, and that it was protested on Saturday previous for non-payment. These notes were negotiable, without days of grace. The court advised the jury to include this note in their calculation of the damages, and on a motion for a new trial, the question could be considered, and if the assessment was found not to be legal, the plaintiff might remit the amount, or a new trial would be ordered. On the motion for that purpose, I have examined the subject. The law is universal in this country and in England that where the last day of grace falls on Sunday, demand and notice must be made on the Saturday previous. Such is the law of the supreme court of the United States. Leudinberger v. Brall, 6 Wheat. [19 U. S.] 104.

In Chitty on Bills (page 377) it is stated that "in this country (England), at common law, if the day on which a bill would otherwise be due falls on Sunday, or a great holiday, as Christmas-day, the bill falls due on the day before; and where a third day of grace falls on a Sunday, the bill must be presented on Saturday, the second day of grace; whereas, otherwise, a presentment on a second day of grace, being premature, would be a nullity." The reason of the rule as to notes in which days of grace are allowable is that as the allowance of days of grace is a mere indulgence to the maker, it shall be granted only in cases where it will not work any extra delay to the holder of the note, who is entitled to strict payment. If any other rule were adopted, he would be compelled to lose the use of his money for four days. But in practice, and in fact, according to the law of this state, a note for thirty days, where days of grace are not waived, as in this note, is a note for thirty-three days,—so understood when the note is given and received; such is the contract. Now the question is, does the waiver of the days of grace extend to the maker one additional day when the day of payment falls on Sunday? At the trial I was inclined to place the note in this respect as a non-negotiable contract, which it was understood would not be payable until the Monday following. In a note to section 220, Story on Promissory Notes, the above remark of Chitty is copied. This seems to confirm the principle that, at common law, this note would be payable on Saturday. In the case of Barker v. Parker, 6 Pick. 80, it is stated by the court that the note in suit fell due on Sunday, and having been made in 1824, was not entitled to grace, the statute allowing grace on promissory notes not having been passed until 1825. The note became due, therefore, on the 13th of November, 1825, and should have been demanded on the 12th, as the day of payment, according to the note, was Sunday. Reference is made to Jones v. Fales, 4 Mass. 245. Such seems to have been the common law of Massachusetts. In the case of Avery v. Stewart, 2 Conn. 69, the note sued on was for a certain sum in cotton yarn and was not negotiable. It fell due on Sunday, and a tender of the yarn was made on the Monday following. The court, six judges to three, decided that the tender on Monday was good and in time. The supreme court of New York, in the case of Salter v. Burt. 20 Wend. 205, decided that the check in suit having been protested, which was payable on the day of its date, which was Sunday, could not be demanded until the Monday following. It is apparent that it could not be presented at the bank for payment on Saturday, as it did not bear date on that day, but on the day following. It did not purport to have been written on Saturday. The reason given by the court favors the idea that this note was payable on Monday; but although the decision was correct, the reasoning may possibly be wrong. It is very certain that a presentment of the check on Saturday would be premature.

The note in suit being a negotiable note, with grace waived, is to be considered the same in regard to Sunday being the day of

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

payment as if the waiver had not been made. When the note was made the maker may possibly have known that the day of payment would fall on a day on which it would be illegal to make demand. At all events, the instrument is to be considered against the maker, and upon such principles is not to be so construed as to allow an indorser to escape. The motion for a new trial will be overruled and judgment entered on the verdict.

NOTE. Where goods sold were to be delivered on a certain day by the agreement of the parties, and that day was Sunday, it was held that they should have been delivered on Saturday. Kilgour v. Miles, 6 Gill & J. 268.

DORFLINGER (CONSOLIDATED FRUIT-JAR CO. v.). See Case No. 3,129.

Case No. 4,003.

DORGAN v. PENTZ.

[The case reported under above title in 1 Chi. Leg. News, 225, and 16 Pittsb. Leg. J. 326, is the same as Case No. 4,121.]

Case No. 4,004.

DORGAN v. TELEGRAPH CO.

[1 Am. Law T. Rep. (N. S.) 406.]

Circuit Court, S. D. Alabama. April Term, 1874.

TELEGRAPH COMPANIES — DELAY IN TRANSMISSION AND DELIVERY — UNINSURED MESSAGES — MEASURE OF DAMAGES — CONTRACT EXEMPTIONS.

[1. When a telegraph company receives a message for transmission, the fair inference is that the sender resorts to the telegraph because he cannot, or does not, choose to wait for the mail, and the company agrees, by implication, that his message shall be carefully transmitted, and delivered without unnecessary delay.]

[2. The fact that a message left at a telegraph office in New York at 5:20 p. m. was not delivered at Mobile until 10:30 a. m. on the next day is prima facie evidence of negligence, it appearing that under ordinary circumstances the message could be transmitted from one telegraph office to the other in about four minutes.]

[3. A person using the telegraph, unless he insures his message, takes the risk of delay and failure to deliver, arising from accidents and obstructions to which telegraph lines are liable.]

[4. Telegraph companies are bound to deliver messages impartially, in good faith, and in the order in which they are received.]

[5. The company is only liable for damages which were within the reasonable contemplation of the parties at the time of making the contract for transmission; and hence if the company's agent was informed that the message was important, and the message itself indicated that it was a business communication, and that delay would result in serious damage, the company is liable for any loss resulting from negligent delay; but if the agent was only informed that the message was important, with a request for early transmission, but the dispatch did not in any way indicate that damage would be suffered by delay, then the liability is limited to nominal damages merely.]

[6. A contract exempting a telegraph company from liability for damages resulting from delay, unless the message was ordered repeated, is void, for it is against public policy to allow the company to exempt itself from liability for the results of its own negligence.]

[Cited in Primrose v. W. U. Tel. Co., 154 U. S. 7, 14 Sup. Ct. 1104.]

Harry T. Toulmin and D. P. Bestor, for plaintiff.

Thomas H. Herndon and John Little Smith, contra.

WOODS, Circuit Judge (charging jury). The following facts are not controverted: At about eleven o'clock a. m. of the 30th of January, 1872, the plaintiff sent from Mobile, Alabama, over the lines of the Western Union Telegraph Company to New York City, the following cipher dispatch: "To J. S. Abbott & Co., New York: Sell Samuel basis silver full style and staple fob dog demon. Reply to-day; have refusal." Which, when translated, reads as follows: "Sell 500 bales, basis middling, full style and staple, free on board at 21⅝ cents, at ½ penny freight. Reply to-day; have refusal." This dispatch was transmitted to New York and there delivered without unreasonable delay to J. S. Abbott & Co. On the same day, some time between twenty and forty minutes after five o'clock p. m., New York time, J. S. Abbott & Co. delivered to the receiving clerk at the main office of defendant, in New York, to be transmitted over the lines of defendant to the plaintiff in Mobile, the following cipher dispatch, the same being in response to the dispatch sent by the plaintiff to J. S. Abbott & Co:—"Sold Samuel, basis silver, fob dog demon, prompt shipment, draw with documents. Edward Dobell. Insure. Telegraph drafts." The meaning of this dispatch was not communicated to the defendant or its agents, but the clerk who received it was told it was important, and requested to forward it immediately. A majority of persons who send messages by telegraph say to the receiving clerk that their messages are important and request that they be sent at once. This dispatch translated would read: "Sold 500 bales, basis middling, free on board at 21⅝ cents, freight ½ penny; prompt shipment. Draw with documents on Edward Dobell. Insure against fire. Telegraph drafts." The dispatch was received in Mobile at ten o'clock p. m. of January 30, but was not delivered to the plaintiff in Mobile until half past ten o'clock a. m. of the next day. The time required to transmit a message of ordinary length from New York to Mobile, when the lines are in good order and there is no other message having precedence, is about four minutes. On January 31st the plaintiff bought five hundred bales of cotton in Mobile to fill the contract of sale referred to in the dispatch to him, at the price of fifty-four thousand one hundred and ninety-nine dollars and twenty-eight cents, and the same cotton could have been

purchased in Mobile on January 30th for eight hundred and ninety-nine dollars, and forty-three cents less than that sum. New York time is fifty-five minutes faster than Mobile time, so that when it is five o'clock p. m. in Mobile it lacks but five minutes of six p. m. in New York. J. S. Abbott & Co., to whom the plaintiff's message was addressed and who sent the reply, were the agents of the plaintiff in New York, and the plaintiff paid for both dispatches. He paid for the dispatch from J. S. Abbott & Co., three dollars and sixty-nine cents, which was the usual day rate for unrepeated and uninsured messages. The message sent by J. S. Abbott & Co. was written upon the blanks furnished by the defendant for day messages, and upon which it required day messages to be written. The business office of plaintiff in Mobile is but one or two blocks from the office of defendant, and his residence about a mile or a mile and a half. It is the custom of the defendant at half-past nine o'clock p. m. to dismiss its messenger boys for the day, and at ten o'clock p. m. to close its office. The plaintiff before January 30th, 1872, had done much business with the defendant's office in Mobile. The plaintiff alleges that the delay in not delivering the dispatch sent by J. S. Abbott & Co. to him until January 31st was the result of the carelessness and negligence of the defendant and its agents, and that he suffered damage to an amount equal to the difference in the value of five hundred bales of cotton in Mobile on the 30th and of the same quantity of cotton in Mobile on the 31st of January. To the declaration of the plaintiff setting up this claim, the defendant pleads a general denial of the case stated by the plaintiff, with leave to introduce evidence in proof of any matter that might be specially pleaded.

The defense as really made amounts to this:—(1) That generally the averments of the declaration are not true. (2) That there was no negligence or carelessness on the part of the defendant in transmitting or delivering the message. (3) That if the plaintiff suffered damage from the neglect of defendant, he contributed to the damage by his own neglect and carelessness. (4) That if the plaintiff suffered any damage by the delay in the transmission and delivery of the dispatch, it was a damage not within the reasonable contemplation of the parties when the contract for sending the message was made between them. (5) That the printed blanks, upon which the defendant required messages to be written, contained a clause exempting the defendant from liability from all except nominal damages for delay in the delivery of unrepeated messages, and that in any event the plaintiff can only recover nominal damages.

Your first duty, under the pleadings in this case, will be to inquire whether the plaintiff has made out his case by proof, substantially as he has stated in his declaration. So far as this part of the case is concerned, the only point in dispute between the parties is as to the question of negligence. Prompt and speedy communication between different localities is one of the most urgent wants of the present age. To meet this demand telegraph companies are chartered, and they engage to subserve the public interests by transmitting intelligence promptly and speedily. Their engagement is to receive and to transmit by telegraph and to deliver, without unnecessary delay, the message according to the directions. Persons whose messages do not require the most rapid transmission and speedy delivery, take the cheaper and slower method of communication afforded by the mails. When a telegraph company therefore receives a message for transmission, the fair inference is that the sender resorts to the telegraph because he cannot or does not choose to wait for the mail, and the telegraph company agrees by implication that his message shall be carefully transmitted by telegraph and delivered without unnecessary delay. 2 Redf. R. R. 287–304; Law of Telegraphs, §§ 146, 187, 188, 352; Allen, Tel. Cas. 71, 114, 284, 335, 563, 570; Sweatland v. Telegraph Co., 27 Iowa, 433. You will therefore inquire whether there was negligence on the part of the defendant in either transmitting or delivering the message in question. It is admitted that the message was left at the office in New York, for transmission to Mobile, at about twenty minutes after five p. m., and that it was not delivered until half past ten the next morning; and that under ordinary circumstances it would require only about four minutes to transmit the message from the office of the defendant in New York to its office in Mobile; and that plaintiff paid day rates and not night rates for the message. These facts being conceded, I instruct you as a matter of law, that a prima facie case of negligence is made out against the defendant. Moore v. Westervelt, 1 Bosw. 357; Allen, Tel. Cas. 284, 343, 570; Law of Telegraphs, § 370; Shear. & R. Neg. 610.

The admitted facts having established the negligence of the defendant, the burden of proof is put upon defendant to rebut the prima facie case thus made. For although the facts unexplained show negligence, the defendant may, by evidence, so excuse and explain its conduct as to make it perfectly clear that there was, in fact, no negligence whatever. This the defendant has undertaken to do. It claims to have shown that the message was not promptly transmitted on account of obstructions beyond its control, and which are peculiarly incident to the transmission of intelligence by telegraph. The rule of law governing this branch of the case may be thus stated: Those who use the telegraph as a means of communication, unless they insure the delivery of their messages, take the risk of delay and failure of their messages to reach their destination

arising from the accidents and obstructions to which telegraphic lines are liable.

Apply this rule of law to the facts in this case. Has the defendant satisfied you by the evidence that the reason why the message of plaintiff did not reach Mobile until ten o'clock p. m. was owing, not to the negligence or carelessness of any of the defendant's agents, but to obstructions in the line which the defendant could not foresee or prevent? If you so find, then the defendant has succeeded in disproving the charge of negligence so far as the delay in the transmission of the message to Mobile is concerned. It is the duty of a telegraph company to transmit messages impartially, in good faith, and in the order in which they are received. Crouch v. Railroad Co., 14 C. B. 255; Johnson v. Railroad Co., 4 Exch. 367; Wibert v. Railroad Co., 12 N. Y. 245. If the defendant has satisfied you that its adherence to this rule contributed to the delay in the transmission of the plaintiff's message, and that such adherence, combined with obstructions in the working of the line, caused the delay in the transmission until ten o'clock p. m., then the prima facie case of negligence, so far as concerns the transmission of the dispatch, is overcome, and you should find that the defendant was not in fault in failing to transmit the message at an earlier hour. Under these instructions you will determine whether the defendant was guilty of negligence in not transmitting the dispatch to its destination before ten o'clock p. m. If you shall be of opinion that the telegraph company was not in fault, but used due diligence to transmit the message, and was prevented from so doing as claimed, you will then proceed to inquire whether the defendant has shown that there was no negligence in the delivery of the message after its arrival in Mobile. Was the defendant bound to deliver the message after ten o'clock at night? If the message showed upon its face that its delivery that night was a matter of importance to the plaintiff, and that a failure to deliver immediately would involve him in loss, and it appeared that the message was a day message and had been delayed, then it is for you to say whether due diligence did not require of defendant to deliver the message at once, or at least make an effort in good faith to do so. If, on the other hand, the message did not on its face indicate the importance of immediate delivery; if the plaintiff had left no notice at the office of defendant that he expected an important message, and had not requested its immediate delivery, and the message actually arrived after the messenger boys had been dismissed for the night, and after the hour for closing the telegraph office had passed, and after the plaintiff had closed its own office and gone to his residence, a mile, or a mile and a half from the telegraph office,—if you find these facts, then you will consider and determine whether due diligence required under these circumstances the delivery of the message on the night of the 30th of January. If you find that it was not reasonable, under the circumstances, that the defendant should be required to deliver the message on the night of its reception, you will be justified in the conclusion that the defendant was not guilty of negligence in not delivering the message on the night of the 30th; and you should then inquire whether there was negligence in not delivering the message at an earlier hour than half past ten o'clock a. m. of the next day.

Ought the defendant to have delivered the message at an earlier hour on the 31st? Before passing upon this question there is another raised by the evidence that you should decide upon. The defendant claims to have introduced proof sufficient to show that the message was taken to the office of defendant between eight and nine o'clock a. m., and was not delivered because there was no one there to receive it. Whether this is the fact, or whether the message was taken to the office of plaintiff for the first time at half-past ten o'clock a. m., you will decide whether there was, under all the circumstances, negligence in the delivery of the dispatch on the morning of the 31st. If under these instructions applied to the facts you shall be of opinion the defendant has rebutted the prima facie case of negligence made by the plaintiff, and has explained satisfactorily the delay in the transmission and delivery of the message, then that is the end of the case, and it will be your duty to return a verdict for the defendant. If, on the other hand, you should be of opinion that the defendant has been guilty of negligence in the premises, you will then proceed to consider other matters of defence. One of them is that if the plaintiff suffered any damage he contributed to bring it about by his own carelessness and neglect. The rule of law upon this branch of the defence has been thus stated: One who is injured by the mere negligence of another cannot recover any compensation for his injuries if he. by his own ordinary negligence. contributed to produce the injury of which he complains. See Shear. & R. Neg. § 25, and cases there cited. I give you this as the law upon the point in question. The defendant insists that the plaintiff, by sending a message of inquiry to New York might have avoided the loss of which he complains, and that, had he acted as a prudent man, he would have done so. That being in negotiation for the sale, both in New York and Liverpool, of the same five hundred bales of cotton, which he alleges he had on hand on the 30th inst., having made an offer to sell in New York, he should not have sold in Liverpool without ascertaining definitely whether his New York offer had been accepted. Now, this is a point upon which you must judge. What were the dictates of ordinary prudence and care? If a prudent and careful man would have telegraphed to New York before closing the sale in Liverpool,

and by failing to take this precaution the plaintiff has contributed to his own damage, and if by the use of this means he might have, and should have, avoided the injury, he cannot recover. His own negligence is a complete bar to his recovery. As men of experience in business affairs, you must determine whether in this respect the plaintiff was in fault. If upon this issue you find for the defendant, that, also, will put an end to the case, and it will be your duty to return a verdict for the defendant. If you shall be of opinion that the defendant was guilty of neglect, whereby the plaintiff suffered damages, and that the plaintiff did not contribute to his own damage by his own neglect and could not have avoided the damage by the exercise of ordinary prudence and skill, then it will be your duty to return a verdict for the plaintiff for some amount. Ordinarily, this amount would be the difference between the value of five hundred bales of cotton in Mobile on the 30th of January, 1872, and of the same quantity of cotton in the same place on the next day. This difference is shown to be $899.43. But what that amount should be in this case will depend upon some considerations which I am about to submit to you.

The damage sustained by the defendant must have been within the reasonable contemplation of the parties at the time the contract for the transmission of the message was made. If the plaintiff, through his agent in New York at the time he left the message for transmission, informed the defendant's agent that the message was important, and the dispatch itself indicated that it was a business message, and that serious damage might accrue to the plaintiff if it was not promptly transmitted, it became the duty of defendant to use diligence to put it upon its transit, and it would become liable for the damage which might be the result of negligent delay in sending the message. But if the plaintiff's agent simply said it was an important message and requested its early transmission, but the dispatch itself was so worded that it did not in any way indicate that the plaintiff might suffer damage by its delay, then the plaintiff would only be liable for nominal damages. If the negligence should be found in the delivery of the dispatch, after it had reached its destination, you should not give any weight in estimating the damages to what was said by the plaintiff's agent at the other end of the line about the importance of the dispatch. The question is, was the agent of the company here in Mobile, under the circumstances, and looking to the words of the dispatch, put upon notice that a failure to deliver it promptly would entail a serious damage upon the plaintiff? If he was, that is sufficient to sustain the plaintiff's claim to recover all the damage that he has sustained. If he was not, if it only appeared to the agent in Mobile to be a dispatch announcing a sale in New York of five hundred bales of cotton in response to an offer by the plaintiff to sell that amount made at a certain hour in the day by message from Mobile, and gives information about the details of the sale, and if it contained no reasonable notice that damage might accrue from delay in its delivery, then the damage for the delay would be nominal only.

Another matter should be borne in mind in estimating the damages, namely, that you are only to allow such damages as were caused by the negligence of the defendant. Was there any negligence of defendant on the 30th of January? If there was, would the plaintiff have been able to avoid the injury he claims to have suffered, even had the defendant been prompt in transmitting and delivering the message? In other words, could the plaintiff, after the time when he claims the message should have reached him on the 30th, have purchased five hundred bales of cotton for any less amount than he was compelled to pay the next day? If he could not, his damage is not the result of the neglect of defendant, and he cannot recover. But suppose you should find there was no neglect on the 30th, but there was neglect on the 31st of January. You will then inquire whether if the defendant had delivered the message on the 31st, at the time demanded by its duty, the plaintiff could have avoided loss. Suppose you should conclude that the message should have been delivered at seven o'clock or eight o'clock or nine o'clock a. m., of the 31st; could the plaintiff have purchased five hundred bales of cotton cheaper at these hours than at half past ten, when the message was in fact delivered? If he has not satisfied you that he could, then he can only recover nominal damages.

There is but one point more that I deem it necessary to notice. The blanks upon which the defendant requires all messages for transmission to be written contain, under the words "All messages taken by this company subject to the following terms," this stipulation. "To guard against mistakes, the sender of a message should order it repeated, that is, telegraphed back to the originating office. For repeating, one half the regular rate is charged in addition; and it is agreed between the sender of the following message and this company that the company shall not be liable for mistakes or delays in the transmission or delivery of any unrepeated message beyond the amount received for sending the same." It is claimed by defendant that this stipulation was brought home to the notice of plaintiff; that his assent may be therefore presumed, and that it is binding, and limits the recovery in this case to the amount paid for sending the message. Under the instructions I am about to give you, it will be unnecessary for you to consider whether this notice was assented to by the plaintiff or not. I instruct that so much of this alleged contract as pro-

vides that the company shall be liable for delays in the delivery, or for the non-delivery, of an unrepeated message only to the amount paid for sending the same, is not binding; the company had no right to exact it: that it is against public policy, and absolutely void. The telegraph company is engaged in a quasi public employment. A large portion of the business of the civilized world is carried on by means of the facilities for intercourse which it affords. Incalculable sums depend upon the alacrity, care, and good faith which it brings to the discharge of its duties. The whole business of the commercial world is to a degree dependent upon it. The public has the right to exact at least ordinary diligence. A common carrier is not allowed to protect himself by contract from liability for the results of his own negligence. New York Cent. R. Co. v. Lockwood, 17 Wall. [84 U. S.] 357. There seems to be no good reason why the same rule should not be applied to a telegraph company. Shear. & R. Neg. § 565; True v. Telegraph Co., 60 Me. 9, Allen, Tel. Cas. 530; W. U. Tel. Co. v. Graham, 1 Colo. 182; Candee v. Telegraph Co., 34 Wis. 471. I therefore instruct you that you should not allow this alleged contract for immunity for all except nominal damages for negligence to have any effect upon your verdict.

The jury returned a verdict for defendant.

DORMAN (AGNEW v.). See Case No. 100.

Case No. 4,005.

DORN v. GERMANIA INS. CO.

[4 Am. Law Rec. 445; 5 Ins. Law J. 183; 1 Law & Eq. Rep. 132.]

Circuit Court, N. D. Ohio. 1875–1876.

FIRE INSURANCE—ALTERATION OF BUILDING WITHOUT INSURER'S ASSENT.

[1. In the absence of any express provisions against alterations without the insurer's assent, an alteration that does not increase the risk does not avoid the policy.]

[2. A policy upon a stone building with a frame addition is not avoided as to the latter by cutting away part thereof next to the stone building, and adding it to the rear of the addition, thus separating the addition from the main building.]

[This was an action by John P. Dorn against the Germania Insurance Company on a policy of fire insurance. Heard on defendant's motion for a new trial.]

WELKER, District Judge. The action was brought upon a policy of insurance issued by defendant upon a stone building with a stone addition on one side, and a frame addition attached to the stone building on the other side. After the insurance, and before the fire, the plaintiff, without the consent of defendants, cut off eighteen feet of the frame addition next to the stone building, and placed the same at the rear end of the frame building addition, thereby detaching the frame addition from the stone building, but leaving the remainder of the frame addition unmoved. In making this alteration it was admitted that the risk of loss by fire was not in any way increased thereby. There was no express provision in the policy against alterations, or requiring assent of the insurer to make improvements upon the property insured. In the fire which occurred, besides damages to the stone building, the frame addition was entirely consumed, the fire having originated somewhere in the stone building. The case was tried to a jury. On the trial the defendants by their counsel claimed that the alterations above stated disconnected the frame addition from the stone building described in the policy; and that being no longer attached thereto it was not covered by the policy, and no recovery could be had for its loss; that such alteration separated the addition from the stone building, and because a separate and distinct building and no part of the main building, and therefore not any longer covered by the policy; and requested the court to so charge the jury, which was refused, and the court did charge in relation thereto: That in the absence of express stipulation in the policy prohibiting repairs and alterations of the premises insured, there was an implied engagement that the assured would not alter the premises or business described in the policy, so as to thereby increase the risk and liability of the insured. The construction and use of the premises, as described in the policy, constituted the basis of the insurance and determined the amount of the premium. Hence no alteration in either must be made by the assured to enhance the liability of the insurer.

The right to repair and alter buildings is incident to ownership, and such repairs and alterations as do not change the risk may be made by the insured, without consent of the insurer, if such assent is not expresssly required in the policy. That the alteration or enlargement of a building will not avoid the policy of insurance unless the risk is thereby increased. That if the jury found that the frame addition to the stone building described in the policy was altered without the consent of the defendant, by taking off eighteen feet of the part next adjoining the stone building, and placing the part so taken off to the rear of the addition, leaving a part of the frame addition in its original place, and they were satisfied that such alteration did not increase the risk to the building insured, such alteration did not in law avoid the policy so far as the frame addition is concerned, and the plaintiff would be entitled to recover for its loss.

The jury returned a verdict for the plaintiff, including damages for the loss of the frame addition. The refusal of the court to charge as requested, and the charge as given, are assigned as grounds for a new trial. I have

carefully considered this matter and reviewed the legal questions involved, and am satisfied that in refusing to charge as requested, and in the charge as given to the jury, there was no error, and therefore overrule the motion for a new trial.

DORR (BRYCE v.). See Case No. 2,070.

Case No. 4,006.

DORR v. GIBBONEY et al.

[3 Hughes, 382.][1]

Circuit Court, W. D. Virginia. June 2, 1878.

EQUITY—SUIT FOR BREACH OF TRUST — PARTIES—WAIVER OF OBJECTIONS—CONFISCATION BY CONFEDERATE COURT — DECREE IN ATTACHMENT — SPECIAL APPEARANCE.

1. On a deed of assignment to a trustee to secure creditors whose debts were all ascertained and who were marshalled by the deed into four classes, a bill in chancery was brought by one of the fourth class against the trustee's executrix for a breach of trust by the trustee. *Held*, that it was not necessary to make the other creditors parties to the suit.

2. At all events it was too late to make such an objection at the hearing.

3. Payment of the debt, by the trustee, to a receiver under a decree of confiscation of a Confederate court, was a breach of trust as against a loyal citizen.

4. A decree in an attachment case instituted during the war by seizure of the property and publication of notice, was void as against a loyal citizen and could be impeached even collaterally.

5. An appearance, after such a decree was rendered, for the mere purpose of moving to strike the case from the docket on the ground that no process had been served, was not such an appearance as waived previous defects in the service, and could not have the retroactive effect of validating a decree totally void.

[Cited in Romaine v. Union Ins. Co., 28 Fed. 638; First Nat. Bank of Danville v. Cunningham, 48 Fed. 518.]

[This was a bill in equity by A. H. Dorr against Robert Gibboney's executrix and others.] In 1859 Thomas L. Preston made to Robert Gibboney as trustee a deed of assignment to secure his creditors. The deed marshalled the debts into four classes and directed that they should be paid in that order of priority. Among the debts mentioned in the fourth class was "a debt due by negotiable note to A. H. Dorr (a citizen of New York) of $2,650." In 1862 the trustee sold to W. A. Stuart, G. W. Palmer, and G. B. Parker, a great part of the property conveyed for $425,000, an amount sufficient to pay all the debts mentioned. It was stipulated that in case any of the creditors did not accept payment in Confederate currency, the purchasers should substitute their notes for such debts until they could be paid. In 1861 this debt was confiscated by John W. Johnston, receiver of the Confederate government, and paid to him by Gibboney, on the decree obtained in August, 1862. But in the meanwhile one Philip Rohr had sued out a process of foreign attachment against Dorr and served it upon Gibboney, accompanying it also by publication of notice, dated August 9th, 1862. A decree was rendered in his case after the war, but there was no renewed order of publication. In 1862, however, the money was loaned by John W. Johnston, receiver, to Philip Rohr. In 1873, Gibboney having died in the meanwhile, Dorr brought suit against his executrix, making parties Thomas L. Preston, Stuart, Palmer, and others, but not making any of the other creditors parties. No demurrer or plea was filed on this ground. The answer, which was not filed for some time, relied on the payment under the decree of confiscation and also on the decree in the attachment case, claiming that this decree could not be collaterally impeached. At the hearing the point was also made that the other creditors should be parties. Dorr, by his counsel, had appeared in the state court, where the attachment case of Rohr had been decided, and moved to strike the case from the docket. It was insisted by the defendants that this was such an appearance as to waive the objection to the defect of summons.

James H. Gilmore and Robert M. Hughes, for complainant, cited Perdicaris v. Charleston Gas Light Co. [Case No. 10,973], affirmed on appeal in 96 U. S. 193; Shortridge v. Macon [Case No. 12,812]; Williams v. Bruffy, 96 U. S. 176; Dean v. Nelson, 10 Wall. [77 U. S.] 172; Ludlow v. Ramsey, 11 Wall. [78 U. S.] 581; Lasere v. Rochereau, 17 Wall. [84 U. S.] 438; Earle v. McVeigh, 91 U. S. 503; Pow. App. Proc. 106, 119, 134, et seq.; D'Arcy v. Ketchum, 11 How. [52 U. S.] 165; Webster v. Reid, Id. 437; Fairfax v. City of Alexandria, 28 Grat. 34; Cuyler v. Ferrall [Case No. 3,523]; Fretz v. Stover, 22 Wall. [89 U. S.] 198.

Joseph W. Caldwell, for Gibboney's executrix, and Johnston & Trigg, for Stuart and Palmer, cited Lancaster v. Wilson, 27 Grat. 624; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449; Walden v. Craig, 14 Pet. [39 U. S.] 154; Cooper v. Reynolds, 10 Wall. [77 U. S.] 308; Pennoyer v. Neff, 95 U. S. 714.

RIVES, District Judge. Before entering on the examination of this case, it is necessary to dispose of the objection made to the hearing for want of proper parties to the bill. At this stage of the proceedings, such an objection cannot be heard unless for defect of parties; the court should be disabled from passing on the very right of the cause. If, however, the objection had come at an earlier stage by way of a preliminary demurrer, it could scarcely avail. There is here no community of property or interest between the complainant and the other cestui que trust under the deed, in the subject of his claim; his is a separate ascertained demand,

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

wholly unconnected with any general question of the administration of the trust fund, and it is hard to conceive how the other creditors could be interested in his recovery, not from the general fund, but from the trustee, whom he seeks to hold liable on account of the actual receipt thereof. This case, therefore, falls under the exceptions to the general rule so well defined in Story's Equity Pleadings, §§ 207a, 212. The complainant has his fixed share of the trust fund, and there can be no necessity, on the ground of principle or authority, to make any other parties than those he has already made to his complaint. His debt is secured by the general trust deed of Thomas L. Preston of the 7th July, 1859, and is included in the fourth class under the designation of "a debt due by negotiable note to A. H. Dorr of $2,650." The bulk of this trust property, consisting of the Preston Salt Works estate, and the lands contiguous thereto, and certain interests in the King's Salt Works, with the appurtenant lands, were sold on the 10th day of June, 1862, by the trustee, Robert Gibboney, to W. Alexander Stuart, George W. Palmer, and George B. Parker, for the sum of $424,000. This contract having been made during the Rebellion, it was contemplated by the parties to this contract that the trustee would not be able to pay off the creditors with the currency of that belligerent era; and hence it was expressly stipulated by the purchasers, that in case of the refusal of creditors to receive such currency in payment, they were to substitute their notes for the amount so refused, secured, to the satisfaction of said Gibboney, in equal instalments, payable in one, two, three, four, and five years, from the first of July then next ensuing, or sooner, at the election of said purchasers, with interest from said first of July, and on the whole amount, payable annually.

In this state of facts, on the 22d October, 1861, the trustee, Robert Gibboney, was served with interrogatories from John W. Johnston, receiver of the Confederate States, acting under the sequestration act of that government, of the preceding May, and, without delay, on the very day of service, made return of this debt to Dorr, as a citizen of New York. Thereupon the said receiver, suing in the name of said Confederate States, procured a decree of sequestration in the district court of the Confederate States for the western district of Virginia, on the first day of August, 1862, of this particular debt. But inasmuch as Gibboney, in his surrender of this claim, stated that it had been attached in his hands by Philip Rohr, this decree of sequestration recites that fact, and the willingness of Gibboney to pay to the proper person; and then directs him to pay it, with accrued interest, to said receiver, John W. Johnston, with this added provision, that said Johnston should lend it on good security, or if unable to do so, invest the same in eight per cent. Confederate bonds or seven 30-100 per cent. treasury notes, to await the decision of the suit brought by said Rohr against said Dorr. Accordingly, on the very day of this decree, we find among the vouchers of Gibboney, trustee, as aforesaid, in the record of Preston v. Stuart, made an exhibit in this cause, p. 140, the following receipt: "$3,137.15. Received of Robert Gibboney, trustee of Thomas L. Preston, three thousand one hundred and thirty-seven dollars and fifteen cents, paid me under the within decree (Confederate States, by J. W. Johnston, receiver, v. R. Gibboney, trustee, etc.). John W. Johnston, Receiver. August 1, 1862." And in the Rohr record, p. 26, we find the bond of Philip Rohr, etc., to John W. Johnston, receiver, under an order of the Confederate States district court in the case against Robert Gibboney, trustee for Thomas L. Preston, to sequester the estate of A. H. Dorr, for the same identical sum of $3,137.15. In the settled account of said Gibboney, we find he credits himself by the same amount "paid John W. Johnston, receiver." So far, then, as Gibboney is concerned, his defence rests on the sequestration alone. He does not hold the fund subject to the attachment of Rohr. He is content with the protection and authority of the Confederate tribunal, and parts with the fund to its receiver, leaving the court to preserve the fund for the satisfaction of the attaching creditor in its own way.

Was not this conduct under the circumstances a breach of trust, for which the trustee should be held liable? It has been seen that he was under no obligation to receive the currency of that day, where it could not be paid to the creditors; on the contrary, he stipulated for its refusal, and the substitution of time notes in its stead. We have shown that he knew Dorr was a non-resident; a citizen of New York; and that he could not satisfy his debt with Confederate notes. Why, then, did he agree to take them? Why did he not avail of his own stipulation for such a case by taking the bond of the purchasers for such a period as would probably cover the duration of the revolt? It is only to be deemed a shift, in flagrant disregard of his duty to his non-resident cestui que trust, to accommodate the purchasers, to expedite his administration of the trust, and signalize his obeisance to the rebel authorities. He must have known and felt that creditors in the loyal states could not be paid in Confederate notes. This principle, as laid down by the supreme court in the case of Fretz v. Stover, 22 Wall. [89 U. S.] 198, must have commended itself to men of ordinary sense, and least versed in business or commerce, even during hostilities. I cannot, therefore, but regard the taking of this depreciated currency as evidence of a purpose to betray the creditor in the state of New York, while the trustee was thereby to gain credit for his zeal in the Confederate cause, and his alacrity in obeying the se-

questration act of the Confederate congress. But above and beyond this consideration, is the absolute nullity of these sequestration proceedings. They depended for their validity upon the success of the Rebellion. With its suppression, they perished; and to respect them now would be inconsistent with the rightful pretensions of the government and the actual results of the war. They are nullities. They are not to be respected by any court, state or federal. I have had repeated occasions to pass upon them in this circuit; and have never hesitated in this view of them, before I could be guided by decisions in the last resort. Since then, we have the case of Perdicaris v. Charleston Gas Light Co. [supra], approved by the supreme court; and the recent case of Williams v. Bruffy, 96 U. S. 176, decided by the supreme court on error from our own court of appeals. This position is virtually conceded in argument by the counsel for the defendants. But they seek to escape its force by sheltering themselves under the attachment suit of Philip Rohr, of which profert is made in the answer of Gibboney's executrix. They rely upon the judgment in that case, as conclusive upon the complainant here.

How far judgments may be collaterally assailed, has been settled by elementary writers and a long course of decisions in the supreme court of the United States, and the appellate courts of the several states. Where the jurisdiction is conceded, errors or irregularities in proceedings conducting to the judgment, are subjects for correction by appeal or otherwise, and can never be used to assail or impeach collaterally such judgment. But where jurisdiction is lacking, either over the person or property, the judgment is void, and has no sanction or validity in any court that has to pass upon it, though collaterally. There must, therefore, be some jurisdictional defect in the judgment to authorize or justify its impeachment in a collateral suit. Thus, in a suit in personam, it is held there can be no jurisdiction save by service of the process on the defendant, or by his personal appearance. This is said to rest on a principle of natural justice, and to constitute that due process of law required by the fourteenth amendment of the federal constitution. And although the law of the state may authorize a substituted service by publication where the non-resident has property in the state that can be subsequently taken on execution upon the judgment to be obtained upon such published summons, yet if the seizure of such property is not the primary object of the suit, it is to be deemed a personal judgment and without validity if it be rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by publication of summons, but upon whom no personal service of process within the state was made, and who did not appear. Pennoyer v. Neff, 95 U. S. 714. But it is otherwise where the proceeding is in rem. The jurisdiction there rests on the duty and right of the state to protect its citizens in their contracts with non-residents, and to control the estate of the latter within its territorial limits. A seizure of the property under the laws of the state, and in the mode prescribed by them, is a species of notice to the non-resident or his agent, and extends only to the property seized. The judgment in such cases of attachment, though personal in terms, extends only to the property, and if not satisfied by it, cannot be availed of, in any way or in any court, to recover the deficiency; but to the extent of that deficiency is wholly void. Cooper v. Reynolds, 10 Wall. [77 U. S.] 308. But the fundamental requisites of such jurisdiction must be sought in the terms of the statute. I will not deny that in such cases the state might prescribe the seizure alone as the ground of jurisdiction, but it is certainly more consonant with natural justice to give the party the benefit of a published summons. Hence, so universal is the legislative sense of fairness, and the desire to protect person and property from any judicial action, of which the best practical notice was not given, that in the attachment laws of the states, so far as I have any knowledge, particular provision is made to couple with the seizure a publication of summons. This mode of proceeding is in derogation of the common law; and it is a credit to our systems of jurisprudence that they adopt every practicable precaution to avoid shocking the common sense of justice, and impairing the sanctity of judicial sentences by insuring to absent parties the opportunity of being heard in defence of their rights of property as well as of person. No man's property should be taken from him and given to another unless by lawful authority, lawfully pursued, and the duty of guarding an absent one against the unlawful seizure and transfer of his property, without his knowledge, is more sacred and more consonant with the maxims of law and the dictates of justice than that of insuring to the resident citizen the fruits of his contracts with the absent owners of property that may be justly made liable to his claims. Drake, Attachm. (4th Ed.) note to section 89a. This state has reflected in its statute this sentiment of enlightened jurisprudence. It does not exact of the absent defendant what might be termed the "summum jus" of its territorial jurisdiction and sovereignty. It does not predicate its jurisdictional right of the seizure alone, but requires, as a prerequisite, an order of publication. Code Va. 1873, p. 1014, § 20. In every case of attachment in this state, then, two fundamental facts must appear to give jurisdiction. First, the seizure; secondly, the order of publication. The one will not do without the other. Both must concur to give validity to the judgment, otherwise it is void.

The sufficiency and regularity of the seizure in this case is beyond dispute, and is not in

controversy. But the objection lies to the order of publication, of which affidavit is duly made under date of the 9th of August, 1862. The publication was, therefore, made during the war, when all intercourse or correspondence between the citizens of the belligerent states was interdicted. Dorr could not lawfully have received it, and if he had done so surreptitiously, he could not have obeyed the summons, and repaired to his defence before an insurrectionary tribunal. The question, therefore, arises whether a publication under such circumstances fulfils the requirements or intentions of the law. Had these transactions transpired in a time of peace, there can be no doubt of the validity of this judgment. But a publication flagrante bello, purporting to be notice to a citizen of a belligerent state, is, in the language of Justice Bradley, delivering the opinion of the court in Dean v. Nelson, 10 Wall. [77 U. S.] 172, "A mere idle form; the party could not lawfully see or obey it." I would add further, it is a mockery of justice. To the same effect are the subsequent cases of Ludlow v. Ramsey, 11 Wall. [78 U. S.] 581; Lasere v. Rochereau, 17 Wall. [84 U. S.] 438; and Earle v. McVeigh, 91 U. S. 503. Under these decisions I am constrained to regard the publication of the summons at that time and under the circumstances as a nullity. There is, therefore, in my view a jurisdictional defect in these proceedings by attachment, which renders the judgment void.

But in the argument of this cause a fuller record of the Rohr attachment was submitted, whereby it appeared that long after the rendition of this judgment, to wit, at the January term. 1874, "came A. H. Dorr, by counsel, and asked leave of the court to make a motion to strike this cause from the docket, which is granted him, and thereupon he moved the court to strike this cause from the docket for the reason that the said Dorr had no notice of the commencement of said proceedings, and for this reason they were null and void, because from the pleadings it appears that said Dorr was a citizen of the state of New York at the time of the institution of this suit." It is now claimed that this was an appearance of the defendant, superseding the necessity of summons or publication. But if regarded as an appearance at all it is subsequent to the judgment and cannot be now invoked to impart validity to an anterior judgment, otherwise void. Besides, such motion by counsel for defendant cannot rightfully be construed as an appearance of the defendant in ratification or approval of illegal proceedings against him. On the contrary, if an appearance at all, it is by way of protest against the judgment, and cannot under any circumstances impart by retroaction a validity to it, which it did not originally possess. This course of reasoning conducts me to the conclusion that the judgment in Rohr's attachment suit was void, and of no obligation upon the complainant in this cause; and especially that it cannot be availed of by the executrix of Robert Gibboney to shield his estate for his accountability by reason of his illegal acceptance of Confederate notes in satisfaction of Dorr's debt, and of the nullity of his transaction with the Confederate receiver, John W. Johnston. His estate in the hands of his executrix is primarily liable to the complainant; but if it should prove insolvent, the plaintiff, on the authority of Fretz v. Stover, heretofore cited. has not lost his recourse against the original debtor, Thomas L. Preston, or his trust estate. But, in no event can the defendants, Palmer, Stuart & Co. be held responsible; they were absolved by Gibboney, and cannot be deprived of the acquittance he gave them and had the right to give them. The plaintiff, therefore, must be decreed his debt and costs against Gibboney's executrix, and the cross-bill must be dismissed with costs.

DORR (HATCH v.). See Case No. 6,206.

Case No. 4,007.

DORR v. HOYT.

[1 Hunt, Mer. Mag. (1840) 252.]

Circuit Court, S. D. New York.

CUSTOMS DUTIES—"TWIST."

[Twist, the component parts of which are goat or mohair and silk, and not adapted to the purpose of sewing silk, is not liable, under the act of March 2, 1833, to the payment of any duty.]

At law. This was an action brought by the plaintiff [Samuel F. Dorr], an extensive importer of French goods, against the defendant [Jesse Hoyt], the collector of the port of New York, to recover back the sum of $88.60, being the amount of duties charged on an importation of twist. These duties had been charged under the decision of the comptroller of the treasury of 1833, and the entry was made, and the duties levied, as upon sewing silk, at the rate of $2.28 per pound.

The plaintiff contended, that this particular article, twist, was not in itself silk, but that it was composed of goat or mohair and silk, and that it would not serve the same purpose as sewing silk, and that under the tariff it was provided, that articles of importation of which silk forms a component part, were free of duty; and it was farther contended, that, according to mercantile usage, twist was not sewing silk, under which class the duty had been claimed and exacted. The entry and payment of the duty, under protest, were admitted, and the plaintiff called a manufacturer of twist, who testified to the article being composed partly of goat or mohair, and partly of silk.

For the defence it was contended and appeared that, under the decision of the comptroller of the treasury of 1833, this article had

been entered as all goods of the like kind, and classified as sewing silk by the custom house authorities. On cross examination, however, of the defendant's witness, it came out that the component parts of the article twist, were as contended by the plaintiff.

Daniel Lord, Jr., for plaintiff.

B. F. Butler, for defendant.

Before BETTS, District Judge.

THE COURT said that all articles manufactured partly of silk, or of which silk was a component part, were entitled to be admitted free of duty. The custom house department had established, as it appeared by the testimony adduced in this case, a rule which the merchants had protested against, and this was a question for the jury to pass upon. The jury, without leaving their seats, found a verdict for the plaintiff for the amount claimed, namely, $88.60; thus sustaining the protest of the merchants, that twist is not liable to payment of duty.

Case No. 4,008.

DORR et al. v. HOYT.

[2 Hunt, Mer. Mag. 261.]

Circuit Court, S. D. New York. Jan. 22, 1840.

SILK TWIST—SEWING SILK.

[Twist composed entirely of silk, even if used for sewing, is not dutiable as "sewing silk," under the act of March 2, 1833, unless it is known as such in commerce; if not so known, it is free of duty as "a manufacture of silk."]

The defendant [Jesse Hoyt], collector of the customs at New York, had exacted from the plaintiffs [S. & F. Dorr & Co.] duties at the rate of 40 per cent. upon silk twist, imported by the plaintiffs during the year 1839, insisting on the right to duty as on sewing silk. The plaintiffs paid the duty, protesting against the right to exact any duty, and brought this suit to recover back the duty.

The plaintiffs insisted that the twist was a manufacture of silk, and, as such, made free by the 4th section of the act of March 2, 1833 (4 Story's Laws, 2338 [4 Stat. 630]). The plaintiffs proved that the article in question was known in trade, among importers, dealers, and consumers, as "twist," and not as "sewing silk;" that although made wholly of silk, and used only for sewing, yet it was a different article from sewing silk, and they could not both be used for the same purpose.

D. Lord, Jr., for plaintiffs.

B. F. Butler, Dist. Atty., for defendant.

THE COURT charged, that if the article was known in commerce as "sewing silk," then the verdict must be for the defendant; but if not, then, as it was a manufacture of silk, it was free. That it was for them to determine whether the article was known in commerce under the name of "sewing silk" or not. If it was not, although it was composed of silk and used for sewing, it was free.

The jury found for the plaintiffs.

Case No. 4,009.

DORR et al. v. HOYT.

[2 Hunt, Mer. Mag. 262.]

Circuit Court, S. D. New York. Jan. 22, 1840.

CUSTOMS DUTIES—CLASSIFICATION—WORSTED CRAVATS.

[Worsted cravats woven on stocking frames, and dealt in principally by dealers in hosiery, and usually known in commerce under the name or class of "hosiery," are dutiable as such under the act of 1832, and not as "manufactures of wool," or "ready-made clothing."]

This was an action for money had and received by the defendant [Jesse Hoyt], collector of the customs at New York, and paid to him by the plaintiffs [S. & F. Dorr & Co.], as duties on certain importations of worsted cravats; the duties had been exacted and paid at the rate of 50 per cent. ad valorem, classing the goods as "a manufacture of wool," or as "ready-made clothing," under the act of July 14, 1832, § 2, class 2 [4 Stat. 584].

The plaintiffs claimed them to be free; being, under the act of 1816 [3 Stat. 310], a non-enumerated article, subject to a duty of 15 per cent., and consequently, by act of 1832 (4 Story's Laws, 2322), § 2, rendered free of duty.

The goods were proved to be worsted, and woven on the stocking frame, and were dealt in principally by dealers in hosiery.

The counsel of the defendant proved that the goods usually went into commerce by the name or class of "hosiery." He admitted that they were not subject to the duty of 50 per cent., as "ready-made clothing," or "manufactures of wool," but insisted that they were not free of duty, but were chargeable with the duty on hosiery.

The counsel of the claimants assented to these views.

D. Lord, Jr., for plaintiffs.

B. F. Butler, Dist. Atty, for defendant.

THE COURT charged, that the goods were liable to duty as hosiery, and that the excess over the hosiery duty must be found for the plaintiffs.

Verdict for plaintiffs, $1,321.

DORR v. LUDLOW. See Case No. 8,052.
DORR (MYERS v.). See Case No. 9,988.

Case No. 4,010.

DORR et al. v. SWARTWOUT.

[1 Blatchf. 179;[1] 5 N. Y. Leg. Obs. 172.]

Circuit Court, S. D. New York. Oct. Term, 1846.

LIMITATION OF ACTIONS — NEW PROMISE IN ACTION AGAINST COLLECTOR OF CUSTOMS — RUNNING OF STATUTE—ABSENCE FROM STATE — RETURN.

1. S. was sued to recover back an excess of duties paid to him when he was collector of the port of New-York. He pleaded the statute of limitations of New-York, to which the plaintiffs replied a new promise. Evidence was given, on the question of a new promise, of certain declarations and acknowledgments made by S., and the court, at the trial, having charged the jury that the declarations and acknowledgments were sufficient in law to take the case out of the statute: *Held*, that this was erroneous, as under the evidence it was a question for the jury whether the declarations of S. were made with reference to his individual liability or to the liability of the government.

2. Under the provision of the Revised Statutes of New-York (2 Rev. St. 297, § 27), that if, after any cause of action shall have accrued against any person, he "shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action," but one case of absence is provided for; and on the return of the defendant into the state after his first departure, so as to be subject to the process of the court, and in a way to give operation to the statute, it then continues to operate, notwithstanding a subsequent departure.

[Disapproved in Cole v. Jessup, 10 N. Y. 107. Cited in Richardson v. Curtis, Case No 11,-781.]

3. A return into the state, which will give operation to the statute, must be under such circumstances as will enable the plaintiff, by the exercise of reasonable diligence and attention to his rights, to serve process personally upon the party. He must have knowledge of the return, or the circumstances must be such as will warrant a jury in bringing knowledge home to him.

[Cited in Engel v. Fischer, 102 N. Y. 404.]

The defendant [Samuel Swartwout] was collector of the port of New-York from the year 1829 to the year 1838. The plaintiffs [Francis F. Dorr and William C. Allen] and Samuel F. Dorr deceased, composed the firm of S. & F. Dorr & Co., of New-York, from 1832 to 1838. This suit was commenced on the 30th of July, 1845, to recover an excess of duties paid under protest by that firm to the defendant at various times from the 6th of July, 1833, to the 3d of February, 1837. The defendant pleaded the general issue and the statute of limitations of the state of New-York. To this latter plea the plaintiffs replied: First, a new promise; and second, that the defendant was within the exceptions contained in the statute of New-York in relation to persons departing from and residing out of the state after the accruing of a cause of action. The section of the statute of New-York which was drawn in question in the suit was as follows: "If at the time when any cause of action specified in this article, shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." 2 Rev. St. 297, § 27.

On the trial before Betts, J., in February, 1846, the payment of the duties under protest was proved, and there was no dispute that the excess claimed was illegally exacted. The plaintiffs also gave in evidence a certificate signed by the defendant as follows:

"City and County of New-York, ss: I, David S. Lyon, being duly sworn do depose and say that, during the years 1833, 1834, 1835, 1836, 1837 and part of 1838, I was a deputy collector of the port of New-York; that during said period S. & F. Dorr & Co., merchants, of the city of New-York, entered certain quantities of wove shirts, drawers and frocks, and silk shirts, silk twist, silk drawers and silk stocks, as per statement signed by C. P. Van Ness, Esq., collector, and deponent;" (this was a statement from the custom house books, of the dates of entry, vessels, marks, packages and contents, cost in sterling and dollars, duty paid, correct duty, excess of duty, and dates of payment of duties, and the claim in this suit was based on the statement;) "that, at the time of making their entries of aforesaid articles, said importers objected, remonstrated and protested to the rates of duties then and there charged; that they claimed silk twist, silk shirts and drawers, and silk stocks, as free goods, and not liable to any duty, and wove shirts, drawers and frocks, as liable to a duty of twenty-five per centum and no more, and they notified this deponent that they should hold the collector Samuel Swartwout and the government liable for the duties exacted on silk twist, silk shirts and drawers, and silk stocks, and the excess of duties exacted upon wove shirts and drawers and frocks; that this deponent stated to the then collector Samuel Swartwout, Esq., and notified him, that the said importers objected and protested as aforesaid, as was his invariable rule and practice to inform the collector from time to time of all such remonstrances, objections, protests and notifications; and further this deponent states that he has not been and is not now in the employment of said importer, nor is he interested in this or any claim they are about making for the excess of duties which they say have been illegally exacted from them. David S. Lyon. Sworn this 15th day of November, 1844, D. Hobart, Commissioner of Deeds."

"I have read over the within affidavit of David S. Lyon, late deputy collector of this port, and have no hesitation in saying that I believe the statements therein made are true.

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

New-York, 15 November, 1844. Samuel Swartwout."

It was proved that Mr. Lyon's affidavit was not made for the purposes of this suit, but to be laid before the treasury department. It was also proved that the defendant left New-York about the middle of August, 1838, for Europe, with his family, and resided there with them till the 3d of August, 1841, when he returned; that he arrived in New-York that day, remained there a few days, at the Waverley House, it being a matter of public notoriety that he was in the city, and, about the 10th of August, 1841, commenced his residence at Frostburgh, Maryland; that he visited New-York at the end of August, 1841, and again about the 1st of December, 1841, when his family returned from Europe; that, on both occasions, he was there publicly and the fact was generally known; that he then remained in New-York till about the 10th of January, 1842, when he went to Georgetown, D. C., where he remained till the middle of March following; that he then returned to Frostburgh, and continued to reside there permanently till November 20th, 1842, with the exception of a visit of ten days at New-York, at the close of May and beginning of June, 1842, where he was publicly as before; that about the 20th of November, 1842, he took up his permanent residence with his family in New-York, and remained there till the commencement of this suit, with the exception of occasional short visits to Frostburgh. It was further proved that Samuel F. Dorr died in 1843, and that, until his death, he resided in the city of New-York; that he became deranged some time before his death; that there was some change in the firm of S. & F. Dorr & Co., in 1840; that after Samuel F. Dorr became deranged, the plaintiff Allen attended to the business of the house; and that he resided in the city of New-York for ten years prior to the time of the trial. The plaintiffs also proved by their counsel that on the 21st of November, 1845, he showed to the defendant the said certificate, affidavit and statement, and pointed his attention to the signature "Samuel Swartwout" to the said certificate, and asked him whether it was his handwriting; and that defendant replied "Yes," and added: "There is no doubt the money is due, and ought to be paid." Being asked on his cross-examination, whether the defendant made at the time any further remark, and, if so, what, he answered that he had stated every word that the defendant said.

The evidence being closed, the defendant's counsel objected that the plaintiffs, as to certain of the moneys sought to be recovered by them, were barred by the statute of limitations of the state of New-York, pleaded by the defendant, and insisted: First, that the declarations and acknowledgments of the defendant, given in evidence on the part of the plaintiffs, were not sufficient in law to take the case out of the statute of limitations; that the first replication of the plaintiffs to the defendant's plea of the said statute was not sustained by such evidence; and that upon the issue joined by said first replication, the defendant was entitled to a verdict in his favor; second, that, on the evidence given on the part of the defendant, of his being publicly in the city of New-York in August, 1841, and of the residence of the plaintiffs and Samuel F. Dorr in that city at that time, the exception contained in the statute of New-York ceased in any manner to apply to this case from the month of August, 1841, and, therefore, that upon the issue formed by the plaintiffs' second replication to the defendant's said plea, the defendant was entitled to a verdict in his favor as to all moneys paid to him for duties by S. & F. Dorr & Co., prior to August 10th, 1836; third, that even if all the several periods of time during which the defendant was absent from the city of New-York, between August 15th, 1838, when the defendant departed from the city of New-York, and the 20th of November, 1842, when he again came to reside in said city, were, under said statute, to be excepted from the time limited for the commencement of such action, yet that the same, as to all the moneys sought to be recovered by the plaintiffs for duties paid by S. & F. Dorr & Co., prior to May 1st, 1835, was not commenced in due season; and that, at least, as to all such moneys included in the plaintiffs' claim, the defendant, under the issue formed on the second replication, was entitled to a verdict in his favor. The defendant's counsel then prayed the court to charge the jury that the action of the plaintiffs to the extent above stated, was barred by force of the statute of limitations, and that the defendant was for this reason entitled to their verdict in his favor upon the issues formed by the plaintiffs' first and second replications. But the court refused to instruct the jury as prayed by the defendant's counsel, and charged that the declarations and acknowledgments of the defendant, given in evidence on the part of the plaintiffs, were sufficient in law to take the case out of the statute of limitations; and that even if the positions of the defendant's counsel, in respect to the questions arising under the second replication, were well taken, as to which the court expressed no opinion, the plaintiffs, by reason of such declarations and acknowledgments of the defendant, were entitled to a general verdict in their favor. The jury found for the plaintiffs. The defendant now moved for a new trial on a bill of exceptions.

J. Prescott Hall, for plaintiffs.

Benjamin F. Butler, Dist. Atty., for defendant.

NELSON, Circuit Justice. I have had some difficulty, on account of the manner in which the bill of exceptions has been made up, in ascertaining, satisfactorily, the extent of the ruling of the court at the trial; that is,

whether or not it assumed to decide questions of fact which properly belonged to the jury. I agree that the court was right in refusing the instructions prayed for by the counsel for the defendant, upon the evidence as it stood in respect to the question of a new promise; as, I think, there was sufficient to require the point to be submitted to the jury. If they had found that the declarations and acknowledgments made by the defendant were made with reference to his individual liability and indebtedness, and not to the liability and indebtedness of the government, the plaintiffs would clearly have been entitled to their verdict. There were facts and circumstances attending the acknowledgments that left this point open to observation, and made it one proper for the determination of a jury.

But the court is made to go further, and to decide, that, as matter of law, the evidence was sufficient to take the case out of the statute of limitations, thus assuming, in favor of the plaintiffs, the question of fact, upon the finding of which the legal effect of the acknowledgments depended. If the declarations were made by the defendant with reference to his own indebtedness, the words were sufficient to sustain the promise; if with reference to the indebtedness of the government, it would be otherwise; and whether the one or the other was a question for the jury. If the bill of exceptions had set forth the ruling of the court refusing the instructions prayed for, and then stated, in the usual way, that the case was submitted to the jury, I should have had no difficulty. As it stands, I do not see how a new trial can be avoided.

The second question, and which arises upon the provisions of the Revised Statutes of New-York concerning the limitation of actions, is more difficult. The section in question is as follows: "If at the time when any cause of action specified in this article, shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after the return of such person into this state; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." 2 Rev. St. 297, § 27. The latter branch of the section presents the point involved in the case.

On the part of the plaintiffs it is insisted, that in all cases where the defendant departs from and resides out of the state after the cause of action has accrued, the statute ceases to operate until he returns into the state; and that if he again leaves before the period of limitation has elapsed, including the running of the statute before his first departure, it also ceases to operate until he returns again, and so on till the whole period expires; that a succession of absences is to be taken notice of and subtracted in computing the time; in other words, that in order to give effect and operation to the limitation, the defendant must be in the state, and subject to the process of the court, during the whole period to be allowed in the computation of the time of limitation. On the other hand, the defendant contends that but one case of absence is provided for by the language of the section; and that, on the return of the defendant into the state after his first departure, so as to be subject to the process of the court, and in a way to give operation to the statute, it then continues to operate, notwithstanding a second or subsequent departure.

The last clause of the section will, doubtless, admit of either interpretation; and I regret the necessity of passing upon it, until it shall have been expounded by the state tribunals. But, after the best consideration I have been able to give to it, and after much hesitation, I am inclined in favor of the latter construction, as most in harmony with the first clause, which is in pari materia, and also with the previous legislation of the state on the subject. Nor can any very good or obvious reason be assigned, why a succession of absences from the state should be provided for in case the defendant departs after the accruing of the cause of action, which would not be equally applicable to a like abatement of the limitation, in case his departure had taken place before the cause of action had accrued. In respect to the first clause, (which is but a copy of the old law,) whatever may be the absences or departures from the state, after the first return of the party into it so as to be subject to the process of the law, they are not regarded, and the limitation continues to operate. The latter clause is new in the Revised Statutes. The case of departure after the cause of action had accrued, had never before been provided for; and the legislature, probably, intended to suspend the operation of the limitation in case of one departure, in analogy to the case of an absence when the cause of action accrued.

There are inconveniences, also, attending the practical working of the clause, upon the construction contended for by the plaintiffs, which should disincline the court to adopt it, unless upon the most imperative language. A return into the state, which will give operation to the statute of limitations, must be under such circumstances as will enable the plaintiff, with the exercise of reasonable diligence and attention to his rights, to serve process personally upon the party. He must have knowledge of the return into the state, or the circumstances must be such as will warrant a jury in bringing knowledge home to him; otherwise, the return amounts to nothing. Now, it is obvious that this question would be involved in each successive return into the state. Because, unless each return is accompanied with the circumstances men-

tioned, no part of the time should be allowed in computing the limitation. The issues would be exceedingly complicated and embarrassing, in the case of numerous returns and departures within the limited period fixed by the statute. I can hardly think that the legislature contemplated such a construction or operation of the clause.

It may be added, also, that the clause in terms provides for but one departure from the state, and consequently for but one return. It does not indeed put the operation of the limitation expressly upon the return into the state; but it does virtually. It contemplates the running of the statute on the return after the departure from the state and residence abroad; and if but one departure or absence is provided for or intended, of course, on the first return, the limitation goes on and continues uninterruptedly till the whole period expires. The construction of the statute is not necessarily involved in this case, upon the bill of exceptions, but it is proper to express an opinion on the question with reference to a new trial. New trial granted.

DORR (WIGGIN v.). See Case No. 17,625.

DORR (WILLARD v.). See Cases Nos. 17,679 and 17,680.

DORR MANUF'G CO. (ESSEX HOSIERY MANUF'G CO. v.). See Case No. 4,533.

DORRANCE (VANHORN v.). See Case No 16,857.

DORRIS, The. See Case No. 9,225.

Case No. 4,011.

DORRIS v. COPELIN.

[5 Am. Law Reg. (N. S.) 492.]

District Court, E. D. Missouri. Nov. Term, 1865.

SHIPPING—BILL OF LADING—RIVER STEAMER—LIGHTERAGE AND RESHIPPING.

1. A bill of lading given by a steamer navigating the western rivers, which contains the "privileges of lighting and reshipping," will be construed as granting to the vessel the privilege of reshipping during the voyage, according as its interest or convenience may advise, and as at the same time imposing upon it the duty to do so when practicable and necessary.

2. The privilege cannot be exercised before the voyage has been undertaken or commenced by the original vessel. It would not justify the steamer, which gives such a bill of lading, in shipping and transporting the cargo by another vessel. In this there would be such a departure from the contract as would render the original vessel liable as insurer.

[Cited in Marx v. National Steamship Co., 22 Fed. 684.]

3. Lighterage does not apply to overloading at the commencement of a voyage.

In admiralty. On exceptions to libel.

James O. Broadhead, for libellant.

J. H. Rankin, for respondent.

TREAT, District Judge. This is a suit on a contract of affreightment, by which the respondent agreed to transport, on the steamer Benton, from St. Louis to Fort Benton, the cargo named in the bill of lading, with the "privileges of lighting and reshipping." The cargo was delivered to the Benton at St. Louis, and by her, before leaving port or commencing the voyage, shipped on another steamer, which, with the cargo, was lost by an excepted peril. The questions raised relate to the rights, duties, and privileges of the boat and owners under the clause quoted. The right and duty of a master to tranship when the vessel receives a deadly wound, or cannot, from an excepted peril, prosecute the voyage, are well settled. "The privilege of reshipping" is obviously for the purpose of securing some authority which otherwise would not exist,—a privilege which has become very important in the navigation of western rivers. Steamers of different draft and capacity are required in different departments of western commerce, owing to the shallowness of water in some rivers, and to rapids in others. A steamer which can make a voyage at one state of a river, may not be able, at another, to reach the port of destination; and instead of waiting indefinitely for a rise, needs the privilege of forwarding the cargo on another steamer of lighter draft. It is well known that the condition of some western rivers changes very suddenly; and unless the contract of affreightment makes provision therefor, serious disputes must arise between the shipper and vessel, and great embarrassments ensue. Hence the clause in question is not of unfrequent occurrence. The adjudications upon its force and effect, however, are few, and not always consistent with each other. It seems to be well settled that when a reshipment is made on a good boat under such a clause, the original vessel continues liable under its contract for the safe delivery of the cargo at the port of destination, just as if the cargo had gone forward on the original bottom. The original vessel continues liable for all losses not within the excepted perils, and the shipper is not responsible for extra freight, as in cases of transhipment under the general law. The rules governing contracts of affreightment differ in no essential respect from those controlling other contracts. The contracting party must do what he agrees to do, according to the terms of his undertaking. If he departs from his agreement, he becomes an insurer. One vessel may be selected by the shipper in preference to all others, for reasons satisfactory to himself, and founded on the quality of the vessel, the character of her officers, the facility for procuring insurance, &c.; and if the cargo is sent forward on a different vessel, the responsibilities of an insurer arise. Dunseth v. Wade, 2 Scam. 285; McGregor v. Kilgore, 6 Hammond, 358; Wilcox v. Parmelee, 3 Sandf. 610; Fland. Shipp. § 481; Whitesides v. Russell, 8 Watts & S. 44; Pars. Merc.

Law, 124, note, 218, note; Dalzell v. The Saxon, 10 La. Ann. 280.

Whether such a clause imposes a duty as well as grants a privilege is not fully settled. In Louisiana (Hatchett v. The Compromise, 12 La. Ann. 783) it is construed as obligatory;—that is, if the vessel cannot make the voyage within a reasonable time, it must reship, when practicable and necessary, at its own expense; and that low water is not an excepted peril. In Broadwell v. Butler [Case No. 1,910], also in Sturgess v. The Columbus, 23 Mo. 230, it is held that the clause is a mere privilege, to be exercised or not; but that custom may be proved to explain the force of the terms. Without the aid given by the foregoing authorities, the rights and duties of the master are easily deducible from general principles. The master under the ordinary contract of affreightment must transport the goods in his own vessel, unless prevented by an excepted peril. Under certain circumstances he must tranship—that is, when the voyage is broken up by an excepted peril; and the cost of the transhipment, beyond the original freight-money, falls upon the cargo. He has no right to reship merely to suit his own convenience or interest; for within the excepted perils, the shipper contracts to have the cargo go forward in the original vessel. If he wishes "the privilege of reshipping," he must specially contract therefor. Treating the clause, therefore, in connection with the reasons for its insertion, it must be considered as granting to the original vessel the privilege of reshipping during the voyage at its convenience; and as, at the same time, imposing the duty to do so when practicable and necessary. If no special exception therefor be inserted, the contract calls for the delivery of the cargo within a reasonable time, to be ascertained, when the privilege to reship exists, by the practicability of sending it forward on the original or some other vessel. It is not to be supposed that the shipper concedes the privilege, if the vessel may detain the cargo indefinitely, waiting for high water, when vessels of less draft are making the voyage daily. It is a privilege with corresponding obligations. The master may earn freight by proceeding on his own vessel as far as practicable, and then using another for the completion of the voyage. He is not bound to reship, if he can complete the destined voyage; but he may do so. He must, however, send the cargo forward without unreasonable delay, either on his own or another vessel.

The contract implies also that the voyage shall be undertaken, or commenced, by the original vessel; else why the agreement to transport on the Benton at all, or why not an agreement with her owner or master, to transport the cargo on any vessel, or to transport generally, without reference to the vehicle or means of transportation? It is well known that a voyage from St. Louis to Fort Benton is not unattended with difficulties, owing to the sudden rise and fall of the Missouri river, and to the necessity of strong and powerful boats. A part of that voyage—say from St. Louis to St. Joseph or Council Bluffs—may often be performed by a large boat, when for the residue of the voyage one of lighter draft will be needed. Shall the shipper have no benefit from his selection of the boat which is to undertake the voyage? He concedes the privilege of re-shipment, so as to relieve the master of the duty to complete the voyage on the original vessel; but can that be justly termed a re-shipment which is, for all practical purposes, the original shipment? Has the steamer Benton performed her contract by simply lying at the St. Louis wharf and having the cargo rolled across her decks to a steamer by her side, or by going through the useless show of putting the cargo into her hold and immediately hoisting it therefrom and transferring it to another boat, without having turned a wheel or unfastened her moorings? Is such a transaction different in any essential particular from a direct loading of the cargo, in the first instance, on the other vessel?

As the main point presented by the exceptions in this case is, so far as known, now to be decided for the first time, and as the views of the courts which have passed upon some questions arising under a similar clause are not in entire accord, it is well to consider the subject in connection with the origin of such a clause, the necessities from which it springs, the nature of the inland navigation to which it generally applies, and the real intentions of the shipper and shipowner. A voyage, for instance, from New Orleans to St. Paul by a boat usually employed in the New Orleans trade, would be impracticable during many months in the year; yet some of the lower river boats might at times accomplish the object. The boat-owner thinking from the stage of the river such a voyage practicable, may contract in New Orleans to deliver cargo on his boat at St. Paul. If none but the usual exceptions were inserted in the bill of lading, low water would not be an excuse for nonperformance, or for sending forward the cargo on another boat.

The case of Collier v. Swinney, 16 Mo. 484, illustrates the doctrine. The voyage would have to be made by the original vessel within a reasonable time, unless prevented by a recognised peril, within the exceptions. The shipper might prefer to have his cargo go forward without breaking bulk or rehandling. The boat-owner, however, being unwilling to enter into an unqualified obligation to that extent, asks the privilege of reshipping; and it is conceded. What is meant by that qualification? That the original vessel shall do nothing, or that she shall undertake the voyage in good faith? It is generally the case that western boats take large cargoes, belonging to many different persons, procured at different places along the river, and delivered at different ports. It may be of great im-

portance, sometimes, for a boat to have the privilege of reshipping even when the voyage could be made without delay or difficulty; for a full return cargo may be offered at an intermediate port, and the cost of continuing the original voyage with the little cargo still on board, would far exceed the freight-money. Hence the shipowner needs the privilege of "reshipping," so as to secure the profitable use of his vessel under all the shifting exigencies of a long coasting voyage; and the shipper is interested in having his goods sent forward in safety and with as little delay as practicable. Low water may cause a delay equally pernicious to shipper and shipowner. For their mutual benefit, based on the character of our river navigation, and each party having a common object in view, viz.: the safe and speedy transportation of the cargo,—the clause for "reshipment" is inserted in the contract, and becomes one of its important elements. Like all mutual agreements of that description, it implies a duty. The contract by the shipowner is, then, that he will transport the goods in a reasonable time to their destined port, on his own vessel, or by reshipping when necessary and practicable. He can consult his own interest and convenience so far as earning freight is concerned, by reshipping at any point during the voyage; and at the same time must consult the interests of the shipper by expediting the transportation, even by resort to another vessel, if from low water or other causes the original vessel cannot go forward, safely or expeditiously.

The maritime rules applicable to navigation of the high seas, if applied with technical rigor to all cases on the western rivers, would frequently work gross injustice to all parties in interest. It is apparent that many of those rules require modifications, or rather modified and entirely new applications. A history of the decisions as to "deviations," especially in the supreme court of Missouri, illustrates the difficulties and embarrassments to shippers and shipowners in the west, when such technical rulings are rigidly adhered to, without due regard to underlying and fundamental principles. Those technical rules for sea voyages are correct applications of sound principles to the facts and circumstances attending such navigation; but an adherence to such technical rules, regardless of the peculiarities of western river navigation, is a sacrifice of principle to inapplicable precedents—is a perversion or change of the contract as made between the parties. They contract with reference to a particular voyage and mode of transportation, differing in important respects from an open sea voyage. Generally the master, shipper, and shipowner can have prompt communication with each other. The necessity of sacrificing the cargo to procure supplies for finishing the voyage, or the means of repairing the vessel when damaged by unavoidable accident, seldom occurs. Hence the master's duties vary, or rather the power inherent in his position is rarely called into rightful action, so far as selling the cargo or vessel is concerned. Hence some courts in the west have been liberal in allowing proof of custom; and still more liberal in relaxing the strict rules concerning the nature and proof of custom; or, if the courts lay down the rigid rule, juries in common-law cases find the existence of the custom on slender proofs. All of this indicates merely a positive conviction in the minds of judges and juries, that a technical and strict following of inapplicable precedents would defeat the object of the law, and the real intention of the parties. In maritime as well as other contracts the intention of the parties—the substance instead of the shadow—should control the interpretation. Most of the maritime rules have sprung from the necessities of commerce. Vessels "are made to plough the seas and not to rot by the wall;" and hence whatever is necessary to the successful use of the vessel has been encouraged and enforced by legal tribunals, until a system of rules has ripened into existence and become recognised in all maritime countries. Those rules sprung from, and are peculiarly applicable to, foreign sea-voyages; yet most of them are equally applicable to river navigation in the west. Under the United States constitution, inter-state navigation is cognisable by federal tribunals, and governed by general, not local, rules and legislation. The United States supreme court has frequently decided, that mercantile contracts are to be interpreted in United States courts by general mercantile law, not by the peculiarities springing from state or local legislation. Taking, then, the fundamental principles controlling contracts of affreightment and applying them fairly and justly to such contracts for transportation on western rivers, there will be no conflict of authority and no departure from established rules. But courts must not close their eyes to essential differences in the nature of special contracts, nor to the real character of the subject-matter. A contract made with reference to one transaction must not be interpreted as if made with reference to an entirely different object. Such a course would be "to stick in the bark"—to sacrifice the substance to the form—right to show—the spirit to the letter. The ancient and modern rules governing building-contracts illustrate the advance of jurisprudence and the adaptation of law to the shifting exigencies of society and business pursuits. "Adjudications," or "precedents," as they are termed, are never to be departed from on slight grounds; but are to be considered for the purpose of ascertaining the principle recognised; not to be followed blindly, regardless of the new elements a case may contain.

The clause in western bills of lading securing the privilege of reshipping and of light-

erage has sprung from the peculiarities and necessities of western navigation; which, if ignored in interpretation, would work an entire change in the contract; defeating the end sought to be effected, viz.: the safe and speedy transportation of cargoes, to the benefit of both shipper and shipowner. The shipowner can now, under that clause, contract with safety for the transportation of cargoes from Pittsburgh or New Orleans even to Fort Benton in Montana; and such a contract binds him to deliver the goods at the destined port, by his own or some other vessel, so soon as he reasonably can. If during the voyage there is a fall in the river under such circumstances as renders it improbable that the original vessel can complete the voyage within a reasonable time, or during that season, and another boat of lighter draft can and does make the voyage and is willing to take the cargo, it would hardly be considered a fair performance of the contract to hold on to the original cargo with the hope of pursuing the voyage the following year, and in the mean time keep it on board subject to the usual dangers attendant upon the breaking up of ice in spring, or to store it over winter at an inaccessible place, subject to great loss in value, or to its destruction if perishable. The shipper contracts for a delivery in a reasonable time according to the usual course of navigation on the specified river or rivers, and the vessel is bound, in good faith, to fulfil the contract according to its tenor. If no clause for "reshipment" were inserted, the vessel would have to take forward the goods on its own bottom; for it would then appear that both parties agreed thereto. If necessary delay resulted therefrom, such delay would be a necessary incident to the contract the parties chose to make. A delivery of goods for such a voyage at a particular season of the year, ought, so far as delays are concerned, to be considered in connection with the difficulties of navigation at such a season. A delivery for a voyage to Fort Benton, for instance, if made at St. Louis in midwinter, would not imply that the cargo was to be landed at Fort Benton in as few weeks thereafter as if delivered in the spring, when the Missouri river is free from ice and the vessel would meet the June rise on the upper Missouri. A delivery for transportation the whole distance on one vessel would subject shipper and shipowner to the necessary incidents of such a voyage; for they could, if they desired, insert the clause for lighterage and reshipment. They can make their contract as they desire to have it; and when made must abide by its terms.

In this case the respondent bound himself to undertake the voyage on the steamer Benton, and secured the right to re-ship. He did not commence the voyage as agreed, nor did he, within the true meaning of his contract, re-ship; for re-shipment implies a previous shipment. Practically, the goods delivered for the steamer Benton were never shipped on her at all; and consequently were never re-shipped by her. The argument of respondent's proctor, that the "privilege of lighting" should be treated as covering this case, involves a misapplication of terms. "Lighterage" has a distinct meaning, and does not apply to overloading at the commencement of a voyage. If it be true that the steamer Benton contracted for a larger cargo than she could carry, the consequences of such greed must fall, not on the shipper, but on herself. The owners of the cargo who may have procured insurance for their shipments on that vessel could not be thus deprived of the benefits for which they stipulated. It is not a "lighting" of a vessel, to take more cargo than she can carry and then transport the excess on a "lighter." Such action is neither "lighting," nor, in the true meaning of such a contract, a "re-shipment." The rule and reasons therefor may be thus succinctly recapitulated:—Inasmuch as a vessel which cannot perform a stipulated voyage within a reasonable time in consequence of low water, or which may not be able to complete a voyage when commenced, in consequence of a fall in the river; and inasmuch as low water is not a peril of the river within the meaning of an ordinary contract of affreightment, whereby the right or duty of transhipment at the expense of the shipper arises; the mutual interests of both shipper and shipowner often lead to a special clause or contract concerning lighting and re-shipping. Each of the contracting parties expects to be benefited thereby. The shipper seeks to avoid the delays incident to navigation by that particular class of boats on the specified route. His object is to secure the speedy and safe transportation of his goods; and for that purpose he is willing that the vessel on which the shipment is made, may, if during the voyage the master deems it necessary or proper, reship on some other good vessel. His interests are thus promoted: the original vessel being still liable on her contract, for the delivery of the cargo, within the excepted perils. On the other hand, the shipowner may, for satisfactory reasons, either of interest or convenience, wish to abandon an uncompleted voyage without loss of freight pro rata itineris, and without becoming an insurer. He, therefore, agrees to the special clause. Each contracting party thus secures himself against a contingency. Each is benefited by the arrangement if mutual good faith is observed; and each has a right to insist upon the terms of the contract. It is not unilateral, or one-sided—a mere privilege without corresponding obligations. It becomes as much a part of the mutual contract as any other provision in it. The shipowner cannot hold the cargo indefinitely, although it may be perishable, or the loss of a market may follow, and defend his action

on the ground, that inasmuch as the clause is a "privilege," it is for him, regardless of the interests of the shipper, to act upon it or not. The relation which binds the ship to the cargo would be thus annihilated, and the shipper placed at the mercy of the master or shipowner. So the shipper cannot insist upon having the vessel proceed on the voyage, regardless of expense and hazards. It is well known that other interests are often intimately associated with the voyage—as those of the underwriters, consignors, and vendors. The rules governing such contracts should be sufficiently comprehensive to include and protect the rights of all. The old contracts of affreightment, policies of marine insurance, power of masters over the vessel and cargo, not being strictly applicable in all particulars to other than foreign sea-voyages, have been largely varied when used in connection with inter-state navigation on our western rivers, so as to adapt them to the necessities of such river commerce. Adherence to the principles on which all such contracts rest, demands their application to the rightful ends for which they exist. The custom of the rivers and the introduction of special clauses in contracts of affreightment, the modifications of policies of insurance, &c., have been gradually working out their needed adaptation to the exigencies of river navigation. Although a river voyage from a port in one state to a port in another, is considered, for some purposes, a foreign voyage, and the rules applicable thereto enforced; yet, in many respects, it differs essentially from a foreign sea-voyage. To ignore those differences would be to overturn sound principles and destroy right and justice.

The clause concerning lighting and reshipment thus interpreted with due regard to the intention of the parties and the peculiarities of river navigation, is beneficial to all concerned and promotive of commerce. It deals justly with the shipper and shipowner. Hence, it must be held to give to the shipowner the right, during a voyage, to re-ship for his own interest and convenience, and to impose on him the duty of so doing when practicable and necessary. The privilege to re-ship is not the privilege of converting the original vessel into a mere receiving-ship—to have her hold out the false inducement that the voyage is to be undertaken by her, and thus mislead the shipper into making all collateral arrangements and contracts, as of insurance, &c., to the destruction of his interests. A shipment on a specified steamer for a prescribed voyage with the privilege of reshipment, implies that the original steamer shall undertake the voyage—that the privilege may be exercised during the voyage, and not before—that there shall be an actual and not a merely ostensible shipment in the first case. By the ordinary contract the shipowner is bound to take the cargo to the port of destination on the boat named, so soon as he reasonably can, the perils of the river excepted. To send the goods forward within a reasonable time as stipulated, on his own or some other vessel, he secures the privilege of re-shipment,—that is, exemption from the obligation to send them forward on the boat named. He secures no other exemption. All his other obligations are intact. He must still transport the cargo in a reasonable time, either on his own or another vessel, subject to all the other conditions and obligations of the ordinary contract. If he fails to do so, a breach of the contract occurs, for which he is liable.

DORSET (FIRST NAT. BANK OF NORTH BENNINGTON v.). See Case No. 4,808.

Case No. 4,012.

DORSETT v. MARSHALL et al.

[5 Cranch, C. C. 96.][1]

Circuit Court, District of Columbia. March Term, 1837.

HUSBAND AND WIFE—SEPARATE ESTATE—RIGHTS OF HUSBAND.

If personal property be conveyed to a trustee for the sole and separate use of a feme covert, her executors, administrators, and assigns, free and clear from any control or demand of the husband or his creditors, with leave to lend the money with the approbation of the wife, for her "like sole and separate use," money thus lent, and unpaid at the death of the wife, does not become the property of the husband; nor is he entitled thereto in equity; although, (standing in the place of administrator under the Maryland law of 1798, c. 101, cl. 5, § 8,) he might recover it at law.

[This was a bill in equity by Amelia T. Dorsett against Robert Marshall and others for an injunction.]

Robert Marshall, the defendant, intermarried with Ann Berry. Shortly before the marriage, they entered into the following agreement: "Robert Marshall and Ann Berry; marriage contract: Whereas Robert Marshall and Ann Berry, both of Prince George's county, state of Maryland, are about to intermarry, it is therefore agreed by the parties before the marriage, that the said Ann Berry shall hold in herself all her right, title, and interest in the following funds of her own, namely, one hundred and fifty shares of stock in the Patriotic Bank, on which $10 have been paid, which stock stands to the credit of Ann Berry; also one hundred and thirty-seven shares of stock in the Central Bank of Georgetown and Washington, upon which $11 per share has been paid, and $3,500 in the bonds of Charles Glover. Given under our hands and seals, this 17th day of February, 1820. Robert Marshall, (Seal.) Ann Berry, (Seal.) Witness, James H. Y. Dorsett." Afterwards by indenture, dated the 1st of May, 1824, between

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

Marshall and his wife of the first part, and Susan G. Beall of the other part, after reciting substantially the marriage agreement, and that Marshall did, at the same time agree to make any other or further instrument of conveyance which might be considered necessary fully to assure and convey the said stock and debts "to the sole and separate use of the said Ann Berry, her heirs and assigns, free and clear from any debts, control, demands, or incumbrances of the said Robert Marshall;" that the bank-stock had been sold by mutual consent; that judgment had been obtained against Glover for $2,000. (part of the $3,500) in the name of Robert Marshall, with interest and costs; and another judgment for $1,500, with interest and costs, (being the residue of the said $3,500,) and that the said Marshall and wife had agreed to settle those judgments and a certain tract of land therein mentioned and described, by a more full, complete, and formal instrument of writing than the marriage agreement above mentioned, according to the terms of the present instrument; Marshall and wife, in consideration of the premises, and for the more fully, completely, and perfectly carrying into effect the marriage contract between them, and in further consideration of five dollars paid to them by the said Susan G. Beall, bargain and sell to the said Susan G. Beall her heirs, executors, administrators, and assigns, the tract of fifty acres, therein described, for and during the joint lives of Marshall and wife and the survivor of them, and the two judgments against Glover. To have and to hold the land for life as aforesaid, and the judgments absolutely, "to the said Susan G. Beall, her heirs, executors, administrators, and assigns, in trust to hold the land for the use of Marshall and wife during their joint lives, and for the use of the husband, if he should survive his wife, during his natural life and no longer, upon the express agreement and understanding that the land should not be subject to, or liable for his debts or engagements; and further in trust that the said Robert Marshall should have to his own use, free of the marriage contract, the judgment against Glover for the $2,000, with interest and costs, and the said Susan G. Beall should hold the other judgment for $1,500, with interest and costs, for the sole and separate use of the said Ann Marshall, her executors, administrators, and assigns, free and clear from any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and upon payment of the said judgment or any part thereof, to invest the said money in stock, or to loan the same on interest with the approbation of the said Ann Marshall; and in further trust that the said Ann Marshall, during the life of her husband, may dispose of said judgment, or the proceeds thereof; and of her right, interest, and estate in the said tract of land after the death of the said Robert Marshall, either by her last will and testament, or by any instrument of writing under her hand and seal in the presence of two witnesses, during her coverture in the same manner as if she were single."

Mrs. Beall received the money upon the judgments against Glover, and, with the consent of Mrs. Marshall, lent $100 to her husband, Robert Marshall, and $400 to her sister, Mrs. Dorsett; and took their respective notes, payable "to Susan G. Beall, trustee for Ann Marshall." Before these notes were paid, Mrs. Ann Marshall died, without having disposed of her property, in the manner designated in the deed of trust. Mr. Marshall, standing in place of an administrator of his wife's estate, under the Maryland act of 1798, c. 101, cl. 5, § 8. brought his action at law against Mrs. Dorsett for the $400 lent to her by Mrs. Beall as trustee for Mrs. Marshall, and, under the opinion of this court that the legal right of action was in him, by virtue of the said act of assembly of Maryland, recovered judgment, at March term, 1836, (Marshall v. Dorsett [Case No. 9,128]); and Mrs. Beall brought a suit at law against Mr. Marshall for the $100 of the trust-money lent to him; upon which, on the 17th of April, 1835, he filed his bill stating all these matters, and claiming the whole of the trust-money as his own property by virtue of his marital rights, and obtained an injunction to stay execution against him, until the further order of the court. Mrs. Dorsett, also, filed her bill, on the 29th of November, 1836, against the said Robert Marshall, charging all these matters, and claiming, with others, the whole of Mrs. Marshall's interest in the trust-fund, as her next of kin, to the entire exclusion of Mr. Marshall; and on that ground praying an injunction to stay execution upon the judgment for the $400 which he had recovered at law against her; and for leave to file this her bill of interpleader, and that the said Susan G. Beall and Robert Marshall, &c., may interplead; and that she may account for her "trusteeship;" that the trust-fund may be decreed to the heirs of Mrs. Marshall as before stated, "or to such as the law may give it to," &c.

Before any proceedings were had upon that bill, Mrs. Dorsett, on the 6th of February, 1837, filed another bill against the said Robert Marshall, Richard H. Marshall, Susan G. Beall, and the other heirs of the deceased Ann Marshall, in which she states the judgment at law for $400 obtained against her by Robert Marshall, under the instruction of the court to the jury that, by the law of Maryland he, as administrator of the estate of his wife, had a right at law, to recover the same; that he is insolvent, and, if he should receive the money, would be unable to refund it to the heirs of his wife if this court should so decree; that by the marriage contract the property belongs to the heirs of his wife, and that he has no right to it; that he has filed his bill against Susan G. Beall, as trustee of his

wife, and claims the property as his own and for his own use; that Susan G. Beall resists and defends the said bill, upon the ground that the property belongs to her and the other co-heirs of Mrs. Marshall, (naming them,) who have interpleaded in "the said suit in chancery," and claimed the same; that the said Susan G. Beall, as trustee of Mrs. Marshall, has notified the complainant not to pay the amount of the judgment to the said Robert Marshall, who cannot recover the same in equity: that the said Robert Marshall, to defraud the heirs, has assigned the judgment to his brother, Richard H. Marshall, who has sued out an execution against the property of the complainant; wherefore she prayed an injunction, &c., which was ordered by one of the judges. To this bill the defendants, R. and R. H. Marshall, demurred, for want of equity, and moved to dissolve the injunction, and dismiss the bill upon the same ground.

R. S. Coxe, for defendants, contended that the marriage contract only restrained the marital rights of the husband during the coverture. That, under the Maryland act of 1798, c. 101, cl. 5, § 8, the husband becomes the owner of all his wife's choses in action, not reduced into possession during the coverture, without taking out letters of administration upon her estate; and is entitled to sue upon them in his own right, and to recover for his own use. The wife's power of appointment was limited to the life of her husband, but she never exercised it. If the husband did not acquire the legal right to this money by the death of his wife, the defence should have been at law. The judgment in the action at law is conclusive. The whole structure of this bill is anomalous and unprecedented. It is not a bill of interpleader. The husband, under the Maryland law, stands in the place of administrator; and, therefore, has a right to claim under the trust, which was to her, her heirs, executors, and administrators. The word "heirs" refers to the real estate only; "administrators" to the personal. The complainant ought to have brought the money into court, and denied collusion.

Mr. Coxe cited Blake, 31; Eden, 247; Fettiplace v. Gorges, 1 Ves. Jr. 46; 7 Dane, Abr. c. 19, p. 351; Stewart v. Stewart, 7 Johns. Ch. 229, 243, 244, 246; 2 Story, Eq. Jur. pp. 113, 114. §§ 806, 807; Id., pp. 116, 117, §§ 809, 810; Id., p. 127, § 824; Fenner v. Taylor, 1 Sim. 169; 2 Cond. Eng. Ch. 86; Sugd. Powers, 315.

W. L. Brent and Mr. Jones, contra, cited Ward v. Thompson, 6 Gill & J. 349; Brailsford v. Georgia, 3 Dall. [3 U. S.] 1; 1 Rop. Husb. & Wife, 120, 130, 221; Toll. Ex'rs, 225; Watt v. Watt, 3 Ves. 244; Cranley v. Hale. 14 Ves. 307; Garrick v. Camden, 14 Ves. 382; Bailey v. Wright, 18 Ves. 49, 1 Swanst. 39; Wimbles v. Pitcher, 12 Ves. 433; Anderson v. Dawson, 15 Ves. 532; 1 Mod. 45; Rayner v. Mowbray, 3 Brown Ch. 234.

The court (nem. con.) was of opinion that Robert Marshall, the husband, had conveyed to Susan G. Beall, the trustee, all his marital rights over the property assigned to her; so that, in equity, he had no right thereto upon the death of his wife, although he might, at law, be entitled to recover in his own name, under the testamentary law of Maryland; and that the demurrer should be overruled, and the injunction continued until final hearing.

The court also dissolved the injunction in the case of Marshall v. Beall [6 How. (47 U. S.) 70].

CRANCH, Chief Judge (after stating the case). The only question now judicially before the court is, whether there is sufficient equity in the present bill to sustain it. It seems to me not to stand alone. It is connected with the two former bills, not only by reference, but by the subject-matter; and if all three bills are taken into view, or even the two last bills, I think there is sufficient equity. The court has decided, at law, that, upon the death of the wife, the legal title to her personal estate and choses in action devolved upon the husband, and that he had a right of action against this complainant; although she had given her note for the money to Susan G. Beall, as trustee. The question now is, whether the next of kin of Mrs. Marshall are not, in equity, entitled to this money under the antenuptial contract, and the deed of trust made by Robert Marshall and his wife to Susan G. Beall. I think they have; and that such was the intention of the parties, both in the antenuptial agreement, and in the deed intended to carry that agreement into effect. The words of that antenuptial agreement are, not that she shall have the use of her property during the coverture, with a power to dispose of it by will, or otherwise, but that she shall "hold in herself" the property designated; that is, it shall never go out of her, the marital right shall not affect it, it shall be retained as if she were sole. This seems to me to be the evident intent of the parties. The deed of trust of the 1st of May, 1824, referring to the antenuptial contract of the 17th of February, 1820, states that "the said Robert Marshall did, at the same time, agree to make any other or further instrument of conveyance, which might be considered necessary, fully to assure and convey the said stock and debts above mentioned to the sole and separate use of the said Ann Berry, her heirs, and assigns, free and clear from any debts, control, demands, or incumbrances, of the said Robert Marshall." And the indenture witnessed that the said Robert Marshall and Ann Marshall conveyed to the said Susan G. Beall, her heirs, and assigns, the property therein mentioned, including fifty acres of land on which they then resided, and which had descended to her from her father, in trust, to hold the land for the joint use of

the husband and wife during their joint lives; and, if he should survive her, then during his life. And in trust, that the said Robert should have the $2,000 judgment against Glover, for his sole and separate use, free and clear of the marriage contract, and of her separate claim. And in further trust that the said Susan G. Beall should hold the $1,500 judgment for the sole and separate use of the said Ann Marshall, her executors, administrators, and assigns, free and clear of any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and to vest the money in stock, or to loan the same on interest, with the approbation of the said Ann Marshall, for the like sole and separate use of the said Ann Marshall. And, in further trust, that the said Ann Marshall, during the life of her husband, might dispose of the said judgment, or its proceeds, by her last will and testament, or by any instrument of writing under her hand and seal, in the presence of two witnesses, during her coverture, in the same manner as if she were single. All the property conveyed by this deed of trust belonged to the wife, and was secured to her sole and separate use by the marriage contract; but, by this deed, she gives her husband an absolute life estate in the land, instead of a contingent estate by curtesy, of which, at that time, he had only a possibility, as he had no child by that wife; and she also gives him absolutely the judgment against Glover, for $2,000 and interest, in consideration of which he conveys to the trustee all his right, if he had any, in the $1,500 judgment, and conveys it absolutely, for the use of his wife, not only during the coverture, but for the use of herself, her executors, administrators, and assigns, which is as great an estate as can be granted in a chattel. He parted with his whole marital right over that subject for a valuable, and more than adequate consideration; and it is against conscience for him now to set up this claim. The act of Maryland devolves upon the surviving husband the legal right to the choses in action of his wife; but he takes them bound by all his conscientious obligations. I am, therefore, of opinion that there is sufficient equity in the bill to support a decree, and that the injunction ought to be continued until final hearing.

It has been suggested that the power reserved to the wife by the deed of trust, to dispose of the trust fund during the coverture, implies a remaining interest, or title, in the husband to that fund. But her disability to control the trust fund did not result from any remaining title in the husband, but from the general disability of a feme covert to make any contract, or to dispose of her property in any manner, during the coverture; and the deed of trust was evidently intended to remove that disability, and not merely to impart to her a power limited to the period of her coverture, or to limit her power of disposing of her property to that period. If the husband had died first, her jus disponendi would have revived in as full force as she enjoyed it before her marriage.

DORSETT (MARSHALL v.). See Case No 9,128.

Case No. 4,013.

DORSEY v. CHENAULT.

[2 Cranch, C. C. 316.][1]

Circuit Court, District of Columbia. May 22, 1822.

PLEADING—VARIANCE—REPLEVIN—JUDGMENT.

1. An averment of a demise from year to year for three years at 120 dollars a year, is not supported by evidence of a demise from year to year for two years at 120 dollars a year, and for one year at 100 dollars a year.

2. If the jury find for the plaintiff in replevin upon the plea of "non dimisit modo et forma," the judgment must be for the plaintiff upon the whole case, although they find for the defendant upon the issue of "No rent arrear."

Replevin. The defendant [Elijah Chenault] made cognizance as bailiff of Robert Brocket, for rent arrear, averring that the plaintiff [Mial Dorsey] occupied the house for the space of three years ending on the 13th of April, 1819, under a demise from year to year at the rent of $120 a year; and because 250 dollars, part of 360 dollars for the rent aforesaid, for the three years ending as aforesaid, were due and in arrear, (the residue of the 360 dollars having been paid) he took the goods, &c.

The defendant pleaded: 1st. That the defendant did not take the goods, &c. for that cause, but of his own wrong. 2d. Non dimisit modo et forma. 3d. No rent arrear. Upon these pleas, issues were joined.

Upon the trial at last term, upon the issue of non dimisit, Mr. Taylor, for the plaintiff, contended that the evidence, which was of a demise from year to year for two years at 120 dollars a year, and for one year at 100 dollars, did not support the averment in the cognizance, of a demise from year to year for three years at 120 dollars a year.

Mr. Swann, contra, contended that it was sufficient in order to support that issue on his part to prove a demise from year to year for two years at 120 dollars a year, and that the defendant had a right to recover for as many years as he could prove at 120 dollars per annum, not exceeding three years.

The court (Thruston, Circuit Judge, absent) instructed the jury, on the motion of the plaintiff's counsel, that the defendant must satisfy them, by the evidence, that the demise from year to year continued for three years at the annual rent 120 dollars; and that if the rent of one of the three years was at 100 dollars per annum, the demise was not supported as laid.

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

The jury found verdicts for the plaintiff on the first and second issues with eight dollars damages on each issue; and verdict for the defendant on the third issue; and found the rent arrear to be $278.83. The defendant moved for a new trial, and the motion was adjourned to this term for argument and consideration.

Mr. Swann, for defendant.

If the defendant has a right to distrain, at all, he may recover for what is found due although less than the amount distrained for. 6 Bac. Abr. (Gwillin) 78, tit. "Replevin." As to the first issue (on the plea that the defendant did not take the goods for that cause.) If a man has taken a distress for a thing which he had no right to distrain for, but had a right to distrain for another cause, he may avow for this other cause; per Lord Chief Justice Holt in Greenvelt v. Burwell, Comyn, 78; King v. Dilliston, Carth. 44; Crowther v. Ramsbottom, 7 Term R. 654, 657, 658; Etherton v. Popplewell, 1 East, 142. As to the second issue (on the plea of non dimisit modo et forma.) Having proved a demise from year to year for two years at $120 per annum, and for one year at $100, we may recover for the two years at $120, under the demise as laid. Morris v. Gelder, 1 Ld. Raym. 317; Bac. Abr. "Replevin," K; Harrison v. Barnby, 5 Term R. 248; Forty v. Imber, 6 East, 434, 437. Upon the third issue, the jury, no doubt, were under a misapprehension that the defendant would be entitled to recover his rent although they found the issue of non dimisit for the plaintiff, otherwise it is probable they would have found that issue for the defendant. A parol lease for more than five years is void by the statute, but if there has been an occupation under such a lease, the courts have construed it to be a demise from year to year during the occupation. If we prove such an occupation for one year only, we have a right to recover for that year; and if the occupation be for three years, it is not necessary to avow for each year separately or to make three avowries.

Mr. Taylor and Mr Mason, contra.

The first plea is, substantially, that the defendant took the goods of his own wrong, without such cause of taking as is set forth in the avowry; and the verdict upon the issue on that plea, being found for the plaintiff, is conclusive against the defendant in this action. The verdict upon the second issue (non dimisit) is not inconsistent with the verdict on the third (no rent arrear), for these might be rent arrear, but not under the demise laid in the avowry. Although a defendant in replevin may distrain for one cause, and avow for another, yet he must prove the cause for which he avows as it is laid. He must show not only that rent is arrear, but that it was due, at the time of the distress, under the demise averred in the avowry, or his justification is not complete. Upon the issue of no rent arrear, the demise is not in issue; the plaintiff can controvert it only upon the plea of non dimisit. There must be a demise, or there could be no lawful distress. It was necessary, therefore, for the defendant to aver a demise, and to prove it as laid. Rent arrear alone is no justification.

THE COURT (THRUSTON, Circuit Judge, absent), having taken time to consider, was of opinion that the instruction which they gave to the jury at the trial was correct, and overruled the motion for a new trial. Judgment for the plaintiff.

DORSEY (HOLT v.). See Case No. 6,647.

DORSEY (MEDFORD v.). See Cases Nos. 9,389 and 9,390.

Case No. 4,014.

DORSEY HARVESTER REVOLVING-RAKE CO. v. MARSH et al.

[6 Fish. Pat. Cas. 387;[1] 9 Phila. 395; 30 Leg. Int. 169; 5 Leg. Gaz. 139.]

Circuit Court, E. D. Pennsylvania. April 7, 1873.

CORPORATIONS—PROOF OF CORPORATE EXISTENCE—PATENT FROM STATE—CORPORATE POWERS, HOW ASCERTAINED—PATENTS FOR INVENTIONS—ISSUANCE BY ACTING COMMISSIONER—REISSUES—INFRINGEMENT—INJUNCTION.

1. It is well settled that patents granted by a state or the general government are to be taken as prima facie evidence that they were regularly granted, and that they import conformity to the few requisitions of the laws authorizing their allowance.

2. The acceptance of the charter is essential in the process of constituting a body politic, and must be proved when the existence of the corporation is put in issue.

3. But it is well settled that acceptance will be presumed from facts which are consistent only with such hypothesis, without proof of any express declaration to that effect.

4. When a general law is in existence authorizing the creation of a corporation by letters patent, to be issued by a public officer, upon the performance of certain preliminary conditions, and letters patent are duly issued, reciting the performance of the conditions and investing the corporation with the franchises of a body politic, and these letters patent are produced by the corporation to establish its existence, it will be presumed that they were granted at the instance of the corporation and accepted by it.

5. The corporate faculties of a corporation are not to be ascertained by reference exclusively to the statutes authorizing its creation. Notice will be taken of any supplementary or general statute pertinent to the inquiry.

6. The purpose of a corporation may be inferred from its corporate name.

7. A corporation has power to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated by its

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

corporate name, even in the absence of any law expressly conferring it.

8. A provisional officer, who is invested by law with the functions of the commissioner of patents, is properly described as commissioner so far as the efficacy of his official acts is concerned.

9. The actual incumbent of a public office is presumed to be in the lawful possession of it, and no affirmative proof of his title is required to support his official acts.

10. The contingency upon which the examiner-in-chief is authorized to assume the duties of commissioner is primarily to be taken to exist from his actual discharge of these duties.

11. The burden of showing the non-existence of the prescribed contingency is upon the party who denies the validity of the ostensible officer's acts.

12. When a patent is extended in apparent conformity to the act of congress, the decision of the officer granting the extension has the attributes of a final judgment. It is not subject to appeal or revision.

13. In a suit by a patentee against an infringer, it can not be shown that the commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent. The patent is conclusively valid until it is successfully impeached in a direct proceeding properly instituted for that purpose.

[Cited in brief in National Hay-Rake Co. v. Harbert, Case No. 10,044. Cited in Brown v. Deere, 6 Fed. 490; Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

14. A reissued patent can not be allowed for an invention different from the one of which the original patent is the basis. But any feature of an invention which is actually a part of it, that was only suggested or indicated in the specification or drawings, may be distinctly described in a reissued specification, and be protected by a reissued patent.

[Cited in Gould v. Ballard, Case No. 5,635.]

15. The claims of a reissue may be restricted or enlarged to cover the real invention.

[Cited in Gould v. Ballard, Case No. 5,635.]

16. It is no objection to a renewed patent that part of the original patent is omitted.

[Cited in Gould v. Ballard, Case No. 5,635.]

17. Absolute precision is not required in a specification. It is sufficient if a mechanic skilled in the art to which the invention pertains, not simply an ordinary mechanic, can from the specification and drawings, construct and use the invention described.

18. Dorsey's invention construed to be "a rake, with its arms attached by a pivot to a shaft, with which it revolves, and so that it will rise and fall as the arm passes along the surface of a cam, by which this latter movement is regulated and controlled."

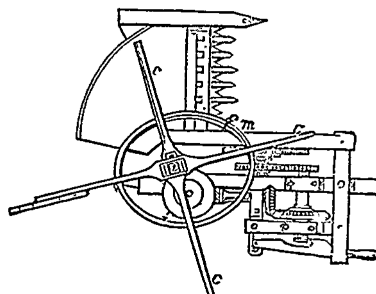
19. The reissued patent granted Owen Dorsey, June 9, 1868, No. 2,982, for improvement in harvester-rakes, and extended March 4, 1870, *held* valid, and infringed by the machines made in accordance with the patent granted James S. Marsh, February 28, 1871, for improvement in harvester-rakes.

20. When the complainant is not a manufacturer of the patented article, and the defendant is an extensive manufacturer, with large capital invested, the court will withhold the issuing of the injunction, upon the filing by defendant of an ample bond, with good security, for the payment of such sum as may be ultimately decreed to complainant for profits and damages.

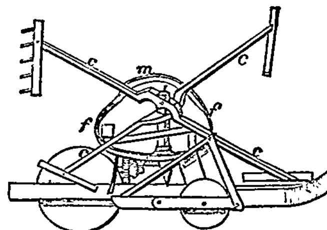
[Distinguished in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804.]

In equity. Final hearing upon pleadings and proofs. Suit brought [against James S. Marsh and others] upon reissued letters patent for "improvement in harvester-rakes," granted Owen Dorsey, June 9, 1868, No. 2,982, as a reissue of the patent originally granted him March 4, 1856 [No. 14,350]. The patent was extended for seven years, from March 4, 1870.

The claims of the patent were: "(1) A continuously revolving-rake, attached by a pivotal connection to the shaft on which it revolves, so as to allow it to describe the proper path, to gather or discharge the grain, and to clear the frame. (2) The combination of a platform, a vibrating cutter, and a continuously revolving, gathering, and discharging rake, so arranged as to enter the uncut grain in front of the cutter, and to discharge the cut grain in the arc of a circle. (3) A continuously revolving, gathering, and discharging rake, which enters the uncut grain in front of the cutters, and discharges the cut grain in the arc of a circle, in combination with one or more immediate revolving gathering heads or beaters. (4) The combination of a continuously revolving, gathering, and discharging rake, which discharges the grain in the arc of a circle, and the cam-way or guide for regulating the course of the rake. (5) The combination of a continuously revolving-rake, which discharges the grain in the arc of a circle, with a platform, having a fender conformed substantially to the path described by the outer end of the revolving-rake in passing over the same, substantially as described. (6) The combination of a continuously revolving, gathering, and discharging rake, which discharges the grain in the arc of a circle with a vibrating cutter. (7) The combination of a continuously revolving, gathering, and discharging rake, a cam-way or guide, and



No. 1.



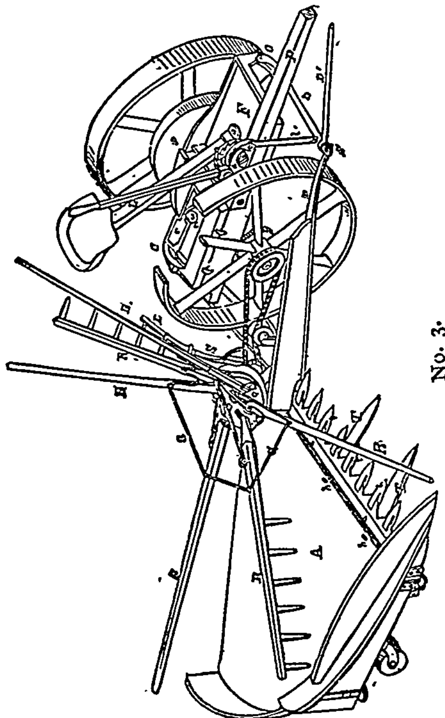
No. 2.

friction rollers, attached to the arms of said revolving-rake."

In the drawings, Fig. 1 represents a top view of Dorsey's harvester-rake, as shown in the original patent, and Fig. 2 a side view. i is the pivoted shaft, to which the diametrically opposite arms c, c are attached; f, m, f is the guide-way or cam for regulating the elevation of the rake-head.

The operation is described in the original patent as follows: "As the rake-head passes over the platform A, its movement is horizontal, the arm C passing over the rail from m to h; but, on reaching the edge of the platform, the rake-head is suddenly raised by the arm passing up the incline, m, of the guide-rail, while the rake and opposite end of the arm drops at a corresponding incline; and, by continuing its movement, the rake reaches over the heads of the grain, and, gradually descending by the guide-rail, draws the wheat toward the cutters."

The claim of the original was: "The combination, with the rake-arms c, c, to which the rakes are firmly attached, of the vertical revolving-shaft i and cam-way or guide f, f, m, m, from which the rake-arms receive an undulating motion in a vertical plane, revolving about said shaft i, substantially in the manner and for the purposes set forth."



The machine constructed by Marsh was substantially the same as patented by him February 28, 1871.

Fig. 3 shows this rake as illustrated in the patent, and will be readily understood when examined in connection with the opinion of the court.

George Harding, for complainant.
David Wright, for defendant.

McKENNAN, Circuit Judge. The bill in this case is founded upon an extended patent to Owen Dorsey, for an improvement in harvester-rakes, dated March 4, 1870. Every material allegation of the bill is denied in the answer; and the validity of the patent and the sufficiency of the complainant's proofs have been contested in an argument of unusual minuteness of elaboration. It has failed to convince me that the complainant is not entitled to a decree, and the reasons for the conclusion reached by me can perhaps be more briefly and lucidly stated by an examination of the points of that argument, in the order in which they were presented.

The suit is brought by the complainant as a corporation, and its existence as such is denied in the answer. It is proved by the exhibition of letters patent, issued under the great seal of the state of Pennsylvania, signed by the governor, and countersigned by the secretary of state. That the governor had authority to cause these letters to be issued, is indisputable, and if they do not warrant a presumption that they were rightfully issued, and therefore that what the law prescribes as necessary to be done to that end had been done, it is difficult to perceive what significance they have. To the acts of public officers within the general scope of their power, some degree of faith and credit is due, and it is no stretch of presumption to consider that they have faithfully performed a duty imposed upon them by law, with a proper observance of all its preliminary conditions. Therefore, it has been held, and is settled law, that patents granted by a state or the general government are to be taken as prima facie evidence that they were regularly granted, and that they import conformity to the prerequisitions of the laws authorizing their allowance. Trenton R. Co. v. Stinson, 14 Pet. [39 U. S.] 458; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 797.

Nor has the second branch of the objection, that the acceptance of the charter is not shown, any better foothold. This fact is undoubtedly essential in the process of constituting a body politic, and it must therefore be proved where the existence of the corporation is put in issue. But it is well settled that it will be presumed from facts, which are consistent only with such hypothesis, without proof of any express declaration to that effect. Thus, where a law is enacted applicable to a designated corporation, the mere passage of the law will not sufficiently prove its adoption by the corporation. But where it appears that the law was enacted upon the application of the corporation, its acceptance is a necessary inference from that fact. And so where a general law is in existence, authorizing the creation of a corporation by letters patent to be issued by a public officer upon the preliminary performance

of certain things by the persons to be incorporated, and letters patent are duly issued, reciting the performance of the required conditions, and investing the corporation with the franchises of a body politic, and these letters are obtained and produced by the corporation for the very purpose of establishing its existence, can any doubt remain that they were granted at the instance of the alleged corporation, and were accepted by it? The possession by a grantee of a deed for his benefit, is everywhere sufficient prima facie evidence of its acceptance by him. Why, therefore, will not the same facts authorize a like presumption as to a corporation? The proofs here leave no doubt that the complainant was duly constituted a corporation according to law.

It is further denied that the complainant has any right to acquire and hold the patent in question. The corporate faculties of the complainant are not to be ascertained by reference exclusively to the statutes authorizing its creation. Notice will also be taken of any supplementary or general statute pertinent to the inquiry. Now, the Pennsylvania statute referred to in the complainant's letters patent authorizes the creation of a corporation upon the fulfillment of certain prescribed conditions, and they are recited to show that these conditions have been complied with, and, as a consequence, it is declared that the applicants are constituted a body politic, "with all the rights, powers, and privileges," conferred upon it by "all the laws of the commonwealth." The creation of the corporation was thus complete, but its powers are not to be sought in these acts alone. The supplementary act of February 27, 1867, extended the scope of the original act, so as to embrace companies thereafter formed for the purchase and sale of patents granted by the authority of the United States, and of rights and licenses under said patents. The right to acquire and hold patents is here clearly given to corporations organized under the original act, thus amplified. If the patent in controversy is related to the purpose of the complainant's organization, the right to take and hold it is expressly conferred upon it. It is not requisite that this purpose should be proved by direct evidence, but it may be inferred from the name of the corporation alone. So it was held in Blanchard's Gunstock Turning Factory v. Warner [Case No. 1,521], where it was inferred that the corporation, plaintiff, "had power enough to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated by its corporate name," in the absence of proof of any law expressly conferring it. But in this case the law expressly authorizes the purchase and tenure by the complainants of a patent, which is cognate to the purpose of its incorporation. That it is founded upon the Dorsey patent, I think, is manifestly indicated. It adopts the name of Dorsey's invention, set forth in his patent, as part of its own; but to individuate the patent more distinctly, it superadds Dorsey's name, so that its corporate style, "The Dorsey Revolving Harvester Rake Company," denotes exclusively Dorsey's invention. I think, therefore, the inference is both legitimate and obvious, that the purpose of the complainant was to operate in reference to the Dorsey invention, and that it has the right to acquire and hold his patent.

The third point is purely verbal. The bill alleges that the Dorsey patent was duly extended by the commissioner of patents, and the proof is that the extension was granted by S. H. Hodges, acting commissioner, and it is therefore urged that the bill must be dismissed, because the proof does not support the averment. The gist of the averment is, that the patent was extended by an officer having authority to grant it, and if the proof substantially supports it, there is no discordance between them. A provisional officer who is invested by law with the functions of the commissioner of patents, is properly described as commissioner, so far as the efficacy of his official acts is concerned, and for this purpose only is it necessary to describe him at all. The validity of his act, not the verbal accuracy of his title, is the essential subject of inquiry.

The fourth and fifth points may be considered together. They affirm that the acting commissioner did not acquire jurisdiction to consider Dorsey's application for an extension, and that his patent was not extended until after the expiration of the original term.

The actual incumbent of a public office is presumed to be in the lawful possession of it, and no affirmative proof of his title is required to support his official acts. This is a familiar maxim. Accordingly, it was held in Winans v. York & M. L. R. Co., 17 How. [58 U. S.] 41, that "the court will take notice, judicially, of the persons who, from time to time, preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts." So, therefore, the contingency upon which the examiner-in-chief is authorized to assume the duties of commissioner, is primarily to be taken to exist from his actual discharge of these duties. That this presumption is conclusive, in a contest between third parties, is, I think, a logical result of the principle affirmed and applied in Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796. But, at any rate, the burden of showing the non-existence of the prescribed contingency is upon the party who denies the validity of the ostensible officer's acts. That burden the respondents here have not sustained. They have shown only that the commissioner was at the patent office part of the day on which the extension was granted, not later than 11½ o'clock a. m.; while it appears that the commissioner, in writing, informed the chief examiner of his intended absence at the time of the decision of Dor-

sey's application, and that the case was actually decided by the chief examiner. There was an actual abdication by the commissioner of his official functions, and an exercise of them by the chief examiner; and, as this was done with a distinct reference to the provisions of the act of congress, the inference that they were strictly observed is legitimate and fair.

The granting of an extended patent is a judicial act. Authority to that end is conferred upon the commissioner of patents by act of congress. The manner in which it is to be exercised, and the time within which it may be exercised, are prescribed by the act. The extension must be granted before the term of the original patent expires; but when it is granted, in apparent conformity to the act of congress, the decision of the officer has the attributes of a final judgment. It is not subject to appeal or revision. This is the clear import of numerous decisions of the supreme court. In Seymour v. Osborne, 11 Wall. [78 U. S.] 516, the court says: "When the commissioner accepts a surrender of an original patent, and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority; that there is such a repugnancy between the old and new patents that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." And this doctrine is asserted with equal distinctness, in reference to the granting of an extended patent, in Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 798. It is there said: "The law made it the duty of the commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for appeal or review. His decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose, according to the rules which define the remedy, as shown by the precedents and authorities upon the subject."

It is plain, from these authorities, that in a suit by a patentee against an infringer, it can not be shown that the commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent, and that it is conclusively valid until it is successfully impeached in a direct proceeding, properly instituted for that purpose. We have, then, a case where a patent has been extended, with every apparent legal sanction, which it is sought to invalidate by parol evidence contradictory of its purport, and claimed to show that it was granted at a time and place contrary to law. This is a forbidden inquiry in this case, and it is therefore unnecessary to notice the evidence presented in relation to it.

The invention of Dorsey belongs to the widely useful class of mechanical devices designed to facilitate the harvesting of grain. His special object was to produce a device which would automatically separate the standing grain in suitable gavels, press it against the vibrating knives of a reaping machine, and, sweeping it in the arc of a circle, deposit it in the rear of the machine, out of the way of the team when it passed round again. By no pre-existing invention was this double effect produced. The function of discharging the cut grain had been performed by a rake sweeping over the platform of the machine, and of separating and gathering the standing grain to the cutters by a revolving reel. These were the more recent and approved automatic devices for these purposes, preceding the invention of Dorsey. But in all the literature of the art, which has been so exhaustively exhibited, no instance is shown in which the gathering office was performed by a rake.

To effectuate his object, Dorsey constructed a continuously revolving-rake, with arms attached by a pivot to a shaft or head, around which they revolve, and so as to allow of their being elevated or depressed by an inclined cam-way, on which they rest. Guided by the cam, the rake is caused to fall in front of the cutter-bar into the standing grain, thereby separating it for each gavel, pressing it against the cutting-knives, and sweeping it over the platform in the arc of a circle, depositing it behind the horses and out of their track on their next round.

The novelty of the operation consists in the performance of the functions of gathering the grain to the cutters and discharging it from the platform by the same instrumentality, and in the mechanical means employed to guide and cause it to rise and fall to perform these functions together. And in these features the complainant's invention is distinguishable from the various devices exhibited by the respondents. I do not propose to consider them in detail, but content myself with saying that in none of them is a rake employed to separate and gather to the cutters the standing grain, nor is there in any of them a similar pivotal attachment of a rake-arm, by which it is capable of rising and falling in its revolving movement; and in all of them, except in Seymour's and Palmer and Williams', the cut grain is discharged directly behind the cutter. I can have no doubt, therefore, of the novelty of the invention.

It is urged that the patent in controversy is void, because the reissue is not for the same invention described in the original. That a reissued patent can not be allowed for an invention different from the one of which the original patent is the basis, is undoubtedly true. But it is equally true that any feature of the invention, which is actually a part of it, that was only suggested or indicated in the specification or drawings, may be distinctly described in an amended

specification and protected by a reissued patent, and that accordingly the claims of the patent may be restricted or enlarged to cover the real invention.

It is a just rule that patents are to be construed liberally, so as to sustain the right of the inventor. Mere verbal discrepancies, therefore, are entitled to but little consideration, especially where, in view of the mechanism devised, the functions it was designed to perform, and its mode of operation, there is substantial accordance between the original and reissued patents. Nor is it any objection to a renewed patent that part of the original invention is omitted. This an inventor may do, because the public may use it, and there is nothing in the policy or terms of the patent act which forbids it. Carver v. Braintree Manuf'g Co. [Case No. 2,485].

I do not think, however, that it requires any great liberality of construction to harmonize the original and reissued patents. The main grouud of the objection is that in the reissue the invention is described as a continuously revolving. gathering, and discharging rake, which descends into the standing grain in front of the cutter, so as to gather the grain for each gavel, and that the gathering function thus defined is not suggested or indicated in the original patent. In the latter it is said "the rake-head is brought by a sweeping descent upon the front edge of the platform, and in so doing draws the uncut grain toward the cutters." And, again, describing the operation of the rake, "by continuing its movement, the rake reaches over the heads of the grain, and gradually descending by the guide-rail, draws the wheat toward the cutters. By this means, I dispense entirely with the reel used on harvesters for drawing the grain to the cutters." Now, the reference here to the gathering function of the rake is distinct. It is expressly stated to be a substitute for the reel, the sole function of which is to gather the grain to the cutters; and it operates so as to reach over the heads of the grain, and, descending gradually, draws or gathers the grain to the cutters. Every step in the process is not as fully described as in the amended specification, but it is obviously implied that the rake, reaching over the heads of the grain, was intended to descend below them into the grain, as it could thus only perform its appointed duty of drawing it to the cutter; and, in so operating, it must necessarily effect a separation of the grain between the rake-head and the cutter-bar from that standing in the rest of the field. The description, therefore, plainly points to a rake adapted to gather the grain to the cutter, as well as to discharge it from the platform, and, in so performing its intended office, necessarily passes down into the grain in front of the cutters, and divides it so as to form the succeeding gavel in the standing grain.

Again, it is objected that the original and amended specifications are vitally irreconcilable in this: that in the former is described a rake attached to the end of a diametrical arm; "each pair of arms, formed of metal or wood, with an opening at their half length of a longitudinal form, so as to allow them to pass over the end of a vertical turning-shaft;" and that this description is omitted in the latter. Diametrical arms are undoubtedly one form of embodiment of the patentee's conception, but they are not the only one to which the principle of his invention is susceptible of application, nor is it so declared. His patent covered equivalent, although formally different, mechanical devices, which operated in the same way and to the same end with diametrical arms. Hence it was legitimate to modify the specification so as to secure protection broadly to the real invention of the patentee against any form of infringement. This is well and accurately illustrated by Acting Commissioner Hodges, in his opinion, where he says, in reference to the distinctive merit of the invention: "It lies in attaching the rake-arm by a pivot to a shaft, around which it revolves, and may be made at the same time to rise and fall upon the pivot. By this construction the rake may be guided in the direction desired. These are the essential features of the invention, and equally so whether the arms are diametrical or merely radial. After trying the latter, Dorsey adopted the former, because he found he could use the limb opposite the rake as a means for guiding it. But the combination of the revolving movement of the arms and their swinging movement upon their pivots, which alone gave him the power to direct the path of the rake at will, was common to both, and constitutes the merit of the contrivance."

Nor does the objection apply with any greater effect to the claims of the reissue. It has been already shown that the original and amended specifications describe a continuously revolving-rake, with a pivotal connection to the shaft on which it revolves, which performs the functions of gathering and discharging the grain, so arranged as to enter the uncut grain in front of the cutters, and discharge the cut grain in the arc of a circle, and so as to separate the grain which is to form the next gavel in the standing grain. It follows, therefore, that the claims of the reissue which embrace the device and combination of devices by which these functions are performed, are in entire harmony with the specification.

Another objection to the validity of the patent is that the patentee has not so described his raking device and its arrangement as to enable an ordinary mechanic to make, construct, and use the same. Absolute precision as to details is not required in the specification. It is only intended as a guide; but it is not the sole instructor. Nor is it addressed merely to ordinary mechanics; but the test of its sufficiency is whether

a person skilled in the art to which the invention appertains can construct and use it. The special skill of the mechanic, derived from familiarity with the art, may be applied in aid of the instruction given by the specification, and this skill may be exerted to modify any direction in the specification as to the matters of mere adjustment or adaptation of the invention to its intended use, else the authority to employ it at all is of but little value. "It will, perhaps, rarely happen, even where the utmost vigilance and care are observed, that the machine or structure will be so accurately described as that the description can be literally and strictly followed in every particular. The skilled mechanic will see that in some particulars there is some vagueness, and some discretion is required, but that fact will not invalidate the patent." Seymour v. Osborne [Case No. 12,688]. But it is a complete answer to the objection that the thing which, it is argued, can not be done, has actually been done. In 1858, Adam Reese acquired a license to use the Dorsey invention, and, in substantial accordance with the specification and drawings, he made and applied it to over fifteen hundred machines, which worked successfully. Against such a practical demonstration, argumentative speculation, reinforced though it may be by the untested opinions of experts, will be of little avail.

In Union Sugar Refinery v. Matthiessen [Case No. 14,399], Mr. Justice Clifford said to the jury: "You will regard the well-known substantial equivalent of a thing as being the same as the thing itself; so that if two machines have the same mode of operation, do the same work, in substantially the same way, and accomplish substantially the same results, they are the same; and so also, if the parts of two machines, having the same mode of operation, do the same work, in substantially the same way, and accomplish substantially the same results, these parts are the same, although they may differ in name, form, or shape."

The invention of Dorsey consists of a rake, with its arms attached by a pivot to a shaft, with which it revolves, and so that it will rise and fall as the arm passes along the surface of a cam, by which this latter movement is regulated and controlled. It operates with a continuous revolution, descending with the inclination of the cam in front of the cutter-bar, thence sweeping backward in the arc of a circle to the rear of the platform, where it is elevated by the cam to clear the frame of the machine, and, passing again to the front, repeats the movement. Its functions are to descend into the standing grain in front of the cutter, thus separating the grain which is to form the next gavel, to draw or gather it to the cutter, and when cut, onto the platform, and then to sweep it across the platform in the arc of a circle, and to discharge it onto the ground out of the way of the return of the machine in cutting its next swarth. These are the characteristic features of the invention.

Now, the alleged infringing devices embodied in the defendants' machines "have substantially the same mode of operation, do the same work, in substantially the same way, and accomplish substantially the same results" as those claimed by the complainants. In the defendants' machine is to be observed a rake-head, with an arm attached to a crown-wheel or head, with which it revolves, and to which it is pivotally connected, so that it will rise and fall under the guidance and control of a cam-way. It revolves continuously, descending into the grain in front of the cutter, separating the gavel, gathering it to the cutter, and, traversing the platform in the arc of a circle, discharges the grain in the rear by a side delivery, out of the way of the return of the machine, and then rising clears the machine and renews the operation. It is obvious, then, that the functions and mode of operation of both devices are substantially the same. In their construction the differences are formal rather than substantial. Instead of a vertical post, the shaft and head of which are of one piece, and revolve together, to which the rake-arm is attached, as in the Dorsey invention, the defendants employ a vertical iron shaft, which passes through the center of a metal head, to which the rake-arm is attached, and which revolves around this shaft, instead of with it; but the mode of operation and the results accomplished by both devices are the same. In Dorsey's drawings and model a diametrical rake-arm is shown; in the defendants' machine the rake-arm is radial, but both are pivoted at the same point to the central revolving head, and are alike guided and governed by the cam in their rising and falling movement. The defendants use a cam, formed in a segment of a circle, while Dorsey's cam is a complete circle; but I think the part of the latter, at its lowest inclination, where the defendants' cam is open, exerts no essential agency in guiding the rake in its traverse on the platform, and that therefore the difference in form between the two is immaterial.

Upon the whole case, I am of the opinion the complainant is entitled to a decree; but it ought to be so framed as not to subject the defendants to any avoidable loss or injury. The complainant is not a manufacturer of reaping-machines, so far as appears, and will be adequately protected by the payment of a just compensation for the use of the Dorsey invention. The defendants have an extensive establishment, and a large capital invested in it for the manufacture of machines, and seem to have conducted their business under the impression that it was no invasion of the rights of others. A sudden stoppage of it would be disastrous to them, and would not benefit the complainant.

A decree will therefore be entered for an injunction and an account; but no injunction

will issue until the further order of the court, if the defendants, within thirty days from the date of this decree, file a bond, in such form and amount, and with such security, as the court or judge thereof may approve, to secure to the complainant the profits and damages which they may ultimately be decreed to pay.

[NOTE. For another case involving this patent, see Dorsey Revolving Harvester Rake Co. v. Bradley Manuf'g Co., Case No. 4,015.]

Case No. 4,015.

DORSEY REVOLVING HARVESTER RAKE CO. et al. v. BRADLEY MANUF'G CO.

JOHNSON et al. v. SAME.

[12 Blatchf. 202;[1] Ban. & A. 330.]

Circuit Court, N. D. New York. June 16, 1874.

PATENTS—INFRINGEMENT SUITS — PARTIES PLAINTIFF—ASSIGNMENT AND LICENSE — TERRITORIAL LIMITATIONS—INJUNCTIONS.

1. In a suit in equity, brought on letters patent for a machine, to restrain the defendant from making the patented machines and selling them to parties who buy them for exportation to and use in foreign countries, it is proper to join, as plaintiffs, the owner of the legal title to the patent with the holder of the exclusive right to make and vend the patented invention for use in foreign countries.

2. A patentee has the right to grant the right to make and sell the patented invention within specified territory, and to make that right exclusive in the grantee, and yet limit the use of the thing so made and sold, within specified limits.

[Cited in Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 25.]

3. A patentee, while granting to another a right to make or to make and sell, may retain to himself the exclusive right to make and sell for export or use in other countries.

4. Whether the grant of a right to make and sell carries with it a right to use, quere.

[See Adams v. Burks, Case No. 50, note.]

5. Whether, when a mere licensee to make and sell a patented machine within specified limits, sells a ma'hine so made to another, the machine may be used anywhere, quere.

6. Where there did not appear to be danger of irreparable injury to the plaintiff, and his right was not clear, a preliminary injunction was refused.

[These were bills in equity, brought, respectively, by the Dorsey Revolving Harvester Rake Company and the Johnson Harvester Company against the Bradley Manufacturing Company, for the alleged infringement of letters patent No. 14,350, granted to O. Dorsey, March 4, 1856, reissued June 9, 1868 (No. 2,982), and by Samuel Johnson and the Johnson Harvester Company against the same defendant for the alleged infringement of patent No. 46,300, granted to S. Johnson, Feb. 7, 1865, reissued May 26, 1868 (No. 2,951).]

George Harding, for plaintiffs.

George F. Comstock and Nathaniel B. Smith, for defendant.

WOODRUFF, Circuit Judge. In each of these cases motions were made by the complainants for an injunction pendente lite. The motions were founded upon the respective bills of complaint, and affidavits pertinent to the several suits, and upon other affidavits and papers pertinent to both; and the motions are resisted upon affidavits used for the purposes of both motions. The object of the motions respectively is to restrain the alleged infringement of patents upon which the suits respectively are founded. The defendants object, in each case, that there is an improper joinder of complainants, because the bills respectively aver that the Johnson Harvester Company have the exclusive right to make and vend the patented inventions for use in foreign countries; also, that the defendants have a right to make and sell within the territory within which they manufacture and sell, without restriction as to the use or place within which the machines in question may be used.

The respective inventions are improvements in harvesters, and especially the harvester rake, one being patented to Owen Dorsey, and assigned to the Dorsey Revolving Harvester Rake Company, upon which patent the first of the above-named suits is founded; and the other being patented to Samuel Johnson, upon which the second suit is founded. That the defendants are making and selling machines embracing these inventions is not denied; and it appears, also, that they are making and selling to parties who buy them for exportation to and use in foreign countries; and this is claimed to infringe the patents.

My conclusions upon the bills of complaint and affidavits, and upon the questions thereupon arising, may be briefly stated. However the parties differ as to the construction and effect of the transactions in question, there is little, if any, dispute about facts.

1st. The suggestion that there is an improper joinder of plaintiffs, if that were a reason for withholding an injunction to restrain an infringement of the rights of one of the complainants, will not avail here. An exclusive license to manufacture for a special use or purpose is not an assignment of the patent, which renders the joinder of the patentee, in a suit for infringement, improper. It is not within the definition of an assignment, in the statute. It does not convey the patent, or any specified territory within which the licensee has the exclusive right to make, vend or use, and is not within any case which has held even that the licensee could sue without joining the person in whom the legal title to the patent is vested, still less within any case holding that the latter may not join in the suit in equity; and, in general, one who has granted such exclusive license has an interest

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 330; and here republished by permission.]

in sustaining the right and protecting his license. Presumptively, his own rights would be affected by an adverse adjudication, if called on by the licensee to defend his license.

2d. I have no doubt of the right of a patentee to grant the right to make and sell the patented invention within specified territory, and to make that right exclusive in the grantee, and yet limit the use of the thing so made and sold, within specified limits. The right to make and vend, and the right to use, are completely severable; and, while a grant of the right to make and sell to others might be deemed to imply the right in the purchasers to use the thing purchased, a patentee may restrict the use. The patent as effectually secures to him a monopoly of the right to use as it does of the right to make. The patentee, or his assignee, may, therefore, give the exclusive right to make and sell for use within certain territory; and such a restriction would be entitled to enforcement. The case of Adams v. Burks, 17 Wall. [84 U. S.] 453, recently decided in the supreme court, is in no conflict with this. In that case, there was a complete transfer of the exclusive title to the invention within and for a specified territory. There was no qualification of the right to use, either expressed in the grant or inferrible (according to the views expressed in the opinion of the court) from the nature of the subject or the circumstances of the case. It is clear that the patentee may grant the right to use within any specified place, town, city or district, and he may make such right of use exclusive; and I deem it no less clear that he may limit the right to manufacture for such use. What the terms of any particular grant or license import, may be and is often a question. But, the right of the patentee to confer upon others such qualified privilege, whether of making, of selling to others, or of using, as he sees fit, whether within specified limits or under limitations of quantity, or number, or restricted uses, does not seem deniable. Whether, in a given case, he has given a privilege with such qualifications, or whether his grantee or licensee has an unrestricted right, without any limitation as to quantity, number or use, must depend upon the facts existing in each case.

3d. The complainants have not vested in themselves, by virtue of their patents, any exclusive right to sell their patented inventions in foreign countries; and, therefore, any one, having possession of their harvesters there, may sell and use them there, and any one there may make, sell and use them. But, a patentee having the exclusive right to make them in this country, and having the right, above stated, to grant that right to others, may qualify the privilege which he confers. A patentee may find it greatly to his advantage, and greatly profitable, to supply a foreign demand for an article of American manufacture, and may be able successfully to compete with foreign machinists in the making. In such case, his monopoly of the right of making and selling here is of great value, because no other one can make in this country and compete with him. I know of no reason, in law or in equity, why, if he give to another a right to make, or to make and sell, he is not at full liberty to retain to himself the advantage and profit of competing in foreign markets, by retaining the exclusive right to make and sell for export or use in other countries; not because the monopoly includes such other countries, but because his actual monopoly does include all making and selling here, with all the advantages which are incident thereto.

4th. The defendants in these cases are making and selling the patented harvester, and are so making and selling for the purpose of exportation, or under contracts, with knowledge and intent that the purchasers are thereby supplying, and will supply, the foreign market.

5th. In respect to the Dorsey patent, upon which the first above named suit is founded, the defendants show no assignment or license conferring upon them the right to use the patented invention. I do not discover in the papers anything which imports such a right, at law or in equity. Counsel for the defendants seem to have assumed that the agreement with Johnson, the patentee named in the other suit, and the correspondence in relation to his harvester, applied to the Dorsey patent also. I do not find in either anything to warrant the assumption; and, especially, I observe that the Dorsey patent expired on the 4th of March, 1870, and was, on or before that day, extended for the term of seven years. The defendants have failed to show a right under such extension.

In the first case, then, the defence rests upon a statement in the affidavit of Mr. Harding, the solicitor therein, and "agent for the Dorsey Revolving Harvester Rake Company, and for the reissued patent of Samuel Johnson, No. 2,951, dated May 26th, 1868," as follows: "that it was agreed, that the right to build what was called 'single reapers,' under said patents, should be given to C. C. Bradley & Son, to manufacture such machines as might be required for use in Minnesota, Wisconsin, Pennsylvania, and New York, except the river counties, so long as, and on condition that, they kept said territory supplied with such machines as are required therein, and paid the license fee." The defendants deny that there was any condition annexed to the privilege agreed to be given them. This statement does not discriminate, in terms, between the two patents, one to Dorsey and one to Johnson. It may refer to the Johnson original and reissued patents. The agreement produced by the defendants refers to the Johnson patent only. If, however, this statement be taken most strongly against the complainants, to include also the Dorsey patent, then it declares that the defendants were only to have the privilege of supplying

the states mentioned with machines for use therein; and this is not at all inconsistent with the loose and indefinite terms of the agreement in relation to the Johnson patent, to be presently further noticed. The defendants, therefore, fail to show a right to manufacture and sell without restriction as to the use of the harvesters at any time. Still less do they show such a right now existing under the extension of the Dorsey patent. The complainants in the first above named suit are, therefore, entitled to the injunction sought by their motion, restraining the defendants from infringing the Dorsey patent, extended as described in the bill of complaint.

6th. As to the Johnson patent, upon which the second above named suit is founded, I feel great hesitation. There was, in relation to that, a written agreement, which contemplated granting to C. C. Bradley & Son "their choice in what territory they may want, at a reasonable price. for the right to build and sell in said territory." Subsequent negotiations, evidenced by correspondence, indicate subsequent and continuous recognition of the right of C. C. Bradley & Son to build and sell, though the precise limits of the territory in which they were to be permitted to build and sell has been the subject of negotiation and fluctuation. As already suggested, the agreement is not very specific or determinate. It is not clear that Bradley & Son were, under this agreement, to have anything more than a license. Nor is it stated that they are to have an exclusive license in any territory. They seem, in the correspondence, to have claimed that; and yet such claim is not conceded, as appears by what they call "encroachments" on them. On the other hand, there is, in this agreement, no express restriction upon the right to make and sell in such territory as might be assigned to them, which in terms confines the use of the harvesters which they make and sell to the same territorial limits. Hereupon, several interesting questions arise. Does the right to make and sell carry with it the right to use? If, by implication, the right to use is incident to, or implied in, the right to make and sell, does not the limitation of the right to make and sell, to specific territorial limits, operate with equal strictness upon the right of use which is incidental thereto or is so implied? Is the incident broader in its scope than the principal grant? If it be true, as claimed, that, when one who has the whole right in the invention, to make, sell and use, (either for the whole or a part of the United States), sells a machine, it passes from under the dominion of the patent, and may be used anywhere, does that follow when a mere licensee to make and sell within specified limits sells the patented invention to another? Does the cautiously guarded decision of the supreme court in Adams v. Burks, 17 Wall. [84 U. S.] 453, carefully limited to the precise case then under consideration, reasonably import an affirmative to the last question? Especially, may one having a license to make and sell within a limited territory only, deliberately contract to supply the patented invention for use in other territory, provided his manufacture and his actual negotiation of sales are within the privileged limits, and may he practically avail himself of the markets of the whole country?

The rights of the parties in respect to the Johnson patent are by no means clearly settled. The question whether the defendants are to be regarded as mere licensees, or as having an interest in the patent, is to be determined. Confessedly, in the present actual condition of things, their interest, of whatever extent, is equitable rather than legal; but that does not prejudice their standing in a court of equity. Again, it is claimed that the license to which C. C. Bradley & Son were entitled was personal to them, and could not be assigned, and, therefore, the defendant, a corporation, has no right whatever, either at law or in equity, to make or sell the patented invention anywhere. The question, whether the right or privilege of C. C. Bradley & Son could be assigned, is not to be determined solely by applying to it the term "license." Whether a license is or is not assignable, is to be determined not merely by the term "license," but by an inquiry into the fair meaning and intention of the parties; and, it may be affected not only by the words of license, but by the nature of the transaction, the consideration paid, and other circumstances showing that an assignable right was conferred. And yet that question is here involved touching a right or privilege which was to be evidenced by writing, which, in the preliminary agreement, is not well defined, and which lies in what may be found to be equitable between the parties.

There are some expressions, in the negotiations between the parties, which would seem to contemplate the possession, by C. C. Bradley & Son, of exclusive territorial rights; and if it should be found that the defendants are so entitled, they may be within the case of Adams v. Burks, above referred to.

If there appeared to be danger of irreparable injury to the complainants, I might feel called upon to decide these questions above referred to, or, at least, such of them as are material to the motion. But no such danger appears; there is no allegation that the damages cannot be easily ascertained, nor that the defendants are not of sufficient pecuniary responsibility to answer for all profits realized by them, and for all damages sustained by the complainants pendente lite. I do not think the case depending upon the Johnson patent developed so fully, and the right so clear, that the injunction should be granted upon the papers now before me. The motion in the suit of Johnson and others

against the defendants must be denied. But, if the complainants deem it important, such denial may be without prejudice to a renewal upon further proofs. The motion in the suit of the Dorsey Company must be granted.

[NOTE. For another case involving patent No. 14,350, see Dorsey Harvester Revolving Rake Co. v. Marsh, Case No. 4,014.]

D'ORVILLE (BROOKS v.). See Case No. 1,951.

DOSS (U. S. v.). See Case No. 14,985.

Case No. 4,016.

Ex parte DOS SANTOS.

[2 Brock. 493.][1]

Circuit Court, D. Virginia. Nov. Term, 1835.

EXTRADITION—INTERNATIONAL LAW—POWERS OF FEDERAL JUDICIARY.

1. A foreign government has no right, by the laws of nations, to demand of the government of the United States, a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence without, and can only be secured by, a treaty stipulation.

[Cited in Ex parte McCabe, 46 Fed. 370.]

2. But even if the right to demand such surrender existed, independently of a treaty stipulation, the judicial officers of the United States, have no authority to surrender the obnoxious individual, or to detain him in custody, until a formal demand for the surrender could be made by the foreign government of the executive of the United States. The judicial power of the United States, was created for the purpose of enforcing the laws of the United States, and no authority is conferred upon the federal judiciary, to assist in the execution of the penal laws of a foreign country. The case of piracy is not an exception to this general proposition, for piracy is an offence against all nations, against the United States as well as others, and, moreover, the constitution of the United States, authorizes congress to define and punish piracy.

[Cited in Elk v. Wilkins, 112 U. S. 108, 5 Sup. Ct. 49.]

A bill of indictment was sent to the grand jury at this term, by the district attorney of the United States, against Jose Ferreira dos Santos, a subject of the queen of Portugal, which the grand jury found "not a true bill." As soon as the bill was ignored, and before the prisoner was discharged, the Chevalier de Figanière d'Morao, chargé des affaires of Portugal, by his counsel, moved the court to detain him in custody until a formal demand for his surrender could be made by the Portuguese government of the executive of the United States. The petitioner alleged, that the prisoner had committed an atrocious murder in Portugal; and this was the ground of the application.

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

The case was argued by Charles Shirley Carter, on behalf of the chargé des affaires, no counsel appearing for the prisoner.

Mr. Carter said, the grand jury having found the indictment against Jose Ferreira dos Santos, the Portuguese subject now in custody, under the charge of piracy, not a true bill, he stands entitled to an order of discharge, at the hands of this court. Before that order is entered, I now submit to the court, in behalf, and at the instance of the chargé des affaires of Portugal, an application that he may be detained in custody, until time shall be allowed the representative of that nation, to claim of the proper authorities of this government, that he be surrendered as a fugitive from justice, in order to his being remanded to Portugal, to undergo before her tribunals, his trial for the crime of murder, which he is charged to have perpetrated within her dominions, under the most aggravating circumstances. This application is based upon the common principle, recognised and acted upon by the enlightened of all nations: That flagrant crime ought not to be permitted to go unpunished. What reason can be adduced why a nation should be instrumental in giving impunity to crimes committed in a foreign state, to which its own laws attach capital punishment when committed within its own jurisdiction? To remedy the evil presented in this question, in the absence of any treaty stipulation to the point, the doctrine of the "comity of nations," has immemorially grown up among enlightened nations, at peace with each other, recognising the right of a nation, whose laws have been violated, to claim the surrender of the fugitive violator, who has taken refuge in a foreign state; and the obligation on the part of the foreign power, within whose jurisdiction he is found, to deliver him up, on such demand by the offended nation. This doctrine, although variously laid down by the standard authorities upon international law, it is believed, is recognised by them all. Burlamaqui, following the opinions of Grotius, lays down several propositions to illustrate it: That since the establishment of civil society, it belongs to the sovereign to punish, as he thinks proper, those transgressions of his subjects which properly interest the public: That as a sovereign is not permitted to send armed men into a foreign state to exact punishment, it is reasonable that the sovereign, in whose dominion the offender has taken shelter, should punish the criminal according to his demerits, or deliver him up to be punished at the discretion of the injured sovereign. "This," he says, "is that delivery up, of which we have so many examples in history." He controverts the opinion of Puffendorf, that the right to demand, and the obligation to surrender, a fugitive from justice, "is rather by virtue of some treaty on this head, than in consequence of common and indispensable obligation," and contends, that Puffendorf has therein, without suffi-

cient reason, abandoned the opinion of Grotius. In fine, he asserts, "that a sovereign renders himself guilty of the crime of another, by allowing a retreat and admittance to the criminal, and screening him from punishment." 2 Burl. p. 179, § 23. Vattel sustains the doctrine, in unqualified terms, in relation to great offences. "Assassins, incendiaries, and robbers," he says, "are seized everywhere, at the desire of the sovereign in the place where the crime was committed, and delivered up to his justice." He even asserts the right of an offended nation to demand of a foreign state, the delivery up of one of its own subjects, by whom a flagrant offence has been committed, or to inflict on him exemplary punishment. Vatt. bk. 2, c. 6, §§ 71–77. These are the weighty names by which this doctrine is supported. It is also fortified by the highest modern authorities; whether we look to the ablest elementary writers, or to judicial decisions. Mr. Blackstone admits, that it is left in the power of all states, to take such measures in relation to the admission of strangers, as they may think convenient, and to send them home if necessary. 1 Bl. Comm. 259. And Chitty (1 Cr. Pr. p. 16) holds, "that if a person having committed a felony in a foreign country, comes into England, he may be arrested here, and conveyed, and given up to the magistrates of the country, against the laws of which, the offence was committed." The decisions of the English courts have also been in conformity with the doctrine. In Colonel Lundy's Case, 2 Vent. 314, the defendant was arrested in Scotland, for a capital offence committed in Ireland, and it was held, that he might be sent thither for trial. In Rex v. Kimberley, 2 Strange, 848, the defendant was committed by a single magistrate, for a felony perpetrated in Ireland, "to be detained until there should be proper means found out, to convey him to Ireland to be tried." Strange, in behalf of the prisoner, objected to the legality of the procedure. But the court declared the commitment proper, and remanded the prisoner. The case of East India Co. v. Campbell, 1 Ves. Sr. 246, is to the same effect; where it was adjudged, that one may be sent from England to Calcutta to be tried, for an offence committed there. It is objected by Chief Justice Tilghman, (in an opinion which will be brought to the notice of the court,) that these cases are not in point, as the countries from, and to which, the demand and surrender were made, were under a common dominion. But this objection appears not sustainable; as upon examination it will be found, that the decisions are not placed upon that ground, but looked to the general principles of international law, which (3 Burrows, 1481; 4 Burrows, 2016) constitute a part of the common law of England. Let it be remembered too, that Ireland was a distinct kingdom, at the time of the adjudications in the two cases first cited; which fact is particularly relied upon by Strange, in Kimberley's Case. And in Campbell's Case, it is distinctly held (1 Ves. Sr. 247) "that the government may send a person to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals."

Can it be doubted, that, (in the absence of the general statutory provision, making it mandatory,) any one of the states of this Union, would surrender to a sister state a heinous offender, who had escaped beyond the limits and jurisdiction of the state, whose laws had been violated? And yet, in such a case, the surrender could only proceed upon the authority of the doctrine here contended for; that from the comity existing between enlightened and independent states, at peace with each other, there has immemorially arisen a right on the part of one sovereign to demand, and an obligation on the part of the other sovereign to surrender, a common felon, flying from justice. Would a precedent, drawn from the case supposed, be entitled to less weight, than had the surrender been made to a foreign sovereignty? I apprehend not. However this may be, the cases of Rex v. Hutchinson, 3 Keb. 785, where the court refused to bail a man, committed for a murder in Portugal, and of Mure v. Kaye, 4 Taunt. 34, are equally pertinent, and liable to no such objection. In the last mentioned case, the doctrine contended for, is laid down in broad terms, by Heath, J., who cites also the case of a Dutch ship, which was mastered by her crew, and brought into Deal, and it was held that she might be seized, and sent back to Holland. "And the same," he says, "has always been the law of all civilized countries." Nor must I pass over the reasoning of Beccarid, or lose the weight of his authority. In his book on Crimes (page 134, c. 35), he holds this language: "In the whole extent of a political state, there should be no place independent of the laws. Their power should follow every subject, as the shadow follows the body. Sanctuaries, and impunity, differ only in degree; and as the effect of punishments, depends more on their certainty, than their greatness, men are more strongly invited to crimes by sanctuaries, than they are deterred by punishment." And again, "The place of punishment can certainly be no other, than where the crime was committed." From the premises, that sanctuaries should not be allowed, and that the only proper place for punishment is where the crime was committed, it inevitably follows, that a fugitive from broken laws, whereso-ever found, ought to be delivered up to be tried by the tribunals, whose just authority he has invaded.

Having taken a survey of the doctrine as it is considered abroad, let us see how it has been regarded in our own country. And here I must remark, that from peculiar political events connected with the early history of this country, the doctrine contended for, is calculated to meet a less favourable reception

from this government, than perhaps, from any other civilized nation. Many of the early settlers in America, were driven from their homes by unrelenting domestic oppression, whether proceeding from party zeal, or religious phrensy. To remand such fugitives to be tried by foreign tribunals, for the crime of free-thinking in matters of politics, or religion, would have been to abandon that liberty, which by their flight, the colonists sought to establish. Among the grievances, so feelingly set forth in our Declaration of Independence, is enumerated, that "of transporting us beyond seas, to be tried for pretended offences." From the date of the Revolution, to the close of the last war, there was no period in which the question of the surrender of subjects, claimed under some pretence or other by the British government, did not agitate the councils, and impart bitterness to the political feelings of our citizens. These events, taken together, have been calculated, I had almost said, to make it a part of the political creed of the American people, to set their faces against the surrender to foreign authority, of any criminal, however atrocious, and under any circumstances, however aggravating. To acknowledge the obligation to surrender, in the instances last referred to, would be to yield the right, set up by Great Britain, which this government never did, and never will admit, to reclaim subjects, wheresoever found, even though engaged in the service of a foreign state; and the right consequent upon it, to invade the sovereignty of a foreign power, by pursuing such subject within her jurisdiction. But this learned court will distinguish between such a question, altogether political in its character, and that doctrine of international law which I am endeavouring to present. As widely do they differ, as the obligation from which we derive the duty to protect, and give a sanctuary to the oppressed, of which we boast; and the obligation to deliver up the guilty, which all enlightened nations acknowledge. It is only necessary for me, in reference to the case at bar, to assert the doctrine in its most limited sense; the surrender of the most flagrant offenders, of those guilty of the "mala in se," the crimes capitally punished by all civilized nations.

Apart from political bias, it will be found that our own courts have not dissented from the learned authorities, which I have relied on. The first case which I find reported, is the case of Respublica v. De Longchamps, 1 Dall. [1 U. S.] 111, which occurred in 1784. The surrender of Longchamps was demanded of the counsel of Pennsylvania, by the French ambassador, for an assault and battery, committed by him, on Monsieur de Marbois, French secretary of legation. The question was referred to the court, M'Kean, C. J. presiding. On deliberation, the surrender of Longchamps was refused; but a sentence in every way satisfactory to the French ambassador, was passed upon Longchamps, by the authorities of Pennsylvania, submitting him to a heavy fine, and two years' imprisonment. In this case, the chief justice uses this language: "We think cases may occur, where counsel could 'pro bono publico,' and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offences were committed." 1 Dall. [1 U. S.] 116. This is one of the cases cited by C. J. Tilghman, as against the doctrine of surrender. In re Washburn, 4 Johns. Ch. 106, occurred in 1819. In this case, Chancellor Kent, with the great ability which distinguishes his decisions, after taking a minute survey of all the authorities, sustains the doctrine to the fullest extent. "It is," he says, "the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country, in which the crime was committed, into a foreign and friendly jurisdiction." Short's Case, 10 Serg. & R. 131, was decided by Tilghman, C. J., in 1823. There the question was, whether a fugitive from a foreign state, could be arrested by a magistrate in Pennsylvania, on a charge by a private individual, of felony committed abroad, in order to his being surrendered by this government, to be tried by the foreign state. The chief justice decided that he could not; but forbore expressing an opinion whether the executive of the state had power to cause an arrest for the same purpose. He asserts "the undoubted right of every nation, to surrender fugitives from other states." "No man has a right to say, I will force myself upon your protection, and you shall protect me." He, nevertheless, inclines against the doctrine; and cites Lord Coke to sustain him, who (3 Inst. Inst. 180) relies upon a text from Deuteronomy—"Non trades servum Domino suo, qui ad te confugerit," a good authority against the surrender of foreign subjects, though not applicable to the surrender of fugitive criminals. The last case which I shall bring to the notice of the court, is the Case of Fisher, 1 Am. Jur. 297, which occurred in Canada, in 1827. In this case C. J. Reid, of king's bench, in an able opinion reviewing those last cited, adopts the reasoning of Chancellor Kent, and properly places out of view the opinions, so much relied upon by Judge Tilghman, of Mr. Jefferson, and other statesmen, (who had upon various occasions been called upon to act on applications for the surrender of foreign subjects,) as political in their character, and not furnishing proper precedents for judicial decision. I confess I have not been able to discover any sound reason against the doctrine, upon which this application is based. It asserts no right to subjects within a foreign state; it invades no foreign jurisdiction; it disallows no foreign sovereignty; it proceeds upon the becoming confidence that all enlightened nations, on terms of peace, will contribute to the promotion of a great com-

mon purpose, interesting to all, and obligatory upon all, to bring flagitious offenders to merited punishment. It is fortified too, by considerations of the soundest policy. It is, indeed, our boast, that under our free institutions, an asylum is afforded to the oppressed of all nations, who fly to our protection. But shall it be extended to the common felon who, having broken the most sacred laws of his own country, has debarred himself from all claim to protection in ours? Will you receive among your peaceful countrymen, the assassin, whose hands are stained with recently shed blood? A regard for their safety forbids it; for, be assured, if you do, as soon as he shall feel himself secure under the too benign influence of your laws, at the first moment when it may be done with impunity, like the serpent in the bosom of the honest, but too credulous husbandman, he will aim the deadly blow at the bosoms of your own citizens!

To the argument against the doctrine of surrender, as forming part of the law of nations, drawn from the existence of treaties to the same effect, between particular states, it may be remarked, that there is not, perhaps, any principle of international law, however well understood, which may not, at some period, have been made, between friendly powers, the ground of treaty stipulation. The extent and operation of the law of nations, however well described by Grotius or Puffendorf, are always liable to be more closely defined, to be contracted or enlarged by particular agreement, to suit the varying necessities or convenience of different nations: And these treaty provisions are, usually, but declaratory of the general law. To argue the non-existence of the general law from the existence of treaties, would be to make one nation dependent on the treaties of another, and to interfere with the convenience of all, by taking away those principles of natural law, which are mainly resorted to, and relied upon, in their intercourse, by those nations, between which, no particular treaties exist. Is the law of nations, upon any point, to be proscribed between Portugal and the United States, because a treaty stipulation defining and modifying the same, as between themselves, exists between the United States and England? Certainly not! If the court is satisfied that the propriety of the demand contemplated by the government of Portugal is established by the authorities which have been adduced, and that it should be followed up by the surrender of the fugitive by the proper authorities of this government, the next question which presents itself is, who are the proper authorities? What is the character of the duty that is to be performed? Is it judicial or executive? Chief Justice Tilghman (10 Serg. & R. 134) says: "The demand of the foreign court, is addressed to none but the executive, and no other power than the executive, has a right to comply with that demand." But I am relieved from the necessity of going into argument, or multiplying authorities upon this point, as it has been demonstrated in the celebrated case of Jonathan Robins [U. S. v. Robins, Case No. 16,175], that the duty is executive and not judicial. The want of treaty stipulation, which existed in that case, being supplied here by the doctrine which has been presented, the argument upon the second question in Robins's Case, is equally applicable to the case at bar. Far be it from me to attempt to add a single syllable to that, the most able argument of the distinguished individual who so recently presided in this court. May I be permitted, in passing, to express the sincere veneration with which I regard his great talents and wisdom, (as far as my humble capacity is able to appreciate them,) and the unsurpassed purity of his character and life!

The only remaining question to be considered, is, will not this court so far conform its action to the doctrine, as to detain the criminal in custody, until the intended demand, and surrender can be made? If the positions which I have attempted to establish, be admitted, this would seem to follow of course. Heath, J., uses this language: "By the comity of nations, the country in which the criminal has been found, has aided the police of the country, against which the crime was committed, in bringing the criminal to punishment." Chief Justive Tilghman agrees, "that this matter of delivery up, is an affair of state, in which the judges and inferior magistrates cannot act, but as auxiliary to the executive power." And in Re Washburn, it is distinctly held, "that it is the duty of the civil magistrate to commit the fugitive from justice, to the end, that a reasonable time may be afforded for the government here, to deliver him up, or for the foreign government to make application to the proper authorities here for his surrender; but if no such application is made in a reasonable time, the prisoner will be entitled to his discharge." Indeed, it would be utterly nugatory, to admit the doctrine, and having referred the duty to the executive, to stop short, and deny or question the only means, by which it can be carried into effect. In this case, too, the prisoner is found in the custody of the officers of this court, and subject to its authority. Will the court, under the circumstances, suffer his discharge? I submit the question.

BARBOUR, District Judge. Jose Ferreira dos Santos, a Portuguese subject, having been committed for trial before this court, under a charge of piracy, and the grand jury having found the indictment against him not a true bill, he would be entitled to a discharge from custody, as it regards that accusation. But an application is now made, at the instance of the chargé des affaires of Portugal, that he may be detained,

until the government of Portugal shall have time to make a demand on that of the United States, that he may be surrendered to the former, as a fugitive from justice, to be tried there, under a charge of murder; which it is alleged that he has committed in that country. And the question is, whether it is proper, or competent, for this court to detain him in prison, for the purpose before stated? The solution of this question depends upon that of two others: 1. Has a nation, whose citizen or subject commits a crime within its own jurisdiction, and is afterwards found within that of another, a right, by the law of nations, upon its demand, to have him delivered up by that other, for the purpose of being tried where the crime was committed? 2. If such right exist, have the judicial officers of the United States, supposing the evidence to be sufficient, any authority to act in relation to it, as auxiliary to the executive department?

As to the first point, as far as I am informed, the subject has not been before any of the federal courts of the Union. The case of Jonathan Robins is not an exception to this remark. He was, indeed, at the request of the then president of the United States, Mr. Adams the elder, delivered up by the district judge of South Carolina, to the British consul, on a charge of murder, committed by him, (Robins,) on board of a British vessel on the high seas. But, that case depended upon the twenty-seventh article of the treaty with Great Britain, made in the year 1794, by which it was agreed, that fugitives charged with murder, or forgery, committed within the jurisdiction of either, and seeking an asylum within any of the countries of the other, should be reciprocally delivered up, in the manner and upon the terms therein stated. The question then, in that case, as it relates to this point was, whether the casus foederis of this article had occurred; whereas, in this case, there is no treaty stipulation, and the question must, therefore, depend upon the right of the government of Portugal to make the demand, and the consequent obligation of our government to surrender the person charged, independently of any treaty or compact between them.

There have, however, been two decisions upon the subject, made by two distinguished jurists of our country: the one, by Judge Kent, of New York; the other, by Chief Justice Tilghman, of Pennsylvania; the first, asserting the right (see the case of In re Washburn, 4 Johns. Ch. 106); the other adopting a different line of reasoning, and arriving in many respects, at different conclusions (see the case of Short v. Deacon, 10 Serg. & R. 126). It becomes necessary, then, to examine the question upon the principles laid down by the writers on public law, with reference to the application made of them in the two cases just cited, to the authoritative declarations of our own government, and generally, to all the bearings and relations of the subject. Grotius asserts the right to demand, and the consequent obligation to surrender, all persons charged with crimes, who have fled to another country, whether they are citizens or subjects of that country, or foreigners, although, in practice, it is not insisted on, except in crimes against the state, or of a very heinous nature. As to lesser crimes, he says, they are connived at, unless otherwise agreed on, by treaty. In this doctrine, he is followed by Burlamaqui, Heineccius, and Wynne. Vattel asserts the right and obligation, in case of great crime; but speaks only as to the subjects of the country, on which the demand is made. And his reasoning applies to them only; because it is put upon the principle of the duty of the sovereign to prevent his subjects from doing mischief to other states, and the consequent duty to punish or surrender. Puffendorf, on the contrary, holds the doctrine, that the obligation to deliver up a criminal, is rather in virtue of some treaty, than in consequence of a common and indispensable obligation. Martens, after stating that a sovereign may punish foreigners who fly to his dominions, after having committed a crime in the dominions of another, as well as those who commit it in his, adds: "But in neither, is he perfectly obliged to send them for punishment to their own country, not even supposing them to have been condemned before their escape." He says, also, that according to modern custom, a criminal is frequently sent back to the place where the crime is committed, on the request of a power who offers to do the like service, and that we often see instances of this. Ward seems strongly to countenance the idea of Puffendorf.

I have thus given an abbreviated statement of these writers on public law; more detailed views of whose reasoning may be seen by reference to the works themselves, or to quotations from them, in the two cases before cited from New York and Pennsylvania. Thus much was necessary as a basis for my future reasoning. Upon the mere authority of foreign publicists, then, it would appear to be doubtful whether there was, independently of treaty, any obligation, on the part of our government, to surrender to another, a fugitive from justice. To decide the question, let us descend from these principles of abstract writers, and see what has been the practice of Europe in ancient and modern times. Lord Coke, in his 3 Inst. 180 (I quote now from 10 Serg. & R.), after expressing a decided opinion against delivering up fugitives, gives us three instances of a refusal to deliver up; the first, a qualified one; the two others, absolute. Henry VII. of England, demanded of Ferdinand of Spain, the earl of Suffolk, attainted of high treason by parliament. Ferdinand refused to deliver him, until Henry promised not to put him to death. Henry VIII. of England, demanded of the king of France, Car-

dinal Pool, being his subject, and attainted of treason; the demand was not complied with. Queen Elizabeth, demanded of Henry IV. of France, Morgan and others of her subjects, who had committed treason against her. He replied, that all kingdoms were free to fugitives, and it was the duty of kings to defend, every one, the liberties of his own kingdom; and, that Elizabeth had, not long before, received Montgomery, the prince of Condé, and other Frenchmen. Chief Justice Tilghman adds the case of Perkin Warbeck, who had fled to Scotland, and who was refused to be delivered, although demanded by Henry VII. Chancellor Kent, in the Case of Washburn, cites some cases in England, as settling the principle, and acting on the practice of surrendering fugitives. As to Lundy's Case, 2 Vent. 314, that of Rex v. Kimberley, 2 Strange, 848, there cited, and East India Co. v. Campbell, 1 Ves. Sr. 247, Chief Justice Tilghman, in my opinion, gives a satisfactory answer: It is—that the territories where the crime was committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign. The king of England could have no privilege against the king of Ireland, being one and the same person. He states, indeed, the case of Rex v. Hutchinson, 3 Keb. 785, who was committed on a charge of a crime committed in Portugal, and refused to be bailed, and who it was said by counsel, (in another case,) was sent to Portugal; and he refers to another, mentioned by Heath, J.; the crew of a Dutch ship mastered the vessel, and brought her into Deal: and it was a question whether they should be seized and sent to Holland. And it was held, that they might, and the same (he said) had been the law of all civilized nations. There is no subsequent case cited, and none is known to exist, where the British government has surrendered a fugitive. On the contrary, Mr. Jefferson, in his letter to President Washington, of November 7th, 1791, after speaking on the subject of conventions for the delivery of fugitives, says: "England has no such convention with any nation, and their laws have given no power to their executive, to surrender fugitives of any description; they are, accordingly, constantly refused; and hence, England has been the asylum of the Paolis, the La Mottes, the Calonnes, in short, of the most atrocious offenders, as well as of the most innocent victims, who have been able to get there." In corroboration of this, I will state, that but the other day, that is, on the 7th of November last, it was stated in the Intelligencer, that application had been made to the secretary of the home department, (England), for a warrant to arrest Bowen; but it was refused, on the ground that no treaty stipulation required such a course, and without it, it was wholly inadmissible. The case is not stated with particularity. Enough, however, appears, to show that it was not one of the atrocious class, mentioned by Grotius; that, however, is not stated as the reason, but the want of a treaty stipulation. I am not prepared to say, how far the secretary acted upon the principle stated in some of the books, that governments were in the practice of conniving at the lesser offences, or that the demand was not made by our government.

There is, indeed, a case in Canada, in 1829, where a criminal from Vermont was delivered to the authorities of that state, upon a charge of larceny committed there, upon a warrant issued by the governor of the province; he was arrested, and on habeas corpus, before the chief justice, it was held lawful: in his opinion, he grounds himself generally upon the authorities and cases before stated, and his decision, therefore, must stand or fall with them. It is worthy of remark, however, that this was a case of simple larceny, and not one of great atrocity, as described by Grotius, and moreover, that the arrest was grounded upon a charge, on oath, of the felony, and not upon a demand by our government; so that it would seem, that the opinion of the government at home, differed from that in the province of Canada. The opinion of European nations on this subject, is manifested by the numerous treaties made by them, containing provision for the mutual surrender of criminals. In 1 Kent, Comm. p. 37, we are told, that treaties of this kind were made between England and Scotland in 1174, and England and France in 1308, and France and Savoy in 1378. As these were in the comparatively barbarous ages of Europe, let us come down to a period, when civilization had reached a high point. In the letter of Mr. Jefferson, before referred to, dated in 1791, he says: "The delivery of fugitives from one country to another, as practiced by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place. I know (says he) that such conventions exist, between France and Spain, France and Sardinia, France and Germany, France and the United Netherlands; between the several sovereigns, constituting the Germanic body, and I believe very generally, between co-terminous states, on the continent of Europe." Why, let me ask, were all these treaties in ancient and modern times? I answer, either because the opinion of Puffendorf was considered right, that without a treaty stipulation, there was no obligation to surrender, or at least, the question was so unsettled, the respective rights and obligations of nations so indeterminate, and the refusal on the part of nations to surrender so frequent, that without treaty, there was no obligation at all, or none of any sort of practical value; for, what is this imperfect obligation of which the writers speak? It is the right of one to ask, which involves the right of the other to refuse, and as applied to this particular subject, that refusal had become so common, as

to be almost the habitual practice, until treaties were formed concerning it. And is not the doctrine of the necessity of treaty stipulation supported, too, by the weightiest reasons? In the first place, in this way alone, can reciprocity be ensured; in this way alone, can it certainly be ascertained to what crimes the doctrine of surrender is to be applied. Some would apply it to all crimes, some to those against the state, or of deep atrocity. Which are of that character? The New York assembly consider simple larceny, or any crime, punishable in their state prison, as proper to surrender for, and have enacted accordingly. The treaty of 1794, between the United States and Great Britain, confines it to murder and forgery. Moreover, as to the expense attending the case, in the treaty just cited, it is provided, that the power making the demand shall pay it. Finally, provision can be made as to the length of time for which a party is to be detained, as is provided in the act of congress in relation to fugitives from justice, from the several states.

Let us now examine the views of our own government, on this point. Mr. Jefferson, in the letter already referred to, in which he is writing to the president on the subject of a request from the government of South Carolina, that a demand should be made upon the governor of Florida, for the delivery of some fugitives, says: "The laws of the United States, like those of England, receive every fugitive, (that is, as he had just before expressed it, the most atrocious offenders, as well as the most innocent victims,) and no authority has been given to our executives to deliver them up." He states further, that the French government had been anxious to make a convention with us, authorizing them to demand their subjects coming here; that in the consular convention, Dr. Franklin agreed to an article, giving to their consuls a right to take and send back captains of vessels, mariners, and passengers. Congress refused to ratify it, until the word "passengers" was stricken out. He goes on to say, in fact, however desirable it be, that the perpetrators of crimes, acknowledged to be such by all mankind, should be delivered up to punishment; yet, it is extremely difficult to draw the line between those, and acts rendered criminal by tyrannical laws only; hence, the first step always is, a convention defining the cases where a surrender shall take place. "If, then, the United States, (he continues), could not deliver up to Governor Quesnada, a fugitive from the laws of his country, we cannot claim, as a right, the delivery of fugitives from us; and it is worthy of consideration, whether the demand proposed to be made in Governor Pinckney's letter, should it be complied with by the other party, might not commit us disagreeably, perhaps dishonourably, in event; for I do not think, that we can take for granted, that the legislature of the United States will establish a convention for the mutual delivery of fugitives; and without a reasonable certainty that they will, I think we ought not to give Governor Quesnada any grounds to expect that, in a similar case, we would redeliver fugitives from his government."

On the 12th September, 1793, Mr. Jefferson thus writes to Genet, the French minister, in answer to a demand that he had made for the delivery of fugitives: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale, is received by them as an innocent man; and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye, is sensibly felt here, as in other countries; but, until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be, to become their accomplices. The former, therefore, is viewed as the lesser evil." He goes on to say, that unless they come within the consular convention, no person in this country is authorized to deliver them; but on the contrary, they are under the protection of the laws, &c. In the course of the next year, (1794), the British treaty was made; the twenty-seventh article of which, already referred to, provided for this subject. Thus, as well by the authoritative declarations, as by the acts of our government, the principle has been announced to the world, that the United States acknowledge no obligation to surrender fugitives, except by virtue of some treaty stipulation. Besides the reasons common to us, with other nations which recommend the justice and utility of this doctrine, we have strong ones arising from the spirit of our institutions, and the provisions of the federal constitution. If, for example, we were to take Grotius as our rule, the offence which he emphatically considers as most requiring a surrender, is treason; or, as he expresses it, offences against the state. Now, let us see what would be the practical effect of this rule? Suppose, that during the late war with Great Britain, a British born subject, who had previously emigrated to the United States, had been found fighting in our ranks, as a soldier, in Canada, and upon his return home, had been demanded by the British government: on their principle of perpetual allegiance, he was still a subject, and had committed treason; upon the principle of Grotius, we must have surrendered him, because he had committed, according to their laws, a crime against the state.

Let us put another case. Suppose that, in the struggle now going on in Texas, an American citizen (of whom we have many) should be found fighting against the authority of Santa Anna, and upon his return home should be demanded. Here, too, according to the rule of Grotius, we must de-

liver him, because he had committed a crime of state, against the present government de facto; and it is a settled principle with us, that we are always to take the present existing government de facto, as the one for the time being to be respected as the government. Can any one for a moment suppose, that in either of the cases here put, our government would surrender? Surely not. In the case in Canada, the chief justice says, that cases of this sort cannot be drawn into precedent, because the authority of the state to which the accused has fled, may well be extended to protect, rather than deliver him up to his accusers, &c.; but is it not apparent, that this is a violation of Grotius's rule? For here is a crime of state committed against the government de facto; one which, if successful, is honoured by the name of revolution; if otherwise, is degraded by the epithet of rebellion, and all engaged in it are called traitors. An attention to some of the provisions of our constitution, will, I think, fortify this doctrine. The second clause of the second section of the fourth article provides, that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. The subject of fugitives from justice was thus in the minds of the convention, and they provided for a delivery of fugitives from the states of the Union. It may, perhaps, be fairly said, that as the constitution was made for the states, and the people of the states, it had no relation in its nature to foreigners: be it so; but the principle assumed, requires us to deliver up citizens, as well as aliens. In this aspect as to citizens, it was properly within the scope of a constitutional provision; and, according to my view, provision is made in the constitution, which, although it does not mention it by name, embraces the whole subject, both as to citizens and all others within our jurisdiction, and puts it within the control of a department of the government. It is the clause creating the treaty-making power, and the reasoning stands thus: the constitution having given to the president and senate the right to make treaties, without limitation in words, there is no other limitation but their discretion, except that the treaty shall not contravene the constitution, or invade the rights of other departments. The various provisions, securing to every person charged with crime, a trial by jury, the right to be confronted by his witnesses, the privilege of not being obliged to be a witness against himself, also, in my opinion, have an important bearing upon this subject. It may be said, that it was intended to apply to crimes against the United States; but, I think, the spirit of them should make the treaty-making power extremely cautious, even as to treaty stipulations, for surrendering our people to a government, where these privileges do not exist; but where there is no treaty, they should, in my opinion, be decisive against a surrender, in the exercise of discretion, even if the law of nations created an imperfect obligation, without a treaty stipulation. I am of opinion, then, that the government of the United States are not under any obligation to deliver the prisoner, in the absence of any treaty stipulation.

The second question is, whether the judicial officers of the United States have any authority to act in relation to it? Perhaps the conclusion at which I have arrived on the first point, might render a discussion of the other unnecessary; but as it was argued, and has been considered, and as I may have fallen into error on the first point, I will very briefly notice it. As a general proposition, the judicial power of a government is created for the purpose of executing its own laws. If in deciding upon a foreign contract, the courts of another country construe it according to the law of the place where made, and intended to be executed; as, for example, to give the interest there allowed, this is not the execution of a foreign law; but of the law of the court, which as to this case, adjudges that as the intention of the parties. As to criminal laws, I believe it is settled every where, that one country will not execute the penal laws of another; not even its revenue laws. So far is this carried in this country, that the courts of one state will not execute the penal laws, either of a sister state, or of the federal government. The crime charged against the prisoner, is one against the laws of Portugal, not against the United States. Over the crime itself, then, the judicial officers of the United States clearly have no jurisdiction. If they have no jurisdiction over the crime, whence can they derive the authority to arrest the party charged with that crime, and detain him, with a view to a trial therefor, in another and foreign jurisdiction? I do not here enter into the second question discussed in Jonathan Robins' Case, whether the duty to be performed there, was a judicial one. That was the case of a treaty. The constitution extends the jurisdiction of its judiciary, to all cases arising under treaties, &c. That, therefore, is a totally distinct question from this, where there is no treaty, and where a judicial officer is asked to arrest, or, what is the same thing, to detain a person charged with the commission of a crime, not against the government, whose judicial power it is his duty to execute, nor for a trial, in any of the courts of that government, but for one to be had before the tribunals of a foreign country, against whose laws the alleged crime has been committed.

Let us look, for a moment, at the legislation of congress, upon the subject of arrest in criminal cases. We are authorized to arrest

for any crime or offence against the United States, for what purpose? The act of congress informs us, that it is for trial before such court of the United States, as by that act has cognizance of the offence. Now, the crime with which this prisoner is charged, is not against the United States, and the arrest or detainer is avowedly asked, not for the purpose of a trial before any court of the United States. The case of piracy is embraced by the provision of this law; for that is a crime against all nations, and amongst others, against the United States; but, moreover, the constitution authorizes congress to define and punish piracy. Congress has defined and provided for its punishment. We are, then, executing a law, made in pursuance of the constitution, when we take jurisdiction of that offence. So strict has been the doctrine, as to the judicial officers of one government executing the criminal laws of another, that, although the act of congress authorizes state magistrates to arrest, for crimes against the United States, yet the general court of Virginia sustained the legality of their warrants, only upon the ground, that it was competent to have authorized private persons to act, and that magistrates are designated as a class of persons by their name of office.

In conclusion I will say, that the counsel who made this application, has presented it in the strongest light, which the principles of public law or the authorities enabled him to do; yet, after the best reflection which I have been able to bestow upon the subject, in the short time which I have had to consider it, I am of opinion, that, without a treaty stipulation, this government is not under any obligation to surrender a fugitive from justice, to another government, for trial; and that, as a judicial officer of the United States, I have no authority whatsoever, either to arrest or detain, with a view to such surrender. It follows, as a consequence, that the prisoner is entitled to his discharge; and he is discharged accordingly.

Case No. 4,017.

In re DOTY.

[16 N. B. R. 202;[1] 1 N. W. Rep. (O. S.) 165; 10 Chi. Leg. News, 1; 25 Pittsb. Leg. J. 24.]

District Court, D. Minnesota. Aug. 22, 1877.

BANKRUPTCY—PROVABLE DEBTS.

No debt can be proved on which an action could not be maintained against the bankrupt in the state where the petition is filed, in case bankruptcy proceedings were not instituted.

I, Henry C. Butler, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Messrs. Start & Gove, who appeared for the assignee of the bankrupt [A. J. Doty], and opposed the allowance of the claim hereinafter described, and Messrs. Jones & Gove, who appeared for Tennis S. Slingerland, and one of the creditors of said bankrupt. The said Tennis S. Slingerland, on the 15th of March, 1877, made and filed his proof of debt for $734.24, and such proof of debt and claim against the estate of said bankrupt is predicated upon two promissory notes made by said bankrupt to said Slingerland; one of which was made and delivered on the 3d day of July, 1868, for the sum of $179, with interest at 12 per cent. per annum, payable in one year from said date; the other was made on the 5th day of August, 1869, for the sum of $194.71, with interest at the rate of 12 per cent. per annum, and was payable in one year from that date. The note first above described became due and payable on the 6th day of July, 1869, and the other on the 8th of August, 1870. No payments have been made on said notes, or either of them. At the time when the said notes were given, both the said Tennis S. Slingerland and the said bankrupt were, ever since have been, and now are residents of the state of Minnesota. The said claim, demand, and cause of action of the said Tennis S. Slingerland against the estate of said bankrupt did not accrue within six years next before the filing of the petition in bankruptcy by the said bankrupt; neither did any part of said claim, demand and cause of action accrue within six years next before the filing of said petition. Upon the said proceedings, and upon the foregoing facts as stated and agreed to by the counsel for the opposing parties, the following question of law arose as agreed to by said counsel: Can a claim which is barred by the statutes of limitation of the state of Minnesota, be proved so as to entitle the holder to share in the estate of a bankrupt when both the creditor and the bankrupt reside in said state, and have resided therein ever since the debt was contracted, and the debt was contracted therein? And the said parties requested that the same should be certified to the judge for his opinion thereon. Dated at Rochester, August 20th, 1877. Henry C. Butler, Register in Bankruptcy.

NELSON, District Judge. I answer the question certified in the negative, and agree to the conclusion reached by the learned judge of the Massachusetts district. In re Kingsley [Case No. 7,819]. The rule that no debt may be proved in bankruptcy on which an action could not be maintained against the bankrupt in the state where the petition is filed, in case bankruptcy proceedings were not instituted, commends itself to my judgment. The statute of Minnesota provides that an action could "only be commenced" to enforce the debt referred to in the question

[1] [Reprinted from 16 N. B. R. 202, by permission.]

certified within six years. The construction by the supreme court of the state of this statute is, that the bar is complete and the statute need not be pleaded. The fact that it appears upon the face of a complaint that the cause of action is barred by statute, is good ground for demurrer, and for reversal of a judgment upon a writ of error. 11 Minn. 320 [Gil. 224].

Case No. 4,018.

DOUBLEDAY et al. v. BRACHEO.

[2 Fish. Pat. Cas. 560.][1]

Circuit Court, S. D. New York. Aug., 1865

INFRINGEMENT OF PATENTS—BONNET STRETCHERS.

Where a patentee claimed "pressing the whole of a bonnet frame, or similar article, at one operation by dies, substantially as specified," and also "forming the side, crown, and flaring face piece of a bonnet frame, in one piece, or at one operation, as specified," and the defendant used a former which was old, but instead of an upper die, used a stretcher, drawing the material tightly over the former—*Held*: That the patent was not infringed.

[Cited in Waterbury Brass Co. v. Miller, Case No. 17,254.]

This was a bill in equity, filed to restrain the defendant from infringing letters patent [No. 15,570] for "improvement in machines for pressing bonnets and bonnet frames," granted to William Osborn August 19, 1856, reissued February 17, 1857; again reissued to Mary J. Osborn, executrix, March 27, 1860 [No. 933], and assigned to complainants.

The claims of the several patents were as follows:

Original patent, dated August 19, 1856: "I do not claim any of the separate parts set forth. Neither do I claim pressing or forming a separate flaring face piece, nor a separate crown piece for bonnets or for bonnet frames. I claim forming the flaring face piece and side crown of a bonnet or a bonnet frame, in one piece, and at one operation, substantially in the manner set forth, and irrespective of the particular form of the bonnet or frame.

Reissued patent, dated February 17, 1857: "I claim pressing the whole of a bonnet or bonnet frame, including the flaring face piece, side crown and tip, at one operation, by dies, substantially as specified, whether said bonnet or frame be formed of one or of several pieces, and irrespective of the particular shape of the bonnet or frame. I also claim forming the side crown and flaring face piece of a bonnet frame, in one piece, or at one operation, as specified."

Reissued patent, dated March 27, 1860: "I claim, etc., first, pressing the whole of a bonnet frame, or similar article, at one operation, by dies, substantially as specified, whether formed of one or of several pieces, and irrespective of the particular size or shape. I also claim forming the side crown, and flaring face piece of a bonnet frame, in one piece, or at one operation, as specified."

George Gifford, for complainants.
W. P. Angel, for defendant.

NELSON, Circuit Justice. The bill, in this case, is filed to enjoin the defendant from the infringement of a patent to William Osborn for a new and useful improvement for pressing all kinds of bonnets, and similar articles, and pressing and forming buckram frames for bonnets. A full description of the means of pressing and forming the bonnet and like articles is given in the specification. The means consist of two dies, an upper and lower of the form or shape required. The lower is of marble or other material that will not rust. The upper is of cast-iron. An arrangement is made for heating, by which the upper die is heated so as to press the articles. The bonnet or bonnet frame is put upon the lower die, and the upper one is lowered on to it by a crank, and is pressed by one impression, or, in other words, is pressed all over at the same time. The patentee then claims: First. "Pressing the whole of a bonnet frame, or similar article, at one operation by dies, substantially as specified, whether framed of one or of several pieces, and irrespective of the particular size or shape. I also claim forming the side crown, and flaring face piece of a bonnet frame, in one piece, or at one operation as specified."

Whether we regard the patent as a combination of the former and upper die in the manner described, or as a process producing the useful result, is not at all material in this case, as the means used by the defendant are substantially different, in either respect. The only instrument similar to the plaintiffs' arrangement used is the former, which is not claimed, and could not be as it is old. No upper die is used, but, in place of it simply a stretcher, which draws tightly the material over the former to produce the requisite shape, excluding the idea of pressure so important in the arrangement of the plaintiffs' improvement. Several advantages are obtained in this mode of forming bonnets and similar articles—an important one, in avoiding the pressure upon the outer surface, which pressure has a tendency to deface, and destroy its beauty, as in the case of velvets and similar fabrics.

The patentee disclaims the separate parts of his arrangement, and the pressing of the crown piece of bonnets, separately by means of dies, but he insists that he was the first to discover the application of dies to the pressing of the whole surface of the bonnet frame, at one operation, whereby the whole article is pressed to its proper shape. And, that by the dies acting upon the whole surface, it became possible to press the entire

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

bonnet at one operation. The whole scope of the language of the specification, as well as the claim, shows that the means used, and relied on by the patentee, for forming the shape of the bonnet, is pressure upon the whole surface by means of the face of the two dies.

Without pursuing the case further, we are satisfied that the plaintiffs have failed to make out any infringement, and that for this reason a decree must be entered for the defendant.

[NOTE. For other cases involving this patent, see Doubleday v. Sherman, Cases Nos. 4,019-4,021.]

Case No. 4,019.

DOUBLEDAY v. SHERMAN et al.

[6 Blatchf. 513.] [1]

Circuit Court, S. D. New York. July 13, 1869.

JUDGMENT — OPENING DECREE IN PATENT CASE — LACHES.

Where a defendant, in a suit in equity for the infringement of a patent, is advised of a decree against him therein, for a perpetual injunction, made on final hearing, and pays in full an execution issued for the taxed costs awarded to the plaintiff by the decree, and neglects, for eleven months after making such payment, to move to open the decree to let in a defence, it is too late for him to do so.

This was a motion to dissolve the perpetual injunction issued in this case, and open the decree made therein on final hearing, to let in the defendants to defend. The suit was a suit in equity [by William E. Doubleday against Frederick Sherman and Herman M. Boas] for the infringement of letters patent.

Daniel S. Riddle, for plaintiff.
Charles B. Stoughton, for defendants.

BLATCHFORD, District Judge. 1. The defendants were advised of the decree as early as May, 1868, and yet took no steps to move to open it until April, 1869. They have, therefore, been guilty of such laches as not to be entitled to the favor they ask, as no excuse is shown for the delay.

2. By paying in full, in May, 1868, the execution issued for the taxed costs awarded to the plaintiff by the decree, without, before making such payment, taking measures to open the decree, the defendants have so affirmed the regularity and validity of the decree, as to make it impossible now for them to move to set the decree aside, or to open it to let in a defence.

[NOTE. Defendant Boas was subsequently prosecuted for a contempt in violating the injunction. See Case No. 4,020. For other cases involving this patent, see note to Doubleday v. Bracheo, Case No. 4,018.]

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

Case No. 4,020.

DOUBLEDAY et al. v. SHERMAN et al. (two cases).

[8 Blatchf. 45; 4 Fish. Pat. Cas. 253.] [1]

Circuit Court, S. D. New York. Oct. 18, 1870.

INJUNCTIONS—PENALTY FOR VIOLATION — FEES IN CONTEMPT PROCEEDINGS.

1. Solicitors' and counsel's fees and disbursements, incurred by the plaintiff, through the resistance of the defendant to an application for an attachment against the defendant for a contempt of court in violating an injunction, and in the course of proceedings before a master on a reference to take testimony as to such violation, allowed, as part of the fine imposed on the defendant as a punishment for such contempt, the violation of the injunction being established, and shown to be wilful, although the master reported that the extent of the violation was not shown by the proofs before him.

[Cited in Searls v. Worden, 13 Fed. 717.]

2. The punishment limited to a fine of the amount of such fees and disbursements and the taxed costs, and commitment until payment.

[Cited in Fischer v. Hayes, 6 Fed. 75; Hendryx v. Fitzpatrick, 19 Fed. 812; Kirk v. Milwaukee Dust Collector Manuf'g Co., 26 Fed. 508.]

3. A defendant who desires to mitigate the pecuniary fine to be imposed for a contempt of court, should present his inability to respond in a manner free from all question.

[This was an attachment for a contempt in violating the injunctions heretofore granted in two cases. See Doubleday v. Sherman [Cases Nos. 4,021 and 4,022]. The question related to the extent of punishment to be awarded.] [2]

Daniel S. Riddle, for plaintiffs.
Edwin W. Stoughton, for defendant Boas.

BLATCHFORD, District Judge. The question in these cases is as to the extent of punishment to be awarded against the defendant Boas, for his contempt of court in violating the injunctions issued by the court. It is not contended that he ought not to pay the taxed costs, which are $979.41; but, opposition is made to the item of $2,723.70, for solicitors' and counsel's fees and disbursements, as ascertained and adjusted by the clerk under the order of the court. The incurring of such fees and disbursements was made necessary by the resistance which the defendant Boas made to the application for the attachment, and in the course of the proceedings before the master on the reference to take testimony as to the violation of the injunctions. The fact of the violation is established, and that it was wilful, although the master reports that the extent of the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 45, and the statement is from 4 Fish. Pat. Cas. 253.]

[2] [From 4 Fish. Pat. Cas. 253.]

violation was not shown by the proofs offered before him. The fact that the extent of the violation is not shown, that is, the extent to which the plaintiffs were injured by the violation, is not a good reason for withholding the allowance of counsel fees and disbursements, which were made necessary to establish the violation itself, although it is a good reason for not imposing on the defendant a further pecuniary fine by way of indemnity to the plaintiffs. The only doubt I have had is as to whether a fine or imprisonment ought not to be imposed, beyond the costs, counsel fees and disbursements, because of the wilful character of the violation of the injunctions, and to vindicate the process of the court, aside from such indemnity as is afforded to the plaintiffs. But, upon the whole, as the extent of the violation is not shown, so that the court could have some guide furnished thereby as to the proper amount of punishment to be meted out for the wilful character of the violation, I think that the proper decree will be, that the defendant Boas pay, as a fine for the contempt, the $3,703.11, and that that sum be awarded to the plaintiffs, towards indemnifying them, the defendant to stand committed until the sum is paid by him.

On the hearing of the case, an affidavit was presented, sworn to by the defendant Boas, on the 20th of September, 1870, in which he set forth that the only property which he then owned was $350 worth of furniture, and $26.93 in money, and a watch worth $100, and that he was not then able to pay as much as $3,700 if ordered to do so, and did not then believe he could raise as much as that amount. This affidavit was furnished with a view to affect the decision of the court as to the imposition on the defendant Boas of a pecuniary fine. But, it appears, that the defendant Boas, on the 15th of September, 1870, five days before the making of the affidavit referred to, executed two bonds, one in each of these suits, to the marshal of this district, to secure his release from custody on his arrest on the attachments issued herein, and swore to an affidavit on each of such bonds, setting forth that he was then worth the sum of $5,000 over and above all his debts and liabilities and property exempt by law from execution. If the affidavits of the 15th and the affidavit of the 20th were all of them true, it follows, that the affiant must have disposed, during the five days, of the property which he had on the 15th. Whether that was the fact, or whether the affidavits of the 15th were untrue and that of the 20th true, or whether the affidavits of the 15th were true and that of the 20th untrue, is not properly a subject of inquiry demanding a solution. The defendant, if desirous of mitigating the pecuniary fine to be imposed, should have presented his inability to respond in a manner leaving it free from all question.

Case No. 4,021.

DOUBLEDAY et al. v. SHERMAN et al.

[3 Fish. Pat. Cas. 369.][1]

Circuit Court, S. D. New York. Jan., 1868.

PATENTS—INTERPRETATION—BONNET STRETCHERS.

The invention covered by letters patent issued to William Osborn, August 19, 1856, and reissued May 29, 1866, consists in shaping, by means of heated dies, the whole of a bonnet frame or other similar article, to be worn upon the head, at one operation instead of requiring several successive operations, as had been previously practiced. Prior to the invention of Osborn the forming of the flaring face-piece and side-crown of a bonnet, jointly, at one operation, had never been effected.

This was a bill in equity filed [by William E. Doubleday and John Stewart] to restrain the defendants [Frederick Sherman and Henry Boas] from infringing letters patent for an "improvement in machines for pressing bonnets, bonnet frames," etc., granted to William Osborn, August 19, 1856, reissued to him February 17, 1857, and again March 27, 1860, assigned to complainants and reissued to them May 29, 1866.

This patent was before the court in the case of Doubleday v. Bracheo [Case No. 4,018]. The claims of the original patent and the reissues of 1857 and 1860 will be found in the report of that case. The claims of the reissue of May, 1866, are as follows:

"I. Manufacturing, stretching, or shaping, by means of heated dies, the whole of the bonnet frame (or similar article, to be worn upon the head), at one operation, substantially as specified.

"II. Manufacturing by stretching, forming, or shaping, by heated dies, the flaring face-piece and side-crown of a bonnet, or similar article, to be worn upon the head, jointly, at one operation, substantially as specified."

D. S. Riddle, for complainants.

J. W. R. Bromly, for defendants.

BLATCHFORD, District Judge. This is a final hearing on a bill in equity, founded on letters patent reissued to the plaintiffs, May 29, 1866, for an "improvement in machines for pressing bonnets, bonnet frames," etc. The original letters patent were issued to William Osborn, August 19, 1856. They were reissued to Osborn, February 17, 1857, and again reissued to Osborn, March 27, 1860. The invention consists in shaping, by means of heated dies, the whole of a bonnet frame, or other similar article, to be worn upon the head, at one operation, instead of requiring several successive operations, as had been previously practised. In the apparatus of Osborn, there is a given die of marble, or other material, and an upper die of cast iron, or other material, the latter so arranged with a rim or flange around the lower edge as to hold heaters all around it to make it hot enough to press the articles. The bonnet

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frame is put on to the lower die and the upper die is brought against the frame by mechanism, and the frame is thus pressed all over at the same time by one impression. Prior to the invention of Osborn, the forming of the flaring face-piece and side-crown of a bonnet, jointly, at one operation, had never been effected. The patent disclaims forming or shaping the tip and side-crown, or crown, separately, and forming the brim or flaring face-piece separately. The claims are:

"I. Manufacturing, stretching, or shaping, by means of heated dies, the whole of the bonnet frame, or similar article to be worn upon the head, at one operation, substantially as specified.

"II. Manufacturing by stretching, forming, or shaping by heated dies, the flaring face-piece and side-crown of a bonnet or similar article, to be worn upon the head, jointly, at one operation, substantially as specified."

The proof is clear that the defendants have infringed the patent by using, for the making of bonnet frames at one operation out of a single piece of material, the same means that are covered by the claims of the patent. There has been no attempt on the part of the defendants to prove any of the defenses of want of novelty set up in the answer.

A decree must be entered for a perpetual injunction against the defendants from further infringing the patent, and for a reference to a master to ascertain and report the profits which have accrued to them from their infringement.

[NOTE. A motion to dissolve the injunction and open the decree in this case was afterwards denied (Case No. 4,019); and subsequently defendant Boas was prosecuted for contempt in violating the injunction (Case No. 4,020). For other cases involving the patent, see note to Doubleday v. Bracheo, Case No. 4,018.]

Case No. 4,022.

DOUBLEDAY v. SHERMAN et al.

[3 Fish. Pat. Cas. 371.][1]

Circuit Court, S. D. New York. Jan., 1868.

PATENTS—INTERPRETATION—CURLING HAT BRIMS.

The invention described in letters patent granted to Frank S. Sibley, October 9, 1860, consists in employing a rope, strap, or band, to turn up or curl the brims of hats, in combination with upper and lower heated dies, which press a flat sheet of material between them to form a hat.

This was a bill in equity filed to restrain defendants [Frederick Sherman and Henry Boas] from infringing letters patent [No. 30,-379] "for an improvement in curling hat brims," granted to Frank S. Sibley and the complainant [William Doubleday], as assignees of Sibley, October 9, 1860, and subsequently assigned to plaintiff.

The claim of the patent was as follows: "The rope. strap, or band c, in combination with the dies a and b, for drawing upon and curling the material forming the hat brim as specified."

D. S. Riddle, for complainant.

J. W. R. Bromley, for defendants.

BLATCHFORD, District Judge. This is a final hearing on pleadings and proofs on a bill filed on letters patent granted to Frank S. Sibley and the plaintiff, as assignees of Sibley, the inventor, October 9, 1860, for an "improved method of curling hat brims." The patent has been assigned to the plaintiff. The invention consists in employing a rope, strap, or band, to turn up or curl the brims of hats, in combination with upper and lower heated dies, which press a flat sheet of material between them to form a hat. The lower die has a curved rim near the edge, and as the pressing progresses the rope is laid around the edge of the lower die and drawn in, which gathers the cloth around the edges of the upper die and holds it there while being dried or pressed, and causes the brim of the hat to assume a curled form corresponding to the shape of the die. The infringement is clearly proved, and nothing is shown in defense.

There must be a decree for a perpetual injunction restraining the defendants from further infringement, and a reference to a master to ascertain and report the profits which have accrued to them from the infringement.

[NOTE. Defendant Boas was subsequently prosecuted for a contempt in violating this injunction. See Case No. 4,020.]

Case No. 4,023.

DOUGHERTY v. AMERICAN STEAMSHIP CO.

[1 Wkly. Notes Cas. 86.]

District Court, E. D. Pennsylvania. Nov. 13, 1874.

SEAMAN'S WAGES — PENALTY FOR ILLEGAL DISCHARGE—UNAUTHORIZED ABSENCE FROM VESSEL.

[A seaman discharged in a foreign port for going ashore in violation of orders *held* entitled to his wages to the date of discharge, with $10 damages, and half costs.]

This was a libel for wages and damages. Libellant shipped as a fireman on respondents' steamship "Indiana" at the wages of $50 per month, and signed articles on March 21st, 1874, for a voyage from Philadelphia to Liverpool and return. The vessel was advertised to sail from Liverpool on April 15th, at 11 a. m. Orders were given on the morning of April 14th, that none of the crew should go ashore. Libellant left the vessel at about 4 o'clock in the afternoon of the 14th, and did not return until 9:30 in the evening, when he found that the vessel had gone out into the stream. The next morning he went out to the vessel in the tender that carried the steerage passengers, but was

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

prevented by the officers from coming on board. Libellant was left for a week in Liverpool, during which time he failed to get employment, and, in the end, had to work his passage home. Respondents showed that a man had been shipped in libellant's place under the direction of the surveyors of the board of trade before he came along side of the tender; and that before the trial of the case they had tendered to libellant's counsel the amount of wages due libellant for the time of his actual service.

Mr. Driver and Mr. Coulston, for libellant. E. Wilson, Jr., and H. G. Ward, for respondents.

THE COURT (CADWALADER, District Judge) decreed for libellant for his wages until the 15th of April, 1874, amounting to $41.66, and the additional sum of $10 for his damages, and half costs.

Case No. 4,024.

DOUGHERTY et ux. v. BENTLEY.

[1 Cranch, C. C. 219.][1]

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

PLEADING—AMENDMENT.

A declaration in slander may be amended by adding a new charge, on payment of costs and continuance.

Motion by the plaintiff to amend the declaration in slander, by changing the words from a charge of being a whore, to that of theft. Granted, on payment of all antecedent costs, and also continued at costs of plaintiff, he having permitted his witness to depart, upon the expectation that the trial of Peacock would have taken up the whole day.

DOUGHERTY (CORCORAN v.). See Case No. 3,227.

Case No. 4,025.

DOUGHERTY v. EDMISTON.

[Brunner, Col. Cas. 194;[2] Cooke, 134.]

Circuit Court, D. Tennessee. 1812.

GRANT TO DECEASED PERSON—RIGHTS OF HEIRS UNDER.

By the common law nothing passes to the heirs under a grant to a deceased person; but under the statute an entry and grant in the name of a deceased person, founded on a removed warrant, will pass the land to the heirs, if the entry be in the lifetime of the grantee.

The plaintiffs' ancestor, George Dougherty, made an entry in 1784, upon which a warrant issued. A law was passed by the state of North Carolina providing that if any person should lose the land which they should enter, the person so losing it might remove his warrant to any other vacant and unappropriated land. The land first entered by Dougherty in 1784, from some cause or other, could not be held; in consequence of which, upon the aforesaid warrant, another entry was made, after the land office opened, in 1807, upon which, in the same year, a grant issued. This last entry, and the grant thereon, was made in the name of George Dougherty, who was proved to have died many years before. The legislature of North Carolina made a provision that if any person made an entry and then died, his heirs should inherit the land, although the grant might issue in the name of decedent. The question was, whether any interest could pass to the heirs of George Dougherty under these circumstances?

Haywood and Whiteside, for plaintiffs. Dickinson and Cooke, for defendant.

TODD, Circuit Justice. It cannot be questioned but that at common law a grant to a deceased person passed no estate to his heirs; or in other words, nothing passed by the grant. But the legislature of North Carolina, supposing this principle to operate inconveniently, in the year 1779 passed a remedial law on the subject, and declared that where a man made an entry, and then died before a grant issued, the estate should pass to his heirs, although the grant issued in his name after his death. The warrant which authorized the entry in 1807 was founded upon a previous entry made in 1784, during the lifetime of George Dougherty. If that entry had been directly carried into a grant in the name of Dougherty, although after his death, yet the estate would have passed to his heirs under the act of 1779, before alluded to. This would have been the fact if the first entry had been special; but it was not special, and therefore it was re-entered in 1807. Shall not this last entry relate back to the first? Not in such a manner, I admit, as to make the claim, in point of priority, good from 1784, but for the purpose of bringing it within the act of 1779. The act of 1779 should be construed liberally. It is a remedial law, and should be construed so as to advance the remedy and suppress the mischief. I am of opinion that this case comes fairly within the spirit and meaning of it. I do not consider the entry made in 1807 entirely as an original entry, but rather as a re-entry. And there is the less difficulty in giving this construction, as no inconvenience results from it, and because it works no injury to any person.

McNAIRY, District Judge, accorded with the opinion of Judge TODD as to the act of 1779 being remedial. He, however, very much doubted whether the grant could pass any estate to the heirs of Dougherty. He said he would acquiesce in the opinion, though he was far from being satisfied.

DOUGHERTY (HARPER v.). See Case No. 6,087.)

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

[2] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 4,026.

DOUGHTY v. DAY et al.

[5 Fish. Pat. Cas. 224;[1] 9 Blatchf. 262.]

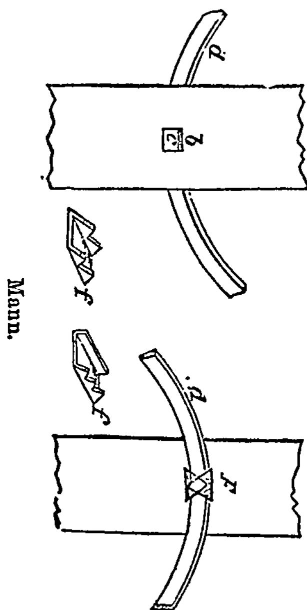
Circuit Court, S. D. New York. Dec. 26, 1871.

PATENTS—VALIDITY—CONSTRUCTION—INFRINGEMENT—SKIRT HOOPS.

1. The letters patent for an "improvement in skirt hoops," granted to L. A. Osborn and I. J Vincent, as assignees of Robert J. Mann, the inventor, June 22, 1858, are valid, so far as the second claim is concerned, namely, "Securing the hoop, d, to the perpendicular straps, by means of small clamps, constructed as herein described."

2. Although the specification states that the nature of the improvement which is the subject-matter of the second claim, consists in the peculiar manner of fastening the hoops "to the perpendicular straps, by means of a small clamp, the said clamp being made with teeth, or otherwise," yet, taking the drawings and the description together, no one would, from them, use clamps without teeth to fasten the hoops to the perpendicular straps.

3. Increasing the number of teeth, and adding another feature to the clamp, while it still has teeth which, after passing through the strap, are clinched, and embrace the hoop, is nevertheless, an infringement of the said second claim.



Final hearing on pleadings and proofs.

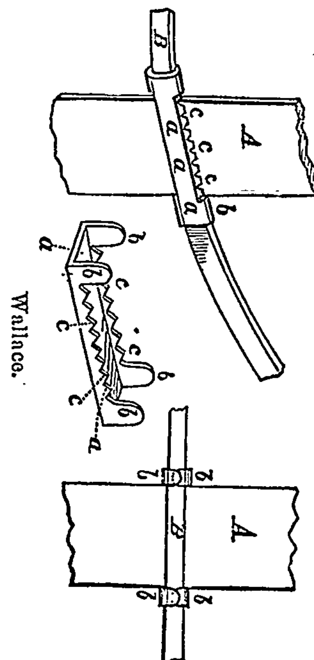
Suit in equity [by Samuel H. Doughty against Theodore D. Day and Gilbert Horton] brought upon letters patent [No. 20,681] for an "improvement in skirt hoops," granted June 22, 1858, to L. A. Osborn and I. J. Vincent, as assignees of the inventor, Robert J. Mann. The facts are sufficiently stated in the opinion, and will be readily understood by reference to the accompanying engravings, one of which represents the Mann fastening, and the other that of Wallace. It will be seen that the teeth in the Mann clasp pass through the tape, and are clinched on the other side. Those of the Wallace clasp do not pass through the tape. The clasp used by defendants contained more teeth than that of Mann, resembling in this respect the Wallace clasp, but the teeth were larger, and penetrated the tape, and were clinched on the reverse side.

Stephen D. Law, for complainant.

John B. Staples, for defendants.

BLATCHFORD, District Judge. This suit is brought on letters patent granted to L. A. Osborn and I. J. Vincent, as assignees of Robert J. Mann, the inventor, June 22, 1858, for an "improvement in skirt hoops." The plaintiff is the owner of the patent, by assignment, for all of the United States, except the state of Rhode Island.

Only the second claim of the patent is involved in this suit, there being three claims in all. In regard to the subject matter of the second claim, the specification says that



the nature of the improvement consists in the peculiar manner of fastening the hoops of ladies' skirts "to the perpendicular straps, by means of a small clamp, the said clamp being made with teeth, or otherwise." It also says that, having made fast the perpendicular straps to the waistband, by means of eyelets or sewing, and the hoops being stretched over a frame similar in shape to the skirt, when the straps and waistband are put on the frame, the straps being brought down over the hoops, it is only necessary to press the teeth of the clamp through the strap,

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

and clinch the same on the inside, to secure the hoop firmly in its place; and that, by this manner of fastening the hoop, half the time is saved that would be occupied in sewing the hoops to the straps. There are nine figures or drawings. Figure 2 is a perspective view of a section of the hoop, d, and perpendicular supporting strap, b, and also showing the manner in which the said hoop is made fast to the strap, b. That manner, as the specification states, and as is shown in figure 3 of the drawings, is by means of a clamp with teeth, which pass through the strap, and are clinched on the inside, so as to embrace the hoop. The second claim is in these words: "Securing the hoop, d, to the perpendicular straps, by means of small clamps, constructed as herein described."

Criticism is made by the defendants on the fact that the specification, in stating the nature of the improvement, says that the clamp, which fastens the hoops to the perpendicular straps, is to be made with teeth, or otherwise; and that it is impossible to so fasten them unless the clamps have teeth. But the drawings and description must all be taken together; and, so viewing them, it is apparent that no person would or could, from them, use clamps without teeth to fasten the hoops to the perpendicular straps. A clamp is shown without teeth, also one with teeth on one side of it, and another with teeth on both sides of it. The clamp with teeth on one side of it is manifestly for use on the lower hoop of the skirt, where the perpendicular straps terminate, and where teeth are necessary only on the upper side of that hoop, there being no strap below that hoop for any teeth to penetrate. The clamp with teeth on both sides of it is for use at the junction of the other hoops with the straps, where the straps extend both above and below the hoop. The clamp without teeth is stated to be for the purpose of fastening extra hoops to the two upper circular hoops on the back of the skirt, so as to form a corrugated bustle. There is no difficulty in construing the second claim in accordance with what appears to have been the actual invention, that is, securing the hoops to the perpendicular straps, by means of small clamps, constructed with teeth on both sides or on one side, accordingly as the clamps are used on the lower hoop or on the other hoops, as shown in the description and drawings, the teeth passing through the strap and being clinched on the inside, so as to embrace the hoop.

The drawings of the plaintiff's patent show clamps which, where the teeth are on each side, have two teeth on each side; and, where the teeth are on only one side, have three teeth on that side. The defendants, in their clamps, have increased the number of teeth to four on each side, where there are teeth on each side, and to four where there are teeth on only one side. The teeth, after passing through the strap, are clinched, and embrace the hoop. The clamps also have projections above and below, at each end of their length, which are clinched around the hoop, without passing, as teeth, through the strap. There can be no doubt that this arrangement is an infringement of the second claim of the plaintiff's patent. Increasing the number of teeth which pass through the strap and are clinched, does not avoid infringement; nor does the addition of the clinched projections avoid it. The use of teeth on the clamp, passing through the strap, and clinched around the hoop, is the essence of the invention, the teeth, when they pass through the strap, being at right angles to the plate of the clamp, and being, when clinched to their final position, in a plane parallel with such plate. The words, "constructed as herein described," in the claim, mean arranged as described when in the final position, securing the hoop to the strap.

In this view, the letters patent to David Holmes, granted June 15, 1858, and the letters patent to Thomas Wallace, Jr., granted June 15, 1858, contain nothing in conflict with the invention of Mann, even if the invention shown in those patents antedated Mann's invention. The patent to Holmes shows a clamp which has no teeth penetrating the strap and then clinched around the hoop. The patent to Wallace shows a clamp which, before it is applied, is, in substance, the same in shape and construction as the defendants' clamp, except as to the size and number of the teeth. But the specification of the patent describes the projections, above and below, at each end of the length of the clamp, as bent over the hoop outside of the tape or strap, on each side of its width, and closed tightly on the hoop, and securing the clamp firmly to the hoop, while the teeth, penetrating the tape or strap, secure the latter. The teeth, although they penetrate the tape, are not clinched around the hoop. The specification states that the space in the length of the clamp occupied by the teeth is equal to the width of the tape forming the strap, and that the teeth are sharp, and that the part of the plate of the clamp from which the teeth project is of a width a little greater than the width of the hoop, and that the projections at the ends and the teeth are turned up at right angles to the face of the clamp, so as to leave the space of a width to receive the hoop. The drawings show three views of the teeth, two of which show twelve teeth on each side, and the other shows sixteen teeth on each side. There is nothing in the description or drawings to indicate that the teeth were to be clinched after penetrating the tape. The smallness of the teeth, their number, their proportion in size to the size of the clinched projections, and the general arrangement of the clamp when in final position, show that no clinching of the teeth, after penetration, was intended; and it is very doubtful whether such and so many teeth as are shown could be clinch-

ed with any advantage or effect, much less with any compared with the expense and trouble, or whether the clinching of penetrating teeth on a clamp, to secure the hoop to the tape, would be suggested to any one by seeing the teeth on the clamp of Wallace. Independently of this, Wallace is not shown to antedate Mann. The specification accompanying Wallace's application for his patent is sworn to May 13, 1858. The date of Mann's invention is carried back by the evidence to as early at least as May 1, 1858.

The oral testimony as to prior inventions satisfactorily shows nothing which anticipates Mann's invention. What Joseph Thomas did was a mere experiment, which came to nothing. This is also true of all that David Holmes did, except what is contained in his patent, before considered.

As to the various clasps or clamps testified to by Antoine Schlumpf and Theodore Schmidt, as having been made, used, and sold by Schmidt, neither the first form nor the second form, if they were prior to Mann's invention, were the same thing as that invention. The first form had no teeth. The second form was like the clamp in Wallace's patent. Schlumpf says it was useless, because it cut the tapes; and, undoubtedly, Wallace's clamp was, for the same reason, useless. As to the third form testified to by Schlumpf and Schmidt, called the "spangle," with one tooth on each side, the evidence does not establish with that degree of certainty which is necessary, that it anticipated Mann. Independently of the material contradictions between Schlumpf and Schmidt, the evidence on the part of the defendants is preponderating to show that no skirts with spangles were made by Schmidt prior to Mann's invention. This view is strongly corroborated by the fact that the most extensive hoop-skirt dealers knew of no skirts with clamps having teeth which penetrated the tapes and were clinched around the hoops on the other side, until they saw the clamp of Mann, and that they took licenses to manufacture under the plaintiff's patent in 1859. The case is entirely free from doubt, and there must be a decree for the plaintiff, as to the second claim of the patent, for a perpetual injunction and an account of profits, with costs.

Case No. 4,027.

DOUGHTY et al. v. HILDT.

[1 McLean, 334.][1]

Circuit Court, D. Ohio. Dec. Term, 1838.

NEGOTIABLE INSTRUMENTS—COSTS OF PROTEST.

The payees [holders] of a promissory note are entitled to re-recover the costs of protest against an indorser; the note or bill being of that character which makes a protest evidence of a demand of payment.

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

Mr. Goddard, for plaintiffs.

OPINION OF THE COURT. This action was brought against the indorser of a promissory note, which is admitted by the default of the defendant; and the judgment being entered by default, a motion is made to instruct the clerk, to include the cost of the protest in the taxation of costs. In the case of Union Bank v. Hyde, 6 Wheat. [19 U. S.] 572, the supreme court say, "The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration, that independently of statutory provisions, if any exist any where, or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser into an absolute assumption." And again, a protest on an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it. In Nicholls v. Webb, 8 Wheat. [21 U. S.] 326, the court say, "It does not appear that, by the laws of Tennessee, a demand of payment on promissory notes is required to be made by a notary public on a protest made for nonpayment, or notice given by a notary to the indorsers. And by the general law it is perfectly clear, that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign bills of exchange; and in strictness of law it is not an official act. But, we all know, that in point of fact notaries are very commonly employed in this business; and in some of the states it is a general usage so to protest all dishonored notes, which are lodged in or have been discounted by the bank. The practice has, doubtless, grown up from a sense of its convenience and the just confidence placed in men who, from their habits and character are likely to perform these important duties with punctuality and accuracy. We may, therefore, safely take it to be true in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice and was an employment in which he was usually engaged."

The notary in the above case being deceased, his book in which he made entries of demands made on promissory notes, and parties given, was received as evidence. The usage to protest promissory notes discounted by banks or made payable at banks, is as universal, as to protest foreign bills of exchange. And it has been adopted for the same reason, the convenience of all who are engaged in commercial transactions. And it is believed to be the practice, in most states, to receive the protest, on a promissory note, the same as on a bill of exchange as evidence of demand. In some of the states this is regulated by statute. The note in question was given payable in a different state from

that in which the maker and indorser reside, so that strictly it is not an inland bill, but, by being indorsed and being made payable in a different state, assumes the character of a foreign bill, and the protest, is every where received as evidence of demand. Buckner v. Finley, 2 Pet. [27 U. S.] 586; Phil. Ev. (Ed. 1839) 382. The holder of the note was bound to use due diligence to charge the defendant who was indorser, and a protest is a step which constitutes a part of that diligence. Proof of notice is rendered unnecessary in this case, as by the default, the defendant has admitted both demand and notice. In the case of Morgan v. Reintzel, 7 Cranch [11 U. S.] 273, the court decide that the maker of a promissory note, payable to order, is, under the custom of merchants, liable to refund the amount of the note and costs of protest, to an indorser who has been obliged to take up the note after protest. The indorser is responsible for the costs of protest, and may recover the amount from the maker of the note. And the holders of the note, in this case, are not less entitled to recover the costs of protest, because the defendant, by his default has admitted the right of action, than if he had contested the right. We think, it is proper, therefore, to include the costs of protest as a part of the judgment in this case.

DOUGHTY (UNITED STATES v.). See Cases Nos. 14,986 and 14,987.

Case No. 4,028.

DOUGHTY v. WEST et al.

[6 Blatchf. 429; 3 Fish. Pat. Cas. 580.] [1]

Circuit Court, S. D. New York. June 4, 1869.

PATENTS—INFRINGEMENT SUITS — DEFENSES—REISSUES.

1. James Draper was the original and first inventor of the improvement claimed in letters patent, reissued to Samuel H. Doughty, August 1st, 1865, for an "improvement in skeleton skirts," the original patent having been granted to Doughty and Draper, on the invention of Draper, October 4th, 1859, and reissued to Doughty, and Draper, and James Brown, and William King, December 27th, 1859. Draper made such invention before he applied for the original patent.

2. In a suit for the infringement of a patent, the defence cannot be taken, that the patent was issued unintentionally through a blunder of a subordinate in the patent office.

3. It is an infringement of the said reissued patent of 1865, to make and sell skeleton skirts, with the threads of filling left out in one or both of the two portions of tape which form the loop.

4. Skeleton skirts made in accordance with letters patent granted to Charles H. DeForest, January 6th, 1863, for an "improvement in hooped skirts," are an infringement on the said reissued patent of 1865.

[5. Cited in Sarven v. Hall, Case No. 12,370, to the point that devices not described or specified may, if they are the invention of the patentee, be the subject of a patent, subject to all other rules governing the inventor's right; but it is not the office of a reissue to embrace them.]

[6. Cited in Fassett v. Ewart Manuf'g Co., 58 Fed. 364, to the point that the action of the patent office in allowing a separation of claims for the purpose of filing divisional applications is conclusive, and not reviewable in the courts.]

[This was a bill in equity, filed to restrain the defendants from infringing letters patent for "an improvement in skeleton skirts," granted to Samuel H. Doughty and James Draper, as assignees of James Draper, October 4, 1859, assigned to Doughty, Draper, James Brown and William King, and reissued to them December 27, 1859, assigned to plaintiff, and reissued to him August 1, 1865. A trial under the first reissue of this patent will be found to be reported Doughty v. West [Case No. 4,029].

[The claim of the last reissue was: "The new manufacture of skeleton skirts, substantially as described, consisting of a series of tapes woven in the direction of their length in alternate sections, as single and double tapes, with the hoops inserted in the loops formed by weaving the tapes as double tapes, and there secured to prevent the tapes from sliding laterally on the hoops."

[The defendant claimed under letters patent for "an improvement in hooped skirts," granted to Charles H. DeForest, January 6, 1863, the claim whereof was as follows: "The employment of the clasp C, or its equivalent, in combination with the hoops and pockets A of the hoop-supporting tapes, for preventing the displacement or derangement of the hoops in the pockets, substantially as hereinbefore described."] [2]

S. D. Law, C. M. Keller, and George Gifford, for complainant.

John B. Staples, for defendants.

BLATCHFORD, District Judge. The bill in this case is founded on reissued letters patent, granted to the plaintiff on the 1st of August, 1865, for 14 years from the 4th of October, 1859, for an "improvement in skeleton skirts." The patent was originally issued, October 4th, 1859, to the plaintiff and James Draper, as assignees of said Draper, as inventor. On the 27th of December, 1859, it was reissued to the plaintiff, and said Draper, and James Brown and William King, the then owners of it. Subsequently, and before the granting of the reissue of 1865, the entire interest in the patent, and in the reissue of 1859, was assigned to the plaintiff. He brought a suit in equity on the reissue of 1859, in this court, against two of the defendants who are defendants in this suit

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 429, and the statement is from 3 Fish. Pat. Cas. 580.]

[2] [From 3 Fish Pat. Cas. 580.]

That suit was brought to a final hearing before Mr. Justice Nelson and Judge Shipman. It appears, from the opinion of the court in that case, Doughty v. West [Case No. 4,029], delivered by Judge Shipman, and concurred in by Mr. Justice Nelson, that the plaintiff contended that the reissue of 1859 covered all skeleton skirts, with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops. The court held, however, that the claim of the reissue of 1859, as drawn, was limited to a skeleton skirt in which the hoops were fastened in the loops or pockets by some kind of material put on in a soft state, and adhering by sticking, and which subsequently became hard, such material being put into the pocket, or upon the hoop within the pocket, so as, when hardened, to keep the hoop rigidly in place. In other words, the court regarded the reissue of 1859 as covering only the mode of fastening the hoops in the loops in the perpendicular tapes by such adhesive material. The court then added: "If the invention is broad enough to include all skeleton skirts with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops, then his patent should be reissued to cover that invention; and there is no possible difficulty about doing it. If there is something in the state of the art which will show that he is not the inventor to that extent, then he can obtain no such reissue. If he is the inventor of a skeleton skirt of that character, with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops, which hoops are inserted either while in process of being woven, or after they are woven, and then fastened in any manner, there certainly can be no possible difficulty in describing, and it is the duty of the patentee to accurately describe it." Again, the court says: "If the patentee invented and was the first to make a skeleton skirt, woven singly between the hoops, and double at the place of insertion of the hoops, fastened at the pockets—and that is the simple description of the invention claimed—then he was entitled to it." Again: "It not very unfrequently happens, that patentees, by mistake, limit the invention described, and make it narrower than the invention made. If that is the case, and it can be seen, on the reissue of the patent, that the invention extends beyond the construction the court gives it, it can be made the subject of trial hereafter. If the patentee has made the invention thus broadly claimed, it will hereafter present a simple issue for trial, as the patent can be made to cover it without difficulty." This decision was rendered in June, 1865, and the present reissue was granted on the 1st of August, 1865.

The specification of this reissue limits the invention to an improvement in skeleton skirts, that is, as it defines them, skirts consisting of a series of tapes extending from the waist down, and a series of horizontal and parallel hoops secured to the side of the tapes, by stitching, by tying, or by rivet-clasps. The object of the invention is stated to be to remedy the defect which arose from the fact that the fastening by which the hoops were secured to the side of the tapes was liable to break, and permit the hoops to fall and drag on the ground, being a source of inconvenience and often of serious accidents. The remedy is effected, says the specification, "by making the skirt of a series of tapes woven along their length, alternately, as single and as double tapes, to form loops or openings, at the required distances apart, for the reception of the hoops, which are no longer dependent upon the means of fastening to the side of the tapes, and cannot fall, even if not fastened." It also says: "A skeleton skirt, when thus fabricated, needs no fastening of the hoops to the tapes to hold them up, and the only fastening required is to prevent the tapes from sliding laterally on the hoops, so that, if such fastening should give way, the hoops will still be held up by the tapes." The specification then states, that the inventor has found glue to be a suitable means for securing the hoops in the loops of the tapes, to prevent the tapes from sliding laterally on the hoops, as the weight of the hoops has no tendency to rupture the fastening, as in skeleton skirts known prior to his invention; and that the hoops may be inserted in the act of weaving the tapes, or the tapes may be woven with the loops, and the hoops be inserted afterwards. The specification then describes the manner in which the tapes can be woven as single tapes for the required distance between two hoops, and then be woven double for a little more than the width of a hoop, and then a hoop be inserted between the two series of tapes, and then the weaving of the tapes as single be resumed, and the hoop be thus inclosed in the loops so formed. It further states, that the loops may be formed by the weaving of the tapes in the same manner, and the hoops may be inserted afterward. The claim is as follows: "The new manufacture of skeleton skirt, substantially such as described, consisting of a series of tapes woven, in the direction of their length, in alternate sections, as single and double tapes, with the hoops inserted in the loops formed by weaving the tapes as double tapes, and there secured, to prevent the tapes from sliding laterally on the hoops."

The bill charges, as an infringement of the patent, the making and selling of skeleton skirts by the defendants. One of the principal defences set up to the bill is, that Draper was not the original and first inventor of what is covered by the last reissue, and much testimony has been introduced by the defendants for the purpose of

establishing the existence, before the time of the invention of Draper, of skeleton skirts similarly constructed. The main questions discussed on the hearing were, whether Draper was an original, and, if so, the first inventor of the improvement claimed in the last reissue, and whether he made such invention before the time when he applied for his original patent. On these points the plaintiff has clearly made out his case, to my entire satisfaction. Without discussing the evidence at length, it is sufficient to say, that it establishes that Draper made the invention of a skirt such as is claimed in the present reissue, as early as June, 1856; that neither the Morrow skirt nor the Hartley skirt anticipates the invention; that neither the Hough skirt, nor the skirt defendants' Exhibit No. 17, was a skeleton skirt, within the meaning of the patent; that the Clark skirt was not prior to the Draper skirt; that the France skirt was subsequent to Draper's; that the Cornet, the Schmidt, and the Schlumpf skirts were not prior to Draper's; and that no other alleged prior skirt, in regard to which evidence was adduced, is an answer to the patent. In fact, the evidence shows that all the skeleton skirts that have been constructed like the one described and claimed in the present reissue of the Draper patent, are traceable back to the skirts which Draper made in connection with Brown, and put into the market in pursuance of his invention. Such skirts, when Draper and Brown first made them, and put them into the market, were constructed precisely according to the description contained in the specification of the present reissue, and like the first skirt made by Draper in June, 1856, and such they have continued to be ever since.

The present reissue is not attacked or impeached for fraud. It must, therefore, stand as a valid reissue, properly granted. The point taken, that it was issued unintentionally, through a blunder of a subordinate in the patent office, is one which cannot be availed of in a suit brought on the patent. For any such alleged invalidity, the only remedy would be a direct proceeding by the United States to vacate the patent. The seal of the United States, and the signatures of the proper officers to the grant must be respected, in the absence of fraud, so long as the United States themselves do not question the grant. This is familiar law in regard to all grants by a sovereign.

The only defence set up on the point of infringement is, that, in some, at least, of the skirts made by the defendants, threads of filling have been left out in one or both of the two portions of tape which form the loop. But this is no defence. The tape is none the less a double tape, within the meaning of the specification, because the loop or pocket is formed wholly of warp threads; and the loop is none the less a loop formed by weaving the tape first as a single tape, and then as a double tape, and then as a single tape, because the portions which form the loop are composed wholly of warp threads. Any such arrangement is, at best, an improvement embodying the original invention of Draper, which cannot be used without violating his patent.

The defendants set up, in their answer, that all the skirts which they have made with double-woven tape, since the present reissue to the plaintiff was granted, have been made under a patent granted to one Charles H. DeForest, January 6th, 1863, for an "improvement in hooped skirts." The specification of that patent declares the invention of DeForest to be an "improved method of fastening the hoops to the tapes in hoop skirts." It also says: "My invention relates to that kind of hoop skirts in which the tapes, or vertical strips, are woven, or formed, with pockets or loops, through which the hoops pass, and which sustain or support the hoops, and my invention has for its object a simple, durable, and effective means of retaining or holding the hoops in the pockets, in their proper position, or, in other words, to prevent the tapes from sliding on the hoops, and, to this end, my invention consists in the employment, in combination with the hoops and pocket tapes, of a metallic retaining clasp, so arranged as to prevent the hoop from sliding through or in the pocket." The claim of the patent is to the employment of the clasp in combination with the hoops and pockets. There is nothing in this patent, properly construed, which can give a right to use, under it, the hoops and pockets, if they are covered by a valid prior patent. The plaintiff's patent is a valid prior patent for the hoops and pockets, as an element of DeForest's combination. If DeForest's patent is a valid patent for such combination, the plaintiff cannot use such combination, without obtaining a right to do so under the DeForest patent. Nor can DeForest, or those holding under him, use the invention of Draper, as an element in DeForest's combination, without obtaining a right to do so under the plaintiff's present reissue.

There must be a decree for the plaintiff for a perpetual injunction, and an account, with a reference to a master, and for the costs of the suit.

[NOTE. This case was afterwards heard on a motion to retax the costs. See Case No. 4,030. On the relation of the defendants it was sought to have the reissue here sued upon vacated on the ground that it was granted by inadvertence and mistake, but the bill was dismissed. See United States v. Doughty, Case No. 14,986.]

Case No. 4,029.

DOUGHTY v. WEST et al.

[2 Fish. Pat. Cas. 553.] [1]

District Court, S. D. New York. June, 1865.

PATENTS—VALIDITY OF REISSUE—PLEADING FRAUD—EQUITY JURISDICTION—ACTIONS AT LAW—INJUNCTION—PRACTICE—LIMITATION OF CLAIMS.

1. An allegation that a reissue was obtained under false representations should be made in distinct language, without equivocation; and, if relied upon at all, it should be the subject of very distinct proof.

2. An allegation, in relation to an action at law, ought not to be set up as any portion of the foundation of a proceeding in equity, unless there was a bona fide trial and complete judgment.

3. It is not necessary, however, in order to empower a court of the United States sitting in equity to pronounce judgment in favor of the patentee, that there should first be a trial at law.

4. The courts of the United States are authorized to take up a patent, and, upon final hearing, to pass upon it, without reference to the fact whether it has been before a jury or not.

5. In order to entitle the complainant to a preliminary injunction, there must be either: 1. Exclusive possession of some kind, by the patentee or his assignees; or, 2. There must have been a judgment at law, approved by the judge who tried the case; or, 3. There should have been a final hearing in equity, which is quite equivalent to a judgment at law, with the approval of the court.

6. Special notices in equity cases are irregular. The issue must be raised by the allegations in the bill and answer: and whenever either the bill or answer is defective, the defect must be cured by amendment, and can not be cured by special notices.

7. The reissued patent granted to James Draper, December 27, 1859, can not be extended any further than glue or cement, or some equivalent substances bearing a resemblance, both in their composition and character or manner of application, put on to make the hoops adhere to the pockets.

[8. Cited in Sarven v. Hall, Case No. 12,369, to the point that devices not described or specified may, if they are the invention of the patentee, be the subject of a patent, subject to all other rules governing the inventor's right; but it is not the office of a reissue to embrace them.]

This was a bill in equity, filed [by Samuel H. Doughty against Joseph I. West and James O. West] to restrain the defendants from infringing letters patent [No. 25,701] for "improvement in skeleton skirts" granted to James Draper and Samuel H. Doughty, assignees of James Draper, October 4, 1859, and reissued December 27, 1859 [No. 870].

The claim of the original patent was as follows: "The new manufacture of skeleton skirts described, in which the hoops B are secured by glue or equivalent cement, between separately woven parts of the tapes, in contradistinction to the stitched or clasped skirt when the parts are woven together as single tapes between the hoops, and separately as distinct tapes, at the points where the hoops are received."

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

The claim of the reissue was as follows: "I claim the new manufacture of skeleton skirts herein described, in which the hoops B are fastened between separately woven parts of the tapes, substantially as herein described, when the parts are woven together as single tapes between the hoops, and separately as distinct tapes at the points where the hoops are received."

The facts upon which the decision was based sufficiently appear in the opinion of the court.

Charles M. Keller, for complainant.
J. B. Staples, for defendants.

SHIPMAN, District Judge. In this case I will state very briefly the conclusion to which the court has come, after a full examination of the case by myself and Judge Nelson; and I may say that, from the first hearing of the case, so far as the patent was concerned, there has been, as there always is, in the mind of the court, a desire to sustain a patent securing an invention upon as broad a construction as is consistent with the rules which must determine the court in the construction of an instrument of this kind.

The case was originally heard under an objection to certain testimony that was taken after the filing of a notice of special matter, in the progress of this bill in equity; and it was more particularly, perhaps, with reference to the determination of that objection to the admissibility of the evidence, and the irregularity of the proceeding, that the reargument was ordered: although it was also ordered upon the whole case, including the construction of the patent. On the second hearing the objection to the introduction of the evidence under notice of special matter was waived. Of course, counsel have a right to waive their own objections; but whether, in the determination to be made, the court will regard such a waiver or not, it is not necessary to determine here; but we desire to say, so that there may be no misunderstanding, and that this proceeding may not be hereafter cited in support of such a course, that we regard the proceeding of filing notice of special matter as wholly irregular; that in all cases the issue raised in suits of this character must be raised by the allegations in the bill and answer, and whenever either the bill or answer is defective, the defect must be cured by amendment, and can not be cured by filing special notices. This is familiar practice, and one which must not be departed from, and reliance must not be placed by either the respondent or complainant upon the disposition of counsel to waive such irregularity. Such a course tends to produce confusion, to complicate the case, increases the labor of the court, and is a proceeding that can not be tolerated.

Now, with regard to the patent, as I have said before, the court has examined this matter very thoroughly, and with no lack of de-

sire to sustain the patent upon the construction which the complainant asks. But we find that to be impossible. We find that this patent, applying to it the most liberal rule of construction that we can, must be read and understood by the court to be a patent for a skeleton skirt of the character described, fastened in the loops or pockets by some kind of material put on in a soft state, and that subsequently becomes hard in the nature of glue or cement, or that class of substances which adhere by sticking; and which are put into the pocket, or on to the hoop within the pocket, and made to fix the hoop in rigidly, after hardening. And it is very clear that this patent must have been issued by the patent office with this intent, because no reliance is placed upon the loops in the perpendicular tapes, with the hoops fastened, except in this particular manner.

If the patentee, in this case, has made an invention of the character now claimed by him, nothing is more easy than to describe it in plain, simple, and unmistakable language; and there was not only no need, but it was highly improper, to put into this patent that part of the specification and claim, in connection with the drawings, which, by a fair interpretation, restricts the invention to a peculiar mode of fastening. We think the patent is very explicit on that. Now, if the invention is broad enough to include all skeleton skirts with the perpendicular tapes woven singly between the hoops, and woven double or with pockets for the reception of the hoops, then his patent should be reissued to cover that invention; and there is no possible difficulty about doing it. If there is something in the state of the art which will show that he is not the inventor to that extent, then he can obtain no such reissue. If he is the inventor of a skeleton skirt of that character, with the perpendicular tapes woven singly between the hoops, and woven double or with pockets for the reception of the hoops, which hoops are inserted either while in process of being woven, or after they are woven, and then fastened in any manner—there certainly can be no possible difficulty in describing, and it is the duty of the patentee to accurately describe it. It is true, one expert testifies that metal clasps are equivalent to glue or cement. We can not surrender our judgment to the opinion of the expert on that matter. If that is equivalent, then all modes of fastening must be equivalent; for stitching or riveting would be a mode of fastening just as analogous to glue and cement as metal clasps. Of course, it is not for us to speculate as to the reasons; but there must have been some reason which prevented the patentee from claiming his fastening, or making his claim so broad as that it could be construed to comprehend metal fastening of that rigid character.

Now, it is alleged by the respondents that the invention of the patentee did not embrace a hoop skirt manufactured in that manner, and fastened with clasps or rivets. We are not disposed to inquire into that matter, as we hold that the instrument is not broad enough to cover such an invention. We desire to keep our minds entirely free from any conclusion at all as to the extent of the invention; because, if the patentee invented and was the first to make a skeleton skirt, woven singly between the hoops, and double at the place of insertion of the hoops, fastened at the pockets—and that is the simple description of the invention claimed—then he was entitled to it; and we do not choose to speculate on any reasons which counsel for the respondents suggests that might cast a shadow on any title which the patentee may hereafter derive from the patent office. But, upon the construction of the patent as it stands (and, I may say, without reference to the singular language of the first patent), we can not extend it any further than glue or cement, or some equivalent substances bearing a resemblance, both in their composition and character, or manner of application, put on to make the hoops adhere to the pockets.

Now, that leaves the patent a patent for hoop skirts of that kind, fastened in that manner, by glue or cement, or some equivalent substances, without particularizing now what they may be, bearing an analogy to those two articles. It gives the patentee a right to the monopoly of that kind of manufacture. On the question of infringement of that, there is some evidence in the papers, although it is not very strong—at least, it is not beyond a reasonable doubt; still, on the whole, we think there is some evidence to sustain the allegation of infringement, and we grant an injunction against the defendants for the infringement of the patent, under the construction we have put upon it, with an order of reference to account. We have thus been careful not to either form or express any opinion upon the extent of the invention, because we are very well aware that it not very unfrequently happens that patentees, by mistake, limit the invention described, and make it narrower than the invention made. If that is the case, and it can be seen on the reissue of the patent that the invention extends beyond the construction the court gives it, it can be made the subject of trial hereafter. If the patentee has made the invention thus broadly claimed, it will hereafter present a simple issue for trial, as the patent can be made to cover it without difficulty. If not, then the patent properly describes his invention, and the judgment of the court is in entire accordance with the patent, as it now stands. I need hardly say that this matter has had a cautious and careful examination. We dislike to see any necessity for reissuing patents; for they are reissued now to such an extent as to perplex the courts and embarrass the public. I need hardly remark that

the allegation that the present reissue was obtained under false representations is not warranted by anything in the proof, and the allegation itself is hardly adequate: it is peculiar. An allegation of this nature should be made in distinct language, without equivocation; and, if relied upon at all, it should be the subject of very distinct proof. One thing I might as well state here, in relation to the action at law put into the complainant's bill. If I recollect right, there was no record filed in the case—no proof offered on that subject; and, so far as the answer sets up new matter, of course I take the answer as true. I exceedingly dislike to see an allegation in relation to an action at law made any portion of the foundation of a proceeding in equity, unless the action at law was tried thoroughly; unless it was not only bona fide, but the whole steps taken show, so far as the record can show, a bona fide trial and complete judgment. In this case, that does not appear, and the inference the court would be compelled to draw is, that there was something about the action at law which should deprive it of weight in this proceeding. It at least lacks those elements which alone can give it any strength as the foundation for an injunction. It is not necessary, however, as claimed by the counsel for the defendants, in order to empower a court of equity (at least a court of the United States, sitting in equity) to pronounce judgment in favor of the patentee, that there should first be a trial at law, and we were a little surprised to see that pressed by the counsel for the respondents. The courts of the United States are authorized to take up a patent, and, upon final hearing, to pass upon it, without reference to the fact whether it has been before a jury or not.

Now, in regard to preliminary injunctions in patent causes, there is a rule which I have endeavored to explain and enforce in the case of Mitchell v. Barclay [Case No. 9,659], in this court; that one of three things must always exist in order to entitle a complainant to a preliminary injunction, and they are these: either there must have been an exclusive possession of the monopoly, as against the public, for some period of time; we might say for some considerable period of time, but we do not choose to use any limiting in terms upon that subject. But for some time there must have been an acquiescence of the public in the exclusive monopoly of the patentee or his assignees. That exclusive possession acquiesced in by the public, as it must be, if exclusive, raises the presumption, it being an adverse claim to the public, that the patentee has a valid title to the invention which purports to be secured by the patent. The length of time necessary to make that exclusive possession available in a motion for a preliminary injunction must, of course, depend somewhat upon the nature of the invention, the extent to which it would be used, and the acquiescence of the public must, of course, depend upon what portion of the public would have any occasion to use it; because the "public" means that class of persons who would be likely to use the invention. I say, there must be, either, first, exclusive possession of some kind by the patentee or his assignees; or, second, there must have been a judgment at law, approved by the judge who tried the case; or, third, there should have been a final hearing in equity, which is quite equivalent to a judgment at law, with the approval of the court. These questions, however, relate to the application for a preliminary injunction. Where one or other of these facts does not appear, I have not known any instance of a preliminary injunction being granted. Where one of these facts does appear, and it is proved to the court—unless some question is raised by the respondent to prevent it—the injunction usually goes. But these remarks do not apply to a judgment on final hearing. On such a hearing, the court will pass upon the questions raised, whether of law or fact, whether there has been any trial before a jury or not. But where there has been a thorough trial at law, and a verdict for the patent, approved by the court, it is usual and proper to make it the subject of an allegation in the bill. Where there has been an incomplete or collusive trial at law it should never appear in the bill, for instead of strengthening the cause, it is calculated to cast suspicion upon it.

[NOTE. See Doughty v. West, Cases Nos. 4,028 and 4,030.]

Case No. 4,030.

DOUGHTY v. WEST, BRADLEY & CARY MANUF'G CO.

[8 Blatchf. 107; 4 Fish. Pat. Cas. 318.] [1]

Circuit Court, S. D. New York. Dec. 29, 1870.

COSTS IN EQUITY SUITS — DOCKET FEES—FEES OF MASTER.

1. On a reference to a master, in a suit in equity, under an interlocutory order, before final hearing, no docket fee of $20 is taxable to the party to whom costs are awarded, as a docket fee on a final hearing in equity, under the act of February 26, 1853 (10 Stat. 161).

[Cited in Wooster v. Handy, 23 Fed. 53, 54; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 686.]

2. In ordinary cases, of no peculiar or special difficulty, and involving no extraordinary labor, a master of this court should, under the 82d rule in equity, prescribed by the supreme court, be allowed for his services on a reference, the compensation allowed by the state law to a referee, $3 per day, or at the rate fixed by the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 107, and the statement is from 4 Fish. Pat. Cas. 318.]

rule of this court, of May 28th, 1859 (4 Blatchf. 515 [Append. Fed. Cas.]), for services rendered by commissioners under the 44th rule of the supreme court in admiralty, where, at that rate, the services would amount to more than $3 per day.

3. Cases of peculiar importance and difficulty ought to be made exceptions to such special rule.

4. In the present case, by reason of special circumstances, $10 per day was allowed to the master for hearings at which testimony was taken, argument heard, or other actual service rendered, and $5 per day for attending when the reference was adjourned without any service rendered.

[Applied in Untermeyer v. Freund, 50 Fed. 80.]

[This was a motion for a retaxation of costs. On a motion for a provisional injunction to restrain the defendants [the West, Bradley & Cary Manufacturing Company] from infringing letters patent for "improvement in skeleton skirts," granted to Samuel H. Doughty and James Draper, as assignees of James Draper, October 4, 1859, assigned to Doughty, Draper, James Brown, and William King, and reissued to them December 27, 1859, assigned to plaintiff and reissued to him August 1, 1865, an order was made directing that unless the defendants pay to the complainant the usual or regular license fee, established by the complainant for the use of such invention, to the extent that this defendant desired to use the same (the complainant tendering, at the time of such payment, a license to use such invention to that extent), a provisional injunction issued as prayed for in the bill of complaint, and by such order it was referred to a master to ascertain and report what, if any, was the regular license fee, so established by the complainant for such use, to the extent that the defendants should state before the master, they desired to use the same. Upon such reference, the parties appeared. Numerous sessions were held, at which proofs were taken, and several days were appointed for the taking of proofs and for hearing, at which the master attended, but at which nothing was done except to adjourn. On the coming in of the report, exceptions were filed, and an order was made referring the matter back for a further report. On such further reference, numerous sessions were had, and proofs were taken, and there were also times appointed for the purpose, at which the master attended, but the proceedings were adjourned. On the taxation of the costs of these references, the clerk has allowed to the complainant two docket fees, of twenty dollars each—one for each reference—and has taxed, as master's fees, twenty dollars per day for each day on which proofs were taken or argument heard, and the like twenty dollars for each day on which the proceedings were adjourned. The defendants objected to the taxation of the items above named, on the ground that no docket fee can be taxed for a hearing before a referee on such a reference, and that the fees allowed to the master are excessive.] [2]

Stephen D. Law, for complainant.
Frederick H. Betts, for defendants.

WOODRUFF, Circuit Judge. (1.) The act of February 26, 1853 (10 Stat. 161), declares, that the fees or compensation prescribed therein shall be taxed and allowed to attorneys, solicitors and proctors in the district and circuit courts, United States district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, and that no other compensation shall be taxed and allowed. The act then allows to attorneys, solicitors and proctors, among other fees, as follows: "In a trial, before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars." No other provision of the act can be claimed to warrant the charge of docket fees in the bill of costs taxed herein. It will be noticed, that, in the language quoted, there is no mention of any hearing before a master of this court in equity, for any purpose, and, I think, for the reason, that there is no practice, in equity, sending a case to a master for a final hearing. And if, within the fair intent of the statute, a matter referred to a master might be said to be heard before him as a "referee," using that term in its broadest sense, and not as meaning a person technically so called, in distinction from a recognized officer of the court, still, the hearing before him on such a reference is neither a trial, nor a final hearing, within the meaning of the act. "Trial" and "final hearing" have well-known definite meanings in the law, and they are used in this statute in that well-known sense. "Trial" is used to describe the process of determining the issues in an action at law; and "final hearing," the submission of the case, for a determination thereof, upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of. No such trial or final hearing was had before the master, in this case, whether he be regarded as master, or, in a general sense, as a referee. The proofs taken before him, and the report he was required to make, were for a provisional and interlocutory purpose, namely, to dispose of a motion for an injunction, pendente lite. This was neither a trial nor a final hearing. The two sums taxed as docket fees should, therefore, have been disallowed, and must be struck out.

(2.) It is a little remarkable, that while the statute often speaks of causes in equity, and prescribes the fees of solicitors, marshals and clerks, for services in suits in equity, the statute nowhere mentions fees of masters. But, in prescribing the fees of commissioners, it does allow (page 167) "for attending to a reference, in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance

[2] [From 4 Fish. Pat. Cas. 318.]

of an order of court, three dollars per day." The supreme court, by rule 88 of the rules in equity, have assumed to authorize the circuit courts, or perhaps to declare the general power of the circuit courts, in equity, to appoint standing masters in chancery in their respective districts; and have provided, that "the compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof." The clerk has no power, under this rule, to fix the compensation to be allowed; and his taxation was, therefore, inoperative. This appeal may, however, be regarded as an application to the court to fix the compensation to be taxed, and it was substantially so treated by the counsel who appeared and argued the question. It is not obvious that, in like cases, the fees allowed to a master for attending to a reference, in a litigated matter, should be greater than the fees to which a commissioner attending to such a reference is entitled by statute. The question, however, under the rule of the supreme court, is what, in the discretion of the court, ought to be allowed to the master, in this case. Obviously, this question can be best answered, by ascertaining, if possible, what is a proper compensation to be in general allowed—what, in ordinary cases, of no peculiar or special difficulty, and involving no extraordinary labor. The importance of some general rule for the government of ordinary cases, at least, is not only apparent, but it has been the ground of specific legislation as to nearly all the fees which are permitted to be taxed; and, although the rule of the supreme court has left these particular fees in the discretion of the court, it is, nevertheless, important, even here, that some general rule should govern the subject. The rule of this court in relation to references in admiralty, under the forty-fourth rule of the supreme court in admiralty, was adopted to fix the fees to be allowed to commissioners under that rule, and the consideration that some general rule or rate of fees was important, may be assumed to have largely influenced the court in the matter, lest abuses should arise out of an unsettled and indefinite appeal to discretion. Indeed, it would not be doing great violence to the action of this court last referred to, if I were to say, that, although this court could not, by rule, deprive a party of his right to appeal to the discretion of the court secured to him by the rule of the supreme court, still, this court can determine what is a proper compensation in ordinary cases, and did so, on the 28th of May, 1859, when the rule of this court was adopted. 4 Blatchf. 515 [Append. Fed. Cas.]. It, therefore, appears, that, by statute, the fees of commissioners, on a litigated reference, in a civil cause, are three dollars a day; and that their fees on a reference in admiralty, under the 44th of the rules of the supreme court, were fixed, in 1859, by rule of the circuit court, at the rates allowed by the court of chancery, and established in 1844, upon the general principle, that the services rendered by officers of this court should be compensated at the rates allowed for similar services in the courts of the state. In general, this will be found just and reasonable, though, since 1859, the changes in the relative value of money and the means of subsistence have been so great, that the specific rates then deemed reasonable may now be inadequate, in some cases. There are now no masters in chancery, under the state laws. The services formerly performed by them are now rendered by referees appointed for each case; and I think it quite reasonable that masters of this court should be allowed, as the general rule, the compensation allowed by the state law to such referees, three dollars per day, or at the rate fixed for services under the above named 44th rule, where, at that rate, the services would amount to more than three dollars per day. But cases of peculiar importance and difficulty sometimes come before a master or a referee, in which that compensation would be inadequate. The state law recognizes this, by providing that the parties may agree to allow the referee a greater compensation, in which case the rate agreed to may be taxed. Without affirming or adopting this latter practice as controlling the court in the exercise of the discretion given by rule 88 in equity, above referred to, I am of opinion that such special cases ought to be made exceptions to the general rule on the subject.

In the present case, the counsel for both parties agree, and it is shown by affidavit, that peculiar and unusual labor and difficulty was thrown upon the master, and that even the adjournments involved a great loss of time, which might have been and would have been devoted to other business actually pending before him. I, therefore—while, as the general rule, I approve the rates prescribed for referees under the state law, and do not design to make this special case a precedent for others—deem it just and reasonable to fix the compensation to be allowed to the master, for hearings at which testimony was taken, argument heard, or other actual service in the case rendered, at ten dollars per day, and for attending when the reference was adjourned without any service rendered, at five dollars per day. An order to this effect may be entered, and the costs will be adjusted according to the foregoing opinion, upon both the points submitted.

[NOTE. For another case involving this patent, see note to Doughty v. West, Case No. 4,029.]

DOUGLAS (CASE v.). See Case No. 2,491.

DOUGLAS (McALLISTER v.). See Case No. 8,657.

DOUGLAS (MAGIC RUFFLE CO. v.). See Case No. 8,948.

DOUGLAS (UNITED STATES v.). See Case No. 14,988.

DOUGLAS COUNTY (FIRST NAT. BANK v.). See Case No. 4,799.

DOUGLAS COUNTY (FIRST NAT. BANK OF OMAHA v.). See Case No. 4,809.

DOUGLAS COUNTY, BOARD OF COUNTY COM'RS OF (ADAMS v.). See Case No. 52.

Case No. 4,031.

The DOUGLASS.

[1 Brown, Adm. 105.][1]

District Court, E. D. Michigan. March, 1863.

COLLISION—LOOKOUT—SAILING VESSELS—EVIDENCE—ADMISSIONS.

1. In a collision between two sailing vessels, one close-hauled and the other with the wind free, the latter was *held* in fault for an insufficient lookout, and for failing to give way in time.

2. A lookout must be constantly at his post, and must not be interrupted in the performance of his duty.

3. But little credence can be given to the testimony of a sailor who contradicts statements deliberately made by him, in writing, immediately after the collision.

4. Great weight should be given to the admissions of the master of a colliding vessel, though not upon deck at the time of collision, who states to the injured party that his own vessel was in fault, and promises to pay the damages done by her.

Libel and cross libel for collision between the schooners Douglass and White Cloud, in the passage between Pointe au Pelée and Pointe au Pelée Island, in Lake Erie, on the morning of July 6th, 1861. The Douglass was bound from Oswego to Chicago, and at the time of the collision was sailing upon a W. N. W. course, having the wind free and nearly abeam. The White Cloud was at the same time bound down the lake, upon an E. S. E. course, close-hauled upon the starboard tack. The night was dark but clear, and lights could readily be discerned. It was averred on the part of the Douglass, that the White Cloud had no light and no proper lookout. This was denied on behalf of the White Cloud, and the fault charged upon the Douglass, that she had no proper lookout, and failed to give way as by law she should have done.

J. S. Newberry, for the White Cloud.

W. A. Moore, for the Douglass.

WILKINS, District Judge. From the closest attention to the proofs on trial, and the application of the rule of law governing the facts unquestionably established, I am clearly satisfied that there was no fault in the White Cloud. In her navigation she kept her course as was her duty. She was heading E. S. E. on the starboard tack, by the wind, which was south, close-hauled, with a bright light burning, sufficiently admonitory to all approaching vessels that were vigilant and kept a proper lookout; her speed was about six miles an hour; a competent crew was on duty. The last fact has been unsuccessfully contested, and had it been otherwise, the incompetency alleged would be of no weight, beyond a mere presumption, clearly rebutted by the preponderance of testimony, as to her keeping her course until the very moment of collision. But little reliance can be placed on the witness John Clancey, the lookout on the White Cloud, whose voluntary statement, reduced to writing a few days after the event, in the presence of his shipmates, fully agreeing with them in their account of the occurrence, does by no means, in this essential particular, correspond with his evidence as a witness on the stand. It is safer to trust to the narrative of a sailor, made when all the incidents were fresh in his memory, than condemn on testimony given a year subsequent, and after appliances brought to bear upon him, probably superinducing a contrary statement. Suspicion will attach under the circumstances, especially where he is brought to give evidence against his own vessel, impeaching the credit of his first story. No fault therefore can be attributed to the management of the White Cloud. Had her crew been inexperienced, and that had produced the collision; or if the wheelsman had been incompetent, and his unskillful steering had caused the calamity; or if her light had been obstructed for a moment, which does not clearly appear, and in consequence she had run into the other vessel, such showing would place her in fault. But such was not the case; the vessel was managed well, her light was bright, and although the wheelsman was young and inexperienced, the rule of the road was strictly observed. Incompetency or negligence must be such as to cause the collision, and fault cannot be imputed where the law of navigation has been followed.

This determination leads to the next question, viz.: Was there fault in the Douglass? It occurred to the court, during the progress of the trial, and from the evidence of the first mate of the Douglass, that such must be the conclusion reached, and that the proofs would not warrant a decree of inevitable accident. In cases of this description, there is usually much conflicting testimony. Hence the court should exercise every caution in scrutinizing evidence, and sift as well as weigh the proofs.

On the night in question, the Douglass was sailing up the lake, bound from Oswego to Chicago, freighted with iron, and was passing through Pointe au Pelée, with a free wind, her course W. N. W., and her speed about seven knots an hour. Her captain had retired, leaving the charge of the deck with the first mate, White, and a competent wheelsman, lookout and deckhands, unsuspicious of danger. The mate was beguiling the passing hour with humorous nar-

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

rative to the wheelsman, when his attention was suddenly called to the light of the White Cloud, and he ran forward exclaiming: "Where the devil is the lookout?" In haste, he gave the necessary order to "hard up," but immediately reversed the same in the fright and confusion of the moment. His order to port was too late. The peril of navigation by night, on ocean, lake and river, whether by steam or canvas, demands constant and uninterrupted vigilance. The officer of the deck is bound to be active; the lookout must be vigilant, and the wheelsman, who has charge of the helm, must not be disturbed in his duty. Their appropriate responsibilities are incumbent upon each, but the deck officer, for the time, supervises all. The distraction or perversion of the attention of either lookout or wheelsman, by the master or mate, leading to a neglect of duty and consequent collision, places the vessel in fault, and makes the owner and master responsible. The duties of lookout and wheelsman demand constant vigilance. The one must give timely warning of approaching peril, and the other must be ready to respond to the appropriate order of the master of the deck. To the subordinates, in particular, are intrusted the lives and property on board. Was this vigilance exercised? The night was clear, wind faforable (a light southerly breeze), and objects at a distance easily discernible. Both vessels were on the same line, moving in direct opposition, and at a speed of six miles an hour. The Douglass, sailing with the wind, was bound to steer clear of the White Cloud; the latter was not discovered by either the mate, wheelsman or lookout of the Douglass, until she was twice her length off, and a collision inevitable. No matter how experienced a sailor was the mate, White, or how trustworthy as a sober man, he neglected his duty at this crisis, and occasioned the neglect of duty on the part of others, until it was too late to escape the peril. A vessel is not free from blame when either the important functions of a lookout or wheelsman are causelessly interrupted, and proper care by the commander will always forbid and prevent such interruptions. The duty of lookout implies vigilant and constant observation, which cannot be faithfully discharged if subjected to the slightest interruption.

In determining the prominent facts, I have carefully considered the proofs on both sides and have no doubt as to those upon which the opinion is based. This was strengthened greatly by the declaration of Captain Turner, to Mr. H. N. Strong, on the 8th of July, twenty-four hours after the collision. Captain Turner was not on deck, his watch having expired a moment before the collision. When he retired he left all well, and therefore knew nothing of the incidents or cause of the disaster. His information was unquestionably received from his mate, and his judgment formed from his and the statement of others. His nautical experience apprised him where the fault lay, and with this knowledge, he calls on his arrival at Detroit, upon Mr. Strong, and states, "that the Douglass was to blame; that he had written to his owners to that effect, and that he would be here and settle the damages; that it was the most lubberly piece of business he had ever known, and that his mate had seen the White Cloud light, which was a good one." When Mr. Strong thus testified, I could not regard it otherwise than as a truthful though fatal admission of Captain Turner. Independent of the character and well-known respectability of the witness, his statement bore internal evidence of truth, not impaired by the denial of Turner, "that, to his recollection, he never made such statement." Mr. Strong is positive: Turner prevaricates. The one is unimpeached, the other is proved to have made contradictory statements to Captain Elsie, and his own account of the motives of his visit to Strong and Elsie, shake the credence which otherwise might have been bestowed upon his denial. That he made the declaration, I entertain no doubt, and I think it settles the controversy. The admission of a seaman of experience and intelligence, based upon the statements of his mate and crew, made at the very time of the occurrence, thus passing judgment upon his own vessel, and attributing the calamity to its mismanagement, render almost unnecessary further examination of the facts; for, who is better able to judge than such an expert with the facts fresh before him? But the proofs presented other points, and the court could not withhold the expression of its opinion as to the character of the fault that makes the Douglass responsible. Decree for libellant.

DOUGLASS (BARTLEMAN v.). See Case No. 1,073.

DOUGLASS (BLACKINTON v.). See Case No. 1,470.

Case No. 4,032.

DOUGLASS v. EYRE.

[Gilp. 147.][1]

District Court, E. D. Pennsylvania. Jan. 8, 1830.

SEAMEN'S WAGES—FORFEITURE—INTERPRETATION OF SHIPPING ARTICLES — CHANGE OF VOYAGE—LOG BOOK ENTRIES AS EVIDENCE.

1. The word "or" has sometimes been construed to mean "and," when such construction has been clearly necessary to give effect to a clause in a will, or to some legislative provision, but never to change a contract at pleasure.

[Cited in Smith v. Hammond, Case No. 13,-053.]

2. Shipping articles for a voyage "from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia," au-

[1] [Reported by Henry D. Gilpin, Esq.]

thorise a voyage directly from Gibraltar to South America, without proceeding to any intermediate European port, but not a return afterwards from there to a European port.

[Cited in The Brutus, Case No. 2,060.]

3. A change of a voyage from that specified in the shipping articles, must be actually resolved on and known to a seaman, to authorise him to leave a vessel without forfeiting his wages.

4. An entry in the log book is prima facie evidence of its truth in every particular, and to be falsified, must be disproved by satisfactory evidence.

[Cited in The Lilian M. Vigus, Case No. 8,346.]

Mr. Grinnell, for libellant.

J. R. Ingersoll, for respondent.

HOPKINSON, District Judge. The libellant states that on the 9th April, 1828, he shipped as second mate on board of the brig Independence, then owned by Franklin Eyre, at the wages of thirteen dollars a month, on a voyage from the port of Philadelphia to Gibraltar, thence to a port or ports in Europe, or to a port in the Brazils, and thence back to the said port of Philadelphia. The libellant avers that he proceeded in the brig, on the said voyage, to Gibraltar, and thence to Pernambuco, faithfully performing his duty until the time of his leaving the brig. He continued on board the brig at Pernambuco until the 31st October, 1828, when he left her; the voyage for which he shipped, being changed, and the said brig ordered for the port of Trieste, for which she afterwards sailed, as the libellant has heard and believes. He avers that when he left the brig, there was due to him for wages as aforesaid ninety-four dollars and seventy-two cents. He further states that he left Pernambuco on or about the 30th November, 1828, and arrived at New York on the 30th December, 1828, and at Philadelphia on the 31st. The libel was filed on the 16th April, 1829.

The voyage described in the articles is, "from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia." The first question arises on the true construction and meaning of this part of the contract. The libellant contends that the vessel should have returned directly from Gibraltar to Philadelphia, or should have gone from Gibraltar to other port or ports in Europe, and thence back to Philadelphia; but had no right to go to South America. I can see no reason to justify this construction. It would be entirely to erase or reject from the articles, the words, "or South America." Whether, if after leaving Gibraltar she had gone to another port in Europe, she could afterwards have proceeded to South America, is another question which does not occur, as she went directly from Gibraltar to Pernambuco. On the other hand, it is contended by the respondent, that, under these articles, the brig, after leaving Gibraltar, had full liberty to go to other ports in Europe, and then to South America, or to go first to South America and back to ports in Europe, terminating the voyage at Philadelphia. To maintain this construction, it is necessary to change one word in the contract, or at least to change its ordinary signification; that is, to construe the word "or" to mean "and." Cases have been alluded to, in which this has been done. "Or" is a disjunctive particle; in its ordinary signification it corresponds to "either," meaning one or the other of two, but not both. If this meaning be taken from it, I know of no other word in our language to supply it. It is true that this word has sometimes been construed to mean "and," when this was clearly necessary to give effect to some clause in a will, or some legislative provision. In such cases it has been forced out of its proper meaning to effect these purposes; but never to change a contract at pleasure. Indeed it seems to be an inaccurate expression to say that "or" can ever mean "and." It should rather be said, that, for strong reasons, and in conformity with a clear intention, "or" has been changed or removed, and "and" substituted in its place. I do not agree with the respondent in his construction of the description of the voyage in these articles. I understand them to mean, that the brig was to sail from Philadelphia to Gibraltar; when there, the captain had his option to go to other ports in Europe, and return to Philadelphia; or to go to South America, and from thence to return to Philadelphia; but having made his election he is bound by it; that is, if from Gibraltar he had gone to another port in Europe, he could not afterwards have gone to South America; or having made his choice to go from Gibraltar to South America, he had surrendered his right to go again to Europe, and was bound to return from South America to Philadelphia. Whether he might have visited other, and how many ports in South America besides Pernambuco, it is not necessary to inquire.

The contract of the parties being thus settled, we proceed to the facts of the case, out of which the controversy has arisen. When this brig sailed from Philadelphia, her master was Joseph M. Douglass, the brother of the libellant. The brig remained but two or three weeks at Gibraltar. She sailed from thence for Pernambuco, where she arrived on the 1st July. From some causes of discontent, not fully explained, nor material, her master left her about the last of August. Her command or direction was assumed by the supercargo, William Fennell. She remained at Pernambuco until the 29th January, 1829, when she sailed for Trieste. On the 31st October, 1828, the libellant left the vessel, without the leave and against the orders of her officer; he remained at Pernambuco, without returning to the vessel for about a month; he then sailed for New York. The following entry is made in the log book; "31st October, 1828, George Douglass left the brig of his own accord," which the counsel for the

libellant admits is a sufficient averment that he left the brig without the leave of the master.

This desertion of the brig by the libellant, and abandonment of his duty, are relied upon by the respondent as forfeiting all the wages then due, and two questions have been made in the case. 1. Whether such a justification is shown by the libellant for leaving the brig as saves the forfeiture and entitles him to his wages. 2. Whether the proof offered of the desertion is sufficient, under the act of congress, to give the respondent the benefit of it. The justification set forth by the libellant, in the libel, is stated thus; that "he continued on board the said brigantine, at the port of Pernambuco, till the 31st October, in the year aforesaid, when the libellant left the said brigantine, the voyage for which the libellant shipped being changed, and the said brigantine ordered for the port of Trieste." This is the allegation; but how is the proof? Is it true that on the 31st October the voyage was changed, and the brig ordered for Trieste? The very reverse of this is proved by two uncontradicted witnesses. No determination to go to Trieste was made until about the 1st January, 1829; nor was the voyage changed until the 29th January, when the brig sailed for that port. It is therefore impossible to doubt that this justification is a mere after thought, untrue in point of fact, when the libellant left the vessel, and forming no part of his reason or motive for abandoning his duty.

He has endeavoured to prove some rumours on shore, that the vessel was going to Trieste, and some absurd talk on board the brig, that she was going to Jerusalem; but there was nothing in the proceedings, the orders, or the declarations of any of the officers of the vessel, to countenance the pretence. When Douglass left the brig, she had no cargo in; but on that day took a few barrels of sugar on board. If a seaman is to be justified in leaving his ship and his duty, in a foreign port, on such pretences and rumours, they will never be wanting. He made no inquiries of the officers respecting these reports or their intentions. The sincerity of this excuse is wholly destroyed by the testimony of the libellant's own witnesses. They have testified that two or three weeks after the libellant's brother, who had been the master, left the brig, they heard libellant talk of leaving her. He gave no reason, but that he did not like the living on board. This was before the rumour of a change of the voyage, which came from two foreign seamen who had been shipped. Again; the libellant made repeated applications to William Fennell for a discharge, sometimes in a rude and insolent manner, as if he would provoke him to it, but never mentioning the change of the voyage as his reason. In short, he left Pernambuco, after loitering there for a month, several weeks before any intention was taken or manifested to go to Trieste, and while it was altogether uncertain whether she would not come directly to Philadelphia from Pernambuco. Surely the brig had a right to his services while she remained at Pernambuco, and it was time enough for him to leave her, and claim his discharge, when she was about to sail for an unauthorised port. He arrived at this port in December, 1828, and made no claim upon the owner, who resided here, for wages, under an apparent consciousness that he had forfeited them. In April, however, when he may have heard the brig had actually gone from South America to Trieste, he files his libel, and sets up this change of the voyage as the justification of his desertion, and to relieve himself from the consequent forfeiture of his wages: I think the libellant has wholly failed in justifying his desertion of the brig at Pernambuco, and that he has thereby forfeited his wages, provided the proof of his desertion has been made out in the manner required by the act of congress. By the fifth section of the act of 20th July, 1790 (1 Story's Laws, 104 [1 Stat. 133]), it is enacted, that if any seaman "shall absent himself from on board the ship or vessel, in which he shall have shipped, without leave of the master, or officer commanding on board; and the mate, or other officer having charge of the log book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels on board the said ship or vessel."

The objection made to the sufficiency of the proof in this case, is, that the entry was not made on the day on which the libellant absented himself. I have found no direct decision of this question, that is, whether, under all circumstances, the entry must be made on the day the seaman leaves the vessel. Certainly much inconvenience may be foreseen from a rigid and literal adherence to the words of the act in this particular; in some circumstances it would be impossible. No case has been produced to support it, and the reasons given for requiring the entry at all, do not require this strict interpretation. An entry in the log book is indispensable evidence of the fact of desertion when a forfeiture is insisted upon. It is necessary in order to show that no release was intended, by receiving the delinquent again on board, as well as to ascertain the fact with greater accuracy. This is the language of the late Judge Peters, in the case of Malone v. Bell [Case No. 8,994]. In the case of The Phoebe v. Dignum [Id. 11,110], Judge Washington says that an absence for more than forty-eight hours, without leave, is a forfeiture of

wages, "provided the officer having charge of the log book shall make an entry therein, of the name of such seaman, on the day on which he shall so absent himself. The reason of this is obvious. If such entry be made, it repels any presumption that such consent took place, or that the forfeiture was intended to be waived. If no such entry be made, it is to be presumed that the absence was not injurious, and was not objected to." When the judge says the entry is to be made, "on the day" the seaman absents himself, he merely recites the words of the act, but does not give any interpretation of them on the point now in issue; nor was it necessary he should, for in the case before him no entry whatever had been made.

Nor do I find myself under the necessity of deciding this question. The evidence of the case makes it sufficiently satisfactory to my judgment, that the entry was duly made, and in conformity with the words of the act. The first evidence is the log book itself. The entry in question purports to be made on the day of the transaction; and it is fair, without any appearance of alteration, obliteration, or falsehood. The entries, before and after this one, all appear in regular order according to their dates; and they must also be false as to the time of making them, if this is. We agree, however, that although the entry in the log book is indispensable evidence under the act of congress, it is not conclusive, and may be disproved by other testimony. Has this been done in this case? John Smith, the first mate of the brig, says that he made this entry, and kept the book; that it was his duty to take notice of it, when any man left the vessel; that it was his usage to make the entries of every day on the days they bear date, unless prevented by some extraordinary circumstances, in which cases they were sometimes made one or two days after. On being very closely pressed, he did say, that he could not say positively whether this entry was made on the day or not; but, in the beginning of his evidence, he distinctly said that he believed the entry was made at the time it bears date. We know that the vessel was lying quietly in port, with no press of business on the mate, nor any extraordinary circumstance that should have compelled or induced him to depart from his custom of making his entries every day. Why then should we not presume it to have been done? But I hold the entry itself to be prima facie evidence of its truth in every particular; and to be falsified it must be disproved by satisfactory evidence. There is no such evidence here. The mate speaks with the caution a conscientious witness would use, about a fact which occurred more than a year ago; and about which there could not be an absolute, infallible certainty. The log book is so far from being disproved by his evidence, that it receives a reasonable confirmation from it. Upon the whole, it is my opinion, that the libellant has forfeited his wages by his desertion from the brig at Pernambuco; and that the desertion has been fully proved according to the provisions of the act of congress.

Decree: That the libel be dismissed with costs.

DOUGLASS (HUIDEKOPER v.). See Case No. 6,851.

DOUGLASS v. JUSTICES OF THE COUNTY COURT OF LINCOLN COUNTY. See Case No. 15,503.

DOUGLASS (MATHEWS v.). See Case No. 9,276.

DOUGLASS v. The S. L. DAVIS. See Case No. 12,939.

DOUGLASS (UNION NAT. BANK v.). See Case No. 14,375.

DOUGLASS (UNITED STATES v.). See Case No. 14,989.

Case No. 4,033.

DOUGLASS v. The WASHINGTON.

[Crabbe, 452.][1]

District Court, E. D. Pennsylvania. Aug. Term, 1841.

ADMIRALTY PRACTICE—DELAY IN PROSECUTING LIBEL—DISMISSAL.

A case was called for hearing, and the parties were ready to proceed, but the libelant had not filed any replication; the court, at the request of both parties, appointed a particular day for the special hearing of the case, and, on its being then called, the libelant moved for a postponement, having no witnesses present, and having issued no subpoena till that day. The court gave the libelant the option of going to trial on the libel, answer, and replication, which being refused, the libel was dismissed.

This was a libel [by George H. Douglass against the ship Washington] for wages. The transactions on which the libel was founded occurred at Calcutta. The vessel was in port for about a month, and the libelant for two weeks, without any proceedings being had in the matter; but when the ship was on the point of sailing the libelant attached her. The case was called for a hearing at the regular time, and the libelant declared himself ready to go on; the respondent was also ready, with his witnesses in attendance, but the counsel for the libelant had not filed any replication: the 20th September, 1841, was then specially fixed for the hearing, at the request of both parties. The respondent then appeared with his witnesses, but the libelant moved for a postponement, having no witnesses in court, and having taken out a subpoena only on that morning. The respondent objected to the postponement, saying that he had already lost one witness, and feared to lose others.

HOPKINSON, District Judge, informed the libelant's counsel that if they chose to proceed with their case on the libel, answer, and

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

replication, he was ready to hear them. This was declined, and the libel dismissed with costs; the libelant not being ready to proceed.

Case No. 4,034.

The DOURO.

[Blatchf. Pr. Cas. 362.][1]

District Court, S. D. New York. May, 1863.[2]

PRIZE—EFFICIENCY OF BLOCKADE—SPOLIATION OF PAPERS.

1. The court overruled the defences set up by the claimants, namely, that the blockade of the port of Wilmington, N. C., was not efficient, and that a vessel of war of the United States, not stationed in guard of a blockaded port, had no right to seize a vessel violating such blockade.

2. Vessel and cargo condemned for a violation of the blockade. Spoliation of papers.

BETTS, District Judge. This vessel and cargo were captured March 9, 1863, at sea, off Cape Fear, by the United States gunboat Quaker City, and were sent to this port for adjudication. A claimant of the vessel, and other claimants of the cargo, intervened and filed formal claims, resting upon like positions of fact and law—that the vessel and cargo were the property of British subjects when seized; that she had a legal right to enter into and depart from Wilmington, N. C.; that the port was not under an efficient blockade; that the capture was unlawfully made, on the high seas, distant from any American port; that the capturing vessel was not one of the blockading squadron, and possessed no authority to seize this vessel or cargo; and that neither vessel nor cargo belong to citizens of the United States. The case was submitted without oral argument on either side, and upon only a statement of conclusions on the part of the United States. The questions of law with respect to the existence of the blockade of the place visited by this vessel, and its efficiency, and the authority of a vessel of war of the United States, not stationed on guard of a blockaded port, to seize a vessel violating such blockade, has been too frequently determined by this court, during the continuance of the present war, to require a repetition of that course of decisions, until the law is called in question by a judicature of higher authority. The inquiry, then, is only, whether the evidence establishes against the vessel and cargo the commission of the offence alleged. The master testifies, on his examination in preparatorio, that the vessel was captured on the morning of March 9, 1863, about 25 miles east of Frying Pan shoals on the coast of North Carolina, because she had been running the blockade; that she sailed from Liverpool to Nassau, and from Nassau, with an additional cargo, to Wilmington, which port she entered February 21; that she there discharged her cargo and took in a return cargo for Nassau, and was captured on going out with that on board; that she brought out with her a Confederate pass, authorizing her to pass the ports; that many of the ship's papers, brought out of Wilmington, were burned on board of her; and that he knew of the war, and that Wilmington was blockaded, when he entered and left that port. The mate and the supercargo do not contradict the evidence of the master, and concur with him in material points. The whole testimony shows conclusively that the vessel entered and departed from the port of Wilmington, knowing that it was in a state of blockade, and destroyed her papers while under chase by her captor. The case is clearly one which demands the condemnation of vessel and cargo, for a wilful violation of the blockade. Decree of forfeiture accordingly.

NOTE. An appeal was taken from this decree to the supreme court by the claimants. That court, at the December term, 1865, affirmed the decree of the district court. See [The Douro] 3 Wall. [70 U. S. 564].

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

[2] [Affirmed in 3 Wall. (70 U. S.) 564.]

DOUSMAN, The (WARD v.). See Case No. 17,153.

Case No. 4,035.

The DOVE.

[1 Gall. 585.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

PRIZE—RECAPTURE—RESTITUTION.

The prize court has jurisdiction to decree restitution of a vessel recaptured from the enemy, and to award damages against the recaptors for embezzlement.[2]

[Cited in Williams v. Waterman, Case No. 17,745.]

STORY, Circuit Judge. This is a prize cause coming before the court under circumstances somewhat singular and embarrassing. The schooner Dove, laden with a cargo of Indian corn in bulk, consisting of 1051 bushels, and owned by the claimant, sailed from New York for Boston, on or about the 29th of July, 1813. On her passage round Cape Cod, the schooner and cargo were, on or about the 12th of August, 1813, captured by the British sloop of war Curlew, the British frigate Nymph being in company. A prize master and four British seamen were put on board, and the master and crew removed out of the Dove. About fifteen bags of corn were taken from the cargo on board the Nymph; and soon afterwards the schooner parted from the Nymph. On Sunday, the 15th of August, the schooner was descried off the harbor of Harwich, and soon afterwards

[1] [Reported by John Gallison, Esq.]

[2] See The Mary [Case No. 9,184]; The Joseph [Case No. 7,53[illegible]]; The Concordia, 2 C. Rob. Adm. 102; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; S. P. applied in case of salvors. See The Bello Corrunes, 6 Wheat. [19 U. S.] 152; The Boston & Cargo [Case No. 1,673].

ran aground on the bar. She was immediately taken possession of by four Americans, who went in a small boat from the shore, namely, Messrs. Joseph Nickerson, Edward Phillips, Theophilus Burgiss, and Israel Nickerson. They obtained a sloop, and put a part of the cargo on board of her; and the Dove, when thus lightened, floated off, and was then moored in the offing. The British prisoners were then landed, and secured by the recaptors. On Monday, the 16th of August, the schooner Dove, and the sloop with her, were brought into the harbor of Harwich. On the same day, Mr. Jeremiah Walker obtained a prize commission from the custom-house for a small whale boat with five men, boarded the Dove, as she was coming into the harbor, and by virtue of his commission, claimed to hold her, as prize. The actual recaptors either acted upon the presumption, that Mr. Walker had acquired a legal right to control the property, or they entered into an agreement to share in concert with him, for they acquiesced in his subsequent directions and orders. The actual recaptors seem to assert, that they acted under ignorance of their own rights; and Mr. Walker as explicitly considers them as entering into a joint engagement with him. It is not necessary to settle this point in a dispute between the present parties; though I strongly incline to the belief, that Mr. Walker attempted to use the ignorance of the actual recaptors for purposes of his own private interest, in a highly improper manner. Certain it is, that the whole merit of the recapture attaches to other persons. Mr. Walker did nothing to accomplish the original enterprise; and his subsequent interference was at a time, when the whole property was in complete security.

Immediately after taking possession, Mr. Walker proceeded, without any authority, to an unlivery of the cargo. Although on the capture by the Curlew, the ship's papers and documents were carried on board of the Nymph, the ownership of both vessel and cargo might be easily ascertained, as the port of Boston was declared on her stern to be the schooner's home. The pretence of Mr. Walker for this unlivery is intimated, in no equivocal terms, to have been the fear of plunder from the lawless character of the inhabitants of those shores. Such an imputation is so pregnant with disgrace and inhumanity, that I confess myself slow to believe in its perfect verity. If it were true, I should think that more exact and decisive allegations would have been made by the witnesses, and that the scene would have been faithfully acted over, under the strong temptations of the case before the court. If indeed there are to be found banditti on our coast, who, without hesitation, plunder the property, which misfortune throws into their hands, I most sincerely hope that the public arm will reach their deeds, and scourge this foul dishonor of our country. I know of but one degree of atrocity beyond it, that of luring by false lights the unhappy mariner to shipwreck, that the spoil may be more securely shared. I cannot however but think, that Mr. Walker's conduct was too precipitate, and that he might well have secured the property on board by a competent guard, or by officers of the customs, until the owners at Boston could have been consulted. If he had so done, it is highly probable, that the whole subject matter of the present controversy would have been avoided.

On the 23d of August, a libel was filed in the district court by Mr. Walker against the Dove and cargo, as prize to a "five handed boat," duly commissioned on the 16th of August, and commanded by himself. Not the slightest intimation is given of the right or interest of the original recaptors; they are studiously suppressed from the libel. The deposition of the British prize-master was taken in preparatory, and in his examination, nothing is said as to any recapture, but that stated in the libel. It was only in the subsequent proceedings, that the real facts appeared, which were so disingenuously concealed by Mr. Walker. No apology has been attempted for this conduct of Mr. Walker, by which he sought to rob other persons of the reward of their meritorious services, and appropriate to himself an undeserved gain. The claimant, Mr. Ladd, having in the mean time heard of the recapture of his vessel, proceeded to Harwich, and there made an adjustment with the original recaptors, allowing them for salvage 100 bushels of corn, and the head money from the United States for the prisoners. On the 26th of August, at Harwich, Mr. Ladd met Mr. Walker, who had returned from Boston, whither he went to file the libel. An agreement was there entered into, by which Mr. Walker, and his lieutenant Jonathan Phillips, for themselves and the crew of the said five handed boat, agreed to deliver up to the said Ladd, or to "his order, on demand, the above vessel and cargo, in as good order as received, free from all expenses, charges, or demands, that may or shall be made against the same, from the time taken possession by us (i. e. Walker and his crew), until the same shall be delivered up;" and further, to discharge Mr. Ladd from all demands, proceedings and suits, in consequence of the detention of said vessel and cargo. Afterwards, on the same day, in consequence, it is said, of a great deficiency in the cargo discovered by Mr. Ladd, the parties entered into a second agreement, as follows: "It is mutually agreed by the subscribers, that on the full execution of the agreement entered into this day by Jeremiah Walker and Jonathan Phillips to William Ladd, and five hundred dollars in cash paid, that receipts in full of all demands shall be passed between us. Harwich, August 26, 1813. Signed, William Ladd, Jeremiah Walker." In pursuance of this agree-

ment, Mr. Ladd received his schooner and eight hundred forty-five and a half bushels of corn. The whole quantity landed, as Mr. Walker admits, was eight hundred and fifty-eight bushels. On the 28th of August, the parties again met to complete the execution of their agreement, at Mr. Walker's house. Mutual discharges were here drawn up in a very inartificial manner, and signed by the parties, purporting on each side to be made in consideration of fifty dollars received. At this meeting no persons were present, but Messrs. Ladd, Walker, and Phillips. No money was in fact paid to Mr. Ladd; and he alleges in his special affidavit, that Mr. Walker fraudulently and violently seized and took away the discharges signed by him, Mr. Ladd, without having complied with the terms (the payment of $500) on which alone they were to have any legal operation. Mr. Walker, in his affidavit, makes a general denial in very loose terms; and the parties respectively produce the counter receipts, which are filed in the cause. On the 2d day of September, the proctor for Mr. Ladd gave notice to the proctor of Mr. Walker in Boston, that the supposed settlement was fraudulent, and that, at the return day of the libel, a claim would be interposed against Mr. Walker, for damages. Mr. Walker was at this time in Boston, and ordered his libel to be discontinued. On the 10th of September, the return day of the libel, the same not having been entered for trial, Mr. Ladd filed a petition and affidavit stating the special facts, on which a monition was afterwards issued against Mr. Walker, to proceed to adjudication. To this monition Mr. Walker has appeared, and filed his special exceptive bar and affidavit, relying on the agreements and discharges of the 28th of August. Upon the hearing in the district court, the cause was dismissed; and an appeal being interposed, it has now been heard upon the allegations of the parties and the new evidence submitted to this court.

It has been argued, that this court ought not to take jurisdiction of the cause, because the question, as between these parties, was put at rest by the agreements before stated; and if these agreements have not been executed in good faith, a common law remedy is open to the aggrieved party. The jurisdiction of this court over the present, as a prize cause, is incontestible; and having possession of the principal cause, it will exert itself over all the incidents and collateral questions. Whether it will, in any given case, interfere, and compel the party to proceed to adjudication, depends upon sound discretion. Certainly it would not choose to interfere after a great lapse of time, and gross laches in the claimant. But when the claim is recent, and the tort manifest, I see no reason to decline the jurisdiction, merely because a detached fragment of the cause may have assumed a shape fitted for the interference of mere common law courts. Nor should I think it expedient to turn the party round to such tribunals, however high my respect is for them, when it is very possible, that in the progress of the inquiry, a question of prize might intermix in the cause; a question, of which such courts have not jurisdiction. The embarrassment would be extreme, and unless a peremptory bar created by the party should exist, it would involve the claimant in a conflict of jurisdictions, at once expensive and tedious. The prize jurisdiction too seems the proper tribunal for questions like that before the court. It can measure out its rewards and damages from an investigation of the whole merits. It can consider the extent and the apportionment of salvage; and try the facts by compelling the answers of the parties on their solemn oaths. It is no disrespect to the common law courts, to state that the very exclusion of prize questions from their cognizance must materially narrow the view, which they are at liberty to take, of any detached incident. And if the adjustment in this case was obtained by fraud, it may admit of some doubt, whether the common law courts can administer an adequate remedy. At all events, it would be a reflection upon the prize court, to suffer a fraud to oust the aggrieved party of his legitimate remedy. If indeed the claimant had, by any solemn act, renounced his claim to damages, or had executed the supposed discharges in good faith; it would be too much to say, that this court ought to interfere, merely because the party has since become dissatisfied. But supposing these discharges were never executed, but fraudulently or surreptitiously obtained, there can be no legal ground to make such fraud an exceptive bar to further proceedings.

Now, whatever doubts might very properly be entertained, as to the fact of such fraudulent conduct, upon the evidence in the district court, I feel no hesitation in saying, that the new evidence here appears to me decisive, that the discharges were not voluntarily or fairly delivered. The deposition of Mr. Phillips (introduced in behalf of Mr. Walker) is so equivocal, disingenuous, and evasive that it authorizes the most violent presumptions against his coadjutor. His very silence, as to the occasion of the quarrel between the parties; his studied ignorance of all the special circumstances attending the delivery of the papers; and his misstatements of material facts relative to himself, throw a suspicion over his testimony, that necessarily involves his principal. Combining this deposition with the relaxed and general denial of Mr. Walker, and the testimony of Mr. Prince, it seems difficult to resist the conclusion, that the discharges of the 28th of August came into the hands of Mr. Walker, malâ fide. It is probable, that Mr. Walker thought, upon reflection, that in agreeing to give $500 to the claimant for the deficiency

discovered in the corn, he had acted with imprudence, and taken the hardship of an unequal bargain. But the mode he adopted to relieve himself, was as unjustifiable as it was dishonorable. The agreements of the 26th of August were but executory, and if he were overreached, as he now pretends, he was not without relief in this or in any other court. And even now, late as it is, as the claimant asks our interposition in his behalf, if the sum stipulated be in equity and good conscience, in sound and substantial justice, too much, the party shall not be without relief.

And this leads me to the argument in defence, that, upon the whole facts disclosed, the claimant has no merits, and is entitled to no damages, because he has received his vessel and all the cargo, which came to the possession of Mr. Walker. I do not, however, consider this defence on the merits to be fully supported. Ordinarily, after a capture by an enemy, a presumption of subtraction of a portion of the cargo might arise. But it is a presumption liable to be rebutted. And in the present case, there is strong evidence taken by Mr. Walker himself, that shows no more than 14 or 15 bags of corn were taken out by the enemy. The residue came into the possession of the recaptors, and there is not the slightest evidence to show, that a single bushel was embezzled by them. On the contrary, the proof is pretty direct, that the whole of the recaptured cargo came into the custody of Mr. Walker.

Undoubtedly, Mr. Walker is not responsible for more than came to his actual possession; nor for more than fair and reasonable diligence in the custody thereof. The deficiency is very considerable, even after a liberal allowance for that portion taken by the enemy. It is incredible, that Mr. Walker should agree to give $500 on account of the deficiency, unless he was sensible, that it was properly imputable to him. He had taken counsel on the subject of his rights, and had filed an allegation in the alternative, as a case of prize or of salvage. Under such circumstances, he agreed to discontinue the legal proceedings, to pay his own costs and expenses, and to pay the claimant $500. I am aware, that this sum was considered in the district court, as nomine poenae, a mere penalty to secure the performance of the principal agreement, as to the restoration of the property. I cannot yield to this construction of the words of the instrument, and it seems irreconcilable also with the actual intentions of the parties. It is also material, that no such construction is asserted by Mr. Walker in his affidavit; and Mr. Ladd asserts positively, that it was a sum to be paid him for damages. This assertion of Mr. Ladd is no where contradicted or denied: and this silence certainly authorizes me to say, that the sum was not a penalty. Under all these circumstances, I must conclude that Mr. Walker had withheld from the claimant the whole quantity of corn which was deficient. Nor do I think, that the terms of the discharges of the 28th of August invalidate this conclusion. They are very inartificially drawn, and acknowledge a receipt of $50 on each side in full of all demands. Either this sum is merely nominal, or the parties had materially varied in their respective claims. At all events, as the transactions of the 28th of August never acquired a legal validity, they offer no sufficient presumption to weaken the inferences from the preceding conduct of the parties. Had Mr. Walker behaved correctly, although he might not have been entitled strictly to salvage, yet the court would have been indulgent in allowing him a recompense for his services, in the preservation of the property. Embezzlement of property saved, is a forfeiture of the right of salvage. I would not apply so harsh an imputation to Mr. Walker; but he cannot expect after so much impropriety and disingenuousness, that this court should listen to any claim for a recompense in the nature of salvage. He must, therefore, be confined to the allowance of such expenses only, as were incurred in the actual landing of the cargo; and I shall allow a reasonable sum for these expenses, to be deducted from the damages, which he may be ordered to pay to the claimant.

I shall order a decree, that Mr. Ladd recover against Mr. Walker the value of the deficiency of the cargo, deducting the allowance aforesaid, and his costs in these proceedings. The actual damage sustained by Mr. Ladd, and no more, can be recovered. Probable profits can form no item in the account; and, as to other allowances claimed, it cannot be necessary for me to state my reasons for rejecting them. The value of the corn must be estimated at the market price at Harwich, at the time of landing.

On these principles and facts, the following account is adjusted:—

Whole cargo on board,		1051 bushels.	
Deduct taken by the enemy, 15 bags, (say)	30 bushels.		
" missing and lost in measuring, &c.	13 1-2		
" received by Mr. Ladd,	845 1-2		
		889	
Whole deficiency,		162	
At $1.33 1-3 per bushel, is			$216
Deduct for allowance for expenses of landing,			21
Balance allowed Mr. Ladd as damages,			$195.00
Interest for 3 months,			2.93
Damages,			$197.93

DOVER STAMPING CO. (MONROE v.). See Case No. 9,714.

Case No. 4,036.

In re DOW.

[The case reported under above title in 6 N. B. R. 10, is the same as Case No. 2,955.]

DOW, In re. See Case No. 17,573.

Case No. 4,037.

DOW et al. v. CHAMBERLIN et al.

[5 McLean, 281.][1]

Circuit Court, D. Michigan. June Term, 1851.

DEED AS MORTGAGE—PAROL EVIDENCE — EQUITY PROCEDURE AND PRACTICE—STATE STATUTES.

1. A deed absolute upon its face, may be shown by parol evidence, to have been intended as a security.

[Cited in Teal v. Walker, 111 U. S. 247, 4 Sup. Ct. 420.]

[See Amory v. Lawrence, Case No. 336; Andrews v. Hyde, Id. 377.]

2. But parol evidence is not admissible to contradict a written instrument.

3. Where a deed was given, with warranty, and a defeasance that the grantor should have a re-conveyance, if within twelve months, he should pay the debt, although in the meantime the grantee had a right to sell the whole or a part of the property at a price fixed, in payment of the debt, the deed will be considered as a security.

4. A statute of a state which regulates the procedure, on a bill of foreclosure, does not apply to the courts of the United States.

5. They do not derive their chancery jurisdiction, or their rules of practice, from state authority.

Mr. Lathrop, for complainant.

Mr. Emmons, for respondent.

OPINION OF THE COURT. This is a bill to foreclose a mortgage, and the question is, whether the property was given in payment or as a security. The plaintiff recovered against the defendant Samuel Chamberlin and one David M. Hinsdale, a judgment for the sum of $756.93 and costs, on which an execution was issued on the 16th of January, 1847, which was levied upon certain real estate as the property of Chamberlin, and was advertised for sale. The counsel for the plaintiffs attended on the day of sale, and on examination found the property levied on much encumbered, so as to be insufficient to satisfy the judgment. And it was agreed that the levy should be released, on the defendant's executing a deed of general warranty to Dow, one of the plaintiffs, for certain lots in the village of Pontiac, which deed was duly executed. After the delivery of the deed, the following instrument was drawn up by the attorney of the plaintiffs, and delivered to the defendant: "Whereas, Samuel Chamberlin has this day executed to Marcus F. Dow, a warranty deed for lots 95, 96, 97, 107, 112, and 113, of the Eastern addition of the village of Pontiac to apply on an execution issued from the United States court in favor of Dow and others, against said Chamberlin and D. M. Hinsdale. Now this witnesseth, that the said Chamberlin or D. M. Hinsdale shall, at any time, within the ensuing twelve months, be entitled to the privilege of redeeming said lots, on payment of the said judgment so rendered against them by the said United States court in favor of said D. K. and S.; and the said plaintiffs hereby agree to reconvey said premises to said Chamberlin on payment of said sum of money as aforesaid; plaintiffs reserving, however, the right to sell any part of said premises when opportunity offers, provided they do not sell them at a less rate than $155 per lot, as this day appraised by persons named; and shall apply the proceeus thereof in liquidation of said judgment pro tanto." Parol evidence has been heard, not to explain any matter upon the face of the above instrument, or of the deed, but to show, beyond the instruments, the nature of the transaction.

The parol testimony casts very little light on the transaction. The statements of the witnesses were made from general impressions, the words spoken not being recollected. Buddington's impressions were, that Chamberlin refused to give the lots as collateral security, as that would take away his control over them, and leave the debt still unpaid. And Duffield says that twelve months were given to Chamberlin to sell the property. This placed the property within his control, unless each lot should sell for one hundred and fifty-five dollars. This may have removed Chamberlin's objection to giving a lien on the lots. At least it is as reasonable a conclusion as any which can be drawn, from the very vague parol testimony in the case. We must look to the two instruments chiefly, to ascertain the character of the transaction. The deed was absolute upon its face, and conveyed the fee, with warranty, to the grantee. And this being done in payment of the judgment, it is contended, the transaction was closed. That this was not the understanding of the parties appears from the fact, that the plaintiffs had the right to sell the lots at the price fixed, the proceeds to be paid, pro tanto, on the judgment. Now, if the judgment had been considered as discharged by the conveyance of the lots, why should the price of the lots be limited, and, particularly, why should the proceeds be applied in part discharge of the judgment? It is no satisfactory answer to this, that Chamberlin was desirous to have a re-conveyance of the lots, or, at least, a part of them, and therefore a limitation on the price was fixed. This limitation might have been agreed upon, without providing that the money received should be paid on the judgment. If that judgment had been discharged by the conveyance, of what importance could it be that the money received on the sale of the lots, should be paid on it? Could the parties have supposed that a double discharge of the judgment was necessary?

It is true the defeasance was written by the plaintiff's attorney, to secure a right to Chamberlin which he deemed of some importance; and which he received, and it is, therefore, evidence showing, to some extent,

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

the nature of the agreement. It does not appear that any evidence of the payment of the judgment was required. It would be an extraordinary transaction if an individual should pay a judgment in land or money, and take no evidence of the fact. The plaintiffs were not required to enter upon the record nor on the execution, satisfaction; and nothing seems to have been said of the propriety of giving a receipt. The written instruments show nothing in relation to the judgment, except that the proceeds of the lots sold were to be applied, pro tanto, to its payment. The deed and the defeasance are to be construed, as though they were but one instrument. The deed is absolute on its face, but to be defeated, and a re-conveyance made, if, within twelve months, Chamberlin should pay the judgment. The privilege of selling the lots, at a fixed price, by the grantee, was not exercised. If it had been, the judgment would have been discharged, in whole or in part, by a sale of a part, or the whole of the property, with the consent of Chamberlin. The effect of the arrangement was, to give Chamberlin twelve months to pay the money, which, if paid, brought back to him the land conveyed. We are satisfied that the deed was given as a security, and that it must be treated as a mortgage. It is clear that no personal liability is imposed by this transaction on Chamberlin, except by the general warranty of the title to the lots. But the liability under the judgment remains, it not having been paid by the conveyance of the lots. The suggestion that it was discharged by the levy on the unencumbered property, which levy was afterwards released, is not maintainable.

The defendant insists, that as the mortgage was given to secure, collaterally the judgment; and, as the bill states, an execution had been issued on the judgment, since the mortgage was executed, on which nothing has been done or return made, that the complainants cannot proceed until they have attempted to collect the judgment. The 109th section of the general chancery act of this state provides, "If it shall appear that any judgment has been obtained in a suit at law, for the moneys demanded by such bill, (of foreclosure) or any part thereof, no proceedings shall be had in such case, unless to an execution against the property of the defendant in such judgment, the sheriff shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the mortgaged premises." Under this statute it has been held (1 Walk. Ch. 387) that a bill filed to foreclose a mortgage given to secure a judgment, is demurrable, unless it appear in the bill that an execution has been issued on the judgment, which has been returned unsatisfied, in whole or in part, and that the defendant has no property, except the mortgaged premises, to satisfy the judgment.

The complainants, in their bill, allege that on the 9th of October, 1848, they caused an alias writ of fieri facias to be issued on the judgment, yet no proceedings were had on said execution, and that the life of the same has long since expired, to wit, on the first Monday of December, 1848. That said execution is in their possession ready to be produced to the court. It is too late to make this objection, it is contended, at the final hearing. The statute is peremptory, but the court are not bound to take notice of it unless it shall be set up in the answer, or by demurrer where the facts appear upon the face of the bill. In the state courts the objection would be fatal to a further procedure in the case. But this provision of the statute being a rule of practice, belonging to the remedy, does not apply to the circuit court of the United States; neither its jurisdiction nor practice in chancery is derived from or governed by the state laws. In several of the states which have no courts of chancery, such a jurisdiction is exercised by the courts of the United States. The court will direct a sale of the mortgaged property, and enjoin the plaintiffs from issuing an execution on the judgment, until the order of this court.

Case No. 4,037a.

DOW v. HARE.[1]

District Court, N. D. California. May 12, 1876.

CHARTER PARTY—BREACH BY MASTER—LIABILITY OF CHARTERER FOR PORT CHARGES AND DISCHARGING CARGO—DAMAGES FOR DETENTION.

[1. The master of a vessel chartered to carry coal consigned to a naval vessel at Ounalaska, being ready to sail next day, so informed the charterer, who, wishing to cancel the contract with the naval authorities, left to consult with them for that purpose, and instructed the master, if he (the charterer) did not come on board in the morning, to proceed according to his instructions. Having procured permission to deliver the coal to other parties, the charterer returned about daylight, saw the vessel, but made no effort to board her until some hours later, at which time she had sailed. *Held*, that the master was not guilty of misconduct amounting to a breach of the charter party.]

[2. On arrival at Ounalaska, the master, not finding the naval vessel, waited for a month, and news having arrived of her loss by shipwreck, after waiting some time for a berth, he landed the coal. The charter party provided that the cargo should be discharged free of all expense to the vessel, the charterer to pay port charges. *Held* that, under the circumstances, the charterer was liable for both the port charges and the costs of discharging the vessel.]

[Cited in McLeod v. 1,600 Tons of Nitrate of Soda, 55 Fed. 532.]

[3. The charter party likewise provided that the charterer should pay $100 per day for every day's detention of the vessel by his default.

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[1] [Not previously reported.]

Held, that he was liable for the agreed sum for the period of delay at Ounalaska.]

[Cited in McLeod v. 1,600 Tons of Nitrate of Soda, 55 Fed. 532.]

[This was a libel by George W. Dow, master of the bark Sierra Nevada, against Charles Hare, for breach of a charter party.]

HOFFMAN, District Judge. On the 3rd of June, 1875, the respondent chartered the bark Sierra Nevada, of which libelant was master, to convey a cargo of coals, then on board, and of which the respondent was the owner, from San Francisco to the port of Ounalaska. The charter party provided that ten running days should be allowed for the discharge of the cargo, to commence on the date of arrival; charterer to furnish lighter when required for ballasting the vessel at Ounalaska free of expense; and for each and every day's detention by default of charterer or his agent $100 per day were to be paid to the respondent or his agent; cargo to be discharged by charterer free of all expense to vessel; free of commissions; any port charges to be borne by charterers. On the 7th and 10th days of June, respectively, the libelant executed and delivered two sets of bills of lading. By the first, he agreed to deliver two hundred tons of coal to the Alaska Commercial Company or assigns; cargo to be received at Ounalaska and delivered as per condition of charter party. By the second set of bills of lading, the master agreed to deliver 587 tons of coal, more or less, unto "U. S. Steamer Saranac or to assigns;" cargo to be received at Ounalaska and delivered as per condition of charter. As the time when the Saranac was expected to arrive at Ounalaska was near at hand, the United States navy officers, with whom the respondent had contracted for her supply, were urgent in demanding the dispatch of the vessel, threatening to annul the contract unless she sailed forthwith. The respondent therefore frequently, and with some intemperance of language endeavored to hasten the libelant's preparations for departure. On the 10th, about 12 o'clock, the vessel was cleared by him, and on the same day a tug was ordered by the master for the ensuing morning. On the afternoon of same day the libelant, at the request of the respondent, went to the office of the Alaska Commercial Company, to give a new bill of lading for the coal to be delivered to the company. While there, he was asked by an agent of the company what he would do with the steamer's coal if she did not arrive, to which he replied that he supposed he would bring it back again. The respondent then said he would instruct the company to receive it. To this, libelant objected that he had signed bills of lading for coal to be delivered to United States officers on board the Saranac, and that he could not make any other disposition of it without the admiral's orders. The rest of the conversation is differently related by the parties.

The libelant states that Hare then asked him when he was going to sea, to which he replied that he well understood that the pilot and tug were ordered, the crew on board, and the vessel ready to go with the next morning's tide. Hare then said: "I don't want to detain you a moment. I can't go to Mare Island and back before 11 a. m. to-morrow, which I shall have to do to get bill of lading endorsed." He then seemed to think of the cattle boat; said he would get back by daylight and come on board, and charged the libelant particularly not to wait for him a moment.

Mr. Hare testifies that he certainly expected the libelant to wait for him, and denies that he ever instructed him not to do so. Mr. Greenbaum and Mr. Newmann, agents of the company, who were present, state that they do not remember that Hare told the libelant not to wait for him. But Mr. Newmann is unable to state that he was present at all the conversation. Mr. Hare thereupon hurried to the Mare Island boat, went to Mare Island, procured from the admiral an order to the respondent for the delivery of the coal to the Alaska Company, if the Saranac should not be in port, and returned in a cattle boat to this city, where he arrived about daylight. On his way to the landing, he passed near the vessel, and observing no movement on board, and no one on deck, he proceeded to his house, took breakfast, and then went to his store. From his store, he went to the steamtug office, and asked a man, who was sweeping the rooms, for the order book. Finding, as he says, no entry of an order, he returned to his store, wrote two letters, and then proceeded to the wharf, to go on board the bark and see the respondent. He found that the vessel had sailed. From the evidence of the persons on board the vessel, the captain of the steamtug and the pilot, the vessel must have got away between 8½ and 9 o'clock. It is also clear that the tug had been ordered the day before. The vessel proceeded on her voyage, arrived at Ounalaska on the 14th of July, and discharged the coal consigned to the Alaska Company. She then hauled out in the stream to await the arrival of the Saranac. On the 14th of August, the schooner Siam arrived, and reported the loss, by shipwreck, of the Saranac. On ascertaining that the Siam brought no orders for him, the libelant concluded that it was for the best interests of all parties to land the coal. He was informed by the agents of the company that he could not come to the wharf until the Siam had finished discharging. This occurred on the 28th. The discharge of the Sierra Nevada was then commenced, and completed on the 13th of September. He then took in ballast, which he got on board on the 17th. On the 20th he sailed. The coal was left in charge of the company's agents, to be held subject to the libelant's claims. The libelant now claims for demurrage at $100 per day for fifty-two

days, viz. from and including the 24th of July to and including the 14th of September, $5,200; for expense of discharging coal, $1,174; and for port charges, $10.

The respondent insists that he is not liable for the consequences of the nonarrival of the Saranac: (1) Because he had made provision for that contingency, and that his arrangements were frustrated by the misconduct of the master in sailing away contrary to orders. (2) That, by the terms of the charter party, he is liable only for detention of the ship caused by his default, and that he is not responsible for the shipwreck and consequent nonarrival of the Saranac.

1. Was the master in fault in not waiting for Mr. Hare to come on board after his return from Mare Island? The libelant testifies very positively that the respondent was emphatic in his instructions to him not to wait a moment. Although neither Mr. Greenbaum nor Mr. Newmann recollect this fact, yet it is to be noted that Mr. Hare does not pretend that he gave any directions to the master to await his return. He evidently expected to reach this city by daylight, as in fact he did, and there was no occasion for any instruction to the master to delay his departure. What, then, was the situation in which the latter found himself when the tug came alongside to take him to sea? Mr. Hare had been urging his departure for some days. He had informed him that the naval authorities threatened to annul their contract unless the vessel sailed at once. In point of fact, although it does not appear that the master knew it, an officer was on the way to the city with orders to cancel the contract if the vessel had not sailed. So impressed was Mr. Hare with the necessity of dispatch that, on the 9th, he telegraphed to the admiral that "the ship had gone below, and would be towed to sea in the morning." The vessel in fact had not, at that time, left her moorings, and did not get under way until the morning of the 11th. Mr. Hare had, on the previous day, cleared the vessel, and knew that she was ready for sea. A pilot and steamtug had been engaged. When the latter came alongside, the master, in the absence of specific instructions to the contrary, had but one course to pursue. He had a right to suppose, from the failure of Mr. Hare to present himself, that either he had not succeeded in obtaining the order he desired, or that he had been unable to come down in the cattle boat. He therefore could not be expected until 11 o'clock. Had the master, under these circumstances, determined to wait, and had Captain Phelps arrived by the 11 o'clock boat and annulled the contract, what excuse could he have offered to the respondent? If Mr. Hare had not chosen to assume that the vessel was not going tc sea, he could readily have communicated with the master. The vessel lay at a very short distance from the wharf where he landed from the cattle boat. He arrived at about daybreak. Instead of going on board, he wasted several hours, and only reached the wharf opposite her place of anchorage about 9 o'clock. Even then, he could, by taking another tug, have readily overhauled her. She lay becalmed at short distance from the Heads during the entire day. His neglect to make, until the last moment, any provision for the nonarrival of the Saranac, and his conduct after his return from Mare Island seem to show that he was not deeply impressed with the importance of doing so. It could have been useful only in case the Saranac were disabled or wrecked, an event extremely unlikely to occur. Certainly neither he nor the master could have anticipated it. So far as appears, the latter acted in entire good faith. He had no motive to hasten his departure except the desire to obey orders. He states that he would have preferred to remain three days longer. He certainly could not then have foreseen the long detention to which he would be subjected at Ounalaska.

My conclusion is that the respondent has failed to show that he has been liberated from the obligations of the charter party by the misconduct of the libelant.

The charter party provides that the cargo shall be discharged by the charterer free of all expense to the ship. Port charges are also to be borne by the charterer. The master, in landing and storing the cargo, seems to have acted prudently and for the interest of all concerned. He is, therefore, entitled to recover the sums paid by him for discharging the cargo and for port charges.

With regard to the claim for demurrage there is more difficulty. By the terms of the charter party, demurrage is to become due only for detention caused by default of the charterer or his agent. In all contracts of affreightment, there is, in the absence of an express contract, an implied agreement that the consignee of goods will provide for discharging and receiving them within a reasonable time, to be ascertained by the jury, on consideration of all the circumstances. But the consignee may explain or excuse his delay by proof of extraordinary circumstances beyond his control, which prevented him. Cross v. Beard, 26 N. Y. 85. In Towle v. Kittell, 5 Cush. 18, it was held, where the vessel was ordered away from the usual place of discharge by competent authority on account of the prevalence of an infectious disease, that the delay thereby occasioned was not caused "by the default" of the charterer. But in this case no fault whatever could be imputed to the charterer or his agent. The delay was caused by superior authority. It would seem to be as much a part of the contract, that the shipper shall provide a consignee to receive the goods at the place of destination, as that the carrier shall transport and deliver them. If, on the arrival of the vessel, the consignee cannot be found after diligent inquiry by the master, the delay so occasioned ought

in justice to be deemed to have been caused by the default of the shipper or his agents. So, in this case, if the coal had been consigned to the Alaska Company, and, by reason of the want of dockage facilities, the discharge had not been completed until after the lay days had expired, no doubt would, I presume, be entertained that the detention should be attributed to the default of the agents of the charterer, for the latter covenanted to discharge the vessel within a prescribed time. But, suppose that the Saranac had arrived and received the coal, but not until after the expiration of the lay days; ought not the charterer to be responsible for the detention? By the bill of lading, the Saranac was the consignee to whom the coal was to be delivered. The consequences of her unpunctuality ought to be borne rather by the party whose agent she, in effect, was, and who had virtually stipulated that she would be ready to receive the whole cargo within ten days after the ship's arrival, rather than upon the shipowner, who was a stranger to the contract with the government, and was entirely subject to the charterer's directions as to the parties to whom the cargo was to be delivered. If the charterer would be responsible for the delay of the steamer in arriving, it follows that he is responsible for her total failure to arrive, provided the master has not waited for her an unreasonable time, which is not pretended in this case. The voyage described in the charter party is a voyage from San Francisco to Ounalaska. The bill of lading, made some seven days afterwards, designates the steamer Saranac or assigns as the consignee. It does not appear that, at the time of making the charter party, the master was aware that the coal was to be delivered to the steamer. But, assuming that he was, and that he also knew that the steamer, although expected, was not then at Ounalaska, and that, therefore, it was possible she might not reach that port at all, it seems more reasonable to suppose that the consequences of such an accident were intended by the parties to be borne by the shipper rather than by the ship; for the former reaped the whole benefit from the contract with the government, had the means of estimating the probability of the Saranac's arrival, and could have provided for an indemnity in case delivery to her was delayed or prevented by her non-arrival.

I have been referred to no case, the circumstances of which bear any close analogy to those of the case at bar. So far as I know, the question, as here presented, is novel. I feel much hesitation in deciding it, and hope it may be submitted to an appellate court.

A decree will be entered in favor of the libelant for the amount claimed in the libel, less two days' demurrage, which seems to be overcharged.

[NOTE. On appeal to the circuit court, the decree was affirmed without opinion.]

DOW (ROBINSON v.). See Case No. 11,950.

DOW (UNITED STATES v.). See Case No. 14,990.

Case No. 4,038.

DOWDALL v. PENNSYLVANIA R. CO.

[13 Blatchf. 403.][1]

Circuit Court, E. D. New York. June 9, 1876.

EVIDENCE—ADMISSIONS OF AGENT — NEGLIGENT TOWAGE—TOTAL LOSS, EVIDENCE OF — MARKET VALUE.

1. In the trial before a jury, of an action at law to recover damages for the loss of the plaintiff's canal-boat, through the negligence of the defendant, while being towed by the defendant, the boat, which was loaded with coal, having struck the spiles of a bridge and sunk, the plaintiff, on being examined as a witness, testified, under objection, that he afterwards had a conversation with a person who was the agent of the defendant in regard to tow-boats, and he said that the boat was sunk, and that it would cost more to raise her than she was worth, and that he regarded her as a total loss: *Held*, that the evidence was competent.

[Criticised in Jennings v. Muller, Case No. 7,282.]

2. The statement was within the scope of his agency, there had been time for the agent to make an examination, and it is to be assumed that he had made one; nor was it a subject in relation to which it was necessary to be shown that the person speaking was an expert.

3. A party claiming a total loss of his vessel must prove either an actual total loss, or that it would cost more to raise and repair the vessel than she would be worth when repaired. The burden of proof is upon him.

4. The facts, that the boat was struck, and filled and sank to the bottom of a river in which the tide ebbed and flowed, and that, after the lapse of sufficient time to ascertain the facts, the agent of the party causing the injury declared to the owner that she was a total loss, and that it would cost more to repair her than she would be worth when repaired, were evidence to justify a submission of the question to the jury.

5. The fact that the boat was proved to have been subsequently seen lying in the harbor of New York, slightly repaired and lying in the mud, did not necessarily alter the result. The whole evidence was proper for the jury.

6. On the question of the actual market value of the boat at the time of her loss, it was competent evidence for the plaintiff to testify as to what he had paid for her and what he had expended upon her.

[7. Cited in Powell v. The Willie, 2 Fed. 99, to the point that the defendants were bound to possess a knowledge of the dangers of the navigation they undertook.]

Timothy C. Cronin, for plaintiff.
Charles H. Woodruff, for defendant.

HUNT, Circuit Justice. This is a motion for a new trial, on a bill of exceptions. The case was tried before a jury, in June, 1875, and resulted in the finding of a verdict for the plaintiff, for eight hundred dollars. The action was to recover damages for the loss of the canal-boat of the plaintiff [Michael Dowdall], through the negligence of the de-

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

fendant, while being towed by the defendant from the city of New Brunswick to the city of New York. The defendant has made a bill of exceptions, obtained a stay of proceedings, and now presents his case upon the motion for a new trial.

The first objection is to the admission of the evidence founded upon the statement of Mr. Jarrard. The plaintiff commenced his case by calling the master of the boat alleged to have been injured, who testified to the circumstances resulting in her striking against the spiles of the bridge, and that she went down to the bottom of the river. She was loaded with coal, and was being towed by one of the defendant's tow-boats through the Hackensack river, when the accident occurred; and it was in that river that she sank. The witness then added: "I saw Mr. Jarrard and Mr. Stevens. Mr. Jarrard is agent for the company, and Mr. Stevens superintendent. I saw Mr. Jarrard at New Brunswick. He is agent of the company in regard to tow-boats. He told me to see Mr. Stevens at Hoboken." Mr. Dowdall, the plaintiff, was then called, who testified as follows: "I had a conversation with Mr. Jarrard. He told me that the boat was sunk, and that it would cost more to raise her than she was worth, and that he regarded the boat as a total loss. I then went to see Mr. Stevens, and he sent me back to Mr. Jarrard." The admission of this evidence forms the ground of the first exception by the defendant. This objection is attempted to be sustained upon different grounds. Thus, it is said: 1st, that the statement is not of such a nature as would bind a principal, by the laws of agency; 2d, that it does not appear that it was within the personal knowledge of the agent; 3d, that it does not appear that it was within the scope of his agency; 4th, that it was not a part of the res gestae; 5th, that an admission is not competent evidence of a fact which might be proved by direct testimony; and, 6th, that this evidence became incompetent when it appeared afterwards that the boat was in fact raised and brought to New York.

It had been proved already, that one of these men, Jarrard, was the agent of the company in regard to tow-boats, and that, upon application to this agent, he referred the plaintiff to the other agent, Stevens, who was the superintendent of the company. We are to assume of these men, as of other agents of railroad companies, first, that they speak for and represent their principals within their agency; and, second, that they act in the interests of their principals—at least, that they do not intentionally favor others at the expense of their principals. Here is the case—not an uncommon one—of a man whose boat has been sunk while in the charge of the company. She goes to the bottom of the river and lies there. What is the owner to do? Shall he rush to a lawyer's office and order a suit to be commenced, or shall he apply to the company for redress? He wisely takes the latter course. To whom shall he apply? One would say, to those agents having in charge the subject of towing boats. This accident happened in the state of New Jersey, and, from the name of the company, we may suppose that its principal place of business, and its president and secretaries, would not be found in that state. The agent in respect to towing boats, and the superintendent of the company, are found, and from one of these he is referred to the other. When he there makes application, it seems to have been already ascertained that the accident had occurred, and what were its results. We are not to assume that Mr. Jarrard, the agent of the company, would make the positive statements he did, unless he had examined into the case. We cannot suppose him thus ready to favor a stranger at the expense of his employer, unless he had ascertained that it was his duty to do so. Apparently, he had informed himself of the state of the case, as, without making further inquiries, he informed the plaintiff, as of his own knowledge, that the boat was sunk, that it would cost more to raise her than she was worth, and that he regarded her as a total loss.

I cannot think it necessary to the competency of an admission, that the party making it shall be shown to be an expert on the subject of the evidence admitted. If the case had been reversed, and Dowdall had admitted that the expense of raising would have been less than the value of the boat when raised, the evidence would have been competent. It would not have been conclusive, and he might have shown the truth in opposition to his admission, as the defendant might have done here, but, it would have been good as far as it went. The subject-matter of the admission appears to have been more within the department of the agent of the tow-boats of the company, than of any other agent or officer. It was his duty to see to this subject, and to see that, in respect to boats to be towed, the interests of the company were protected. That this boat was subsequently raised and brought to the city of New York, is a circumstance affecting the weight, and not the competency, of the evidence. I shall have occasion to refer to this subject further, in considering the objection to the charge, on the point of a constructive total loss.

The second objection also arises upon the testimony of the plaintiff, Dowdall. He says: "The value of the boat was fifteen hundred dollars. She was worth that to me." This was objected to by the defendant's counsel, and an exception taken. The witness proceeded: "I paid seven hundred dollars, and laid out three or four hundred dollars." This was also objected to, the objection was overruled, and the defendant excepted. The defendant's argument, that the actual market value of the boat at the time

of the injury furnishes the rule of damages, is certainly a sound one. What the plaintiff paid for her, or what repairs he put upon her, do not necessarily establish her value. Nevertheless, these are competent facts, as bearing upon the question of actual value. What an article will sell for is a good test of value; and what the boat sold for, when the plaintiff bought her, is one of those tests. It is not conclusive. He may have paid an extravagant price, he may have made a very good bargain, or the circumstances may now be very different. So, his expenditures upon her enter into the same view. If she was worth a certain sum when he bought her, it is not an unreasonable argument that the expenditure of $300 upon her added so much to her value. It was for the jury to determine. It was never doubted, that what the plaintiff gave for his boat or his horse or his carriage, within a short time before the injury to it, is competent evidence on the question of value. The practice on that point, at jury trials. is believed to be uniform. The statement that the boat was worth the sum stated, to him, the plaintiff, was not specially excepted to. It is quite likely, that, if attention had been called to that expression, the court would have limited the evidence to the value of the boat generally and not its value to the plaintiff. The exception was general. to the plaintiff's evidence that the boat was worth $1,500, as well as that she was worth that sum "to me."

The remaining exception is to the charge of the judge. Among other things, the jury were charged as follows: "If you hold, that, upon the proof, the plaintiff is entitled to recover, the next question is as to the amount of such recovery. On that point, I charge you, that the rule of damages is this—1. If the boat was sunk, and was totally lost in fact, the plaintiff is entitled to recover her actual value at that time. 2. If she was not actually and totally lost, but was in such a condition that the expense of raising and repairing her would exceed her value when so repaired, then the plaintiff can recover her actual value at the time of the injury." The defendant objected and excepted to the submission of the question of value to the jury, on the ground that there was no evidence of total loss or of the cost of recovery and repair. In connection with this exception. the defendant's counsel requested the court to charge the jury, that the recovery should be for nominal damages only, which request was refused.

At the trial and upon the present argument, the counsel for the defendant conceded that the law as announced by the court was correctly announced, but insisted that there were no facts found, and no competent evidence before the jury, to which such principles could be applied. If this contention is well taken, there was doubtless an error for which a new trial must be awarded. It was proven, that, after receiving the injury, the boat filled and sank to the bottom of the Hackensack river. We are not informed of the depth of the water in this river, and only know of it that it is a river in which the tide rises to the height usual in the latitude of New York, and runs with force at the point in question, and that it is one of the great highways of internal traffic. After the boat was so sunk, and after the lapse of sufficient time to procure the presence of her owner. and for him to call upon the different agents of the defendant in New Jersey, involving probably a period of several days, the jury were justified in believing that those agents made an examination of the boat, as she lay in the river. They must be supposed to be familiar with the river, with its depths, its tides, the means and expenses of raising boats, and the expense of repairing boats that had been stove and sunk. It was both their duty and their interest to ascertain the actual injuries to this boat. They had all the means of ascertaining the actual injury, and of judging of the cost of repairing her, and the jury had the right to assume that they would not adjudge and declare until they had made the necessary examination. Such agent did then and there. under these circumstances, declare to the plaintiff, that his boat was a total loss, and that it would cost more to raise and repair her than she would be worth when raised and repaired. I am of opinion that the plaintiff had a right to rely upon this declaration, and that these facts and circumstances afforded evidence to the jury on which they might find that there was a total loss of the boat. If there was such evidence. then it was for the jury to decide whether or not it was overborne by the fact of the subsequent appearance of the boat in the Hudson river. It was proven, that, a year after the accident, to wit, in the fall of 1874, a witness saw the boat in the Hudson river between 56th and 57th streets, New York, and that he saw her again in the same place, a few days before the trial, which took place in June, 1875. A piece of plank had been put on her and a piece of timber had been put in her, and she laid in this condition, in the mud. It did not appear who had removed the boat, or who had repaired her, whether. after an attempted repair, she was found to be of any value, or whether she had been again abandoned and left to rot in the mud as of no value to any one. Assuming, as the defendant's counsel is justified in doing, that it was the duty of the plaintiff to establish his case, and that, if he claimed a total loss, it was for him to establish the facts which would justify that claim, I am still of the opinion that a prima facie case was made by him, and that the case was not necessarily, and as matter of law, overthrown by proof of the subsequent condition of the boat. It left the case, upon the whole evidence. for the judgment of the jury, and I see no occasion to interfere with the decision made by it.

Case No. 4,039.

DOWELL v. CARDWELL et al.

[4 Sawy. 217.][1]

District Court, D. Oregon. April 6, 1877.

LIEN OF AGENT—ASSIGNMENT OF CLAIM — CLAIM. DEFINITION OF—PLEA IN ABATEMENT—LIEN OF AGENT AS AGAINST THIRD PERSON — HOW ENFORCED.

1. An agent employed to collect a claim against the United States for a certain per centum of the amount realized, whether in bonds, drafts or cash, has a lien upon the fund for his compensation.

2. An assignment of such claim to such agent absolute upon its face, but made in fact to enable him to collect the same in his own name, is nevertheless an assignment of so much of the claim as the agent is entitled to retain as compensation.

3. The term "claim," as used in section 3477 of the Revised Statutes, does not include claims for supplies furnished the Oregon expedition to protect the emigrants of 1854; at least after the act of congress providing for their payment.

4. A plea in abatement pleaded with matter to the merits is considered waived or abandoned.

[Cited in Collinson v. Jackson, 14 Fed. 309.]

5. Where an agent has a lien upon a fund for a certain compensation for his services, either by virtue of his agency or an assignment pro tanto, he may sue in equity to enforce his rights therein against a third party receiving the same with notice thereof.

6. Where the principal of such agent is an administrator, the latter is not bound to present his demand to him for allowance or rejection before commencing suit against such third party, the latter's liability being wholly dependent upon his own acts, and not those of the administrator.

[This was a suit by B. F. Dowell against James A. Cardwell and W. C. Griswold.]

Addison C. Gibbs and plaintiff in pro. per., for plaintiff.

Walter W. Thayer and Richard Williams, for defendant.

DEADY, District Judge. This suit was commenced on November 16, 1874, in the circuit court for the county of Jackson, and on March 27, 1876, as to the defendant Griswold, was removed into this court. The transcript was filed in this court on January 9, 1877. It was heard in this court on the pleadings and proofs made and taken in the state court. The plaintiff seeks to recover the one-half of the sum of $2,580, alleged to have been wrongfully received by the defendant Griswold from the United States, on November 9, 1874, on account of supplies furnished by Wallace A. Gridley, deceased, to Company A of the ninth regiment of Oregon militia, in the summer of 1854, the plaintiff claiming a lien upon the fund for that amount for services and expenses in procuring an appropriation by congress to pay what might be due upon the claim, and procuring its allowance by the department.

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

The testimony is very voluminous, and covers a wide range both as to time and transaction. The material facts appear to be as follows: On July 17, 1854, upon the representation of Charles S. Drew, quartermaster-general of the Oregon militia, and others of Jackson county, the then governor of the territory, John W. Davis, directed the colonel of the ninth regiment of said militia, John E. Ross, to call into service volunteers for the protection of the immigrants coming into Oregon by the southern trail. In pursuance of this order, a company of volunteers was organized under the command of Captain Jesse Walker, and mustered into service by said Ross, as Company A of said regiment of militia. On August 8, 1854, the company, seventy-one strong, rank and file, proceeded upon the emigrant trail to the vicinity of Goose lake, sending detachments as far as Humboldt, and after an absence of about three months returned to Jacksonville, and was discharged without the loss of a man. This expedition attracted some attention in its day, and is the same that was sometimes characterized by such as lacked faith in the disinterestedness of those who promoted it, as "the expedition to fight the emigrants" rather than the Indians. The money and material necessary to equip and transport the command were furnished by the people of the vicinity with a view of bringing the immigration into that part of the territory, and in the expectation that congress would make an appropriation to pay the indebtedness incurred in the operation. Vouchers in due form were issued by Drew for supplies furnished. Among others, there were issued on September 15 and August 3, to Wallace A. Gridley, two vouchers, for $2,580 in the aggregate, on account of twelve beeves furnished the quartermaster, at thirty cents per pound, "for the use of Company A, mounted volunteers of the ninth regiment, Oregon militia, enrolled into the United States service to protect emigrants through that portion of Oregon territory which is now, as heretofore, inhabited by numerous tribes of hostile Indians." The amount of indebtedness incurred by the expedition for supplies, transportation, and employees, was about $45,000, for which Drew, as quartermaster and commissary, issued vouchers. The plaintiff accompanied it and furnished the larger portion of the supplies and transportation.

On February 2, 1871, "An act to pay two companies of Oregon volunteers" (16 Stat. 401) became a law without the approval of the president. This act provided: "That the act of congress entitled 'An act to authorize the secretary of war to settle and adjust the expenses of the Rogue River Indian war,' approved July 17, 1854 [10 Stat. 307], be and the same is hereby extended to the two companies of Oregon volunteers commanded by Captains Jesse Walker and Nathan Olney, called into service to suppress Indian hostilities in Oregon in 1854." By the act hereby

extended to Walker's company, it was provided: "That the secretary of war be and he hereby is authorized to adjust and settle, on just and equitable principles, all claims for services rendered in the late war with the Rogue River Indians in Oregon, known as the Rogue River war, according to the muster-rolls of the same; also for subsistence, forage, medical stores and expenditures, as well as for other necessary and proper supplies furnished for the prosecution of said war; and that on such adjustment (the same shall) be paid out of any moneys in the treasury not otherwise appropriated." 10 Stat. 307. Soon after the return of the expedition, the plaintiff commenced operations to procure its recognition and the payment of its expenses by congress. In 1856, he first went to Washington on this business, and thenceforth for the next fifteen years he spent much time and money there, and in going to and fro, in this behalf. He wrote and published petitions and arguments, procured evidence and memorials from the territorial legislature, labored with committees and members of congress, and in many and effective ways worked long and diligently to procure an appropriation for this purpose. The result was the passage of the act of February 2, 1871 [16 Stat. 401], which was mainly due to his pertinacious industry and energy.

In 1856, the plaintiff made a verbal contract with Gridley, by which the latter placed his vouchers in the hands of the former for collection, and agreed to pay the plaintiff a reasonable fee for his services, and contribute his proportion of the expense of procuring an appropriation and the payment of his claim. On September 3, 1859, Gridley died, leaving as his heirs at law a widow, Sarah, and five minor children. On November 7, 1859, letters of administration upon the estate of Gridley were duly issued to his widow. Soon after, the administratrix renewed the contract with the plaintiff to procure the payment of the Gridley vouchers, the same being modified so that it was agreed that the latter should have a proportionate share of his expenses and a "big fee" for his services, both not to exceed in any event one-half of the amount realized, and not otherwise, "whether paid in bonds, drafts or cash." At this time these claims for supplies and transportation furnished Walker's company had no particular value. Only a few persons were interested in them, and there was but little faith in their ultimate payment. The expedition itself had been publicly denounced as a mere private speculation under the guise of the public good. Subsequently, Sarah Gridley married Benjamin Stephens, and thereby her appointment as administratrix was superseded by operation of law; not, however, until the estate was substantially administered. After the passage of the act of February 2, 1871, namely: on September 8, 1871, the defendant James A. Cardwell, at the instance of the plaintiff and said Sarah Stephens, was appointed administrator de bonis non of the estate of said Gridley, for the purpose, particularly, of enabling him to give the plaintiff formal authority to collect and receive what was due the estate from the United States on these vouchers. On November 21, 1871, Cardwell gave the plaintiff a duly executed power of attorney, thereby authorizing him to demand and receive for him and in his name all sums due on account of the supplies furnished by said Gridley for the use of Walker's company in 1854; and on March 18, 1874, said Cardwell gave the plaintiff another power of attorney, which was "irrevocable," and by which, for the sum of $1 and other considerations, he transferred and conveyed the same to him.

Upon the passage of the act of February 2, 1871, the plaintiff procured proof of the value of the supplies and transportation furnished Walker's company, and prosecuted the allowance of his own and Gridley's claim before the proper department at Washington. In April, 1871, he was allowed $18,288.33 on his own demand, and the defendant Griswold as assignee of B. J. Drew, a brother of the quartermaster Drew, was allowed about the same time the sum of $15,556.50. Soon after this, Griswold, as the assignee and attorney of Chester and Jesse Robinson, appears to have presented claims to the department as a part of the expenses of the expedition, amounting to $22,003.56—by far the greater part of which appear to have been forged or fictitious—thus swelling the total amount of the expense to about $65,000, while the act making the appropriation had been passed upon the affidavit of the plaintiff that the whole expense of the expedition did not exceed $45,000. See Sen. Ex. Doc. No. 24, 3d Sess. 42d Cong. p. 32. Attention having been called by some means to the probable falsity of these claims, and the original abstracts of Quartermaster Drew not being produced, the payment of claims on account of the expedition of 1854 was peremptorily stopped by the war department until about January 20, 1874, when $21,064.88 of said fictitious claims were allowed and paid to Griswold. In the meantime the plaintiff denounced these new claims as fraudulent, and procured and tendered to the department convincing evidence to that effect. Afterward, and while these claims were still under embargo in the department, the plaintiff procured himself to be appointed administrator of the estate of one Thomas J. O'Neal, by the proper court of Jackson county, and presented a claim at the treasury department, as such administrator, for an allowance for the use of rigging on pack animals in the Oregon Indian war of 1855–6. Subsequently O'Neal turned up, and the defendant Griswold, upon the affidavit of O'Neal, procured an order, on March 16, 1874, from the secretary of the treasury (Richardson) to the effect that the plaintiff would "not be recognized as an attorney for the

prosecution of claims" before that department until otherwise ordered. Afterward, on September 18, 1874, it satisfactorily appearing that the plaintiff's action in the premises was had in good faith and that he was honestly mistaken, Secretary Bristow rescinded this order. On May 5, 1874, Griswold induced the defendant Cardwell, as administrator, to sell and assign the Gridley demand to him by a duly executed assignment and power of attorney of that date. Prior to the passage of the act making the appropriation to pay these claims, two of the children of Gridley had died, unmarried and without issue, and a few days before the assignment by Gridley to Griswold the latter had in fact purchased the three-sixths interest of Sarah Stephens, and the two-sixths interest of her two adult sons in the claim, for about $1,200. Besides, being administrator, Cardwell was the guardian of the third and minor child of Gridley, and although in form and in law he sold the whole claim as administrator to Griswold, yet, in fact, he only disposed of and received pay for the one-sixth thereof, the interest of said minor child therein. Altogether, Griswold paid between $1,500 and $1,600 for the claim. These parties were induced to make this sale, and Cardwell to execute this assignment and power, by the representations of Griswold, to the effect that the plaintiff could not collect any claims at Washington, because he was indebted to the United States in the sum of several thousand dollars for overpayment on his own claims, which he refused to refund, and because he had been disbarred from prosecuting claims in the treasury department; and by giving said Cardwell a bond to indemnify him against any liability which he might thereby incur to the plaintiff. At the time the defendant Griswold made these representations the plaintiff was not in fact indebted to the United States for overpayments or otherwise in any sum. But about November, 1871, when payment of the 1854 Oregon claims had been stopped, as above stated, and the same referred to a clerk of the war department, Thomas H. Bradley, for special examination, this officer reported that the plaintiff had been overpaid on his individual claim aforesaid in the sum of $6,158. Afterward, on January 19, 1874, he ascertained that such overpayment only amounted to $497, which sum the plaintiff refunded on March 18, 1874. Before this time the plaintiff had offered to set off a like amount of this or other claims then and for long justly due him against this demand, which offer was arbitrarily refused. Neither did the plaintiff admit that he was overpaid in any sum, but the contrary; and he appears to have refunded this $497 only because he was constrained to do so in order to obtain the payment of the claims then due him from the government. Griswold's representation that the plaintiff was then prohibited from prosecuting claims as an attorney in the department was true; but that order did not include and ought not to have prevented him from collecting a claim as assignee, and such was his legal relation to this one from March 18, 1874. Besides, the order disbarring the plaintiff was improperly procured by the defendant Griswold, whether knowingly or otherwise, and he ought not to be allowed to take advantage of his own wrong.

Owing to the plaintiff's action in regard to his fictitious claims aforesaid, it appears that Griswold endeavored to discredit him at the departments and with his clients in Oregon, and to this end he procured the order disbarring him, and made representations to such clients to the effect that they must sell their claims or take them out of his hands if they ever expected to realize anything on them. Apparently, as a part of this scheme and in Griswold's interest, objections were made in the third auditor's office to paying the plaintiff as assignee according to the duly executed assignments of Cardwell and others, and letters signed by the third auditor were privately addressed to the plaintiff's clients, including Cardwell, inquiring about the assignments to the plaintiff as if they might be fraudulent, and suggesting doubts as to the propriety of paying the claims to Dowell as provided by them. By this means, in addition to what has already been stated, Cardwell and others of the plaintiff's clients became alarmed, and were induced to sell their claims, amounting to several thousands of dollars, to Griswold at a low figure, in disregard of their engagement with the plaintiff and his rights. The evidence shows that Griswold, in buying up these claims, gave as a reason why he could get them allowed, and why he could not afford to pay any more for them than he did, that he had to spend money upon the clerks, and this apparently officious interference by some one on his behalf warrants the inference that this statement was not a mere idle boast or a dealer's device to cheapen the claim. The assignment of the Gridley claim to the plaintiff, although in form and effect absolute, was not so in fact, and was obtained by him in good faith and without fraud or deceit, for the sole purpose of collecting the claim as assignee if not as attorney, and thereby getting the compensation out of it to which he was justly entitled, and for which he had so long and so faithfully labored. On November 19, 1874, a warrant was directed to issue in satisfaction of the Gridley claim for the full amount of $2,580, payable to Griswold, who thereupon received the money from the United States upon it. Under ordinary circumstances, the collection of this claim after the passage of the act making the appropriation to pay it was a matter of comparatively small moment. The great labor, time and expense was incurred in securing the appropriation, because the necessity and integrity of the expedition had been seriously ques-

tioned from the first; and this, as has been stated, was accomplished mainly by the plaintiff. The appropriation being made, there ought not to have been any doubt or question as to the validity or payment of the claim. All that was necessary was to show that the price of the beef was in justice and equity, under all the circumstances, reasonable; and although the price appears to have been very high, no serious objection was made upon that account, because there were plenty of precedents for it among the allowances under the act of July 17, 1854, and the purchases by the regular army under similar circumstances in that region of country. Besides, the fact that the parties had waited for their money seventeen years, without interest, and had been compelled to pledge a large portion of it to defray the expenses of procuring the appropriation to pay it, might well be considered by the secretary of war in making an adjustment and settlement of this claim "on just and equitable principles." But, notwithstanding all this, by one means and another, and without any apparent fault of the plaintiff, the payment of this claim was delayed and obstructed in the department for over three years, to the great injury of the plaintiff and the other parties interested. Directly and indirectly the defendant Griswold appears to have been the principal cause of this delay, and finally, with full notice of all the circumstances, he appears to have taken advantage of them to get the claim transferred to himself, for a little over fifty cents on the dollar, with the intent to deprive the plaintiff of his interest in it, and all compensation for the time, labor and expense bestowed on it in making it available.

Before the execution of the assignment and power of March 18, 1874, by Cardwell, the plaintiff, upon inquiry by the former, told him that his charges would be thirty-three and one-third per centum of the sum collected, and Cardwell then and there assented to the proposition, so that at the time of the sale to Griswold, the plaintiff had a one-third interest in the claim, unless there is something in the law applicable to the transaction which will prevent the acts and doings of the parties from taking effect according to their manifest intentions and the justice of the case. Counsel for the defendant, however, claim that as a matter of fact, the plaintiff was simply employed to collect this claim; that he has no lien upon the fund for his services, and that no part of it was appropriated or assigned to him as a security therefor, or in satisfaction thereof, and therefore Cardwell might dispose of the claim to Griswold, pending its collection, without his consent, and if there is anything due the plaintiff for services rendered, or expenses incurred on account of his agency in the matter, he may bring an action at law against Cardwell, wherein he can recover damages commensurate with the injury sustained, if any. But upon the proof there can be no doubt that under the contract and power of attorney of November 21, 1871, the plaintiff, as agent or attorney in fact of Cardwell, had a lien upon the fund in the treasury of the United States for his compensation earned, which Cardwell could not divest or ignore. Story, Ag. §§ 372, 476. But under the irrevocable power and absolute assignment of March 18, 1874, there was at least an equitable assignment to the plaintiff of one-third of the amount to be realized on the claim, as a compensation for his past services and expenses in procuring the appropriation and those yet to be rendered or incurred in obtaining its allowance. This was not a mere agreement by Cardwell to pay the plaintiff when the claim should be allowed, or out of this fund when it should be received by him, but an actual appropriation of so much of the same to the plaintiff, so that the United States was thereby authorized to pay the amount directly to him without the further intervention of Cardwell. The case comes directly within the rule laid down by Lord Truro, Ch., in Rodick v. Gandell, 12 Beav. 325, cited in 2 White & T. Lead. Cas. Eq. 406. "The extent of the principle," said his lordship, "to be deducted from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid, equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or funds to which the order refers;" and also the supreme court in Murray v. Gibson, 15 How. [56 U. S.] 420; Wright v. Ellison, 1 Wall. [68 U. S.] 22; and Trist v. Child, 21 Wall. [88 U. S.] 447. In the first of these cases, the court say: "The evidence proves that the complainant was to receive a contingent fee of five per centum out of the fund awarded, whether money or scrip. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to, and not the personal responsibility of the owner of the claim." In the second case, the court, in speaking of the doctrine of equitable assignment, say: "It is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In the third case, the court say: "It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There

must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor, without the further intervention of the debtor."

But admitting the facts of the transaction and the intentions of the parties to be as herein stated, the defendant still maintains that the plaintiff never had any legal authority to collect this claim, and could not acquire any lien upon or interest in the fund out of which it was payable, because of the prohibitions contained in section 3477 of the Revised Statutes, and, therefore, Cardwell might lawfully dispose of it to Griswold, as he did, free from any demand or right upon the part of the plaintiff. This section is composed of the act of July 29, 1846 (9 Stat. 41), and section 1 of that of February 25, 1853 (10 Stat. 170), and substantially provides that "all transfers and assignments" of any claim upon the United States or any interest thereon, and all powers or other authorities for receiving payment of any such claim are "absolutely null and void," unless made among other things, "after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof." To show that a warrant of attorney to collect and receive a claim may be made under the act of 1846, supra, at any time after provision has been made by act of congress for its payment, plaintiff cites Opinions of Attorney General (volume 6, p. 60). But the ground for the ingenious distinction taken in that case between "a warrant of attorney" and "a transfer or assignment" no longer exists. The acts of 1846 and 1853, supra, as consolidated and revised in section 3477, supra, put "warrants of attorney" and "transfers and assignments" upon the same footing. Either, if made with reference to a claim upon the United States within the purview of this section, before "the issuing of the warrant for the payment thereof" is "absolutely null and void." Still the Revised Statutes, as such, not being in force prior to December 1, 1873, the warrant of attorney given to the plaintiff under the act of 1846, on November 21, 1871, was, upon the authority of the opinion supra, undoubtedly valid. On account of the agency thereby created and as a security for the services of the agent the law imposed a lien upon the fund in favor of the plaintiff for his compensation, his commissions, advances and expenses. But the power and transfer of March 18, 1874, being made after the Revised Statutes took effect, if within the scope of section 3477, is void. But my impression is that the section is not applicable to any of these claims. In my judgment "a claim upon the United States" is something in the nature of a demand for damages arising out of some alleged act or omission of the government, not yet provided for or acknowledged by law. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. Worcester and Bouvier, verba "Claim." When the demand is admitted, authorized or provided for by law it is not a mere claim, but a debt. It no longer rests in mere clamor or petition, but is something due upon which an action may be maintained.

This demand had its ostensible origin in the order of Governor John W. Davis, a United States officer, and then commander in chief of the militia of Oregon territory. It arose out of a contract in due form with an officer of that militia in pursuance of such order, and was afterward, in pursuance of the joint resolution of the territorial legislature, passed January 26, 1855, directly recognized by the United States by the passage of the act directing its adjustment and settlement by the secretary of war, and its payment out of the treasury. There is ground, then, for the argument of the plaintiff that the demand was a debt from the beginning, and never a mere claim or assertion. But by the acts of 1854 and 1871, supra, it was provided that these claims should be adjusted on "just and equitable principles" and paid accordingly. Thereafter, if not before, they were debts and not mere claims. Besides this, legislation seems to recognize the right of the assignee, who is in equity the owner, and entitled to receive the money. It must have been known to congress that the vouchers for the supplies furnished to the expedition of 1854 had in many instances changed hands. To equitably adjust and settle these claims involves the determination of who is entitled to the payment therefor. This seems to have been the construction placed upon the act by the department. The evidence shows beyond a doubt that claims growing out of the Rogue River war of 1853, the expedition of 1854, and the general war of 1855–6, were constantly paid to attorneys and assignees upon powers and transfers made before the issuing of the warrants, or even before the act making the appropriation for their payment. Indeed, the very assignment upon which Griswold received the amount of the Gridley claim was made to him more that six months prior to the issuing of the warrant therefor. This being so, even if the case was within the statute as between the parties and the United States, Griswold, having obtained this money in violation of or contrary to it, ought not to be allowed to set it up in this suit to prevent the plaintiff from recovering that portion of it which in equity belongs to him.

The defendant also objects, that if the defendant is entitled to recover at all, his remedy is at law, and therefore this court is without jurisdiction. The pleadings in this case were not reformed after its removal to this court. The answer to the complaint contains a plea to the jurisdiction, along with

matter to the merits. But a party who desires to object to the jurisdiction of this court, must do so by plea before answering to the merits; and if he pleads such a plea with one to the merits, it will be treated as waived or abandoned. Chapman v. School Dist. [Case No. 2,607]; Murray v. Gibson, supra; S. C. Eq. Rule 39. For this reason, the defendant is not entitled to make this objection at this time. But if this were otherwise, it would not affect the result. There is no doubt but that the plaintiff might have maintained an action at law against the defendant, upon these facts, as for money had and received to his use. But it being determined that the plaintiff had a lien upon the fund, which accompanied it into the hands of the defendant, equity has jurisdiction also. Story, Eq. Jur. § 1044; Bradley v. Root, 5 Paige, 640; Murray v. Gibson, supra; Trist v. Child, supra. The latter case is particularly in point. There the court found, upon the evidence, that the plaintiff had no lien, because the transaction only amounted to a personal agreement between the parties, and therefore there was no jurisdiction in equity, saying: "If there was no lien, there was no jurisdiction," which plainly implies the converse of the proposition—if there is a lien, equity has jurisdiction.

The defendant also pleads that this demand was not presented to Cardwell, as administrator, for allowance, as provided in sections 374 and 468 of the Oregon Civil Code, and therefore this suit cannot be maintained. If this were so, the fact would not be a bar to the right, but only abate this suit. Hentsch v. Porter, 10 Cal. 557. But the allegation being pleaded with matter to the merits, is therefore to be considered waived and abandoned. But if this were otherwise, the plea is not good. So far as Griswold is concerned, this is not a claim against the estate of Gridley, but against himself upon a liability arising out of his own conduct—the obtaining this money from the United States, upon which the plaintiff had a lien, if not by fraud, at least wrongfully and with notice of the facts. For this reason, it matters not whether the demand was presented to Cardwell, for allowance, or not, or whether he, as administrator, is even liable for it or not. Even so far as Cardwell is concerned, correctly speaking this is not a demand against the estate, because of the liability of the intestate, but a demand against the administrator, on account of a liability incurred by him in the administration of the estate. An administrator may incur expenses, including attorney's fees, in the administration of an estate, for which he shall be allowed in his settlement. Civ. Code Or. § 1146. I doubt whether such demands are within the purview of section 374, supra, and must therefore be verified and presented for allowance or rejection, by the administrator, before an action can be maintained against him to enforce them. However this may be, such allowance or rejection can in no way affect Griswold's liability in the premises. There must be a decree for the plaintiff for the one-third of the fund received by the defendant—$860—with legal interest upon the same from the time he received it at the treasury of the United States, together with his costs and expenses in this suit.

Case No. 4,040.

DOWELL v. GRISWOLD.

[5 Sawy. 23;[1] 4 Law & Eq. Rep. 517; 10 Chi. Leg. News, 11; 1 San Fran. Law J. 87; 23 Int. Rev. Rec. 403.]

Circuit Court, D. Oregon. Sept. 11, 1877.

INTEREST ON VERDICT.

When an action is brought upon an interest-bearing claim, and there is a verdict for the plaintiff, and the defendant delays the giving of judgment by a motion for a new trial or otherwise, the plaintiff is entitled to legal interest on the verdict.

[Cited in Griffith v. Baltimore & O. R. Co., 44 Fed. 585; Gunther v. Liverpool, London & Globe Ins. Co., 10 Fed. 831.]

Action for money had and received to the use of the plaintiff. The plaintiff [B. F. Dowell] brought an action against the defendant [William Griswold] to recover certain sums of money alleged to have been received by the defendant from the treasury of the United States at Washington, to the plaintiff's use. Upon the trial of the action, on May 25, 1877, the plaintiff had a verdict for four thousand dollars. The defendant moved for a new trial, and the district judge, before whom the trial took place, continued the application until Mr. Justice Field should sit in the court. On September 4, the motion for a new trial was denied by Mr. Justice Field, and judgment ordered on the verdict for the plaintiff. The plaintiff now asks interest on the amount of the verdict from the finding of the same until the giving of judgment.

Addison C. Gibbs, for plaintiff.
William H. Effinger, for defendant.

DEADY, District Judge. No authority from the supreme court of the state is cited upon the point, though it is said by counsel to be the practice in some of the circuits to allow interest on verdicts and reports of referees. The New York Code (section 310) provides that in all cases where "the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto." Substantially this provision has been in force in that state since 1844, but no similar one is contained in the statutes of this state. Prior to 1844, and in the absence of any statute on the subject, it was uniformly held in New York that when the action was upon an interest-bearing contract

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

and the delay between the verdict and the judgment was caused by the defendant, the plaintiff was entitled to tax interest upon the verdict as a part of the costs. Vredenbergh v. Hallett, 1 Johns. Cas. 27; Williams v. Smith, 2 Caines, 253; People v. Gaine, 1 Johns. 343; Henning v. Van Tyne, 19 Wend. 101; Lord v. Mayor, Etc., of New York, 3 Hill, 426; Bull v. Ketchum, 2 Denio, 189.

Whether the contract or transaction upon which this action is brought is an interest-bearing one or not, depends, I suppose, upon the law of this state. On this subject the statute of Oregon (page 623, § 1) provides, "That the rate of interest in this state shall be ten per centum per annum, and no more, on all moneys, after the same becomes due, on judgments and decrees for the payment of money, on money received to the use of another, and retained beyond a reasonable time without the owner's consent, expressed or implied."

In my judgment, this case falls within the latter provision of this section. This verdict was given for money which in contemplation of law was received by the defendant to the use of the plaintiff, because in equity and good conscience it belonged to the plaintiff, and the defendant took it—received it—with full knowledge of the facts that made it so. This being so, and the delay being caused by the defendant in interposing a motion for a new trial, the plaintiff is entitled to interest on the verdict at the legal rate for the period of three months and a half, which amounts to one hundred and sixteen dollars and sixty-six and two thirds cents.

Case No. 4,041.

DOWELL v. GRISWOLD.

[5 Sawy. 39; 5 Reporter, 78; 10 Chi. Leg. News, 107; 1 San Fran. Law J. 235; 24 Int. Rev. Rec. 28.] [1]

Circuit Court, D. Oregon. Nov. 26, 1877.

JURISDICTION.

1. The circuit court has not jurisdiction of a case irrespective of the citizenship of the parties, unless it arises out of a law of the United States; nor is an averment that an action arises out of such law sufficient to confer jurisdiction, but it must appear from the facts stated that it does so arise.

[Cited in Hambleton v. Duham, 22 Fed. 465.]

2. An averment that the trial of an action will necessarily involve the construction of certain acts of congress does not show that such action arises out of such laws.

3. The original jurisdiction conferred upon the circuit courts by section 1 of the act of March 3, 1875 (18 Stat. 470), does not include an action arising out of the contracts or dealings of the parties although upon its trial a question may arise involving the proper construction of a law of the United States.

[This was an action by B. F. Dowell against William C. Griswold.]

A. C. Gibbs, for plaintiff.

W. Lair Hill and H. J. Thompson, for defendant.

DEADY, District Judge. This action was commenced on October 1, 1877, to recover from the defendant [William C. Griswold] the sum of two thousand and eighty-one dollars and thirty-two cents, as money had and received by him to the use of the plaintiff [B. F. Dowell]. The complaint alleges that the plaintiff is a citizen of Oregon, and the defendant of New York.

The cause of action appears to have arisen as follows: The United States being indebted to sundry persons for services and supplies furnished to the expedition of 1854 to aid the emigrants on the southern route to Oregon and in the Oregon Indian war of 1855-6, employed the plaintiff to collect the same, giving him a power of attorney for that purpose, and agreeing that he should have a certain portion of whatever he might obtain upon such claims in full satisfaction of his services and expenses on that account. In pursuance of such authority and agreement, the plaintiff performed valuable services in that behalf, and did all that was necessary to secure the allowance and payment of such claims, when the defendant with full knowledge of the facts fraudulently purchased said claims of said persons, and conspired with certain officers of the treasury department to prevent said plaintiff from obtaining payment of the same, and thereby was enabled to and did collect them himself, and recovered and retained that portion belonging to the plaintiff as compensation for his services and expenses as aforesaid. The defendant pleaded in abatement that he is not a citizen of New York, but is, and prior to this action was, a citizen of Oregon. The plaintiff demurred to the plea, and assigned as cause of demurrer: 1. That the plea does not state facts sufficient to constitute a defense. 2. "That the plea, if true, would not oust the court from jurisdiction in this action, as the complaint avers other complete jurisdictional facts." The "other complete jurisdictional facts" is an allegation in the complaint that the cause of action arises under the laws of the United States, and necessarily involves the construction of two certain acts of congress therein named, to wit, the act of July 17, 1854 (10 Stat. 307), providing for the payment of the expenses of the Rogue River Indian war of 1853, and the act of February 2, 1871 (16 Stat. 401), providing, among other things, for the payment of the expedition aforesaid to aid the emigrants.

Assuming that "complete" facts are only facts, the question made by the demurrer is,

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 Reporter, 78, and 24 Int. Rev. Rec. 28, give only partial reports.]

whether or not this action arises under a law of the United States. The constitution (article 3, § 2) provides that "the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority." By the act of March 3, 1875 (18 Stat. 470), this judicial power was first fully vested in the circuit courts in all cases of original cognizance where the matter in dispute exceeds the value of five hundred dollars.

The allegation in the complaint that the cause of action arises under the laws of the United States, and necessarily involves the construction of certain acts of congress, is only a conclusion of law. Unless the facts stated show how it arises under such laws the allegation is insufficient to confer jurisdiction by reason of the character of the cause without reference to that of the parties.

Upon the facts stated it cannot be said that this action arises under either of the acts of congress mentioned in the complaint, and no other has been suggested out of which it could arise. The indebtedness on the part of the United States to the several persons for whom the plaintiff was acting as agent may be said to have arisen out of these acts. By them the United States recognized and assumed the payment of their several claims, or so much thereof as might be found "just and equitable." But the liability of the defendant in this action grows out of his alleged misconduct in obtaining for himself from the United States, contrary to equity and good conscience, the portion of such indebtedness which belonged to the plaintiff, as a compensation for his services and expenses rendered and incurred in and about the same; or, as was said by this court in Dowell v. Griswold, April 1, 1877 [Case No. 4,039]; "Griswold's liability arises out of his own conduct—the obtaining this money from the United States, upon which the plaintiff had a lien, if not by fraud, at least wrongfully, and with notice of the facts." This act is of recent date, and no case, has been cited giving construction to its language, "arising under the constitution or laws of the United States." But similar language contained in the patent act of July 4, 1836, has been repeatedly held not to confer jurisdiction of suits between patentees and third persons growing out of the dealings and contracts of the parties thereto, with reference to the subject of the patent. Section 17 of that act (5 Stat. 124) provided: "That all actions, etc., arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States," etc.

In Wilson v. Sandford, 10 How. [51 U. S.] 100, it was held by the supreme court that a suit to set aside a contract for the use of a patent—Woodworth's planing machine—and to obtain an injunction against the future use of the same, because the contract was forfeited by the refusal of the defendant to comply with its conditions did not arise under this act, but out of the contract of the parties concerning the subject of the patent. To the same effect is Goodyear v. India Rubber Co. [Case No. 5,586]; Nesmith v. Calvert [Id. 10,123]; and Blanchard v. Sprague [Id. 1,516].

But it is also alleged as a ground of jurisdiction that the trial of this action will "necessarily involve" the construction of the acts of congress aforesaid. Whether this is so or not, at this stage of the proceedings, cannot be told. But in my judgment an action cannot be said to arise under a law of the United States, simply because its construction in some respect is or may be incidentally involved in the trial of it. For instance: In an action between citizens of the same state upon any ordinary contract, a transcript of the record of the judgment of a sister state may be offered in evidence to prove that the matter is res judicata, and thereupon the question may arise whether the same is authenticated in the manner prescribed by the law of the United States on that subject. 1 Stat. 122; Rev. St. § 905. The determination of this question necessarily involves the construction of the national law. But it can hardly be contended that under the act of 1875, supra, whenever such a question is liable to arise in any action, it may, therefore, be brought in the circuit court of the United States, without reference to the character of the parties, as a case arising under the laws of the United States. Such a case does not arise under a law of the United States, but the contract of the parties, and the general principles and rules of law applicable to such transactions. The supposed question arising in the course of the trial under the United States law is only incidental, and at most, contingent upon circumstances which do not lie at the bottom of or affect the real merits of the case. Of course, the judicial power of the United States extends to such questions, but it would appear that the only mode yet provided for its exercise is by an appeal to the supreme court from the final judgment of the state court, as provided in section 25 of the old judiciary act. Rev. St. § 709. Indeed it is not apparent how else it could be exercised than upon appeal, as in many, if not most of such cases, it is impossible, or at least very inconvenient, to foresee and determine in advance whether any such question will arise or not. I know that in Cohens v. Virginia, 6 Wheat. [19 U. S.] 378, the supreme court in construing the language of the constitution defining the judicial power of the United States, ruled that a case "may truly be said to arise under the constitution or laws of the United States whenever its correct decision depends upon the correct construction of either;" and that upon this au-

thority, which has never been shaken, a case which involves a question depending for its solution upon the proper construction of a law of the United States, is a case arising under such law, and therefore within the judicial power of the national government. But the court was construing this language with reference to the extent of the grant of such power and its appellate jurisdiction under section 25, supra, which expressly includes a case where upon a trial in a state court a question arises under a law of the United States, and is decided adversely to the plaintiff in error. The jurisdiction conferred upon this court by the act of 1875, supra, in cases arising under a law of the United States is, however, original, and not appellate. A case does not arise under such a law within the scope of that jurisdiction, unless the very right of the party springs out of or has its origin in such law. As was said by the supreme court in the case of Osborne v. U. S. Bank, 9 Wheat. [22 U. S.] 824: "The questions which the case involves must determine its character, whether these questions be made in the cause or not."

As the law stands, if in the progress of any case it appears that the right of either party or the mode of establishing or enforcing it incidentally touches upon or is upheld or limited by a law of the United States, so far and thenceforth it becomes a case arising under such law, and therefore falls within the purview of the judicial power of the United States. How this power is to be exercised in such a case is a question for congress. Doubtless it may provide, that it shall be exercised by the circuit courts on appeal from the final judgment of the state court, or that the action may be commenced in or removed to such courts upon a showing that a question arising under a law of the United States, and necessary to its determination, is involved therein. Osborne v. U. S. Bank, 9 Wheat. [22 U. S.] 119; Story, Cont. § 1648; The Federalist, No. 82. But as at present advised, it appears to me in the light of the ruling in Wilson v. Sandford, supra, that no provision has yet been made for the exercise of the judicial power of the United States in such a case by an original proceeding in the circuit court. It does not appear, from the statement of the plaintiff's case, how his right arises under a law of the United States, or that even any question under such law will arise in the progress of the trial. The demurrer was overruled.

At the same time that the demurrer was submitted, the issue of fact made by the plea in abatement was submitted to the court for trial without the intervention of a jury. Upon the evidence, I find that the plea is true, and that the defendant at the commencement of this action was a citizen of Oregon.

DOWELL v. The NIAGARA. See Case No. 10,221.

Case No. 4,041a.

DOWLIN v. STANDIFER et al.

[Hempst. 290.][1]

Superior Court, Territory of Arkansas. Jan., 1836.

APPEAL BOND—LIABILITY OF SURETIES—DISCHARGE.

1. Where an appeal bond is conditioned to prosecute the appeal with effect, or on failure to do so to pay the debt, damages, and costs adjudged, the failure of the appellant to prosecute the appeal with effect, renders the parties liable on the bond; and, as bail in error, they become fixed, without ca. sa., or any step against the principal.

2. Bail in error are not discharged, nor is the judgment satisfied by taking the body of the principal on a ca sa., and a plea to that effect is bad.

3. When bail become fixed, they cannot be discharged from liability, either by the surrender, bankruptcy, or arrest of the principal on a ca. sa.

4. The difference between bail to the action and bail in error is, that in the former the sureties are not fixed until ca. sa. is sued out and returned; but in the latter, no ca. sa. is necessary at all for that purpose, and they become fixed from the judgment of affirmance by the superior court.

5. Debt is the proper action on an appeal bond or recognizance, but by the common law rule, the plaintiff must sue all, if living, or one, and not an intermediate number, otherwise the defendants may plead it in abatement.

6. Although upon an appeal or writ of error, the statute requires a recognizance; yet entering into bond with security, is a substantial compliance with the statute, and the parties are liable on a bond so given.

Appeal from the Washington circuit court.

[This was a suit by Thomas Dowlin, for the use of John McPhail, against Seaborn G. Sneed and Reuben W. Reynolds, on an appeal bond.

Before JOHNSON and YELL, Judges.

YELL, Judge, delivered the opinion of the court.

This was an action of debt, instituted by Dowlin for the use of McPhail, against the defendant, upon a bond for the prosecution of an appeal from the circuit court of Washington county to this court, in which Abraham Standifer was the principal, and Sneed and Reynolds, securities. [See Case No. 13,284a.] The condition of the bond as set forth in the declaration is, to prosecute the appeal with effect, or on failure to do so to pay the debt, damages, and costs adjudged against Standifer. The present defendant Standifer failed to prosecute that appeal with effect, and the superior court gave judgment for the present plaintiff in error. This suit has been instituted upon the bond, after a failure to collect the money upon execution against Abraham Standifer. The defendants filed a special plea, in which they alleged that the taking of the body of the defendant Standifer in execution, was a full and complete satisfaction of the judgment

[1] [Reported by Samuel H. Hempstead, Esq.]

and a discharge of the debt, to which plea the plaintiff demurred, and issue being joined thereon, the court overruled the demurrer, and gave judgment for the defendant, from which judgment the plaintiff prayed an appeal to this court, which was granted.

Two questions are presented for the consideration of this court, in aid and support of the judgment below: 1. Was the taking of the body of Abraham Standifer in execution a release and satisfaction of the debt? 2. Was the bond sued on such an one as authorized by the statute? This cause involves questions of great importance to the country, and deserves a careful investigation by the court. The obligation sued on is called a recognizance, but is in fact a bond for the prosecution of an appeal, the condition of which is, that they will pay the debt, damages, and costs, in case the judgment of the circuit court shall be affirmed by the superior court. The present defendants are considered by the court as bail in error, and the condition of the bond pursues substantially the condition of a bond on a writ of error, namely, to pay the debt, damages, and costs awarded by the former judgments. Archb. Pr. 223, 245. In error, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff be non-prossed, the bail are liable. The issuance of the execution against Standifer, the principal, and taking him in execution, did not discharge the bail in error. When once the bail becomes fixed, their responsibility is as irrevocable and certain as that of the principal, and their liability is fixed from the affirmance of the judgment by the superior court. Bail, when once fixed, cannot be discharged from their responsibility by surrendering the principal, nor by his bankruptcy, nor even if the principal be taken on a ca. sa. Archb. Pr. 323; 2 Bos. & P. 440; 1 Term R. 624. Bail to the action, or bail alone, are not liable until a judgment and ca. sa. against the principal; and if any proceedings be had against them before the return of the ca. sa. it is error for they may surrender the principal, in discharge of their liability, at any time before final judgment, but not after their liability becomes fixed. Archb. Pr. 103, 311, 319; 8 Term R. 456. The difference in liability between bail to the action and bail in error is simply this: There is no necessity to sue out a ca. sa. against the principal, in order to proceed against bail in error; but is it not allowable to proceed against bail to the action until you sue out a ca. sa. against the principal. The liability is not fixed until the return of a ca. sa. Archb. Pr. 319. Debt is the proper action on this bond, and debt may be brought on a recognizance. When the principal and securities all enter into the recognizance, or into the bond, as in this case, the action must be brought against all, if living, or against each separately. If brought against two, without joining the rest, the defendants may plead it in abatement. Archb. Pr. 324; 2 Saund. 72; 1 Saund. 291.

The doctrine contended for, that the taking of the defendant Standifer in execution is a discharge of the debt and a release of the securities, does not apply to the facts of this case. That doctrine rests on the ground that the taking of the body in execution is upon the same debt or contract, and before the bail is fixed. Here, the execution sued out against Standifer, the principal, was upon the judgment from the circuit court, from which an appeal had been prayed to the superior court. In that appeal, Standifer entered into the bond mentioned and set forth in the declaration with Sneed and Reynolds, his securities, for the prosecution of the appeal with effect. This action is instituted on that bond, and is a new and distinct contract and cause of action from the judgment in the circuit court upon which the execution issued, and therefore that principle of law does not apply. The issuance of the capias ad satisfaciendum and taking the body of the defendant, is not such satisfaction as to bar the plaintiff from a recovery against the securities. Tidd, Pr. 958; Archb. Pr. 323. The case in 2 Bos. & P. 440, expressly decides that in error, if the plaintiff in the action have his judgment affirmed, and take in execution the body of the defendant, for the debt, damages, and costs, he does not thereby discharge the bail in error.

The second point made by the defendants relates to the legality of the bond, and they contend that a recognizance is the only security allowed by the statute to be taken on an appeal or writ of error. It is true that the statute requires the appellant, who was plaintiff below, to enter into a recognizance, with one or more securities, in a sum sufficient to cover the costs in the inferior and superior court, conditioned to prosecute his appeal, and, where the appellant was defendant below, to enter into a recognizance, with one or more securities, in a sum sufficient to cover the amount for which judgment has been given, together with the costs that have accrued, or that may accrue, by reason of such appeal. Ter. Dig. 334. The court have no doubt that a recognizance is the mode pointed out by the statute; but it does not preclude the mode here adopted, nor does it avoid the appeal or discharge the securities in the appeal bond. Though it is not a strict compliance with the statute, yet the securities having bound themselves in a bond substantially good, cannot take advantage of their own act to defeat a recovery upon it. Having subscribed the bond, in lieu of a recognizance, we are disposed to enforce its collection, especially as the statute requiring a recognizance does not preclude the party from entering into bond with security, as was done in this case. No possible evil can result from sustaining the bond, as the suit is no more expensive,

nor the defence less ample, than upon sci. fa. upon recognizance. We cannot, therefore, enforce the strict rule, as contended for by defendant's counsel; and, as we consider the bond valid, the action well brought upon it, and the plea bad, we hold that the demurrer should have been sustained. Judgment reversed.

DOWLING (BURCH v.). See Case No. 2,139.

DOWLING (MURRAY v.). See Case No. 9,959.

Case No. 4,042.

DOWLING v. The RELIANCE.

[1 Woods, 284.][1]

Circuit Court, D. Louisiana. Nov. Term, 1872.

MARITIME LIENS—PART OWNERS.

A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly with the other owners, possession of the vessel, cannot acquire a lien upon her for maritime services.

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

T. M. Gill, for intervener.

B. Egan, for complainant.

WOODS, Circuit Judge. W. H. Riddle, who intervenes in the suit of Dowling against the steam tug Reliance, claims to recover of the tug the sum of $290, being the remainder of his wages, due for his services as pilot from September 1, 1871, to December 8 of the same year, at the rate of $150 per month. The answer does not deny the services of the intervener, but alleges that he was not shipped or hired as pilot, but that he rendered the services sued for, as master, and under the express understanding and agreement that he should become a part owner of the tug.

The evidence is somewhat conflicting as to the precise character in which the intervener served on the tug, whether as pilot or master. But as to the contract or agreement that intervener was to become a part owner, the record clearly establishes these facts: That prior to the date when intervener commenced his services on the tug, to-wit, in August, 1871, she was the property of William Taylor; that Taylor made a verbal agreement with the intervener, Riddle, and one Chapman, by which he sold to them each one third of the tug, retaining the other third himself. No bill of sale was ever executed conveying to these purchasers their respective shares, but an account was opened with each in a book kept on board the tug, and open to their inspection, and which, it is clear from the evidence, they must have seen, in which each was charged with the purchase money of his share of the tug, namely, $2.000. There can be no doubt that Taylor in this manner sold to Riddle and Chapman each one-third of the tug, and the purpose and hope of these joint owners was that by putting the tug in good repair, and all three devoting their time and labor to the task of running her, they would be able not only to pay off the claims then outstanding against the tug, but that Riddle and Chapman, out of their portion of the profits of the business, would be able to pay the purchase money for their shares respectively. It is further established by the proof, that during all the time of the service of Riddle upon the tug, she stood registered in the name of Taylor as sole owner. Was this sale by parol of a third interest in the tug to Riddle, effectual to pass to him any interest in the tug as owner?

Mr. Chancellor Kent in his Commentaries (3 Kent, Comm. 130, 131) says: "A bill of sale is the true and proper muniment of title to a ship, and one which the maritime courts of all nations will look for, and in their ordinary practice require. Possession of a ship and acts of ownership will, in this as in other cases of property, be presumptive evidence of title without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof, and a sale and delivery of a ship without any bill of sale, writing or instrument, will be good at law between the parties." So Mr. Greenleaf, in his work on Evidence (1 Greenl. Ev. § 261), observes: "By the statutes of the United States and of Great Britain, the grand bill of sale is made essential to the complete transfer of any ship or vessel through or between the parties themselves; a title may be acquired by the vendee without such document." On the other hand, it is said by Mr. Justice Story, in the case of Ohl v. Eagle Ins. Co. [Case No. 10,472]: "I think that a title to a ship cannot pass by parol when she is sold to a purchaser."

Even conceding that the weight of authority is with Mr. Justice Story, yet I think it clear, that when a parol contract of sale is made and is followed by a possession of the ship, the purchaser cannot acquire a lien on the ship for maritime services. The fact that he has an equitable ownership in the vessel is conclusive evidence that he does not render the services on the credit of the vessel, but they are rendered to himself as part owner. The evidence in this case makes it clear that Riddle rendered service to the tug, supposing himself to be one of her owners, and in fact having an equitable title to a third interest in her; and that as soon as he completed the payment of the purchase price, that interest would have been conveyed to him by Taylor, in whom the paper title to the tug remained. Under these circumstances, I am of opinion that Riddle has no lien upon the tug for his services, and that his intervention must be dismissed at his costs. Decree accordingly.

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

Case No. 4,043.

DOWNER et al. v. BRACKETT et al.

[5 Law Rep. 392; 21 Vt. 599.]

District Court, D. Vermont. 1842.

LIENS — POSSESSION OF LIENOR — ATTACHMENT— BANKRUPTCY—ENFORCEMENT OF LIENS — PROVABLE CLAIMS—BAR BY DISCHARGE.

1. To constitute a lien on property, real or personal, it is not indispensable, that the property be in the possession of the person to whom the debt or duty is due.

2. By the Revised Statutes of Vermont (chapter 49, § 53, and chapter 43, § 51), an attachment on mesne process is expressly denominated a lien.

3. Under the bankrupt act of the United States [5 Stat. 440], there is no distinction between a lien by judgment and a lien by attachment; by the provisions of the act, both are preserved.

[Followed in Re Reed, Case No. 11,640.]

4. Ordinarily, where a suit is pending and property attached, when proceedings in bankruptcy are commenced, nothing but proof of the debt under the bankruptcy, unless it be the bankrupt's certificate of discharge, will prevent the creditor from proceeding in his suit to judgment and execution.

5. Quaere:—Whether if the certificate of discharge is pleaded in such a case, the plaintiff may not reply over the fact of his lien, and have judgment, with the right to take execution against the property attached.

6. In general, the proceedings in bankruptcy have relation to the decree of bankruptcy and not to the petition. But for some purposes, the rights of the assignee extend back by relation to the date of the petition.

7. All debts existing before and at the date of the decree of bankruptcy are provable under the bankruptcy, and all debts up to that time are barred by the certificate of discharge.

8. Where there was a petition in bankruptcy in invitum, and property had been attached on mesne process before the alleged act of bankruptcy was committed, and judgments had been obtained and the property seized on execution before the filing of the petition, but after the alleged act of bankruptcy, and no fraud or collusion was stated or shown, it was *held*, that there was no valid ground for an injunction to restrain the sale of the property on the executions.

This was a petition for an injunction, stating that the petitioners [Downer and others], being creditors of William F. Spear, a trader, on the first day of September, 1842, filed their petition in bankruptcy in due form against the said Spear, alleging an act of bankruptcy to have been committed by him on the eighteenth day of August last past, and praying that he might be declared a bankrupt. The petition further stated, that Charles Brackett, and the several other creditors named in the petition, on the fifteenth day of the same August, sued out writs of attachment against the said Spear, and caused certain goods, wares, and merchandise of the said Spear to be attached thereon to a large amount; that on the twentieth day of August judgments were rendered in the several suits against said Spear on his confession, executions taken out, and the goods attached as aforesaid, seized thereon; and that the goods were advertised to be sold on the executions on the third day of September, and would be then sold, to the great injury of the petitioners and other creditors of said Spear, unless the sale should be stayed by injunction from this court.

PRENTISS, District Judge. The general question presented in this case is one of much importance, affecting, as its ultimate decision undoubtedly will, to a very considerable extent, the rights and interests of many persons in this state. Viewing it in that light, I have given to the question all the consideration the time afforded me would allow, and have endeavored to form an opinion upon it with a single eye to its merits, and without indulging in any extraneous or irrelevant speculations. I have not allowed myself to be influenced by any considerations arising out of the supposed policy of the bankrupt act, beyond what appears to be its policy from the act itself. To go aside of a written positive law, and reason upon an assumed and imputed general policy in regard to it, especially if there be no apparent ambiguity in the law, is, in my opinion, an unsafe and unsatisfactory mode of argument, in judicial questions. It is as one of the present judges of England said of public policy as a ground of argument, like an unruly horse, when you once get astride it, you never know where it will carry you. The policy of the act, whatever it may be in respect to the distribution of the bankrupt's estate among his creditors, and whether more or less restricted, is to be collected from the provisions of the act itself, giving to all its parts a just construction. It is conceded, as it must be, that it is not the policy of the act to distribute the property of the bankrupt, pari passu, among his creditors, in ratable proportions, regardless of all existing liens, for that would be a contradiction of the act, at once direct, palpable, and undisguised. It is admitted that some liens are saved; and if so, the question is, upon a fair interpretation of the act, what liens? Are they those only which are created by express contract, or are they all liens whatever which are created or exist under the laws of the respective states?

The act provides, "that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act."

"Any liens, mortgages, or other securities on property, real or personal," are very comprehensive terms, and are used without any qualification or limitation whatever, except what is imposed by reference to the laws of

the states and to the provisions of the second and fifth sections of the act. The obvious reading would seem to be, that every kind of lien or security, upon real or personal property, is protected and preserved, where such lien or security is valid by the state laws, unless it is fraudulent within some of the provisions referred to, or is liable to the objection of creating such a preference as those provisions prohibit. Though "lien," in a narrow, and perhaps the more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand, yet it has a more extensive meaning, and, in common acceptation, is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is styled a "lien on the property," although the property be not in the possession of him to whom the debt or duty is due. The right of a vendor upon land as security for the purchase money; the right of a judgment creditor against the lands or goods of the judgment debtor, given by law in England and in many of the states in this country; and the right acquired by a creditor under an attachment of property, where the law of attachment exists, are all spoken of and treated as liens, in abridgments of the law, in elementary treatises, and in judicial decisions. Indeed an attachment is expressly called and denominated a lien in the statutes of this state. Rev. St. c. 49, § 53, and c. 43, § 51.

That the term "lien" is used in the act in the latter sense, and that the bankrupt's property vests in the assignee, subject to any such lien or claim others may legally have upon it, is not only evident from the term being applied in the act to real as well as personal property, but seems to receive countenance and support from other provisions of the act. The eleventh section gives the assignee power, under the direction of the court, "to redeem or discharge any mortgage, or other pledge or deposit, or lien upon any property, real or personal;" the third section authorizes him to defend any suit pending against the bankrupt at the time of the decree of bankruptcy; and the fifth section declares the proving of any debt by a creditor, under the bankruptcy, to be a waiver of any action pending therefor, or judgment recovered thereon, so that whatever lien may have been acquired by suit or judgment is thereby surrendered and given up. These provisions help to strengthen the conclusion, that it was the intention to save from the operation of the act, every bona fide claim or charge on property, valid by the local laws, and not declared fraudulent or unlawful by the act, whether created by express agreement of the parties, or given by operation and effect of law. Even under the English bankrupt acts, it has been held, that the lien of the vendor of land was a valid charge upon it for the purchase money, though the vendee become bankrupt, and though no agreement for the purpose. Chapman v. Tanner, 1 Vern. 267; Vin. Abr. 74; Fonbl. Eq. 380. That a judgment was a "lien" within the meaning of the bankrupt act of 1800 [2 Stat. 19], was decided in the case of Livingston v. Livingston, 2 Caines, 300. The question arose under the 31st and 63d sections of the act, containing the following provisions:—"In the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognisance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupt) shall not be relieved upon any such judgment, statute, recognisance, specialty, or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt. Nothing contained in this act shall be taken, or construed, to invalidate or impair any lien existing at the date of this act, upon the lands or chattels of any person who may have become bankrupt."

The plaintiff's judgment was obtained before the passing of the act, and the question was, whether the lands held by the bankrupt, at the time of docketing the judgment, passed to the assignees, discharged of the judgment, or whether the judgment remained a subsisting lien paramount to the claims of the general creditors. It was insisted, that the lien mentioned in the 63d section, contemplated only such liens as were created by the act of the party, as mortgages and the like, but the court held, that the section preserved all preceding liens, and that there could be no doubt that a judgment was a lien. It will be perceived, that the act of 1800 associates attachments in the same class with judgments, statutes and recognisances, and treats them all as liens or securities on property, of like validity, and of like consideration in the law. But there is this difference to be observed between the right acquired by a judgment, and the right acquired by an attachment on original process. A judgment is only a general security, not a specific lien like an attachment. A judgment, or the execution issued upon it when delivered to the sheriff, binds all the property of the debtor, his lands in the one case, and his goods in the other. An attachment binds only the particular property attached—the property, if personal, being taken into the possession of the officer, and held in his custody, for the benefit of the creditor, to satisfy the judgment he may recover.

By the laws of this state, property attached on mesne process, if real estate, is holden five-

calendar months, and if personal estate, thirty days, from the time final judgment is rendered in the suit, to answer the judgment; and unless taken in execution within the time limited, the property is discharged from the attachment. This lien by attachment on mesne process is given by statute as a substitute for the lien by judgment or award of execution existing at common law; and undoubtedly, an attachment here binds the lands or goods attached, during the time fixed by law, as effectually as a judgment, or execution sued out, binds lands or goods in England. The lien, to be sure, like every other lien whatever, is defeasible; but nothing will defeat it but the plaintiff's failing in his action, or not taking out or levying his execution within the time prescribed after judgment, or the defendant's satisfying the judgment before sale of the goods or levy upon the lands. The nature and effect of an attachment, as it exists in this state as well as in Massachusetts, is well stated in the case of Grosvenor v. Gold, 9 Mass. 209. It is there said, that by the laws of Massachusetts, goods may be attached on the original process, and held thirty days after judgment, to be taken in execution; and if not seized on execution within that time, then, and not till then, the attachment is dissolved. And it is added, that by an attachment, the plaintiff has a lien upon the subject of it provisionally, that is, to the amount of the judgment he may recover, and in so much is the absolute property of the defendant diminished. It is true, that in the case of an attachment, no more than in the case of a judgment, is the general property in the subject of the lien altered or changed, until execution executed. Until then, the general property continues in the defendant; and if he becomes bankrupt before the writ is executed, the property passes to and vests in the assignee, subject, nevertheless, to the existing lien. It is a principle long ago settled in England, that a judgment and execution so far binds the goods, that if the judgment debtor dies after the award of execution, the sheriff may proceed against the goods that were his, in the hands of his executors or administrators. Specious objections have been very often urged against this doctrine, and they have been as often overruled. In Farrer v. Brooks, 1 Mod. 188, it was objected, that by the words of the fieri facias, it run against the goods of John Brooks, and by his death they ceased to be his goods, and became the goods of his administrator; and in Parsons v. Gill, 7 Term. R. 21, note, it was urged, that the execution ought not to have been executed upon the executors of Gill, for that it imported only a command to take in execution the goods of Gill, and whatever was his in his life time, upon his death ceased to be his, and became his executors', against whom the authority given by the writ did not extend. In Waghorne v. Langmead, 1 Bos. & P. 571, it was further urged, that the defendant died insolvent, leaving bond and other creditors, for whom the administrator was to be considered a trustee, and therefore the execution ought not to bind the goods: in Bragner v. Langmead, 7 Term R. 20, it was objected, that to give effect to the execution, would be against the real justice of the case, because thereby one creditor would obtain an undue preference, to the prejudice of the other creditors; and in Oades v. Woodward, 7 Mod. 94, it was said to be a very inequitable thing, for by this means one creditor would run away with all, and leave the rest nothing, and this would be both against conscience and law, and a kind of fraud. But in all these cases, as had been uniformly adjudged before in others, it was held, that the property being bound by the award of the writ before the death of the party, it might be taken in execution after; and in the latter case, Lord Holt, with all his legal acumen and depth of penetration, was not able to understand how it could be a fraud to get a just debt by due course of law.

The principle of these cases was adopted in Massachusetts, in the case of Grosvenor v. Gold, already cited, as applicable to attachments. In that case, it was held, that goods attached on mesne process, might lawfully be sold by the sheriff upon the execution, although the judgment debtor had died insolvent after the judgment and award of execution, and before the sale—the court observing, that undoubtedly goods in Massachusetts were as much bound by attachment, during the time they were holden, as goods in England were by and from the teste of the writ. The law, beyond doubt, is the same in this state, notwithstanding the statute provision, that when the estate of any person deceased shall be insolvent, and insufficient to pay all the debts owing, the estate shall be distributed, pro rata, among the creditors, in proportion to the sums to them respectively due. If the suit is pending at the time of the decease of the insolvent debtor, then, to be sure, by another provision of the statute, the suit is discontinued, and the attachment of course dissolved, in like manner as it is under the bankrupt act, where the creditor comes in and proves his debt. But under the latter act, nothing but proof of the debt under the bankruptcy, unless indeed it be the bankrupt's certificate of discharge, will prevent the creditor from proceeding in his suit to judgment and execution. The decisions under the English bankrupt acts have no application to the question arising in this case, for those acts, instead of saving liens, as our act does, expressly avoid all judgment and execution liens whatever. The statute 21 Jac. I, c. 19, § 19, enacts, "that creditors by judgment, statute, or recognisance, whereof no execution or extent is served or executed on the lands or goods of the bankrupt, before his becoming bankrupt, shall not be relieved for more than a ratable part of their just debt."

Under this act, liens by judgment or execution have no operation or effect whatever. If, therefore, the judgment debtor becomes bankrupt before execution executed, the property vests absolutely in the assignees, discharged of the lien, from the time of the act of bankruptcy committed; and the creditor, having no subsisting lien, cannot lawfully take the property in execution. But if the property is seized upon execution, though not sold, before the act of bankruptcy, it does not pass to the assignees; for by the seizure, without sale, the property is altered, and divested out of the debtor, before any title accrues to the assignees.

The clause in the act of congress, as has been before observed, is general, saving all liens without specification or distinction; and it has been already seen that an attachment by the laws of this state is as much a lien on property, as a judgment is by the laws of some of the other states. It is impossible to distinguish, under the bankrupt act, otherwise than arbitrarily, between a lien by judgment and a lien by attachment; and from the provisions of the act, it appears to me that it was the intention to save both. It is not unreasonable that it should be so; for although it is true as a general rule, that equality is equity, yet when a legal preference has been bona fide gained by the superior diligence of any creditor, it is neither wrong nor unjust that such preference should be preserved. If an attachment is held not to be a lien within the meaning of the act, but to cease to have any effect in case of the bankruptcy of the defendant, it is easy to see that it may lead in practice to some strange and very anomalous consequences. Where property has been attached in an action for a personal injury, or for some other aggravated tort, the plaintiff may be deprived of all benefit of the attachment, by the defendant's becoming bankrupt pending the suit, though he can neither come in and prove his claim under the bankruptcy, nor share at all in the dividends the cancelling of his attachment will have contributed to augment. So where land attached by a creditor has been subsequently mortgaged, if the attachment is defeated by the defendant's bankruptcy, the benefit may enure, not to the general creditors, but entirely to the mortgagee.

Under the English statutes, the property of the assignees relates back to the time of the act of bankruptcy; and if such was the case here under the act of congress, it would be clear that any attachment, or levy of execution without prior attachment, after the act of bankruptcy, would be void as against the assignee. But there is no provision in the act to that effect. On the contrary, the act vests the property in the assignee from the time of the decree of bankruptcy. The third section of the act declares, that all the property and rights of property, of every name and nature, of every bankrupt, except, &c., who shall by decree be declared a bankrupt, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, and the same shall be vested, by force of such decree, in the assignee, who shall have all the rights, titles, powers, &c. to sell, dispose of, and sue for the same, as fully as might be exercised by such bankrupt, before or at the time of his bankruptcy declared as aforesaid; and all suits then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee, in the same way, and with the same effect, as they might have been by such bankrupt. The fifteenth section also declares, that all deeds of land sold and conveyed by the assignee, made in the manner provided therein, shall be as effectual to pass the title of the bankrupt, as if made by the bankrupt himself immediately before the decree of bankruptcy.

These enactments, it appears to me, are too strong and plain, too positive and unequivocal, to be argued or explained away. They seem to admit of but one meaning in relation to the point in question, and appear to be so explicit and precise in regard to it, as to leave, in the absence of any opposing provision, no room whatever for construction. They treat the bankrupt as the legal owner of the property up to the issuing of the decree, and tie down the title of the assignee to that time so as to preclude its relation back. All the property then owned by the bankrupt passes to and vests in the assignee, and consequently all debts existing before and at the date of the decree are provable under the bankruptcy, and all debts up to that time barred by the bankrupt's certificate of discharge. Still, to some purposes, the rights of the assignee undoubtedly extend back by relation. Though he is not actually invested with the very property until the decree of bankruptcy, he may avoid many mesne acts done to the prejudice of the general creditors, such as fraudulent preferences and payments, or fraudulent transfers in contemplation of bankruptcy, and other transactions fraudulent or void on general principles of law. Perhaps, too, the property in the intermediate time, between the filing of the petition and the decree, may be considered as remaining in the bankrupt in trust for the creditors, or as in the custody of the law and under its protection. In this view, the property would not be liable to be attached on mesne process, or to be taken on execution without a prior lien after the filing of the petition; nor if taken before, would the transaction be protected, if the attachment or execution be collusive, or, perhaps, if there be notice of the act of bankruptcy, or of the intention of the party to petition for a decree. The transaction, like payments or conveyances in contemplation of bankruptcy, might be treated as a fraud upon the act, and therefore void. But where the attachment is not liable to any of the objections mentioned, and a bona fide lien has been acquired before

the filing of the petition, it would seem that the property may be taken in execution whenever judgment is obtained in the suit, whether before or after the filing of the petition, or before or after the decree of bankruptcy. The property, if holden at all, is holden to satisfy the judgment which may be recovered; and if the lien is saved by the act, the act must be so construed as to give full effect to the lien and secure to the creditor the full benefit of it. Indeed, I doubt whether the bankrupt's certificate of discharge, when obtained, notwithstanding the general operation given to it by the act, would be allowed in such case to prevent a recovery of judgment. If the certificate is pleaded in bar of the action, why may not the plaintiff reply over the fact of his lien, and have judgment, with the right to take execution against the property attached? In some cases at least, this must be allowed, or obvious injustice will be done. Where land attached has been afterwards sold or mortgaged, or a subsequent attaching creditor has first obtained judgment, and levied, or may levy upon the land, shall not the creditor, first in point of time, be allowed to proceed to judgment and have the benefit of his attachment? But however this may be, it appears to me that at any rate there can be no doubt, in any view of the question, as to the right of the attaching creditor, where, or wherever he has in fact obtained or may obtain judgment.

In the present case, the property was attached before the alleged act of bankruptcy was committed, and the judgments were obtained, and the property seized upon execution, before the filing of the petition, though after the act of bankruptcy. This being the case, and no fraud or collusion being stated or shewn, there is, in my opinion, no ground for an injunction to restrain the sale of the property on the executions. But as the principal questions here discussed have been otherwise decided by a most learned and accomplished judge, whose opinions are entitled to the highest consideration, and as the case is one of emergency, not admitting of any delay, the property being posted for sale tomorrow, it seems to be a proper discharge of my duty to grant the injunction; and I shall accordingly do so, with the understanding, that on the motion to dissolve it, the question will be adjourned into the circuit court for final decision, so that the parties may suffer no injury from any error of opinion on my part.

NOTE. The opinion here referred to is undoubtedly that of Mr. Justice Story, in Ex parte Foster [Case No. 4,960], although that case is not referred to, by name, in any part of the above opinion. See, also, Parker v. Muggridge [Id. 10,743], and In re Allen [Id. 5,305].

DOWNER (LORING v.). See Case No. 8,513.

DOWNER & BEMIS BREWING CO. (CORNELL v.). See Case No. 3,236.

Case No. 4,044.

In re DOWNING.

[1 Dill. 33;[1] 3 N. B. R. 748 (Quarto, 182); 17 Pittbs. Leg. J. 169; 3 Amer. Law T. 165; 2 Chi. Leg. News, 265; 1 Amer. Law T. Rep. Bankr. 207.]

Circuit Court, D. Missouri. 1870.

BANKRUPTCY — RIGHTS OF INDIVIDUAL AND FIRM CREDITORS—BANKRUPT ACT—CONSTRUCTION OF THIRTY-SIXTH SECTION.

1. Where a partnership has been dissolved and one of the co-partners purchases all of the assets of the firm, and agrees to pay all of the debts, and both partners subsequently become bankrupt, and are individually put into bankruptcy, so that there is no solvent partner and no firm property: *Held*, under the bankrupt act of 1867 [14 Stat. 517], that the creditors of the firm, as well as the individual creditors of the partner who assumed to pay the firm debts, were entitled to share pari passu in the estate of such partner.

[Cited in Emery v. Canal Nat. Bank, Case No. 4,446; Re Dunham, Id. 4,144; Re Rice, Id. 11,750; Re Tesson, Id. 13,844; Re McEwen, Id. 8,7 3; Re Isaacs, Id. 7,093; Re Webb, Id. 17,317; Re Hamilton, 1 Fed. 812; Re Lloyd, 22 Fed. 90; Re West, 39 Fed. 203.]

2. Under the bankrupt act (section 36) assets are to be marshalled between the firm creditors and the separate creditors of the partners only when there are firm and separate assets and proceedings are instituted against the firm and the individual members, as provided in that section.

[Cited in Re Knight, Case No. 7,870; Re Long, Id. 8,476; Re Rice, Id. 11,750; Amsinck v. Bean, 22 Wall. (89 U. S.) 404; Re Litchfield, 5 Fed. 50.]

The facts in the case, which were agreed to by the respective counsel, show that the bankrupt, William Downing, and one Richard W. Emerson, were co-partners under the firm name of Downing & Emerson, and as such were dealers in boots and shoes in the city of St. Louis, previous to December, 1868; that in the month of December, 1868, they dissolved by consent, Downing purchasing the stock of goods and all other assets of the firm, and agreeing to pay off and discharge all of its liabilities, and executing and delivering to Emerson, for his (Emerson's) supposed interest in the concern, his notes, amounting to about $40,000; that said firm was then largely indebted and actually insolvent; that after the dissolution of said firm, Downing continued in his individual name, and for his individual account, to prosecute the business at the same place until the 16th day of August, 1869; that while so doing business alone, Downing, in the regular course of business, disposed of part of said stock of goods, added to it by further purchases, paid off some of the liabilities of the old firm, and contracted further liabilities and debts in his own name alone; that on the 16th day of August, 1869, Downing executed a conveyance or assignment of all his assets, including the assets which came

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

from the firm of Downing & Emerson, to John W. Kennan, as trustee, for the equal benefit of all his individual creditors, and the creditors of said firm; that the trustee (Kennan) thereafter disposed of the stock of goods, realizing about $60,000 for it, and when he had done so, Downing was proceeded against and adjudicated a bankrupt by the said district court; that thereafter said Kennan paid over to the said assignee in bankruptcy, John A. Allen, the whole of the proceeds of the sale of said stock of goods; that the co-partnership of Downing & Emerson was never adjudicated bankrupt as such, nor have the persons holding claims against it released Emerson from liability on such claims, but that Emerson has also been adjudicated a bankrupt in the state of Massachusetts; that claims against the bankrupt Downing, individually, as well as claims against him as one of the said co-partnership of Downing & Emerson, have been proven and allowed against his estate without any distinction, except so far as the evidences of debt upon which the proofs were made would show any, and that all these creditors voted for the said assignee; that before he was adjudicated a bankrupt, and after the 16th of August, 1869, Downing executed and delivered to each one of the creditors of Downing & Emerson an agreement in the following form:—"Whereas, the firm of Downing & Emerson, which was composed of William Downing and Richard W. Emerson,—was, in the month of December, A. D. eighteen hundred and sixty-eight, dissolved; and whereas said Emerson assigned to said Downing all his said Emerson's interest in the property and assets of said firm, and said Downing, in consideration thereof, gave said Emerson certain promissory notes, and agreed to assume and pay all the liabilities and debts of said firm of Downing & Emerson, and hold said Emerson harmless from the same, and I have agreed to pay the debts and liabilities of said firm, as my own private individual debts, and the party with whom this agreement is made may now have debts and claims against said firm: Now, therefore, I, the said Downing, for value received by me of ——, the receipt whereof is hereby acknowledged, do hereby covenant and agree with said ——, that I, individually, will pay, as my own private and individual debts, all and singular the debts, liabilities, and claims against said firm of Downing & Emerson, held by said ——. Witness my hand and seal, this —— day of September, 1869." At a meeting of the creditors of said William Downing, called by and held before Register Eaton, for the purpose of distributing the said $60,000, some of the individual creditors of Downing, who became such creditors after the dissolution of the firm of Downing & Emerson, filed a motion insisting that they and other individual creditors of Downing, were alone entitled to share in the distribution of said fund, while on the other hand, those of the creditors who held debts against Downing & Emerson made the same claim. Then the question arose as to how the distribution should be made, and that is the question certified. The district judge gave the following opinion or decision: "Upon the facts submitted, the court rules that the separate creditors of the bankrupt must be first paid in full before the partnership creditors can receive any dividends from the funds in the hands of the assignee." To this decision and ruling the assignee excepted and prosecuted this appeal. It was also admitted in the argument in the district court, that Downing was adjudicated a bankrupt upon the petition of an individual creditor.

Hitchcock & Lubke, for appellant.
Sharp & Broadhead, for appellee.

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

DILLON, Circuit Judge. The court finds this to be a very difficult case. The difficulty arises rather from the state of the authorities, all of which have been brought to our attention by the industry of counsel, than from any doubt in the mind of the court as to how it ought, on principle, to be decided. As an early determination is desired, we shall refrain from an extended examination of the cases cited or elaborate exposition of our views, and content ourselves with indicating briefly the grounds of our judgment. On either of two grounds the order appealed from is, in our opinion, erroneous.

1. This is a contest between the individual creditors of Downing, and those who became the creditors of the firm of Downing & Emerson, before its dissolution. It is admitted that Downing purchased of Emerson all "the goods and assets of the firm." There is no joint property. Emerson is a non-resident of this state, and is also insolvent and in bankruptcy. The ground on which the individual creditors claim priority is that, by the sale from Emerson to Downing, the property became the individual property of the latter, and that upon the well known equity rule, recognized, as it is claimed by the bankrupt act (section 36), they, as the individual creditors of the bankrupt, are entitled to be paid out of his separate estate in preference to the firm creditors. This rule, upon the agreed statement, has no application to the case. Downing, when he purchased the assets from Emerson, agreed with the latter "to pay off and discharge all the liabilities" of the firm. This contract was binding on Downing, and so far as he is concerned, made these debts his own. As between Downing and Emerson, the former thereby became the sole and individual debtor. As between Downing and the creditors, the latter had the legal right, if they deemed it to be for their interest, to treat Downing as individually liable to them on his promise to Emerson, for their benefit.

In equity, the promise which Downing made to Emerson to pay these debts, could be enforced against him; and this controversy is to be decided upon equitable principles. Indeed, a promise by one to another for the benefit of a third person may, according to the prevailing American doctrine, be enforced at law in the name of the latter, especially where, as in the case at bar, the promissor receives a fund or property with which to make such payment. "In this country," says Mr. Parsons, "the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted, and we think it would be safe to consider this the prevailing rule with us; indeed, it has been held that such a promise is to be deemed made with a third party, if adopted by him, though he was not cognizant of it when made." 1 Pars. Cont. (5th Ed.) 467, 468, and cases cited. "After some conflict of opinion, it seems now to be settled in cases of simple contract, that if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him." 2 Greenl. Ev. § 109, and cases there cited. That Downing received, in the surrender to him of the assets, a sufficient consideration for his promise, cannot be disputed. By this promise he is bound, and the creditors of the firm are in equity entitled to enforce it against him. It is, on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to be able to get the benefit of this promise, made by one of its members, for their benefit. If Downing had secured this promise by mortgage, can it be doubted that equity (aside from the bankruptcy) would give the creditors the benefit of this security if they desired it? The right of the creditors given by the arrangement between Downing and Emerson is not defeated by the subsequent bankruptcy of Downing. They may assent to and claim the benefit of it at any time, either before or after bankruptcy of their debtor. I look upon their rights in equity as being the same as if Downing had individually indorsed the pre-existing firm paper, in which case they could have proved their debt against either, if not indeed against both the firm and Downing. It would be strange if the parties could, by the same transaction, make the assets individual property, but could not, with the assent of the creditors, make one of the firm debtors, also, individually liable. It carries out the contract precisely to hold that the parties made the property the individual property of Downing, and that the latter superadded to the existing liability to the creditors, his individual liability.

2. But if the foregoing views should be erroneous, I am of the opinion that the same result is reached by the true construction of the bankrupt act of 1867. In the case at bar, it will be remembered, the partnership had ceased to exist. There were no firm assets. Both of the members of the firm were separately in bankruptcy, and insolvent. Under these circumstances, the creditors of the former firm of Downing & Emerson had, under section 19 of the bankrupt act, a right to prove their debts against the estate of Downing—especially as he had, for a valuable consideration, assumed to pay them. If no proceedings are taken against the partnership, under section 36 of the bankrupt act (which contemplates cases where there are both firm and individual assets and debts) firm debts may, as stated, be proved under section 19, are entitled to share pro rata under section 27, as it extends to "all creditors whose debts are duly proved," and are embraced in the discharge provided for in sections 32, 33, and 34. These sections provide for a discharge from "all debts and claims," and the use of the word "partner" in section 33, shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for, or in respect of, partnership debts. In other words, section 36 of the bankrupt act only comes into operation when there are firm assets, and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshalled according to the equity rule, firm creditors to have priority as respects the joint assets, and individual creditors as respects the separate estate of their debtor. This construction of the bankrupt act has the merit of producing that equality, which it is the leading and manifest purpose of the act to secure, and in effect reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz.: That where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share, pari passu in the estate of the bankrupt partner.

Upon the facts submitted, this court is of the opinion that all of the creditors of the said bankrupt who had proved their claims before the register, were, and are, entitled to share pro rata in the distribution of the estate of the bankrupt, whether their debts were originally against the firm of Downing & Emerson, or against Downing, individually. This court is therefore of the opinion that the court below erred in holding that the individual creditors of Downing were entitled to priority, and its judgment is reversed, and the assignee ordered to make an equal distribution of the estate among all the creditors whose claims have been duly established and registered. Reversed.

NOTE. Bankrupt Act—Rights of Individual and Firm Creditors under the 36th Section. Followed, In re Isaacs & Cohn [Case No. 7,093]; In re Rice [Id. 11,750]; In re Long & Co. [Id. 8,476]; In re Tesson [Id. 13,844]; In re Long & Corey [Id. 8,476]; In re Knight [Id. 7,880]; In re McEwen [Id. 8,783]; In re Hamilton, 1 Fed. 812; In re Litchfield, 5 Fed. 48, 50. Cited.

Amsinck v. Bean, 22 Wall. [89 U. S.] 404; Emery v. Canal Nat. Bank [Case No. 4,446]; In re Webb [Id. 17,317].

Case No. 4,045.

In re DOWNING.

[3 N. B. R. 741 (Quarto. 181); [1] 2 Chi. Leg. News, 313.]

District Court, E. D. Missouri. May 3, 1870.

BANKRUPTCY—ADVERTISEMENTS OF SALES.

Rule as to the legal rate of charges for printing advertisements of sale of real estate by order of the court.

I, Lucien Eaton, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings; to wit: The assignee presented for my signature a check for one hundred and sixty-six dollars and fifty cents, in favor of Geo. Knapp & Co., for printing an advertisement of sale of real estate under the order of the court. The notice contained five and 15-100 folios each, and was printed thirty-six times. At the rate allowed by the statute of 26th February, 1853, this would amount to thirty-seven dollars. The statute alluded to says, that printers shall be allowed "for publishing any * * * notice * * * required by * * * the lawful order of any court * * * in any newspaper, forty cents per folio for the first insertion, and twenty cents for each subsequent insertion." I am aware of no other statute in force on this subject. For the reason that it seemed plainly a case within the statute, I felt constrained to withhold my signature till the opinion of the court should be had, which I now request for my guidance. Lucien Eaton, Register.

TREAT, District Judge. The computation is to be in accordance with the following rule: Each square of eight lines, first time, $1.00; each subsequent insertion, per square, $.50

DOWNING, In re. See Case No. 12,212.

DOWNING (SMITH v.). See Case No. 13,-036.

Case No. 4,046.

DOWNING v. TRADERS' BANK.

[2 Dill. 136; [2] 11 N. B. R. 371.]

Circuit Court, E. D. Missouri. 1873.

BANKRUPTCY—SECTION 19 CONSTRUED—PAYMENTS BY SURETY AFTER BANKRUPTCY OF PRINCIPAL DEBTOR.

1. The bona fide holder for value of an accommodation bill is entitled on the bankruptcy of parties thereto, to prove as to all parties against whom the holder could have supported an action on the bill.

2. The receipt by a holder of a bill drawn by the bankrupt, but accepted for the accommodation of the drawer, of partial payment from the accommodation acceptor after the bankruptcy of the drawer, does not disentitle such holder from proving against the estate of the drawer in bankruptcy for the full amount due on the bill at the time of the adjudication of bankruptcy.

[Explained in Re Hollister, 3 Fed. 454. Cited in Re Broich, Case No. 1,921; Re Baxter, Id. 1,121; Re Pulsifer, 14 Fed. 249.]

3. Section 19 of the bankrupt act [of 1867 (14 Stat. 525)], in respect to partial payments made by a surety after the bankruptcy of the principal debtor, considered.

[Cited in Re Hollister, 3 Fed. 454.]

4. A mere covenant by a creditor not to sue an accommodation acceptor does not prevent him from proving against the drawer's estate in bankruptcy.

This was a contest in the district court between Downing's assignee in bankruptcy and the Traders' Bank of St. Louis, and the cause is brought here by the bank to obtain a review of the decision of the district court ordering the bank to credit the sum of $4,000 on its claim against the estate. Downing was adjudicated a bankrupt on the 9th day of December, 1869, upon a petition filed against him on the first day of that month. On the 12th day of February, 1870, the Traders' Bank filed and made proof of a claim against the estate of Downing for $18,500, composed of three protested drafts, each drawn by Downing; one for $4,500, protested June 15, 1869; one for $6,000, protested June 26, 1869; and one for $8,000 (being the one to which the present controversy relates), protested September 7, 1869. Accompanying the proofs of its claim, the bank filed a list of collaterals held by it. In January, 1872, the assignee objected to the proof of claim by the bank, on the ground that it should credit the sum of $4,000, alleged to have been paid by Saunders Bros. & Co. in the manner hereafter appearing.

The objections of the assignee were, by the parties, submitted to the district court upon the following agreed statement of facts:

"First. It is agreed by said parties that bankrupt on June 4, 1869, at St. Louis, Missouri, drew his draft on and directed to Saunders Bros. & Co., Boston, Mass., and thereby requested them, three months after date thereof, to pay to the order of bankrupt $8,000, value received, and to charge to his account.

"Second. This draft was accepted by Saunders Bros. & Co. for the accommodation of the drawer and payee, and without any consideration from said Downing to said Saunders Bros. & Co., it being a mere loan of their name, and that bankrupt discounted and sold this paper to said Traders' Bank for value.

"Third. That said Saunders Bros. & Co., after said draft had been duly protested, and all parties properly made liable thereon, and

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

after the failure of said Downing, gave certain notes to said Traders' Bank for fifty per cent. of said acceptance, and then and there received from said bank the following paper, to wit: 'To all Persons to Whom These Presents shall Come: The Traders' Bank, a corporation duly established by law in the state of Missouri, send greeting: Whereas, Edward W. Saunders, in the county of Essex, and commonwealth of Massachusetts, heretofore doing business under the style of Saunders Brothers & Company, is indebted to said bank as acceptor upon a draft, dated St. Louis, Missouri, June 4, 1869, for $8,000, drawn by William Downing, payable in three months after date, to said Downing's order, and indorsed by said Downing, and said Saunders is unable to pay his obligation in full, and some time since offered said bank to pay it one-half the amount of said draft in two equal instalments by his notes, indorsed by John Cummings, payable in four and six months from the maturity of said draft, with interest at the rate of six per cent. per annum, from maturity: Now, therefore, in consideration thereof, and of the receipt by said Traders' Bank of said notes, the said Traders' Bank doth hereby covenant and agree with said Saunders, his heirs, executors, and administrators, that it will not sue him or them upon said draft, or upon any claim arising out of the same, but this covenant is without prejudice to the rights of said bank against the other parties to said draft or any person whatsoever. In witness whereof the Traders' Bank has hereto affixed its seal and caused these presents to be signed by William Taussig, its president, thereunto legally authorized, this eighth day of November, Anno Domini, eighteen hundred and sixty-nine. William Taussig.' That said bank made this arrangement by and with full knowledge of all the parties, as to the relation that Saunders Bros. & Co. bore to said paper, and that the bank still holds the original draft. That Saunders Bros. & Co. made this arrangement with the bank without the knowledge, request, or consent, of Downing or his assignee.

"Fourth. The bank now presents the draft for allowance against the estate of Downing, the bankrupt, whilst Saunders Bros. & Co. seek to prove against said estate the $4,000 paid by them on the agreement of the Traders' Bank above set out. That the bank is willing to surrender all their rights to said draft to either the assignee or Saunders Bros. & Co. on the payment of the balance of the $8,000 to them, but not otherwise."

The record recites that "the court held on the facts submitted that the Traders' Bank is entitled to recover on the draft for $8,000 named in the said agreement the amount originally due thereon, with interest and damages, less the amount paid thereon by Saunders Bros. & Co.," and ordered a reference to Lucien Eaton, Esq., the register, to "ascertain the precise amount due in accordance with this ruling." The register reported the amount due on said draft for $8,000, less the credit, required by the order of the court, to be $5,570.60, and that the entire unsecured balance due the bank from Downing's estate, including that sum, was $7,745.48, and judgment was entered accordingly.

The bank appeals, and the only ruling complained of is that by which it was ordered to credit on the draft for $8,000 the $4,000 received of the accommodation acceptor under the circumstances above set forth.

Slayback & Haussler, for the Traders' Bank.
Hitchcock, Lubke & Player, for assignee.

DILLON, Circuit Judge. This is a controversy between the assignee of Downing's estate and the Traders' Bank in respect to the bill of exchange for $8,000, of which Saunders Bros. & Co. were the accommodation acceptors for the bankrupt. The assignee claims for the estate the benefit of an alleged payment of $4,000 under the agreement of November 8, 1869, set out in the statement of the case. The draft for $8,000 matured, and was protested for non-payment, September 7, 1869. The agreement of November 8, 1869, between the Traders' Bank and Saunders recites that the bank has received of Saunders two notes of his for $2,000 each, indorsed by Cummings, due respectively in four and six months from maturity of the draft, and in consideration thereof the bank covenants with Saunders not to sue him on the draft; but it is provided that this covenant shall be without prejudice to the rights of the bank against the other parties to the draft or any other person. No indorsement of payment was made on the $8,000 draft, which was retained by the bank, and very shortly after the agreement of November 8th was made, and before the notes for the $4,000 which were received from Saunders, fell due, Downing was adjudicated a bankrupt.

It is not expressly admitted in the agreed statement that the notes for the $4,000 were ever paid; but this is perhaps fairly to be implied. The presumption is, that if they were paid, it was not before maturity, and consequently the payments were made after Downing was adjudicated a bankrupt. It is plain that upon the agreed statement there is no ground to hold that the bank received the new notes of Saunders indorsed by Cummings, in absolute extinguishment or satisfaction of one-half of the amount of the draft. No indorsement to that effect was made upon the draft, nor is there any acknowledgment of part payment contained in the agreement executed at the same time. On the contrary, the draft for the full amount was left in the hands of the bank, which agreed with Saunders not to sue him upon the said draft, but it reserved its rights without prejudice against all other parties. Story says that "by the law of England, and of most of the states of America, the receipt of the promissory note

of the debtor for a debt is, in the absence of all other proof, treated as a conditional payment only of the debt; that is to say, if or when the note is paid." Story, Prom. Notes, § 438. "Where the holder receives a promissory note or bill in payment of a debt, it is not an absolute, but a conditional payment only, unless otherwise agreed by the parties, and it only suspends the right to recover until the credit has expired." Id. § 389. And he lays down the same rule where the creditor receives from the debtor the note of a third person; presumably, it is a conditional satisfaction, or extinguishment only. Id. § 404. We cannot, therefore, upon the facts appearing in the agreed statement, hold that the bank took the new notes in extinguishment of $4,000 of the amount due it on the draft, or that the new notes were received by the bank in absolute payment to that extent. The presumption of law is otherwise, and the presumption is fortified by the non-indorsement of payment, and by the language of the agreement, which is a covenant not to sue, and not an acknowledgment of satisfaction or payment.

It will be conceded that from the agreed statement it can be implied that these new notes were subsequently paid; and, nothing appearing to the contrary, the presumption is that they were paid by Saunders at maturity, which, as before stated, was after the bankruptcy of Downing. Conceding also, for the time, that when the bank actually received payment of the new notes for $4,000 it operated to extinguish, or satisfy pro tanto, the amount due on the original draft, we now proceed to inquire to what extent the bank was entitled to make proof in bankruptcy with respect to this draft? Saunders Bros. & Co. having accepted this draft for the accommodation of Downing, the drawer, the latter, as between them, was the principal debtor, they being his sureties, or incurring a liability in that nature. Chit. Bills, 703, 708, 718. Downing was the party principally and ultimately liable for the $8,000; and it is not controverted that in respect to this debt the sum of $8,000 can be proved against his estate. It is admitted on all hands that the bank can prove to the extent of $4,000; and as to the other $4,000, the only question is, whether it shall be established as a claim in favor of the bank or in favor of Saunders. In effect, the substantial controversy seems to be one between the bank and Saunders; and so far as this record shows, it is a matter of indifference to the estate of Downing whether the allowance is to the one claimant or the other; so that the assignee, in resisting the claim of the bank, apparently occupies the position of waging gratuitously the battle of Saunders.

As the latter is not before the court, his rights as against the bank cannot be investigated or determined. We have only to do with the rights of the assignee and of the bank. And thus the question is narrowed down to this: Had the bank, as against the estate of Downing, the right to prove its claim to the full amount of the draft? Or, in other words, has the assignee the right to insist that the bank must credit the $4,000 and prove for the balance only? This $4,000, it will be borne in mind, was received by the bank, not from the estate of Downing, the principal debtor, but from his surety, and was received by it after the bankruptcy, though in pursuance of an agreement made just before that event, to which, however, Downing was not a party. The question here presented depends upon the construction of section 19 of the bankrupt act, to the terms of which I will refer in a moment. The bank being a bona fide holder of the draft for value, would be entitled on the supervention of bankruptcy to prove against any and all parties against whom it could have supported an action on the bill; and unless it had released or parted with its rights, it could have sued concurrently both the acceptors and the drawer. Chit. Bills, 721; Id. 703, 708. It could recover against both, though of course it could have but one satisfaction. Its agreement of November 8th, before-mentioned, would have prevented it from sustaining any action after that time against the accommodation acceptors; or, if they had gone into bankruptcy, from proving against their estate. But this agreement on its face declared that it did not prejudice the rights of the bank against Downing. Before any payment, so far as this record shows, was received by the bank, Downing was adjudicated a bankrupt; and his assignee claims that the bank must now credit the amount which it received after the bankruptcy, not from Downing, nor from anything he had pledged to secure the debt, but from his accommodation acceptor.

This question is settled by the bankrupt act: "All debts due and payable from the bankrupt at the time of the adjudication of the bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made, may be proved against the estate of the bankrupt." This $8,000 draft was due and payable to the bank by Downing, the principal, at the time he was adjudicated a bankrupt. At that time the bank had received nothing from any one, and has received nothing to this day from Downing or his estate or property. If Downing had not been put into bankruptcy, and had been sued on the draft at law, a plea that the bank had entered into a covenant not to sue his surety would have presented no defence. This was simply a covenant not to sue the accommodation acceptors, and did not, under the authorities, extinguish or satisfy the debt, or any part of it, as against the drawer, who had, in no event, any recourse over against the acceptors. 2 Pars. Notes & B. p. 238; Story, Prom. Notes, §§ 409, 421, 426; Jones v. Broadhurst, 9 Man., G. & S. 173. The statute, by the lan-

guage above quoted, requires debts to be due and payable at the time of the adjudication of bankruptcy, or to be then existing, though not payable until a future day; and at the time of the adjudication of bankruptcy the whole amount of the draft was due to the bank. If it had afterwards received payment by or through Downing or his property, it might have been compelled to credit it. Section 22.

The next portion of section 19 which refers to the question before us, reads as follows: "Any person liable as bail, surety, guarantor, or otherwise, for the bankrupt, who shall have paid the debt, or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced." The act proceeds: "And any person so liable for the bankrupt, who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor or otherwise, as may be provided by the rules," &c. These provisions apply to the question presented in this case.

Now conceding, for the purposes of this appeal, but not deciding, that when the bank received the $4,000 of Saunders, it operated as a payment or satisfaction pro tanto of the draft, yet, as the whole debt was not paid, nor part in discharge of the whole, the bank could still, under the language of the act, prove the whole amount as against the drawer, and at the most would be liable only to be treated as proving or having proved, for the benefit in part of the party from whom it received, as the surety of the bankrupt, such partial payment. If the bank should refuse or omit to prove for the whole amount, then the party paying could make the proof, in the name of the creditor, or otherwise. This view of section 19 will be found to be much strengthened by the course of decision under the English bankrupt acts, both prior to and since the act of 6 Geo. IV. c. 16, § 52, from which this portion of the 19th section of our act is substantially taken. It would too much protract this opinion to go at length into a review of the English legislation and decisions, and I will content myself by referring to Mr. Chitty's view of them in his work on Bills. Chit. Bills, 703, 727.

On the agreed statement of facts, the bank, as against the objection of the assignee, is entitled to make proof for the whole amount of the draft, and if Saunders claims, as to the $4,000 which he paid after the bankruptcy, that he is entitled to stand in the place of the bank, he can make application to the bankrupt court to that effect. This will bring the two parties interested face to face, and the court will determine their rights upon the case they make. It would be premature to pass upon them now. If Saunders should establish his right to prove against the estate for the $4,000 paid to the bank, or to hold the estate liable therefor, it will follow that the court will make an order that the proof made by the bank shall to that extent stand for his benefit. If he shall fail to establish this right, it will follow that the bank is entitled to receive dividends on the basis that the whole amount of the draft is due to it. This disposition of the matter seems preferable to the one made by the district court, since, as we have seen, it is clear that the estate is liable in respect to the whole amount of the draft, either alone to the bank or to it and Saunders. The order appealed from holds that the bank is not entitled to prove as respects the $4,000 paid by Saunders, which is equivalent to holding that Saunders is entitled to make proof for this sum, a question which it is better to determine on an application by Saunders adverse to the bank, and where both parties can be fully heard. The order of the district court will be modified accordingly, and the cause will be remanded, with directions to overrule the objections of the assignee to the proof of claim of the bank, but with leave to Saunders to apply to the court for an order that the proof made by the bank shall stand pro tanto for his benefit, of which application the bank shall be entitled to notice. Modified and remanded.

NOTE. In support of the foregoing view, see decision of Hoffman, J., in Re Ellerhorst [Case No. 4,381], and cases there cited; Ex parte De Tastet, 1 Rose, 10; Reid v. Furnival, 1 Cromp. & M. 538. When payment or satisfaction by one party to a bill or note, will enure to the benefit of other parties: See Jones v. Broadhurst, 9 Man., G. & S. 173, where the English cases are collected and reviewed in the learned judgment of Creswell, J.

DOWNING (UNITED STATES v.). See Case No. 14,991.

Case No. 4,047.

DOWNS v. ROCK ISLAND COUNTY.

[4 Biss. 508.][1]

Circuit Court, N. D. Illinois. Jan., 1869.

SERVICE OF MANDAMUS.

A writ of mandamus against a board of supervisors, whether alternative or peremptory, should be served upon the individual members. An acceptance by the clerk, although "by order of the board," is not sufficient.

Alternative writ of mandamus was served on the clerk of the board of supervisors of Rock Island county, and service admitted by such clerk, "by order of the board." Application was made that a peremptory writ issue.

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

DRUMMOND, District Judge. This mode of return is objectionable. I think that the officer ought to serve the writ on the parties themselves and return the fact that he has done so. This might give rise to controversy; still, under the special circumstances, I will give you the peremptory writ, but I think that ought to be served on the individual members of the board.

Case No. 4,047a.

DOWNTON v. YAEGER MILLING CO.

Circuit Court, E. D. Missouri. March 28, 1879.

[See 9 Fed. 402.]

DOWS (BLAISDELL v.). See Case No. 1,489.

DOWS (BOWKER v.). See Case No. 1,734.

DOWS (CASSEL v.). See Case No. 2,502.

Case No. 4,048.

DOWS et al. v. CHICAGO & S. W. RY. CO. et al.

[Trans. Rec. U. S. Sup. Ct. Oct. Term, 1876, p. 10,334.]

Circuit Court, D. Iowa. Aug. 3, 1875.[1]

RAILROAD FORECLOSURES — MISCONDUCT OF TRUSTEES—PARTIES TO CROSS BILLS — GUARANTEE—SUBROGATION — INTERPRETATION AND VALIDITY OF CONTRACTS—ULTRA VIRES.

[1. Mortgage bonds on the main line of a railroad were guaranteed by another company, with a full right of subrogation for any payments made by it. Afterwards a branch line mortgage was given to the same trustees, but the bonds were not guaranteed. The guarantor, having made payments of interest on the main line bonds, caused the trustees to institute a foreclosure suit. Certain branch line bondholders were made parties on their own petition, claiming that their interests were affected, and that their trustees were guilty of bad faith and collusion in bringing the suit. *Held*, that as these bondholders were thus brought within the protection of the court, which would see that their rights were properly guarded, they could not insist on the alleged misconduct of the trustees as a ground for denying the relief sought.]

[2. At the time the intervening bondholders were made parties to the original bill, cross bills by both the mortgagor and guarantor companies were on file, but the intervenors were not made parties thereto, nor did they ask it. *Held*, that the proceedings under the cross bills were not invalid on that account, for the intervenors could not be considered as necessary parties thereto, as their trustees, who were parties, represented them.]

[3. Where a guarantor of railroad mortgage bonds is by express stipulation to be subrogated to all the rights of the mortgagees in respect to any payments made by it, its right to foreclose for interest payments which it has accordingly made cannot be denied on the ground that, as it would still remain bound on its guarantee, it would have the right to further foreclosures for future payments. Any purchaser at the foreclosure sale would be presumed to take this into account, and make provision accordingly.]

[4. A railroad company which guaranteed the bonds of another company, with a right of subrogation to the mortgage lien, further agreed "either to furnish equipment for the operation of said road, or to lease and operate the same on terms to be agreed upon between them." *Held*, that this stipulation could not be construed as a contract to lease for a rental sufficient to pay the interest on the guaranteed bonds.]

[5. The mortgagor company, having afterwards commenced a branch line and issued bonds upon it, made an additional contract with the guarantor company, containing the provision that, "with regard to the lease of said branch, it shall be used and operated * * * in the same manner and on the same terms as the main line." *Held*, that this referred merely to leasing and operation, and did not include an agreement to guarantee the branch line bonds.]

[6. The executive committee of a railroad company appointed a subcommittee of two to "agree upon the basis of a contract" for a running arrangement with another road, and report the same. Acting with a similar committee of the other road, the subcommittee accordingly agreed upon the terms of a perpetual lease. When this agreement was made, a third member of the executive committee was present and assented to it. He, with the two members of the subcommittee, constituted a majority of the executive. The contract, however, was subsequently rejected by a majority of the executive committee. *Held*, that such mere presence and assent did not make the agreement binding, and it never became a valid contract.]

[7. The R. Railroad Company, which had made an agreement to lease and operate a new road to be built by another company, was made the custodian of the latter's bonds and funds, which were to be paid out on the certificates of its chief engineer. Subsequently certain bondholders of the latter company sought to hold the R. Company liable on the ground that it was bound to see that the funds were properly applied, and that it had permitted them to be wasted and dissipated by extravagant construction contracts. It appeared, however, that the R. Company, after taking possession of the road, had, out of its own means, placed it in first-class condition. *Held* that, as the mortgage lien covered the road as thus improved, the bondholders were not injured, and their claim must fail.]

[8. Neither the officers nor directors of a railroad company nave any authority to bind the company to supervise the construction of a railroad for another company, or to make it responsible for wasteful and extravagant expenditures in connection therewith.]

[9. The officers and directors of a railroad company cannot bind the company, by mere parol declarations and promises, to guarantee the bonds of another company; nor will the company be liable for any false representations or declarations of its individual officers or employees, in connection with sale of such bonds.]

[This was a foreclosure suit, brought by David Dows, Frederick S. Winston, and Calvin F. Burnes, trustees, against the Chicago & Southwestern Railway Company and the Chicago, Rock Island & Pacific Railroad Company. To this bill, Franz A. Muller, George Van der Kors, and Edward C. Boissevain Danielzoon were, on their own intervening petition, made parties defendant. The Chicago & Southwestern Railway Company filed a cross bill against all other original parties, and the Chicago, Rock Island & Pacific Company did the same. The inter-

[1] [Affirmed in 94 U. S. 444.]

venors filed a cross bill against all the other parties.]

OPINION OF THE COURT. On the 25th day of September, 1869, two railway companies, which had been organized under the laws of Iowa and Missouri, were consolidated under the name of the Chicago & Southwestern Railway Company. This company undertook to build a railroad from the Washington Branch of the Chicago, Rock Island & Pacific Railroad to the Missouri river opposite the city of Leavenworth. The Rock Island Company being interested in the projected road, as a feeder to its own roads, on the 1st day of October, 1869, entered into a contract with the Southwestern Company, by which, in order to aid the enterprise, the Rock Island Company agreed, on certain terms contained in the articles of agreement, to guarantee the payment of the principal and semi-annual interest of the bonds of the Southwestern Company to the amount of five millions of dollars, ($5,000,000.) This contract, among other things, provides that the Southwestern Company will enter into a contract with the Rock Island Company for the equipment, or the equipment and operation, of said road upon terms to be mutually agreed on between them, or will lease its line, franchises and property to the Rock Island Company at the option of said last-named company, and further "that when said road is completed and ready for operation," said Rock Island Company "agrees either to furnish equipment for the operation of said road, or to lease and operate the same on terms agreed upon between them." It was further provided that if default should be made by the Southwestern Company in the payment of the bonds or coupons above mentioned, or any part of either, and the said Rock Island Company should be required to and should pay the same, or any part thereof, that, as between the said parties, said payment should be held to be an advance of money upon the mortgage securing said bonds and coupons, and said Rock Island Company should receive all such bonds and coupons, and hold the same against said Southwestern Company unsatisfied and uncanceled, and should be subrogated to all the rights of the original holders thereof, and entitled to the lien and security of said first mortgage as against said Southwestern Company, and every other person, firm, or corporation, except the holders of outstanding bonds and coupons, and should have the right to foreclose said mortgage, and collect the said bonds and coupons so held by it, and sell all the property covered by said mortgage, subject only to the outstanding bonds and coupons secured by said mortgage; it being the intention of both parties that said first mortgage should stand as a security to said Rock Island Company, in the nature of a second mortgage of all the property of said Southwestern Company described therein, as against the holders of outstanding bonds and coupons, and as a first mortgage against all and every other person or persons, firms or corporations. On the 6th day of October, 1869, the Southwestern Company, in pursuance of said contract, executed to the complainants in the original bill, as trustees, a mortgage to secure the $5,000,000 of bonds referred to. This mortgage, reciting the terms of the agreement of October 1st, provided for the subrogation of the Rock Island Company, as in said agreement stipulated, and for the foreclosure of the mortgage at the written request of the Rock Island Company to the trustees, upon the happening of the contingency specified. The Rock Island Company indorsed the bonds in pursuance of this agreement. The Chicago & Southwestern Company having made default in the payment of the coupons when due, the Rock Island Company paid and took them up from November 1, 1871, to May 1, 1875. On the 25th of November, 1870, a company was organized in Missouri to build a branch road from Atchison, Kansas, to the main line of the Southwestern road, and on the 31st of May, 1871, this so-called Atchison Branch Company was consolidated with the Chicago & Southwestern Railway Company under the latter name. On the 1st of June, 1871, this consolidated company executed a mortgage to the same trustees—these complainants—to secure its bonds to the amount of one million of dollars, ($1,000,000,) to be used in building the Atchison Branch. This mortgage made the branch bonds a first lien on the Atchison Branch and a second lien on the main line. On the 27th of July, 1871, the Rock Island Company and the Chicago & Southwestern Company entered into a second contract in writing, which, reciting the fact of the execution of said branch bonds and mortgage, provides that it is agreed by and between the said companies that "with regard to the lease of said branch it shall be used and operated by said Chicago. Rock Island & Pacific Railroad Company in the same manner and on the same terms as the main line of the Chicago & Southwestern Railway Company." The construction of the main line commenced in December, 1869, and was finished in September, 1870. The construction of the branch was commenced in July, 1870, and was not completed till the latter part of September, 1871. The branch bonds and mortgage were issued to raise money to complete the branch road. The Rock Island Company took possession of the main line and branch roads as fast as they were built and fit for operation. The evidence shows that the Rock Island Company took possession by arrangement with the Southwestern Company, without any definite agreement or understanding as to the terms or rental on which it should operate the road, or as to the length of time it should continue in possession. The Rock Island Company,

when it took possession, found the roads in an unsafe and unfinished condition, and expended the sum of $1,271,936.46 in repairs and betterments, thus making, of both the main line and branch, "first-class western roads." The company also expended for operating the roads the sum of $1,489,152.63, and it received, as the earnings of the road, the sum of $1,420,089.69. The Southwestern Company, through Frank & Gans, bankers in New York, negotiated the branch bonds in Europe, and the defendants, Muller, Van der Kors and Danielzoon, became and are the owners and holders of these securities, to the number of 392 bonds, of $1,000 each. On the 4th of December, 1871, a subcommittee, appointed by the executive committee of the Rock Island Company, made to a committee on the part of the Southwestern Company a "certain counter proposition" containing "terms for a lease." This proposition was accepted by the committee of the Chicago & Southwestern Company. Among many other stipulations, it provides that the Rock Island Company shall lease both the main line and branch roads for a period of 999 years, furnish all equipments, pay all taxes and assessments, keep the road in good repair, and operate it for 65 per cent. of the gross earnings. On the 5th of February, 1872, the executive committee of the Rock Island Company rejected this contract, refusing to ratify it, by a tie vote.

The relief prayed by the parties may be stated as follows: Dows, Winston, and Burnes, as trustees, filed the original bill in compliance with the request of the Rock Island Company, made under a provision of the main-line mortgage seeking a foreclosure as to the main line, subject only to the rights of the holders of the main-line bonds and coupons outstanding. The Southwestern Company does not resist the foreclosure, but files a cross bill praying an accounting with the Rock Island Company, and that the alleged contract of December 4, 1871, be canceled. The Rock Island Company admits the allegations of the original bill, denies any indebtedness to the Southwestern, and by cross bill joins in the prayer of the original bill, prays an accounting with and decree against the Southwestern Company, and also attacks the contract of December 4, 1871, as null and void. Muller, Van der Kors, and Danielzoon, the intervening bondholders, ask for alternative relief upon two theories of fact. One of these theories seems to be that the Rock Island Company has undertaken, by contract, to guarantee substantially the whole bonded debt of the Chicago & Southwestern Company by virtue of a perpetual lease, binding that company to pay a rental sufficient to meet the semiannual interest upon the bonds of both the main line and the Atchison Branch. The intervening bondholders therefore pray that the Rock Island Company may be required to specifically execute a lease of the Southwestern Railroad, including the Atchison Branch, upon the terms contained in the paper known as the "contract of December 4th." The other theory upon which they proceed is that, by reason of the misconduct of the Rock Island Company as trustee or custodian of the proceeds arising from the sales of the bonds of the Southwestern Company, it has become liable to the holders of said bonds for the amount of principal and interest due and to become due thereon, and should be decreed to pay the par value of the same, or at least should be postponed to the bondholders; and the corresponding prayer is that it be decreed to make such payments. Thus it is apparent that the real controversy in the case is between the Rock Island Company and the intervening bondholders. And it is evident that, if there be a decree of foreclosure, there can be no decree for the specific performance of the contract set up by the intervening bondholders for a perpetual lease; and the converse of this is true,—if there be a decree for the specific performance there can be no foreclosure. The one precludes the other. The questions of lease and foreclosure must therefore necessarily be considered together. A decision in favor of the one determines the other adversely. But it is equally clear that the complainants' prayer for a foreclosure might be granted, and yet a decree be rendered in favor of the intervening bondholders upon their claim for indemnity against the Rock Island Company growing out of its alleged breach of trust.

The controversy may therefore be resolved into two questions: First. Are the complainants entitled to a decree of foreclosure? This necessarily involves the question of specific performance. Second. Are the intervening bondholders entitled to a decree for indemnity under their prayer for alternative relief?

It thus appears that the Rock Island Company, as surety for the $5,000,000 of main-line bonds, assumed a vast responsibility. It was but natural that it should seek to secure itself against this liability by all the means in its power. One means of indemnity was its right to foreclose the mortgage in the event of its being compelled to pay the semiannual coupons. But this would manifestly have been imperfect security. It was probably supposed by the parties that the net earnings of the road would be sufficient to meet the semiannual interest. This, however, would depend upon the manner in which the road should be operated. The earnings of the road, if managed with skill and economy, would prove an additional security to the Rock Island Company; but the road might be unskillfully used, or the earnings misapplied, and in that event the Rock Island Company might have to look to the mortgage alone for security. And this clearly explains the reason for the provision in the contract of October 1, 1869, giving to the

Rock Island Company the option to lease the road on such terms as might be agreed upon. That clause gave the Rock Island Company the right, at its election, to lease and operate the road, and thus to make its resources available for the payment of the coupons. It was therefore specially and primarily intended as an additional security to that company, as guarantor of the bonds. It was not specially intended for the security of the bondholders, who were to be amply protected by the guaranty upon their bonds. But, surely, it was not intended that this optional right to lease should, as counsel contend, debar the Rock Island Company from its right to foreclose the mortgage upon payment of the coupons. Who could foretell, when the contract of 1869 was made, what the earnings of the road might or might not be? Who could then safely predict that the earnings would not, as the sequel proved, fall short of paying for repairs and running expenses; in which event, if the Rock Island Company could not, by reason of its lease, foreclose the mortgage, it would be without any remedy whatever till the maturity of the bonds at the expiration of thirty years? That company would then, after having paid the semiannual coupons for thirty years, have the privilege of foreclosing the mortgage for the $5,000,000 of bonds, with the interest compounded and accumulated. This construction would make the privilege of leasing the very opposite of an additional security to the guarantor.

It is evident that if the Rock Island Company had elected to lease the road at a rental agreed upon with the Southwestern, it would have been the duty of the former to apply the rental faithfully to the payment of the coupons. If the stipulated rental had been insufficient to pay the coupons, it would have been the duty of the Chicago & Southwestern to provide the balance required; and if the Southwestern bad failed in this, leaving the Rock Island Company to pay the balance due upon the coupons, the right to have the mortgage foreclosed would have accrued to the guarantor. If the Rock Island Company took possession of and operated the road under any arrangement whatever with the Southwestern, without any agreement or understanding as to rental, it is evident that the former must account for the use of the road on the basis of a reasonable rental to be determined by the net earnings; and, in that case, it would have been the duty of the Rock Island Company to apply such reasonable rental to the payment of the coupons. The Rock Island Company was bound to operate the road with reasonable skill and economy, and apply the rental or net earnings faithfully to the payment of the semiannual interest. And if it were shown that the Rock Island Company failed to exercise reasonable skill and diligence in operating the road, or failed to make the proper application of the rental or net earnings, a substantial ground would exist in equity to refuse it a foreclosure. This ground does not, however, seem to exist. It is not relied on by the branch bondholders. It was manifestly the interest of the Rock Island Company so to operate the road as to make its available income as large as possible. In the absence of any showing to the contrary, we are bound to presume that the Rock Island Company did operate the road so as to make it produce all that it reasonably would, and the result shown is that the earnings were not sufficient to pay the running expenses.

Since the intervening bondholders do not rely upon any alleged delinquency of the Rock Island Company in running and operating the road, or in appropriating the proceeds, as a reason for refusing a foreclosure, what are the substantial grounds upon which they claim that the court should deny this relief to the guarantor?

First. The intervening bondholders complain of the alleged misconduct of the trustees, and insist that these proceedings have been instituted by collusion between the trustees and the two railroad companies. I see no sufficient evidence of any misconduct on the part of the trustees, or of the alleged collusion. At all events, the intervening bondholders are now fairly before the court, and, whatever may have been the motives for commencing the suit, the intervening bondholders cannot be injuriously affected thereby. The mala fides and collusion complained of, if they existed, have at all events failed of their alleged purpose, since the branch bondholders are now here, by their own request, and under the protection of the court. which is competent to secure to them their just rights and equities.

Second. The intervening bondholders insist that the cross bills filed by the two railroad companies, and all the proceedings in reference thereto, are irregular and invalid, since the intervening bondholders, having been by order of the court made parties to the original bill, were necessary parties to the cross bills. The intervening bondholders applied, by petition, to be made parties to the original bill, and the court granted all they asked. The cross bills had been filed and were then pending. The intervening bondholders did not ask to be made parties defendant to the cross bills. and it is their own fault if they were not made defendants. The court would doubtless have granted their petition if they had so framed it as to be made parties to the cross bills. But, in truth, whilst the intervening bondholders would have been proper parties to the cross bills they cannot be said to be necessary parties. The trustees of the branch mortgage are defendants to the cross bills. These trustees represent the bondholders. Regularly, indeed, the trustees of a railroad mortgage are the only necessary parties to a bill for foreclosure, since they

represent the interest of all holders of the bonds and coupons. It is, in general, impracticable to make the numberless holders of bonds and coupons all over the world parties defendant. The court, for special reasons, granted the prayer of the intervening bondholders to be made defendants in this case, but what is to prevent the branch bondholders from making their defense, whatever it may be, to cross bills in the name of their trustees? Surely the court would not deny them a hearing, and would not permit their trustees to obstruct them in making any proper and legitimate defense to the cross bills. The court would know how to deal with trustees who should attempt to deny to parties, whose interest they represent, the fullest opportunity to be heard in defense of their just rights.

Third. The intervening bondholders insist that the bill should be dismissed, because it shows that the suit is brought not to foreclose either of the two mortgages, main-line or branch, but to enforce a lien which is given by the main-line mortgage, etc. Now, the main-line mortgage gives the right of foreclosure to the guarantor upon its payment of the semiannual coupons; but the theory of the branch bondholders would exclude this right till the maturity of the bonds, a period of thirty years. A foreclosure is the appropriate relief in equity upon default in the payment of money secured by mortgage. The parties have expressly agreed to this remedy; the court cannot refuse it unless some insuperable obstacle stands in the way of granting it. I see no such obstacle. It is said that there can be but one foreclosure; that the Rock Island Company will remain bound for the future instalments of interest; that they cannot have additional foreclosures; and that the purchaser will take all the interests of all parties subject to the outstanding coupons and bonds. We are not now particularly solicitous about the purchaser at the foreclosure sale. Whoever he may be, he must take care of himself. No one will be compelled to purchase, but if any one shall purchase the property he will take it with full knowledge that his rights are subordinate to the outstanding bonds and coupons. He will acquire by the sale the whole interest of the Chicago & Southwestern Company, with the right to possess and operate the road. He will certainly know that the interest must be provided for and the bonds paid at maturity, and that if not paid, the bondholders or their guarantor, subrogated to their rights, as the case may be, will have the undoubted right to enforce payment by foreclosure. What possible difference could it make to a purchaser whether another and future foreclosure for nonpayment should be effected at the instance of the bondholders themselves or their guarantor? The purchaser, to save himself from a foreclosure, must see that the coupons and, finally, the bonds are paid.

Fourth. We come now to the principal ground on which the branch bondholders seem to rely to defeat the foreclosure. They contend that the Rock Island Company undertook to lease the Southwestern Company's road at a rental sufficient to pay the semiannual interest; that in pursuance of this undertaking that company took possession of the roads, both main line and branch, and that it has continued to use and operate them to the present time. The branch bondholders insist that if the Rock Island Company had fulfilled this agreement there would have been no default in the payment of interest and no ground in equity for a foreclosure. They seek to deduce the fact of this alleged undertaking from the terms of the contract of October 1, 1869, which they allege was extended to the branch bonds by the further contract of July 27, 1871. They also rely upon the alleged contract of December 4, 1871, which they insist was but the consummation of what had been previously agreed upon and understood. Now, if it was the intention of the parties to the contract of 1869 that the Rock Island Company should lease the road at a rental sufficient to pay the semiannual coupons, why was not that intention expressed? Why was language expressive of a totally different meaning incorporated in the instrument? The language of the contract is that the Rock Island Company shall furnish equipment for the road, or lease it on terms agreed upon by the parties. This, it must be admitted, leaves the matter of rental, as to amount, wholly indefinite and uncertain. Why did the contract not provide in terms that the Rock Island Company should lease the road at a rental sufficient to pay the semiannual interest, if that was the intention of the parties? How are we to account for the fact that intelligent parties, acting doubtless with the advice of counsel, after having agreed to a clear and definite stipulation as to the amount of rental to be paid, failed to incorporate their meaning in apt terms in their contract, but left a matter of such vital importance vague and obscure, and only to be deduced inferentially? The Jew Shylock, whatever else may be said to his discredit, displayed some conception of the law of contracts when, upon being told by Portia, the "wise young judge," to have a surgeon at his own charge to stop Antonio's wounds, lest he bleed to death, exclaimed: "Is it so nominated in the bond?" The contract and mortgage of 1869 declare in the clearest terms that the bondholders shall have the right to foreclose upon the nonpayment of the interest, or any part thereof, and these instruments provide that if the Rock Island Company shall pay the coupons, they shall be subrogated to all the rights of the bondholders, and shall be entitled to a foreclosure of the mortgage. But the branch bondholders repeatedly affirm, in the course of their argument, that the Rock Island Company, even though compelled to pay the cou-

pons, shall not, according to their interpretation of the mortgage and agreement, be entitled to have the mortgage foreclosed until the maturity of the bonds, a period of thirty years. Here, it must be confessed, is a direct contradiction in terms. According to the ingenious theory of the intervening bondholders, as expounded in their argument, the Rock Island Company, though not receiving a dollar from the road above running expenses, must go on paying the semiannual interest for thirty years without any right to proceed upon the mortgage; and this upon the assumption that the Rock Island Company have undertaken to pay a rental equal to the semiannual interest. According to this interpretation of the contract and mortgage, the Rock Island Company will, at the close of thirty years, have the privilege of foreclosing the mortgage for the five millions of bonds, with the compound and accumulated interest. Clearly the Rock Island Company would not have entered into such a contract as this, unless it was ready and willing to guaranty that the earnings of this projected road would be sufficient to pay running expenses, repairs, and the semiannual interest. And who can believe in the absence of explicit and unmistakable terms, that the Rock Island Company would, when the contract in question was signed, with all the uncertainties then before them, have assented to so improvident a contract, founded upon an assumption as to earnings not justified by the experience of western roads? If a rental was to be paid by the Rock Island Company sufficient to pay the coupons as they became due, how is it that the parties to the agreement and mortgage of 1869 provided, in these instruments, that the Rock Island Company, if it paid the interest, should have a right to foreclose the mortgage? In such case default in the payment of the coupons could only have happened by the failure of the Rock Island Company to pay the stipulated rental; in other words, the Rock Island Company would, under such contract, have had in its hands at all times money enough due to the Southwestern Company as rental to provide for the semiannual interest. Why then provide that if that company should pay the coupons it might foreclose the mortgage? Was the Rock Island Company, according to the contract, as expounded by the branch bondholders, to pay the coupons out of money due to the Southwestern Company, and make that payment the gravamen of a suit against the Southwestern and a ground of foreclosure?

Having thus disposed of the contract of 1869, and seeing its true character, let us next consider the contract of July 27, 1871. The intervening bondholders contend that by this contract the parties intended to extend the contract of 1869, including virtually and substantially, if not in terms, its express guaranty, to the Atchison Branch bonds. If such was their intention, it is remarkable that they did not express it in the contract. The language actually used in the contract of July 27, 1871, seems to have been carefully chosen for the purpose of limiting the extension of the contract of 1869 to the leasing and operation of the road by the Rock Island Company The language itself clearly excludes the guaranty. The terms are that, "with regard to the lease of said branch, it shall be used and operated by said Chicago, Rock Island & Pacific Railroad Company in the same manner and on the same terms as the main line," etc. Now, if we confound the two stipulations of the contract of 1869, —if we hold that the contract to lease in that instrument is precisely equivalent to the undertaking to guarantee the bonds,—the construction sought to be placed upon the contract of 1871 is, perhaps, correct. But why should we go outside of the terms of an instrument seeking alien constructions, when it has a plain and obvious meaning? Are we to assume that the parties did not understand the import of the terms they used? Do they say, generally, that the agreement of 1869 is extended to the branch bonds, or that the agreement with respect to both the guaranty and lease are so extended? Not so. On the contrary, the language clearly implies that with "regard to the lease" the contract is so extended, and by irresistible implication that the guaranty is excluded.

But the intervening bondholders insist that their construction of the contract of July 27, 1871, is illustrated and enforced by the facts and circumstances in evidence, by the conduct of the parties, and, especially, by the oral declarations of Mr. Tracy to Mr. Frank. It is beyond question that the branch bonds were not in fact indorsed with the guaranty of the Rock Island Company, as the bonds of the main line had been, and that they were accepted by the bondholders without that indorsement. It is also a fact that no one ever claimed, or asked, or demanded, that the branch bonds should be so indorsed under and by virtue of the contracts of 1871 and 1869. Some of the main-line bonds were negotiated without this indorsement prior to the execution of the alleged contract of December 4, 1871. It was agreed by that contract that the bonds which had been already sold should be exchanged for new bonds, which the Rock Island Company was to indorse. It is clear that up to this time no one claimed that the Rock Island Company was under any obligation to indorse the branch bonds as they had done the main-line bonds. It is in evidence that after the alleged agreement of December 4th, and while it was supposed that the Rock Island Company would, in pursuance of its terms, indorse the branch bonds, they were regarded by all parties as a much more valuable security than they had been before. The value of the branch bonds, as fixed before the contract of December 4, 1871, was 80 cents on the dollar; whereas the main-line bonds, with the Rock

Island Company's indorsement, were worth 90 cents on the dollar. Why this difference in the market value of the bonds, if it was understood that the Rock Island Company was, in fact if not in form, bound, under the contracts of 1869 and 1871, to pay the semiannual interest on both classes of securities? What construction could dealers in these securities have put upon the fact that one class of bonds bore upon their face the guaranty of the Rock Island Company, and the other class did not, except that the Rock Island Company intended to become responsible for the main-line but not for the branch bonds? And, if it was understood by the parties interested that the Rock Island Company was bound by contract to pay the semiannual interest upon the branch bonds, why did they not require some writing—some express undertaking—to that effect? Was such a thing ever heard of before, as that a set of astute capitalists, who considered themselves entitled to the security of a responsible indorser, should advance a million of money without requiring any express or written undertaking from their guarantor? Who can believe that these bankers and capitalists would have been content to rest upon the mere oral declarations or promises of parties assuming to represent the guarantor, or upon vague inferences drawn from contracts not directly connected with the loan?

Again, the branch bondholders seem to place great reliance upon the declarations of Mr. Tracy to Mr. Frank prior to the execution of the contract of July 27, 1871, and prior to the negotiation of the branch bonds. Mr. Frank testifies that he told Winston, Burnes, and Courtright, who represented the Southwestern Road, that he had no objection to negotiate the branch bonds if they could get the guaranty of the Rock Island Company on the bonds. "They answered that it would be hardly possible to get that, because Mr. Tracy had stated that his stockholders were dissatisfied with his guaranteeing any bonds,—any more bonds; but they said that the road would be leased and the interest on the bonds taken care of by the Rock Island road. I answered that if they could get me such a writing as that, or to that effect, I would negotiate the bonds." Shortly after this Mr. Frank met Mr. Tracy, and mentioned the facts of this Atchison Branch negotiation: "Told him that the parties wanted him (Frank) to sell these bonds; he seemed to know of the scheme, and I asked him if he would guarantee those bonds. He said 'No, because his stockholders were not satisfied with his guaranteeing any bonds.' That was about the substance." Frank then asked him, "'Will you lease the road when it is finished, and take care of it the same as the main line?' He said, 'I see no objection to that.' I asked him, 'Will you give that as the president, or as the company, for the company?' He said, 'Yes,' and he did." What the witness means by the words "and he did" was that Mr. Tracy made with the Southwestern Company the contract of July 27, 1871, which was brought to him (Frank) by Winston or Burnes, before he negotiated any of the branch bonds.

Now, it is evident that Mr. Tracy here makes a clear distinction between the obligation to guarantee the bonds and to lease and operate the road and take care of it the same as the main line; and we have just seen that the same distinction clearly appears in the contract of July 27, 1871. Now, this is a distinction without the least substantial difference, if it was understood that Mr. Tracy was to lease the road at a perpetual rental sufficient to pay the semiannual interest, and that he was thus to pay the coupons as they matured. What must the bondholders have understood from Mr. Tracy's language, if truthfully reported to them by Mr. Frank? Why, certainly, that he made a broad distinction between guaranteeing the bonds and leasing and taking care of the road the same as the main line. He would not guarantee, but he would lease. What did that distinction import? From this could the bondholder have justly concluded that although the Rock Island Company, by the mouth of its president, expressly refused to guarantee the bonds, yet that the company would substantially guarantee by taking a perpetual lease of the road at a rental sufficient to pay the interest? No. They must have understood Mr. Tracy's language in its natural and obvious import, namely, that the Rock Island Company would lease, operate, and take care of the branch line under the same arrangements which should be made applicable to the main line, whatever those arrangements might be. Not one word was said by Mr. Tracy as to any definite contract for the rental of the road, or any definite sum to be paid. By what forced interpretation of language can Mr. Tracy's words be made to imply that the Rock Island Company would lease the road at a rental sufficient to pay the interest upon the bonds, or at any fixed and definite rental whatever? What possible difference would it make to Mr. Tracy's stockholders, whether he directly guaranteed the bonds or made an arrangement, by which they would be bound, after paying for repairs and running expenses, to pay a rental, upon a perpetual lease, sufficient to liquidate the semiannual interest?

We come now to the consideration of the alleged contract of December 4, 1871. I deem it unnecessary to go into the interesting legal questions, so ably discussed by counsel, touching the validity of this supposed contract. Whether or not its material provisions were, as to the Chicago & Southwestern Company or the Rock Island Company, ultra vires, is, in my view, unimportant, since it is clear, upon the facts, that it was not a consummated contract. What are

the facts? The executive committee of the Rock Island Company, on the 30th day of October, 1871, passed a resolution appointing "William L. Scott and Hugh Riddle a subcommittee to agree upon the basis of a contract for a running arrangement between the Rock Island and the Southwestern Companies, and when so agreed upon to report to this committee." Manifestly, this subcommittee had no power whatever to consummate any contract binding upon the Rock Island Company. It were an idle waste of words to discuss so plain a proposition as this. The subcommittee, however, did, as they well might, on the 4th day of December, 1871, agree with a similar committee on the part of the Southwestern Company upon the basis of a contract. They did this clearly and unquestionably in their capacity of subcommittee, and by no authority whatever, except the resolution by which they were appointed. Mr. Riddle and Mr. Scott signed their names to the proposed agreement in their capacity as a committee, and in due time they reported their proceedings to the executive committee. By that body this proposed agreement or basis was rejected. By a tie vote the executive committee refused to ratify what their subcommittee had agreed to or proposed and reported to them. Upon this statement of facts, no possible doubt could be entertained that there was no consummated contract; in other words, no contract at all between the two railroad companies. But the bondholders rely upon the fact that Mr. David Dows, a member of the executive committee, was present when the contract in question was agreed to, and that he assented to the agreement. Hence they say a majority of the executive committee assented to the contract, and a majority had power to make a contract binding upon the Chicago & Rock Island Company. In what capacity Mr. Dows was present does not clearly appear. He did not sign the paper with the other members of the committee, and hence it is to be inferred that he did not assume to act as a member of the committee. He may have been casually present, or intentionally present, for the purpose of aiding the subcommittee with his opinion and advice. At all events, it does not appear that he was present in any official or corporate capacity whatever. But it is beyond doubt or question that Mr. Riddle and Mr. Scott were then and there acting in their capacity as a subcommittee, and that Mr. Dows was not a member of the subcommittee. How could Mr. Dows, by being present at a meeting of the subcommittee, change its character and authority, enlarge its powers, and, in a word, clothe it with the whole authority of the executive committee to make contracts binding upon the Rock Island Company? To state such a proposition is sufficient to dispose of it. It was clearly not intended that Mr. Dows, by his presence, should clothe the subcommittee with any such enlarged and plenary authority as is now claimed for it, since he did not sign the contract which it reported to the executive committee. He may have advised or assented to their action; but, if so, his advice and assent gave to the contract no greater validity than it would have had without his co-operation; nor would the result have been at all different if Mr. Scott and Mr. Riddle had acted, not in their capacity as a subcommittee, but as members simply of the executive committee. To say that a majority of a committee may meet, casually or intentionally, without notice to the minority, not at a time of any regular meeting, and without regard to any of the forms of the body to which they belong, and take resolutions binding upon the whole body of which they are members, is to assert a proposition without support in law or reason. Such a practice would ignore the rights of minorities, and deprive the constituent body of all the benefit, to which it is entitled, of the knowledge, experience, advice, and counsel of the minority in consultation and discussion. Clearly, any resolution of a majority so taken would not be the act of the committee in its organized form, but merely the individual act of the majority members. I am, therefore, of opinion that the prayer of the original bill for foreclosure should be granted, and that of the cross bill, for specific performance, denied.

Let us now finally consider the case presented by the intervening bondholders to maintain their prayer for alternative relief. This prayer is founded upon the allegation that the Rock Island Company committed a breach of the trust imposed upon it as custodian of the money raised on the branch bonds. It was provided in the branch mortgage that the bonds and proceeds should be delivered and paid over by the Rock Island Company, as custodian, upon the certificate of the chief engineer of the Southwestern Company, with the approval of the president of the Rock Island Company indorsed thereon. Hence, it is insisted that it was the duty of the Rock Island Company to supervise the expenditure of the money, and see that it was judiciously applied to the building of the road, and that, instead of performing this duty, the custodian permitted the money to be squandered and wasted dishonestly upon extravagant construction contracts. It is also alleged that the road was accepted in so unfinished and imperfect a condition that a large sum of money had to be expended to prepare it for use and operation. It is further said that the line was represented to the bondholders to be fifty miles in length, whereas it was in fact only about thirty miles long, and that in this the branch bondholders were grossly defrauded. These frauds, it is contended, could not have been consummated if the trustee of the fund had faithfully performed its duty as prescribed

in the branch mortgage. With respect to the line of the Atchison Branch road, it may be remarked that there is no provision in the branch mortgage, as there is in the contract of October 1, 1869, which, by the recitals of the main-line mortgage, became a part of it, giving to the Rock Island Company any control of the alignment. The Rock Island Company, having indorsed the main-line bonds, reserved to itself the right to control the location and alignment of that road. Allowing, as true, all that is affirmed by the intervening bondholders with respect to the imperfect construction of the road, I cannot see that they have suffered any substantial injury, since it is shown that the Rock Island Company has, by repairs and betterments, paid for with its own means, made the Atchison Branch "a first-class western road," and it is conceded that the lien of the branch mortgage attaches to the road in its improved and bettered condition in preference to the Rock Island Company's claim for improvements. It is noticeable that by the terms of the branch mortgage the Rock Island Company is made custodian merely of the funds, and they are to pay or deliver upon the certificates of the chief engineer of the Southwestern Company with the approval of the president of the Rock Island Company indorsed thereon.

But at this point it may not be amiss to inquire: What is the Rock Island corporation? What are its functions? Who compose the corporate body? The president and directors are not the corporation. The corporate body must have existed before its officers or agents were chosen. If every one of these should be killed by lightning in a moment, the corporators who elected them would still live. Manifestly, the stockholders constitute the corporation. They put their money into it. They own the stock and property of the corporation. They alone take the profits and suffer the losses resulting from its business. They keep the corporation alive or put an end to its existence. In a word, they are the constituent body, the life, the soul of the incorporeal body, and under the law they are the final source of all power and authority. The president and directors cannot therefore bind the corporation to anything and everything and by every manner of means. Their power is derivative, and, like all persons exercising delegated power, they must, to bind their principal, keep within the scope of their authority. The president and directors of a railroad company could not, with the money of the corporation, purchase stock in a manufacturing company. They could not commit the stockholders to the building of a canal. They could not engage the company in the banking business, accept money on deposit, deal in exchange, and thus make the stockholders, to the extent of their stock, responsible for losses.

Now, in the present case the Chicago & Southwestern Company saw fit in the branch mortgage to provide that the Rock Island Company should be the custodian of its bonds and money; and it is contended that this mortgage committed the Rock Island Company to the duty of supervising the contracts, the alignment and the construction of the Atchison Branch road. Was it cognate to the ends and purposes of the Rock Island Company's organization to become the trustee and custodian of the funds of another road, to supervise its construction contracts and alignment, and to superintend, from a vast distance, its actual construction, its building material, its stone, timber, and mortar? Had the president and directors the right to commit their stockholders, without their consent, to this vast responsibility, and make them liable for losses growing out of it? Doubtless the treasurer, Mr. Tows, who received the money as custodian, became responsible as an individual for its safe keeping and disbursement; and perhaps, if Mr. Tracy undertook to supervise the construction and alignment, he, as an individual, may have become responsible for a faithful execution of that trust; but, in my judgment, neither Mr. Tracy nor the whole directory had any authority to bind the stockholders without their assent to duties and responsibilities so extraordinary and so alien to the business of the corporation. And, in my view, the same principle applies with even greater force to the declarations, admissions, and representations of individual members and officers of a corporation made beyond the scope of their authority and outside of the corporate business. The stockholders, the real corporators, are not bound by such declarations and admissions. It seems to be supposed that whatever Mr. Tracy may have said or promised anywhere, and about anything, was sufficient to commit the corporation to the greatest and most onerous responsibilities. If this were law, there would be no safety for the stockholders of any corporation whatever. There seems to be no sufficient evidence in the case that any of the officers of the Rock Island Company were privy to the false representations upon which it is alleged the branch bonds were negotiated. But what if they were? Had any individual officers or directors, or the whole directory, any power whatever to bind the stockholders of the Rock Island Company, without their own consent, to any guaranty of another road's bonds, even if they had assumed to do so by the most solemn written forms, much less by mere oral declarations, "without form and void"? Are the stockholders of the Rock Island Company to be made responsible for the payment of millions of money by the floating declarations of its individual officers and employees? Would any prudent money lender—and what money lender is not prudent—have accepted and relied upon such evidence as a basis for loaning large sums of money? Is this the kind

of evidence on which vast loans are negotiated by financiers and capitalists? To hold any corporation bound by the somewhat slippery doctrine of estoppel to the extent claimed in this case would, in my judgment, be carrying that doctrine to an extravagant length. By such an application of the doctrine of equitable estoppel the staunchest corporation in the land might any morning find itself buried beyond hope under a huge mountain of oral obligations, "proved by parol."

For these reasons, I am of opinion that the prayer of the cross bill for alternative relief must be denied, and the cross bill dismissed.

[NOTE. The intervenors took an appeal to the supreme court, which affirmed the decree, Mr. Justice Strong delivering the opinion. The questions there discussed were, however, mainly jurisdictional, and the points made in the foregoing opinion were given little prominence. See Muller v. Dows, 94 U. S. 444.]

DOWSON (CARROLL v.). See Case No. 2,452.

Case No. 4,049.

DOWSON et al. v. PACKARD.

[3 Cranch, C. C. 66.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.

PRACTICE IN EQUITY — ATTACHMENT—WHEN RETURNABLE.

An attachment, issued by order of the court, under the 10th rule of practice prescribed by the supreme court of the United States for the circuit courts, against a defendant in equity for not answering the bill, must not be made returnable to the clerk at the rules, but may be issued by the court, returnable immediately to the court.

The defendant Packard was brought in upon an attachment, for not answering the bill. This attachment was issued by order of the court at this term, on the 10th of January, 1827, and made returnable by the clerk before himself at the rules on the first Monday in April next.

Mr. Jones, for defendant, moved to quash the attachment; or to discharge the defendant without answer, upon merely entering his appearance.

THE COURT (nem. con.) quashed the attachment, because it was made returnable at the rules.

Mr. Redin, then moved the court for an attachment to bring in the defendant to answer the interrogatories contained in the bill; not having filed any other interrogatories.

THE COURT (nem. con.) granted the attachment for not answering the bill generally

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

Case No. 4,050.

In re DOYLE.

[1 Holmes, 61.][1]

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

BANKRUPTCY—INSOLVENCY OF TRADER — FRAUDULENT PREFERENCE—DISCHARGE.

1. A trader is insolvent within the meaning of the bankrupt act [of 1867 (14 Stat. 517)] when he is unable to pay his debts as they full due, in the ordinary course of business.

2. A payment to one of his creditors, made out of the ordinary and regular course of business by an insolvent debtor, within four months of his petition in bankruptcy, he then knowing himself to be insolvent, is a fraudulent preference within the meaning of the twenty-ninth section of the bankrupt act, and will prevent the granting of a discharge in bankruptcy to such debtor, although the preferred creditor at the time of the payment had not knowledge, nor reasonable cause to believe, that the debtor was then insolvent.

Petition in bankruptcy for review and reversal of a decree of the district court, denying an application of the petitioner [Louis J. Doyle] for a discharge in bankruptcy. [See Case No. 4,051.] The facts are stated in the opinion.

T. A. Jenckes and C. Hart, for petitioner.

C. S. Bradley, O. Lapham, and B. N. Lapham, for opposing creditors.

SHEPLEY, Circuit Judge. The creditors of Louis J. Doyle, a bankrupt, filed specifications in the district court in opposition to his petition for discharge. Upon a hearing before the district judge, upon his application for discharge, and the specifications of the creditors in opposition thereto, the prayer of the petition for discharge was denied by the court. The bankrupt thereupon filed his petition in this court, sitting as a court of equity, for a revision of alleged errors in the rulings and decree of the district court, praying for a reversal of the judgment of the district court, and that a discharge be granted to him as prayed for in his application. In determining the question of the right of the bankrupt to a discharge, the district judge denied the application, upon the ground that the allegation of the opposing creditors was sustained by proof of a fraudulent preference of a creditor contrary to the provisions of the act. The third subdivision under the general allegation of fraudulent preference alleges that the bankrupt paid the firm of Doyle & Joslin, of the city of Providence, the sum of two thousand dollars but a short time before the filing of his petition in bankruptcy, and when he knew himself to be insolvent and in contemplation of bankruptcy. It appears that on the 10th day of December, 1868, two days before the paper of the bankrupt went to protest, and he finally suspended payment, and nineteen days before the date of filing his petition in bankruptcy, he

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

[2] [Affirming Case No. 4,051.]

was indebted to the firm of Doyle & Joslin for a balance due them upon an open account between the parties. Doyle & Joslin were acting apparently as bankers for the petitioner, receiving deposits from Doyle, and making him advances from time to time, keeping an interest account. On his examination, the bankrupt states that he was continually borrowing money from them from time to time. He would borrow money for a day or two, and return it in a day or two. On the 10th of December, the balance against Doyle exceeding four thousand dollars, Doyle & Joslin called for payment. Doyle had twenty shares of American Screw Company's stock standing in the name of Gideon Spencer, who had advanced nine thousand dollars on the stock, and held the title as collateral security for the loan. The note to Spencer for the nine thousand dollars was not due until Jan. 9. 1869. Doyle sold the stock, and, after paying the note to Gideon Spencer, paid the balance of the proceeds of the sale, about two thousand dollars, to Doyle & Joslin, still leaving a balance, as he states it, of twenty-one hundred dollars due them. This payment resulted pro tanto as a preference of Doyle & Joslin over the other creditors. Was this a transaction in the ordinary course of the bankrupt's business? or was it such a payment as, being made with a full knowledge of insolvency and with intent to give a preference, would be fraudulent in the contemplation of the bankrupt act?

Of his actual insolvency at that time there can no question be made. The total amount of his liabilities, as stated by himself at the hearing, amounted at that time to over five hundred thousand dollars, of which nearly two hundred thousand dollars was unsecured by the mortgages on his real estate and mill property. The assets in the hands of the assignee apparently are not sufficient to pay much, if any, more than ten per cent. on the debts not covered by the mortgages. Doyle's losses in the manufacture of beaver cloths between Oct. 1, 1866, and the time of his suspension, were $92,619.72. He says the beaver account was settled in December, 1868. "The final balance showed a loss at that time; though we knew all the time, if the goods sold, they would show this loss." That loss occurred some time between October, 1866, and December, 1868, without any exact time to assign to it. He had manufactured beavers, and shipped them to Hunt, Tillinghast & Co., of New York, up to Aug. 22, 1867, when the last consignment was made. They had advanced him large sums on the goods, and he says that when he "stopped manufacturing beavers, the beaver account looked as though it might show a large loss." After that he began to manufacture fancy cassimeres. "I kept," he says, "a cassimere account separate from the beaver account. That was an agreement with Hunt, Tillinghast & Co. I made this trade with Hunt, Tillinghast & Co., that I should be able to draw my balances on fancy cassimeres. They were to advance me three-fourths on the goods. If any balances accrued, I was to draw them. They were not to apply them to the liquidation of the beaver account." The beaver cloths were selling slowly in May, 1867, at two dollars a yard, at which price they yielded a profit, after deducting commission and expenses, of "from ten to fifteen cents a yard." They did not sell very well, and there was a constant decline in prices. Only a few cases were sold at $2.00; then they declined to $1.80. There were but a few sold at $1.80; then they fell again, and continued to fall during the whole season. This decline in prices continued to the time of the final sale, at $1.12½. It is clearly apparent from the evidence that Hunt, Tillinghast & Co. had advanced him very large sums on the beaver account over and above the market value of the goods, and that when he ceased to manufacture that class of goods, and engaged in the manufacture of fancy cassimeres, it was with the hope that the profits on the cassimeres might compensate for the losses in the manufacture of beavers. Hunt, Tillinghast & Co. agreed to carry the large amount due them for over-drafts on the beaver account, to afford Doyle the benefit of any favorable change in prices of the beaver cloths, and to give him the benefit of the experiment in the manufacture of the cassimeres. But the price of the beavers constantly declined, and the manufacture of the cassimeres proved no less ruinous than that of the beavers, showing, from Feb. 1, 1868, to the final close of the account by the assignee, a loss of $67,123.02.

Without going more minutely into the details of the other transactions of the bankrupt, I am satisfied that long before the 10th of December, 1868, he was fully aware of his insolvency, estimating his property and assets at their market value at that time. He was struggling to keep his head above water, trusting solely to the indulgence of his creditors, who were willing, as he expresses it, so long as he kept his head above water, to do nothing to put it under, and vainly hoping for a favorable change in the market value of his goods that might extricate him from his embarrassments. His statements and his conduct in December, 1868, both show that he was fully aware that when the sustaining hands of Hunt, Tillinghast & Co. were withdrawn from him, he must fall. Most manifestly, he knew that he had not the means to meet his business liabilities in the ordinary and regular course of business. Of his actual insolvency, and of his knowledge of that insolvency at the time of the payment to Doyle & Joslin, I think there can be no reasonable doubt. "Insolvency," as used in this act, does not mean an absolute inability to pay one's debts at a future time upon a settlement and winding up of

all a trader's concerns; but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. Bayly v. Schofield, 1 Maule & S. 338; Thompson v. Thompson, 4 Cush. 134; Buckingham v. McLean, 13 How. [54 U. S.] 167; In re Gay [Case No. 5,279]. If the payments to Doyle & Joslin had been, as it is contended on the part of the bankrupt they were, payments made in the ordinary and regular course of the business of the bankrupt, as traders ordinarily pay small sums of borrowed money on call loans, I should not be inclined to consider such payments as made with an intent to give a fraudulent preference. If payments made in the regular and ordinary course of business by an insolvent, even with knowledge of his insolvency, are necessarily to be considered as preferences in fraud of the act, but few bankrupts could obtain a discharge, if opposed. The intent to secure to one creditor a preference over others must appear. The money paid to Doyle & Joslin was not paid in the ordinary and usual course of the bankrupt's business, nor out of the proceeds of his ordinary sales. Having previously mortgaged his other property to nearly its full value, he disposed of these shares of stock, apparently the only property remaining not so incumbered as not to be available to raise money upon, and, anticipating the payment of the debt for which the shares were pledged, he applied the balance of the proceeds to the reduction of the debt of Doyle & Joslin. From the condition of his property, he must have known that there was no reasonable expectation that his other creditors would fare as well in proportion to the debts. Although it does not appear that he expected then to stop payment immediately (on the contrary, it does appear that he was still expecting and struggling to keep his head above water, as he expresses it, for a time longer,) yet he was so thoroughly aware of his situation, that two days after, with twelve thousand dollars in amount of paper indorsed by perfectly responsible parties in his hands, he decided to suspend instantly, upon Hunt, Tillinghast & Co. refusing to discount it, without making an effort to obtain the money elsewhere.

I am forced most reluctantly to the conclusion, that the evidence in the case sustains the specification of a fraudulent preference, contrary to the provisions of the bankrupt act, in the payment to Doyle & Joslin of the sum of two thousand dollars, but a short time before the filing of his petition in bankruptcy, and when he knew himself to be insolvent. I come to this conclusion reluctantly, as before stated, because the evidence utterly fails to prove any actual fraud on the part of the bankrupt by any concealment of his assets or withholding of any information, and I find no evidence in any other transaction set forth in the record of any conduct which ought to interfere with his discharge. But having designedly and intentionally paid a favored creditor when he was not able to pay all his debts in the usual and ordinary course of his business at the time, knowing such to be the condition of his affairs, meaning to secure that favored creditor whether his other creditors should be paid or not, he is not entitled to his discharge.

It is contended that the creditor receiving the payment or security should have knowledge of the insolvency at the time, in order to defeat the discharge on account of the preference given to him. This question is very fully considered in the very able opinion of Judge Fox, in Re Gay [supra]. This is one of the ablest and most exhaustive opinions which have been given on the construction of the bankrupt act. I entirely agree with the reasoning and the conclusions of the learned judge in that opinion. The twenty-ninth section of the act declares that "no discharge shall be granted if the bankrupt has given any fraudulent preferences contrary to the provisions of this act." By the thirty-fifth section, it is enacted, that, "if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition for or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under liability for him, procures any part of his property to be attached, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, &c., having reasonable cause to believe such person is insolvent, and that the same is made in fraud of the provisions of this act, the same shall be void." I do not think that the question, whether such a conveyance made by an insolvent with knowledge of his insolvency, and with a view to give a preference to a creditor, would be in fraud of the provisions of the act, is dependent upon the knowledge of the creditor receiving the payment or security of the insolvency at the time. If the assignee would invalidate the payment, and recover back the payment or security given, it is necessary that he should have knowledge of the insolvency, and that the preference was given in fraud of the act on the part of the favored creditor. Until this knowledge is brought home to the creditor, he is allowed to retain the payment or security, which, so far as he is concerned, he has honestly received. But, so far as the bankrupt himself is concerned, if he has in fraud of the act given to one of his creditors a preference, and has concealed the knowledge of his insolvency from that creditor, it is certainly a greater injury to the other creditors, and as great a fraud upon the act as if the preference had been given to a creditor having full knowledge of his condition and purpose. In the latter

case, the preference can be impeached and avoided, and the property reclaimed by the assignee for the benefit of the general creditors; in the former case, the preference is valid and effectual. Decree affirmed.

Case No. 4,051.

In re DOYLE.

[3 N. B. R. 640 (Quarto, 158).] [1]

District Court, D. Rhode Island. 1870. [2]

BANKRUPTCY—DISCHARGE—FRAUDULENT PREFERENCES.

1. Where a discharge is refused bankrupt on the ground of his having given a preference, *held*, the bankrupt is a trustee for his creditors. Property must be administered in accordance with the provisions of the national bankrupt law [14 Stat. 517].

2. Q.—Can one of the leading purposes of the bankrupt act be thwarted by and through the means of a continuing indemnity mortgage, unlimited in amount?

[In the matter of Louis J. Doyle, a bankrupt.]

The court adjudged six of the specifications not sustained, but finding one of the four allegations embraced in a seventh specification to be established, refused a discharge. This specification contained allegations or charges of fraudulent preferences made by the petitioner—1st, to Hunt, Tillinghast & Co.; 2d, to Gideon L. Spencer; 3d, to Doyle & Joslin; and 4th, to William Barstow. The first of these was summarily disposed of, as unsupported by the proof; but in regard to the other three, the court, after recapitulating the facts and circumstances in proof, which bore upon them especially, proceeded to express its views. The charge of a preference to Spencer was dismissed as unsupported; but that of a preference to Doyle & Joslin (a payment of two thousand dollars on the 10th of December, 1868, two days prior to the petitioner's failure) was adjudged sustained, rendering it unnecessary to express an opinion upon the fourth charge of a preference to William Barstow, on or about October 1st, 1868.

The law of the case (as counsel had been apprised prior to the hearing), the court premised, was to be found in a ruling of Judge Fox, of Maine, in Re Gay [Case No. 5,279], adopted and commended by Judge Blatchford, of New York, in Re Louis [Id. 8,527]. Says Judge Fox, "I hold that in order to deprive a party of his discharge, the transfer or conveyance constituting the preference must be made by him in contemplation of bankruptcy or insolvency, or when he is in fact insolvent; and in the latter case, the court must not only be satisfied that he was insolvent, but further, that he had actual knowledge of his insolvency, or had good grounds for fearing and believing that he was insolvent, and acted on such belief in making the preference. In short, he must have designedly and intentionally given a preference, meaning to secure or pay that particular creditor, when he was not able to pay all his debts in the usual and ordinary course of business at the time, fearing and believing such to be the condition of his affairs. If such is his situation, and he so acts, meaning to secure a favored creditor, whether his other creditors shall get their pay or not, I am of opinion that he is not entitled to his discharge. He has a fraudulent purpose and design to violate the law by giving one of his creditors security, when he believes he cannot do the same by all others, or discharge his liabilities to them as they accrue."

Treating of the preference to Doyle & Joslin, the court said: Was the petitioner insolvent December 10th, 1868? Did he know, or have reasonable cause to know, that he was insolvent? Did he mean to secure or pay Doyle & Joslin, being not able to pay all his debts in the usual and ordinary course of business at the time, fearing and believing that to be the condition of his affairs? To each of these three interrogatories, I am constrained by the law and the evidence to give an affirmative answer. That the petitioner had been "insolvent," in every sense of that word, for many months, cannot be questioned. That he knew it is a fair inference from his answers to the questions put to him as to this point. When asked as to his knowledge of his condition, at various dates from March, 1867, to December 12, 1868, declining to say he did believe himself able to pay his debts, he invariably replies evasively that he could not say as to this, until his property (real estate, beaver cloths, and cassimeres, included) should be sold. But whether he knew and believed that he was insolvent, is not the question. It suffices that he had reasonable cause to know and believe that his condition was that of insolvency; and as to this the testimony is plenary and convincing. His books showed his insolvency, and besides this the petitioner says, truthfully I doubt not, that he always knew the state of his affairs, irrespective of his counting-house records. Throughout the summer and autumn of 1868—to name no earlier date—it is manifest that his was the condition of the "strong man struggling in a bog," keeping his head above water, to use his own expressive phrase, only through the forbearance and favor of Hunt, Tillinghast & Co., William Barstow, and, I will add, Doyle & Joslin; his business (in his own language again) going down hill with a daily increasing momentum and velocity; his property, parcel after parcel, being mortgaged, directly or indirectly, to Barstow, and his commercial paper being met only by renewals, in whole or in part, Hunt, Tillinghast & Co., and Barstow accepting and indorsing—the paper

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 4,050.]

on which they were liable being invariably cared for and protected—while the claims of other creditors, in November, if not earlier, were put off—not met in the usual course of business. Whether the Barstow and Hunt & Tillinghast paper can be said to have been met in the usual course of business (having been paid only by renewals or new loans), is a question upon which I need not here express an opinion.

As to the intent of the petitioner in paying to Doyle & Joslin the two thousand dollars, there is, it is true, some ground for difference of opinion. It is said that the plaintiff did not contemplate stopping payment and business—but until about noon of the 12th of December, 1868, confidently expected to go on, as he had been going on, hoping for better times; and therefore, it is argued, he could not have intended to prefer Doyle & Joslin. It is enough to say, in reply to this, that the evidence fails to satisfy me that the probability of a failure and a breaking up of the business within a brief period, had not been the subject of thought and meditation for days, if not weeks and months, before the 10th of December, on the part of the petitioner, with or without the privity of Barstow. Indeed, the petitioner says that Mr. Barstow had consented, in order that he might go on with his business, to indorse new paper to the amount of twelve thousand dollars, if Hunt, Tillinghast & Co. would discount that piece of paper. Nay, more, that he took with him to New York on the 12th, a note thus indorsed, which Hunt, Tillinghast & Co. declined to discount, without giving any reason, except that they did not feel inclined to do it; whereupon the petitioner then and there at once, without conference with or notice to Barstow, determined to allow his paper, due that day, to go to protest, although he had the means to meet it, and virtually then and there failed, in effect acknowledging himself bankrupt as well as insolvent. Evidently, between Doyle and Barstow, there must have passed conversation, in which the probability of a breaking up of the petitioner's business must have been alluded to, if not fully considered and discussed. Indeed, in view of the evidence and the lack of evidence, bearing upon this point, there is some reason for suspecting that this mode of bringing the Doyle business to a close, seemingly without premeditation on his part, was pre-arranged by and between two at least (if not all three) of the parties concerned. What would be the testimony of Hunt and Tillinghast and Barstow in this regard, we are left to surmise, as no questions bearing upon this point were addressed to them. The payment to Doyle & Joslin did in fact operate as a preference, for it does not appear that the petitioner made any payment to any other creditor after the 10th of December; and in view of the circumstances in proof, and of the law applicable to them, I cannot but adjudge the payment under consideration to have been fraudulent, within the provisions of the bankrupt act.

It is but justice to the party most interested here to say that it is only when tested by the provisions of the bankrupt act, that the payment in question, or indeed any act of his brought to the notice of the court, is to be stigmatized as fraudulent, by a Rhode Island jurist, or by any of our Rhode Island moralists. He has, it appears in proof, for a long time prosecuted the hazardous business of cotton and wool manufacturing, under and in conformity with Rhode Island laws and customs, as hundreds have done before him—the few, very few, securing in the end, great wealth, and elevated social or political position—the many, without success. Under our state laws, it has always been legal, and (for aught that our ethical instructors in the pulpit or the professor's chair have taught us) honest also, to obtain possession on credit of large portions of this world's goods, to use them and peril them in the prosecution of an uncertain business; for year after year, though hopelessly insolvent, to keep creditors at bay by threats of assigning with preferences—and finally, after experimenting at the risk and expense of others for months or years, and perchance wasting in ostentatious or riotous living tens or hundreds of thousands of dollars, to make an assignment, preferring first the indorsers, upon whose credit the debtor had, in fact, lived, and moved, and had his being. To provide a remedy for, and a preventive of the multiform evils inseparable from a system like this, was, really, one of the most important of the aims of the leading legislators of 1855, 6, and 7, in framing the bankrupt act. And not hastily and inconsiderately, but deliberately, was that act adopted. Whether a wise enactment, or other than wise, it is the law of the land. Of its probable enactment the public had years of notice, and if individuals or communities failed to set their houses in order, they are entitled to little sympathy if now, in 1870, these prove untenantable. It is shown by the dates of the mortgages above referred to that the petitioner and Hunt, Tillinghast & Co., and Barstow were not oblivious of the bankrupt act in the spring of 1867, but whether the petitioner and Mr. Barstow, in the summer and autumn of 1868, were as well advised as to its provisions as they should have been, may well be questioned. That act, it is to be kept in mind, adopts as its cardinal principle the very opposite of the Rhode Island theory of property, as embodied in her laws, her judicial decisions, and the business habits of her citizens. The principle is well stated in an opinion—Perry v. Langley [Case No. 11,006] —in these words: "The intention of the law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposi-

tion as the bankrupt law has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent law of the state, but according to the provisions of the national bankrupt law." Thus stood the law in March, 1867, and thus has it stood from that time forward, entitled to obedience on the part of the petitioner as on the part of all other good citizens. He is to be presumed to have known, after March, 1867, that an individual actually insolvent could not legally retain his possessions, real or personal, and go on for months, not to say years, consuming and jeoparding the property of his creditors, in the hope either of acquiring wealth for himself, or of obtaining the means of discharging existing obligations. The bankrupt law constitutes such a debtor a trustee for his creditors. The property in his hands is theirs, not his; and as they shall prescribe, either through commissioners or by an assignee of their appointment, that property should be administered for the benefit of its owners. Nor has this law any clause of exceptions in favor of any class of minds or any class of traders. The capable and the incapable, the sanguine and the distrustful, the reckless and the discreet, the industrious and the lazy, are all subject to the same rule. None can claim exemption. Nature or circumstances may have made the individual a Micawber, always hoping and expecting something will turn up for his advantage, or he may be preeminent among the crowd of mortals who instinctively and habitually "listen with credulity to the whispers of Fancy, and pursue with eagerness the phantoms of Hope;" still must he yield obedience to the bankrupt law, or suffer the consequences. One of these consequences is, that when he shall ask to be discharged from his debts under the beneficent provisions of the law, that discharge shall be refused, if creditors opposing shall show that he has made any fraudulent preference. This the creditors have done in this case, and therefore a discharge of the petitioner is denied.

As to the allegation of a fraudulent preference to William Barstow, I refrain from remark in this connection. My finding, as already announced, renders unnecessary here any expression of opinion upon the several very interesting questions which the court must decide in passing upon that allegation. Those questions, I will add, may be expected again to present themselves in this case on appeal, or in some other case in this district, when, it is reasonable to hope, they will be settled by an authoritative decision. One of those questions, it will be remembered, was, in effect, can one of the leading purposes of the bankrupt act be thwarted by and through the means of a continuing indemnity mortgage, unlimited in amount? a question manifestly of no ordinary interest to many a capitalist of Rhode Island, and to their legal advisers as well.

[NOTE. On the petition of the bankrupt a review of this decision was had in the circuit court, and the decree was there affirmed. See Case No. 4,050.]

Case No. 4,052.

In re DOYLE.

[3 N. B. R. 782 (Quarto, 190).][1]

District Court, D. Rhode Island. 1870.

BANKRUPTCY—DISCHARGE—PRIMA FACIE FRAUD.

Where eleven objections to a discharge were filed and pressed by opposing creditors, and under each an issue of fact was raised, and evidence and argument submitted, *held*, the opposing creditors having established a prima facie case of fraud, the petitioner is not entitled to his discharge.

[In the matter of Philip A. Doyle, a bankrupt.]

Eames & Payne, for opposing creditors.
Blake & Gorman, for petitioner.

KNOWLES, District Judge. The petitioner, on his own application, was declared a bankrupt on the 29th of December, 1868. His petition for a discharge was filed on the 9th of November, 1869, and specifications of two creditors, in opposition, were filed on the 22d of January, 1870. The hearing upon these specifications was, by consent, postponed from time to time until May 4, on which day, and on several subsequent days, including the 10th of June, the parties were fully heard.

As the case was submitted to me upon both law and fact, it seems essential, in delivering my judgment, simply to enunciate or indicate my rulings upon the points of law, if any, raised before me, and to announce my findings upon the issues of fact. An elaborate discussion of the facts proven, in vindication of those findings, I deem neither necessary nor expedient. We listen to no argument from a jury in support of the verdicts they render, and I fail to see why, when parties elect to constitute the court, pro hac vice, a jury, a labored argument in support of its conclusions of fact should be inflicted upon parties and counsel. Upon parties and counsel, I say, for to them only can such an argument with propriety be addressed, inasmuch as they only can be presumed to feel any interest in the matter, and they moreover, generally speaking, are the only persons who can know enough of the case, as it chanced to be presented to the court upon the proofs and argument, to be authorized even to form an opinion, as to the soundness or unsoundness, the justice or injustice of the decision. They, it is presumable, care not to hear a third argument from the bench, for or against them, in support of a judgment

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with which it is probable but one party will, save upon sober, second thought, if ever, be fully satisfied.

The objections to a discharge, filed and pressed by the opposing creditors, are eleven in number, and under each of them an issue of fact was raised, and evidence and argument were submitted. Of the fourth, fifth, and eleventh specifications I shall first treat, here quoting them: "Fourth. That the said Philip A. Doyle has been guilty of fraud in this: that he has not delivered to his assignee a stock of goods consisting of groceries, liquors, and other articles of great value, which at the time of the presentation of his petition and inventory belonged to him, and were in his possession, in the store occupied by him on Canal street, in said city of Providence; and a beer pump, and other goods and property, in the store now or formerly No. 3 Peck street, in said city of Providence. Fifth. That the said Philip A. Doyle has concealed a part of his estate and effects, namely: the stock of goods aforesaid, and a beer pump, and other goods and property, in the store now or formerly No. 3 Peck street, in said city of Providence, which are not included or mentioned in the schedules filed with his petition." "Eleventh. That the said Philip A Doyle, being a tradesman, has not, subsequently to the passage of the act of congress aforesaid, kept proper books of account; in this, that he has kept no bill-book, or invoice-book, or any other books of account, except a day-book, ledger, and cash-book." The issue raised under these specifications, is one purely of fact. The creditors, assuming the burden of proving their allegations, upon the evidence maintain that the petitioner from the spring of 1854 to the filing of his petition on the 24th of December, 1868, was engaged in the liquor and grocery business, in truth and fact, for himself, though pretendedly and ostensibly as an agent—a portion of the time of one O'Reilly, a merchant tailor, of Providence, and afterwards of one O'Donnell, a liquor dealer of Boston; and accordingly they contend that when he filed his petition, he should have scheduled the goods and effects in the two stores named in the specifications, including the beer pump named, and also all debts due for goods sold from those stores; of course contending also that he was bound to keep, subsequently to the passage of the bankrupt act [of 1867 (14 Stat. 517)], proper books of account. The answer of the petitioner is simply that as to the store on Peck street, he was never the keeper of it, or interested in it, in fact, further than that he procured a license for it in his own name, for the benefit and accommodation of a friend and customer, a Mr. Stewart, to whom the city authorities would not grant a license; though he did (as agent, as he says) procure for use in said store, in August, 1868, and lend or let to Stewart, a beer pump apparatus, costing one hundred and ninety-five dollars cash, which, since the filing of his petition, he had claimed as his property as agent. And as to the store on Canal street—he says the business prosecuted there was, from the spring of 1864 to the spring or summer of 1865, the business of Owen O'Reilly—he, the petitioner, being simply O'Reilly's agent—and that, since the failure of O'Reilly (as a merchant tailor), the business has been carried on there by a Mr. O'Donnell, of Boston—the petitioner being his agent or hired servant, and nothing more. Therefore, contends he, as he was not owner of the property in that store, or of the beer pump, he could not inventory them as his property—and as he was engaged in no business—neither merchant nor tradesman, he had no occasion, nor was he bound to keep books of account of any kind.

My conclusions upon the proofs and arguments are: Firstly, that the creditors fail to show that the petitioner was interested in any property or effects in the Peck street store, other than the beer pump apparatus. Secondly, that they do show that the business on Canal street, while O'Reilly figured as nominal principal, was in truth the petitioner's—the only object of the arrangements between petitioner and O'Reilly being to enable the former to prosecute for his own gain, undisturbed by his numerous creditors, the business in which he had formerly been engaged, and to which an end was put in December, 1868, by a general assignment for the benefit of creditors, in the very worst form of even Rhode Island assignments, under which it happened, as usual, that no outside creditor ever received a farthing. Third, that the creditors do show, if not that the arrangement with O'Donnell is identically the same as was that with O'Reilly, yet that it most probably was and is the same in fact and in legal effect—no less illusory—no less fraudulent—not less a sham; and thus, in my judgment, imposes upon the petitioner the burden of overthrowing their prima facie case. And lastly, that this prima facie case is not overthrown, if indeed, it be at all weakened, by any proofs adduced by the petitioner, or any argument submitted by his ingenious, learned, and zealous counsel. It may be true that O'Donnell was, in 1868, the owner de facto et de jure, of the Canal street store and its belongings, and of the beer pump in the Peck street store; and it may be that evidence could be adduced corroboratory of the petitioner's somewhat faltering, vague, and discordant declarations and statements in regard to this point. But be this as it may, it is my province to deduce conclusions from the evidence submitted, and that, as I have already stated, not only warrants but dictates a judgment to the contrary. His schedule, rendered under oath in December, 1868, should have disclosed his ownership of the property in question; and as it did not, I adjudge the fourth, fifth, and eleventh specifications sustained by the

proofs, and the petitioner not entitled to his discharge.

In regard to the remaining specifications, it is unnecessary to say much in this connection. It is, however, but justice to the petitioner to say, that I find the ninth and tenth specifications, relating to the claim of William Doyle, to be unsustained; and but justice to the opposing creditors to say, that the evidence submitted in support of the remaining specifications (grounded on the petitioner's omission to assert or disclose in his schedule a title in himself to certain estates, formerly belonging to him, but now claimed to be the property of his wife) fully justifies their suspicions and surmises, if not their formal averments. I, however, refrain from passing upon those specifications, even pro forma, for the reason that upon two or three points of law which seem to me to be involved, and which were not raised at the hearing, it is desirable, before expressing a judicial opinion, to be enlightened by arguments of counsel.

The record of the suit in equity—Peckham v. Doyle [Case No. 10,898]—offered in evidence by the petitioner on the 10th of June, and received de bene, under objection, I adjudge inadmissible, whether regard be had either to its character as evidence, or to the stage of the trial when it was proffered. "Agencies" (so called), like that which I find to have existed between the petitioner and O'Reilly and O'Donnell, successively, were an irrepressible outgrowth of the laws regulating the relations of debtor and creditor, as these existed prior to the enactment of the bankrupt act: and it was reasonably anticipated, as one of the benefits which that act would confer, that these so-called agencies, corrupting and demoralizing to the community at large, as well as to the parties concerned, and their relatives, privies, and employees, would come to an end, throughout the land. Under the beneficent provisions of that act, in July, 1867, the way was open to every man, no matter how heavily burdened by debts, to relieve himself of his pecuniary obligations. He was required simply to be honest, surrendering to his creditors whatever he possessed, and whether his assets yielded to them a dividend small or large, or nothing, he secured to himself a discharge, and became once again a free man. If it should happen, as perchance it might, that a compliance with this requisition, under the pressure of an oath, would necessitate humiliating and damning confessions of deceit and fraud, in days gone by, still the obligation to be honest in word and act must be respected, if a discharge from his debts was desired. The bankrupt act humanely provides relief for the honest, and, not less humanely, prescribes punishment by penalties and privation and disabilities for the knavish. It gives little heed to the antecedents of the petitioner for its benefits. Whatever his offenses against heaven's laws, or man's laws, in the remote past, let him show that since the passage of the bankrupt law its requirements have been respected, and he may confidently, and without harmful self-abasement, claim the exercise in his behalf of its debt-discharging power. This, it must be borne in mind, is a condition-precedent of relief which no court is empowered to waive; and more than this, a requirement with which agent-arrangements between an insolvent debtor and his friends and relatives of easy virtue, or no virtue, such as I find to have existed between the petitioner and O'Reilly and O'Donnell, cannot be made even to appear consistent.

Case No. 4,053.

DOYLE v. CLARK.

[1 Flip. 536;[1] 8 Reporter, 163; 9 Cent. Law J. 5.]

Circuit Court, E. D. Michigan. March Term, 1876.

DOMICIL—INTENTION AND FACT—EVIDENCE.

1. Declarations, which are part of the res gestae, are admissible in evidence to show intention as a general rule, but admissions of declarations either written or verbal in connection with acts done, and giving character to such acts, depend much on circumstances and upon the nearness or distance of time to the declarations made and the acts done.

2. Instances are numerous where the declarations of a person made at the time of changing a residence have been received as evidence of an intention to make the change permanent, and to rebut the presumption that it was for temporary purposes only.

[Cited in U. S. v. Chong Sam, 47 Fed. 886.]

3. At the same time, the admissibility of such declarations is somewhat in the discretion of the court, and subject to another general rule, viz.: that a person will not be allowed by his declarations to make out a case for himself.

On motion to remand.

Plaintiff, a citizen of Illinois, began suit against the defendant in the superior court of Detroit. This was removed to this court and tried on the 24th day of June. On the trial plaintiff submitted to a nonsuit, and two days thereafter began this suit for the same cause of action in the superior court of Detroit, which was also removed upon the petition of the defendant setting forth that plaintiff was a citizen of Illinois. Motion was made to remand on the ground that at the time the suit was commenced plaintiff was a citizen of this state, and this court had no jurisdiction.

Mr. Atkinson, for plaintiff.
Mr. Wisner, for defendant.

BROWN, District Judge. If plaintiff be a citizen of the United States, and in absence of proof to the contrary I must presume such to be the fact, her citizenship of

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

any particular state depends solely upon her residence within such state. The constitution, investing jurisdiction in the federal courts over controversies between citizens of different states, is to be interpreted as if the word "resident" were used instead of "citizen," though when used in contradistinction to the word "alien," it signifies that class of persons who by nativity or naturalization have obtained the right to the protection of the general government and to the prerogatives and immunities attached thereto. Cooper v. Galbraith [Case No. 3,193]; Read v. Bertrand [Id. 11,601]; Butler v. Farnsworth [Id. 2,240]; Gardner v. Sharp [Id. 5,236].

Two things must concur to effectuate a change of domicil: 1st—An actual change or removal of residence. 2d—An intention to make such change or removal permanent. If both of these requisites concur in point of time, the place to which removal is made becomes instantly the place of domicil, notwithstanding the party may entertain a floating intention to return at some future period. Story. Confl. of Laws, § 46. This is illustrated in the ordinary case of an emigrant who transports his family and household effects to a new state, and settles upon a farm A change of domicil takes place instantly upon his arrival. On the other hand, a person may transport his family and household effects in like manner to another state for a temporary purpose, as for instance the settlement of some particular business, or for a change of climate in summer, without thereby disturbing his former residence. The leading English case on this question is that of Somerville v. Somerville, 5 Ves. 750, and the principles there laid down have been since so often reaffirmed as to have become the unquestioned law of both countries. From a very large number of American cases I cite the following as the best illustrations of the general doctrine: State v. Hallet, 8 Ala. 159; Ringgold v. Barley, 5 Md. 186; Smith v. Croom, 7 Fla. 81; McKowen v. McGuire, 15 La. Ann. 637; Leach v. Pillsbury, 15 N. H. 137; Johnson v. Twenty-One Bales [Case No. 7,417]; Jennison v. Hapgood, 10 Pick. 98; Williams v. Whiting, 11 Mass. 423.

While, as before observed, the general rule applicable to a change of domicil is unquestioned, much difficulty is experienced in applying it to a given state of facts. In the case under consideration, it appears with sufficient certainty that plaintiff, prior to her coming here to attend the trial of her cause, was a citizen of Illinois, and that she is now a citizen of Michigan, and the only point to be determined is, when this change of citizenship took place. Her deposition is loose and contradictory, and there is an evident desire on her part to make it appear that she was a resident of this state at the time this second suit was commenced. She states in substance "that she has resided in Michigan since her trial here, June 24; that this has been her permanent residence since then; that Michigan has been her home off and on these last two years; that she had no home, and lived in Chicago up to July last; last July her house was sold." That she was here on the day of the trial of her case, and told Mr. Atkinson that she would become a citizen. She also told him three months before; and asked him whether there was any oath necessary or anything else required; that she asked him that in this court room, and told him it was her intention to become a citizen; that immediately after that she resided at St. Mary's Hospital for three days, and then, in response to a telegram from her brother, returned to Chicago to nurse him, came back after three weeks, stopped at the Biddle House a week, and then at the Alexander House, at Grosse Isle, three or four weeks, and then at a farmer's; thence she went to St. Mary's Hospital, and has since remained there, though it appears she went to Mt. Clemens and remained some time, taking care of her brother. She concludes her direct examination by saying that from the date of the trial she became a citizen of this state. It appears that she came to this city two weeks before the trial, because, as she said, she had no home anywhere else, and the climate agreed with her better than Chicago.

Her counsel testifies in an affidavit that she has continuously claimed Detroit as her home, since this suit was commenced, and removed here on purpose to prevent the removal of this case to this court, where it was once tried, and a non-suit suffered. I have no doubt the truth is substantially this, that plaintiff came here with no intention of changing her residence, but to attend the trial of the case, that disappointed at the result of her trial, and desiring to commence a new suit in the superior court, she announced her intention of becoming a resident of this state, and did finally remove here. Disembarrassed of her declaration to her counsel, made at the time of the non-suit in this court room, that she intended to become a citizen of this state, the question would present no difficulty. It is the ordinary case of a person coming from abroad to attend the trial of a suit in which she is interested, and subsequently made this state her residence. Did then her declaration to her counsel, that she intended to change her residence, and become a citizen of this state, operate to effectuate such change? The general rule is well understood, that declarations which are a part of the res gestae are admissible in evidence to show intention, and the instances are numerous where the declarations of a person made in changing a residence have been received as evidence of an intention to make the change permanent, and to rebut any presumption that it was made for temporary purposes. At the same time, the ad-

missibility of such declarations is somewhat in the discretion of the court and is subject to another general rule, that a person will not be allowed by his declarations to make a case for himself. In matters of general and public interest, in which evidence of reputation or common fame is admitted, the declarations of persons supposed to be dead are held admissible only if made before any controversy arose touching the matter to which they relate, or as it is usually expressed ante litem motam. 1 Greenl. Ev. §§ 130, 131.

Declarations which are claimed to be part of the res gestae are apparently subject to a similar qualification. The principle is illustrated in the case of Thorndike v. City of Boston, 1 Metc. [Mass.] 247, where the question arose upon the admission of letters, offered on the ground that they were declarations of the plaintiff accompanied with his acts of removal from Boston to Edinburgh, addressed to his agent in the ordinary course of business, and were, therefore, as res gestae, good evidence of his intention connected with those acts. The case turned upon the question whether the plaintiff was liable to taxation as an inhabitant of Boston in 1837, and the court held that letters written before the plaintiff knew the tax had been assessed upon him were admissible, but it was strongly inclined to the opinion that letters written after the suit was brought were not so. The court observe: "The admission of declarations either written or verbal in connection with acts done, and giving character to such acts, depends much on circumstances and upon the nearness or distance of time to the declarations made and the acts done."

In the case of Watson v. Simpson, 13 La. Ann. 337, conversations with a party, where he had an opportunity to manufacture evidence for the purpose of establishing a fictitious domicil, were held not to affect the real facts of the case. So, also, in Tobin v. Walkinshaw [Case No. 14,070], a distinction is taken between declarations as to residence made before and after a controversy arose on the question as to residence became material.

Now, in the case under consideration, the declarations in question not only did not accompany the act of removal, being made some two weeks after she arrived here, but were evidently made with the design thereby of establishing a new domicil, or, in other words, of making a case for herself. There had been no change of residence. She retained her house in Chicago, and there is nothing tending to show that she came here with anything more than her ordinary clothing. It is true that she is poor, and there is nothing to show that she has now brought her furniture with her; but it does not appear that in July she sold and abandoned her house in Chicago, and that since that time she has remained in this state. There had been, it is true, a change of presence, but nothing to indicate a change of residence.

This case bears some resemblance to that of Williams v. Whiting, 11 Mass. 423, where the question arose as to the residence of an elector, on the 2d of November, 1812. It appeared that on the 28th of October he resided in Roxbury, being a householder and having a family there. Previous to this time he had been appointed and qualified as clerk of the court in the county of Norfolk, and, on the 28th of October, came to Dedham for the purpose of performing the duties of his office, took possession of the apartments in the court house, but his family and household establishment remained in Roxbury until the 12th of November, when he removed them to Dedham. From the 28th of October until the 12th of November he boarded at a public house in Dedham. On the 29th of October he contracted for a house in Dedham, which he was to rent and occupy from the 12th of November. On November 1st, he returned to his family in Roxbury at night [where he continued until the 4th, when he contracted for a horse and chaise to go to Dedham daily and return to Roxbury at night].[2] The court were of opinion, under the circumstances, he remained an inhabitant of Roxbury until the day of his removal with his family. A still stronger case is that of State v. Hallet, 8 Ala. 159. In this case a resident of Georgia came to Alabama for the purpose of settling, leased land and purchased materials for the erection of a foundry, and returned to Georgia for his family, and, after some detention, returned with his family and took up his residence in Alabama. The court held that he did not lose his domicil in Georgia, or acquire one in Alabama until his actual removal with the intention of remaining. The court remark that his acts in coming to Alabama with the design of settling and manifesting his intention of making that state his permanent residence by leasing a piece of land, procuring materials for the erection of a foundry, mark unequivocally his intention of changing his residence, but were not sufficient to cause a loss of the domicil he previously had. If, say the court, on his return to Georgia he had, before being able to carry his purpose into effect died, it can admit of no doubt the courts of Georgia and not of this state would have been entitled to distribute his estate. The same rule must have prevailed if he had died upon the journey here, for until he had actually reached here there would have been no change in the fact of the domicil. See, also, McIntyre v. Chappell, 4 Tex. 187; 4 Cow. 516.

Putting the illustration used in the Alabama case, it seems to me there can be no doubt that if the plaintiff had died after she had returned to Chicago, the day following the commencement of this suit, her estate would have been administered there and not

[2] [From 9 Cent. Law J. 7.]

here. I am satisfied she was not a citizen of this state at the time this suit was commenced, and the motion to remand must be denied.

DOYLE (HARTFORD FIRE INS. CO. v.). See Case No. 6,160.

DOYLE (LORD v.). See Case No. 8,505.

DOYLE (PECKHAM v.). See Case No. 10,-898.

Case No. 4,054.

DOYLE v. RICHARDS.

[4 Cranch, C. C. 527.][1]

Circuit Court, District of Columbia. March Term, 1835.

ATTACHMENT.

THE COURT quashed an attachment issued upon one non est returned upon a justice's warrant for a small debt; the defendant being a resident of the district. See Acts Md. 1791, c. 68, § 1, and 1715, c. 40. Two non ests were necessary.

Case No. 4,055.

DOYNE v. BARKER.

[4 Cranch, C. C. 475.][1]

Circuit Court, District of Columbia. Nov. Term, 1834.

SLANDER—BAIL, WHEN REQUIRED.

Bail, in slander, will be required, upon the plaintiff's affidavit that the words were maliciously uttered; that the defendant is a transitory person, and about to leave the District, and the plaintiff verily believes that she has suffered damages to a certain amount.

W. L. Brent, for defendant, offered to appear without special bail. 2 Johns. 100, 203; Brown (Pa.) 233; Clason v. Gould, 2 Caines, 47.

The plaintiff's affidavit stated that the defendant maliciously uttered the words in the declaration mentioned; that the defendant is a transitory person, and is about to leave the District; and that she verily believes she has suffered damages to the amount of $3,000, and that she will recover judgment for that amount.

The words charge her with being a swindler and a cheat, and cheating others. The plaintiff is a milliner.

Mr. Brent contended that the plaintiff must swear positively as to her damages.

Z. C. Lee, contrà. A plaintiff, in slander, cannot swear positively as to damages. High. Bailm. 12, 15, 24; Starkie, Sland. & L. 243.

THE COURT (nem. con.) required bail to the amount of $700.

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

Case No. 4,056.

The D. P.

KELLEY v. THOMPSON.

[1 Lowell, 124.][1]

District Court, D. Massachusetts. Feb., 1867.

COLLISION—LIGHTS—EXPERT EVIDENCE.

1. The omission of the libellants to carry upon their vessel the side-lights required by statute, will not necessarily prevent a recovery of damages for collision. It is a fault which, if it caused or contributed to the collision, will bar the damages, or cause them to be divided, as the case may require.

2. It is not safe to rely upon the opinion of experts as to the course which a vessel took, when the opinion is founded on a very nice calculation of time and of angles, and is opposed to the clear testimony of eye-witnesses.

3. Upon the facts, *held*, that the libellants' vessel, which was without lights, was solely in fault, unless the accident was inevitable, and in neither case could the libellants prevail.

The schooner Romp, loaded with iron, and bound on a voyage from Boston to Jonesport in Maine, was run into and sunk a few miles outside of Thacher's Island, Cape Ann, on the evening of March 16, 1866, by the schooner D. P.; and this libel was promoted by her owners for the damage. The night was very foggy, the wind about S. S. W.; the Romp was sailing on the starboard tack, with the wind free, heading about N. E. by E., and had no lights set. The D. P. was closehauled, on the port tack, heading about W. by S., with the red and green lights properly placed and burning brightly. The Romp had two men on the lookout, one of whom reported a light, and the master immediately came on deck and ordered his helm to be put hard down, at the same time hailing the D. P. to put her helm hard up. The only fact seriously disputed was, whether the respondents' vessel obeyed the order given from the Romp, or took the opposite course and luffed.

John Lathrop, for libellants.

1. The fact that the Romp did not have the lights required by the act of congress, does not prevent the libellants from recovering, as the absence of the lights did not cause the collision. The Panther, 24 Eng. Law & Eq. 585; Morrison v. General Steam Nav. Co., 8 Exch. 733.

2. If the absence of lights did contribute to the collision, the libellants are entitled to recover half damages, the D. P. being also in fault. Chamberlain v. Ward, 21 How. [62 U. S.] 548.

3. The vessels were meeting end on, or nearly end on, within the 11th article of the United States statute of 1864, c. 69 (13 Stat. 60), and it was the duty of both vessels to port their helms. The evidence shows that the Romp ported her helm, and that the D. P. luffed instead of porting.

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

J. C. Dodge, for respondents.

We admit that the vessels were meeting nearly end on, but not that we omitted to port as soon as we heard the hail. If the Romp had carried lights, she would have been seen sooner. Having broken the law in this respect she cannot recover whether the D. P. was in fault or not.

LOWELL, District Judge. Reasonable care and skill are expected of persons in charge of ships. The statute specifies some of the precautions proper to be taken by navigators, and leaves others, equally obligatory, to the common law of the sea. It is no bar to a recovery of damages in a case of this kind, that one of these precautions, whether imposed by the statute, or having a different foundation, has been neglected, unless the neglect caused or contributed to the collision. Chamberlain v. Ward, 21 How. [62 U. S.] 548.

The evidence in this case, on both sides, shows that the lights of the D. P. were seen before the hull or the sails of either vessel were visible from the other; and it is probable that if the Romp had had her lights, time enough might have been saved to have enabled the vessels to clear each other. If not, the disaster was inevitable, and in either case the libellants cannot recover, unless it be true, as they allege, that the D. P. luffed. All the witnesses on board that vessel deny it, and no one on the libellants' schooner, excepting the mate, is willing to say that he saw any change of that sort, though they argue that one must have been made. It is not probable that men who could see nothing, but only hear a hail to put their helm up, should at once proceed to put it down. The mate, who was examined several months later than the others, says he saw first the red and then the green light, but I find him not only unconfirmed in this, but contradicted by his own crew in one most material matter, and in several of less importance, so that I cannot rely on his evidence.

Some gentlemen of nautical experience have given it as their opinion, that if the vessels were meeting in the direction and at the distance supposed, and the libellants changed their course as they say they did, the vessels could not have come together if the D. P. had ported her helm. But the value of such an opinion depends on so nice a calculation of times, courses, and distances, that I should not feel safe in adopting it against the clear weight of the direct testimony of eye-witnesses. One of the experts said that a variation of half a point in the course of either schooner would make the difference between clearing and not clearing. I find that the respondents ported as soon as they had warning, and are not in fault. It is admitted on both sides that the vessels were meeting nearly end on; but if they were not, the libellants would be no better off, because they had the wind free and must assume the burden of giving way. The libel must be dismissed; and the allegation that the respondents' men wantonly or carelessly abandoned the boat of the lost schooner not being proved, costs will follow the decree. Libel dismissed.

NOTE. Affirmed by the circuit court, May term, 1867 [unreported].

Case No. 4,057.

The DRACO.

[2 Sumn. 157.] [1]

Circuit Court, D. Massachusetts. May Term, 1835.

ADMIRALTY JURISDICTION—BOTTOMRY BOND GIVEN BY OWNERS—LIEN — RECORDING — BONA FIDE PURCHASERS—SALE OF VESSEL—TROVER AGAINST VENDEE.

1. A valid bottomry bond may be made by the owners of a vessel, in a foreign or a home port.

[Cited in Vandewater v. The Yankee Blade, Case No. 16,847.]

2. The admiralty has jurisdiction over all maritime contracts in personam; and also in rem, where there is a maritime lien or express pledge, as security; and this embraces, of course, a bottomry bond, given by the owner in the home port, where there is an express pledge, as security.

3. It is not necessary to the validity of a bottomry bond, made by the owner of a vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage; though it would be otherwise, where the money was borrowed by the master, virtute officii.

[Cited in Leland v. The Medora, Case No. 8,-237; The Panama, Id. 10,703. Criticised in Greely v. Smith, Id. 5,750.]

4. A bottomry bond is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a voyage or a definite period.

[Cited in Leland v. The Medora, Case No. 8,237; Morrison v. The Unicorn, Id. 9,849; The Grapeshot, 9 Wall. (76 U. S.) 135; The Rapid Transit, 11 Fed. 325. Criticised in Greely v. Smith, Case No. 5,750.]

5. An hypothecation of a vessel, on maritime risks, draws after it a maritime lien.

[Cited in Greely v. Smith, Case No. 5,750; Delaware Mut. Safety Ins. Co. v. Gossler, Id. 3,766.]

6. A bottomry bond need not be recorded under the statute of Massachusetts (1832, c. 57) which provides for the registration of mortgages of personal property.

[Cited in Leland v. The Medora, Case No. 8,-237.]

7. A valid bottomry bond will be upheld, where there are no laches on the part of the lender, even against a bonâ fide purchaser, without notice.

[Cited in Delaware Mut. Safety Ins. Co. v. Gossler, Case No. 3,766.]

8. A bottomry bond may be upon time, as well as upon a specific voyage.

9. If, after the risk on a bottomry bond has commenced, a sale or transfer of the vessel takes place, or the voyage is in any manner broken up by the borrower, the maritime risk terminates, as in the case of a policy of insurance, and the bond becomes presently payable.

[Cited in Leland v. The Medora, Case No. 8,-237; Greely v. Smith, Id. 5,750; Morrison v. The Unicorn, Id. 9,849.]

[1] [Reported by Charles Sumner, Esq.]

10. Where it was expressly stipulated in a bottomry bond—"that the said brig, shall be delivered to no other use or purpose whatsoever, until payment of this bond is first made;" *held*, a fortiori, that a sale of the brig, after the commencement of the maritime risk, terminated the risks under the bond, and entitled the lender to an immediate right of action.

11. Trover would lie at common law, in favor of the lender on bottomry, against the vendee of the vessel, who, after the commencement of the maritime risk, and before the satisfaction of the bond, had taken possession of the vessel.

[Followed in Greely v. Smith, Case No. 5,750.]

Libel in admiralty by the Tremont Insurance Company, a corporation created under the authority of a charter from the commonwealth of Massachusetts, against the brig Draco, upon an asserted bottomry bond. The claimants, Messrs. Stanton, Nichols and Whitney, assert in themselves title as vendees, and also other matters of defence.

The bond in question was executed by the owners in Boston, the home port of the brig, to the Tremont Insurance Company, on January 6th, 1834, while the brig was still at sea. The following is a copy of it:

"Know all men by these presents, that we, James P. Flint, Jacob C. Flint, and Sherman G. Hill, merchants and copartners in trade under the name and style of P. & C. Flint & Co. as principals, and Rufus G. Norris & Joseph W. Flint, merchants and copartners in trade, under the name and style of Norris & Flint, as sureties, are held and stand firmly bound and obliged unto the Tremont Insurance Company, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, in the sum of six thousand dollars, money of the United States of America, to be paid to the said Tremont Insurance Company, their certain attorney, successors, or assigns, to which payment well and truly to be made, we bind ourselves, each of us, and each of our heirs, executors, administrators, and assigns, and each and every of them, jointly and severally, and firmly, by these presents.

"Dated at Boston, this sixth day of January in the year of our Lord, one thousand eight hundred and thirty-four.

"Whereas, the Tremont Insurance Company aforesaid, have this day lent and advanced unto the said P. C. Flint & Co. the full and just sum of three thousand dollars, which is to run on bottomry on the block, tackle and apparel of the brig Draco of Boston, whereof —— is master, and of which the said P. & C. Flint & Co. are the owners, to be employed as follows: At and from the —— to, at and from all ports and places to which she may proceed for one year, commencing the risk on the sixth day of January, one thousand eight hundred and thirty-four at noon, and to continue until the sixth day of January, one thousand eight hundred and thirty-five at noon, and no longer, unless she should be on a passage at that time, in which case the risk is to continue, until her arrival at her port of destination, and the said obligors are to pay to the said Tremont Insurance Company, interest, at the rate of six per cent. per annum, on the sum loaned, to be paid semi-annually, at the said company's office, in Boston, and a further premium of five per cent. on the marine risk of three thousand dollars, on the said brig, valued at ten thousand dollars, for the term of one year, commencing the risk on the sixth day of January, one thousand eight hundred and thirty-four, and to continue till the sixth day of January, one thousand eight hundred and thirty-five, and at pro rata premium, if on a passage, until the same shall be ended.

"In consideration whereof, the casualties of the seas, and all other risks enumerated in the printed form of policies, now in use, by the said Tremont Insurance Company, are to be on account of said Tremont Insurance Company, and for the further security of the said Tremont Insurance Company, the said P. & C. Flint & Co. doth by these presents mortgage and assign over to the said Tremont Insurance Company, the whole of the said brig, and it is hereby declared, that the whole of the said brig is thus assigned over, for the security of the bottomry taken up by the said —— and shall be delivered to no other use or purpose whatever, until payment of this bond is first made, with the premium and interest that may become due thereon. And said Tremont Insurance Company is to be entitled, in case of loss, to the whole of the salvage of said brig, which the said obligors hereby promise to pay to the said Tremont Insurance Company.

"Now the condition of this obligation is such, that if the above-bounden James P. Flint, Jacob C. Flint, and Sherman G. Hill, Rufus G. Norris and Joseph W. Flint, their, or either of their heirs, executors, administrators or assigns, shall and do and well and truly pay, or cause to be paid to the said Tremont Insurance Company, their certain attorney, successors or assigns, the full and just sum of three thousand dollars, being the principal of this bond, together with the premium and interest that shall become due thereupon, at the time of the safe arrival of the said brig at her port of destination, in manner aforesaid; and in case of loss of the said brig, shall pay the whole of the salvage to the said Tremont Insurance Company, then this obligation to be void, otherwise to remain in full force and virtue."

The libel, after stating the substance of the instrument, and annexing a copy of it, proceeds to state, that in July, 1834, the sum of ninety dollars had become due on the loan, and had not been paid; that after the execution of the instrument, and in the same month of January, 1834, the firm of P. & C. Flint & Co. (the borrowers on the bottomry) transferred and assigned the vessel to the present claimants, contrary to the stipulations in the

instrument; that the claimants deny the interest and lien of the libellants in and on the vessel, and insist upon their free and unincumbered title; that the vessel is about to proceed to sea on a foreign voyage; that Flint & Co. have become insolvent, and utterly unable to pay the bond; and that, by reason of the premises, the bond has become forfeited, and they therefore pray admiralty process against the vessel, and that she may be sold to pay the sums due to them. The answer of the claimants admits the execution of the bond, and the sale to themselves; and insists, that the court has no jurisdiction, because it is not, in fact, a bottomry bond; that the brig was at sea, when it was given; that the sum lent, was not lent to fit out, or repair or supply the brig, or to purchase a cargo for her, or for any purpose connected with any voyage, or the navigation of the brig,—but for the general purposes of the firm, in their trade and negotiations as merchants, then residing in Boston; which facts were at the time known to the libellants. The answer further insists, that the libel is not maintainable, because the sum loaned had not as yet become due, according to the terms of the instrument; that the claimants, on the 14th of January, 1834, purchased the brig of the firm for the sum of $6,006, the brig being then at sea, on a voyage from Russia to Boston; that a bill of sale was duly executed and lodged at the custom-house in Boston immediately after its execution; that the brig arrived at Boston in February, 1834, and was immediately taken possession of by the claimants, who took out a new register, and chartered her to Enoch Train and Charles W. Cartwright, in the same month of February, 1834, on a voyage for South America, on which she sailed in a few days afterwards; that the claimants at the time of the purchase of the brig, had no notice of the asserted bond, nor until after the brig had sailed on the said voyage, and then only casually; and the libellants gave them no notice of it, until the commencement of the present suit; that on the arrival of the brig from Russia, in February, 1834, the libellants did not take possession of her, never took any bill of sale of her, and never caused their bond to be recorded in the office of the city clerk of Boston, and never caused any endorsement thereof upon her register. A general replication was put in, denying all the facts in the answer; but in point of fact, as from the subsequent proceedings, it appears, the parties admit all the material facts to exist, which are stated in the original libel and answer, except that the libellants deny, that they knew that the loan was not to be applied to pay for the expenses of the vessel or her lading. The amendments principally bring forward collateral matters, asserting that the title of the claimants is not absolute, but a mere mortgage, and asking an account of the freight and other proceeds, and other matters consequent upon new allegations; to which the supplemental answer replies in a suitable manner.

Mr. Sprague, for libellants.

Mr. Sprague said, that for what he had to offer he was indebted almost entirely to his young friend, F. C. Loring, whose brief had been transferred to his hands merely because that gentleman could not address the court.

First. Bottomry bonds may be legally made at home. The practice has existed from the earliest periods of commerce, is authorized by the ancient and modern codes of sea laws, is recognised in the laws and usages of all commercial nations at this day, in all elementary works, and is expressly authorized by the statutes of Massachusetts. There is no distinction between bonds made by an owner or a master, except that a master's authority is limited; between bonds made for voyages, or years. It is necessary that the loan should be used for lading the ship. Bynk. 506; Abb. Shipp. 118; Ordinance of Louis XIV. lib. 3, tit. 5; Code du Commerce, art. 312; 2 Browne, Civ. & Adm. Law, 196; 3 Dane, Abr. 114; 1 Phil. Ins. 302; Park, Ins. 410; 2 Pet. Adm. 295 [Wilmer v. The Smilax, Case No. 17,777]; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386; Thorndike v. Stone, 11 Pick. 183; Appleton v. Crowninshield, 3 Mass. 443, 8 Mass. 340.

Second. If bottomry is a maritime contract, it is a corollary, that this court has jurisdiction, especially as it alone can give relief, and effect the intention of parties, by enforcing the lien. The lender might have a remedy at common law by an action of trover or assumpsit. Hurry v. Hurry's Assignees [Case No. 6,922]; Busk v. Fearon, 4 East, 319; Franklin Ins. Co. v. Lord [Case No. 5,057]. But this would be only against the person. The essence of the contract is, that the loan is made on the security of the thing; the credit is given to that, not to the borrower. The jurisdiction of admiralty over a bond like this, has been denied in England, because the common law courts claim exclusive jurisdiction over them, and have power to prohibit the admiralty courts; not because the subject-matter is not fit. All the authorities to this effect are in the common law reports; in the admiralty reports there is no intimation of any disability or disinclination. And it is doubtful, if the common law courts would interfere at this time. The Barbara, 4 C. Rob. Adm. 1; Corish v. The Murphy, 2 Browne, Civ. & Adm. Law, 530, Append. But it has been frequently declared, that the limited jurisdiction of the English admiralty is no rule for this court. De Lovio v. Boit [Case No. 3,776]; The Jerusalem [Cases Nos. 7,293 and 7,294]; Wilmer v. The Smilax [supra]; The Mary [Case No. 9,187]. Other cases are, however, contrary; but they were decided under circumstances, which weaken their authority, so far as the present point is concerned. See The Charles Carter, 4 Cranch [8 U. S.]

428; Forbes v. The Hannah [Case No. 4,925]; Hurry v. The John & Alice [Id. 6,923].

Third. The bond is forfeited, and the bottomry loan turned into a simple loan by sale of the vessel. The sale of a vessel, subject to a bottomry bond on time. is, ipso facto, a forfeiture of the penalty. The contract of bottomry is often compared to that of insurance. In insurance, if the risk is not commenced, the contract is dissolved; in like case, a bottomry loan becomes a simple loan. In the case of a deviation, insurers are discharged, and a bottomry becomes a simple loan. If the loss be occasioned by the barratry of the master, or the misconduct of the owners, the insurance is discharged; bottomry becomes a simple loan. In both contracts there are the same general principles; therefore, as by a sale of the vessel the insurers are discharged, so by a sale without consent, the bottomry becomes a simple loan. The general principle is the same in cases of insurance and of bottomry; that any acts of the owner, by which the risks are increased or changed, is a dissolution of the contract. The sale and delivery of this vessel to the claimants (contrary to the express stipulation and agreement of the parties to the contract). was a change of the risks, assumed by the lender, which would of itself, without any express agreement, have avoided a policy of insurance, and on the same ground would have reduced a contract of bottomry to a simple loan; and the present case is much stronger, because the lender agreed to make the loan on the express stipulation, that the vessel should not be sold, which stipulation, without their knowledge or consent, has been broken by a conveyance to third parties, acknowledging no right in these libellants, and who have compelled them to pursue their remedy at law.

Fourth. Can the rights of the lenders be defeated by a transfer of the vessel to an innocent third party? or, in other words. can the breach of an express agreement, and consequent moral obligation, by one man, have the effect to deprive another of his property? The libellants gave no credit to the borrowers; they trusted to the vessel. The claimants bought her on the faith of the warranty of the borrowers, and therefore it was they, who gave the credit to the borrowers, and they must bear the consequences of their own misplaced confidence. By every definition of a bottomry bond, it appears, that the vessel is hypothecated for payment of the loan, and that when the loan becomes due, the lender has the security of the vessel as well as of the borrower. By all authorities on the subject, it is declared. that a bottomry lien takes precedence of all others, except a few particularly favored, such as mariners' wages. There is no authority, as well as no reason, which declares, that a bottomry lien is defeated by a transfer of the property. It is impossible to suppose. that this contract, which has been in constant practice for centuries, and on which millions have been loaned, should have ever been in use at all. if the security created by it could be defeated by a mere transfer of the vessel by the borrower. The law is laid down fully and unqualifiedly by Parker, J. in Appleton v. Crowninshield, 8 Mass. 359.

I have endeavored to show, that the bond in question is a legal bottomry bond, subject to the jurisdiction of this court, reduced to a simple loan, and made immediately due by the breach of the agreement not to deliver the vessel to any other use till the bond should be paid. and that the lien created thereby is not discharged by the transfer of the vessel.

Mr. Fletcher, for claimants.

I. The district court has no jurisdiction of the case, for two reasons: (1) Because the bond was executed by the owners at home. (2) Because it is not a bottomry bond. It is not disputed in England, that the admiralty courts have no jurisdiction of bottomry bonds, made by an English owner in England. Abb. Shipp. 121. In this country the law is the same. Such an opinion is expressed by Chase, J., in Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; and the same doctrine has been expressly held in another case, Forbes v. The Hannah [supra]. See, also, Story's notes to Abb. Shipp. pp. 108, 121. Where a bottomry bond was given by the master of a vessel and also part-owner, and having a power from the other part-owner, for a pre-existing debt, and not for necessary supplies of the vessel. it was held that it could not be enforced in a court of admiralty, though it might be proceeded upon in a court of common law. Hurry v. The John & Alice [supra]. See, also, Hurry v. Hurry's Assignees [supra]. The case of material men, &c. is somewhat analogous. Persons, furnishing repairs or supplies for a foreign vessel, have a lien which they can enforce by admiralty process. But persons, repairing or furnishing supplies for a vessel in the port or state to which she belongs, have only such a lien as the state laws give them, and cannot resort to admiralty to enforce it. See Story's note to Abb. Shipp. 116.

The other ground of want of jurisdiction, that this is not a bottomry bond, need not be considered separately, as all the authorities fall equally well under the next point. The case of Wilmer v. The Smilax [supra], has been cited on the other side, to show, that the admiralty courts take jurisdiction of bonds made by the owner at home. But the question of jurisdiction does not appear to have been started in the case, and it was decided in the district court by Judge Winchester.

II. The instrument in question is not a bottomry bond—and did not operate as an hypothecation of the brig to the Tremont Insurance Company. In taking this position,

I would not be understood to say, that the instrument has no validity whatever. It is good between the parties to the instrument. as a personal obligation for the payment of the money and the marine interest, and would give the insurance company the same rights as another mortgage, i. e. as long as the property continued in the Flints after the year, the insurance company would have a right to take it as a mortgagee; but I contend, that as against bonâ fide purchasers, the insurance company stands in no better position than a common mortgagee. The very nature of a bottomry bond requires, that the money loaned should be laid out upon the vessel, or for the voyage. The great privileges, belonging to the holders of such bonds upon the vessel, are given, because they have enabled the vessel to carry on the voyage; and because their money has contributed to the success of the enterprise. The contracts of bottomry and respondentia have been used for several thousand years. They were used by the Greeks and the Romans, and their nature has always continued the same. It has always from the very beginning been of the essence of these contracts, that the money borrowed should be used for the purposes of building or repairing the vessel, or of the voyage. Among the Romans, the pecunia nautica or trajectitia, was money lent to be employed in a voyage. "Contractus nauticus, seu trajectitiae pecuniae, ille est, quo pecunia alicui creditur; hac lege, ut, si aut ipsa pecunia aut merces ex ea comparatae navigatione perierint, periculum sit creditoris, qui nihil hoc casu recepturus erit." "Trajectitia ea pecunia est, quae trans mare vehitur; caeterum si eodem locum consumatur, non erit trajectitia. Sed videndum an merces ex ea pecunia comparatae, in ea causa habeantur; et interest, utrum etiam ipsae periculo creditoris navigent, tunc enim trajectitia pecunia fit." Poth. Pand. Just. L. 22, tit. 2, art. 1. Bynkershoek considers the Roman law de nautico faenore, the origin of maritime laws on bottomry and respondentia. Quest. Jur. Priv. l. 3, c. 16. The contract "à la grosse," as the French call it, embraces both bottomry and respondentia. Pothier, the most accurate of all legal writers, defines it as follows: "A contract, by which one of the parties lends the other a certain sum of money, on condition, that in case of the loss of the property on account of which (les effêts pour lesquels) the money has been lent, by some peril of the sea or vis major, the lender cannot reclaim his money," &c. Poth. Traité du Contrat de Prêt à la Grosse, art. 1, note 1. This definition is adopted by Emerigon (volume 2, p. 385) and Boucher (page 315). Emerigon, who has treated of this contract with greater fulness and research, than any other writer within my knowledge, demonstrates, that the money must be used for the purposes of the vessel, or the voyage, in various passages. He says, that in Italy money can be lent à la grosse, in the form of a wager. "If the ship agreed on arrives, the capital and marine interest are due to the lender, and if the ship is lost, he loses both, although the borrower may not have employed the money received in the voyage, and has nothing at risk." "All this is prohibited among us. It is of the essence of the contract à la grosse, that the money should be employed for some purpose, which exposes it to the perils of the sea; and it is necessary, that in case of loss, the borrower had there, on his account, property to the amount of the sum borrowed." 2 Emerig. 392. Boucher (note 1180) adopts the foregoing emphatic words: "If the borrower uses the money on shore, without exposing it to the risks of the sea, it ceases to be a contract à la grosse, although it may be termed so in the instrument." 2 Emerig. 393, 396. "Money procures articles, which we wish to send or carry beyond sea; and without money a ship cannot get out of port. This is the reason, why so great privileges are given to the contract à la grosse. But as soon as a ship has set sail, the public interest is accomplished, and it is no longer necessary to grant such privileges to an enterprise already executed. Our ordinance, which permits insurance before or during the voyage, does not repeat the same provisions in regard to this contract. So far from it, the privilege given by the article 7 h. t. is not given on the hull, except to those, who have advanced their money for the necessities of the voyage; and is given on the cargo only to those who have furnished their money to make it (pour le faire)." Id. 484; Hall, Mar. Loans, 136. Emerigon next controverts the opinion of Valin, who says it is of little importance whether the lending be before or after the departure of the vessel, on the ground, that the presumption is, that money has been beneficially employed for the thing put at risk, or has paid what was due on this account. "But this presumption," he says, "would go too far, for here the interest of third parties comes in question; and privileges are to be construed very strictly. I think, therefore, that a third party would have sufficient ground for resisting the pretended preference of the lender, whose contract was entered into after the risk commenced." 2 Emerig. 484. After citing a case on the subject, he proceeds: "After the sailing of the ship, nothing prevents the borrowing of money, and assigning in payment the interest at risk; but this assignment does not give the creditor any right in the thing, (droit real) or privilege on the thing. The money is not truly trajectitia, unless the property at risk has been acquired by means of the money borrowed. 'Trajectitia ea pecunia est quae trans mare vehitur. Sed videndum an merces ex ea pecunia comparatae, in ea causa habeantur; et interest, utrum etiam ipsae periculo creditoris navigent, tunc enim trajectitia pecunia fit.' L. 1 ff. de naut. faen. Now the borrowing, after the sailing of the

vessel, has not procured the cargo already at risk, 'merces ex ea pecunia comparatae non fuerunt.' The money is not trajectitious. The presumption of which M. Valin speaks is contrary to the text of the law; it would give rise to the greatest abuses." Id. 484, 485. Bynkershoek gives a case of a contract called a "bottomry," by which the owners and master of a vessel conveyed her to two merchants, to secure them for a loan. They afterwards sold the vessel; and the purchaser held her by the decree of the court of Holland, free from the claim of the two merchants. One of the reasons, in support of the decision, whether his own or the court's does not appear, was that the money was not borrowed in necessitate itineris. Quest. Jur. Priv. L. 3, c. 16. The principles of the English law are the same as the French and the Roman, and have always been recognised as such. "Bottomry," says Blackstone, "(which originally arose upon permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (partem pro toto,) as a security for the repayment." 2 Bl. Comm. 457. "Bottomry is a contract in the nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship or to purchase a cargo for the voyage proposed, and he pledges," &c. 2 Marsh. Ins. 733, Park, Ins. 410, and Hughes, Ins. 451, give similar definitions. So 1 Holt, Shipp. 419. Marshall, in comparing bottomry and insurance, says, "In bottomry the lender furnishes the borrower with the money to purchase the goods which are put at risk." 2 Marsh. 737, 738. Lord Tenterden, also, in his treatise on Shipping, (page 118), evidently has the same idea, that when the owners borrow money it must be to raise money for the purposes of the voyage. The form of a bottomry bill in Beaw. Lex Merc. 144, given by the owner and master, recites that he is necessitated to take up money, upon the adventure of the ship, for setting forth the said ship to sea, and furnishing her with provisions. So in the forms of bottomry and respondentia bonds, given by 2 Magen, Ins. pp. 431, 433, the object of the loan is recited.

The cases on the subject of bottomry and respondentia, in England and this country, are not numerous. Much the greater part of them, are cases, where money had been advanced to captains in foreign ports, and they bottomried the ships as security. All the cases in the English admiralty reports, I believe, are of this kind. Lord Stowell remarks, that these bonds "are usually given, for the payment of repairs and other necessary expenses incurred in foreign parts, where the owner and captain have no personal credit." The Zodiac, 1 Hagg. Adm. 325. I am not aware of any case, English or American, in which a bottomry bond has been supported, where it was given by the owner, for a debt not connected with his vessel or her navigation. It seems every where taken for granted, that money lent on bottomry must be used for the vessel or the voyage. Thus, in the case of The Mary [supra], Thompson, J., says, in speaking of the difference between the power of the master and the owner, that the owner "has the absolute control over his property, and has a right to pledge his vessel for money borrowed for any purpose, to be applied to repairs, outfits, or other necessaries, or to the purchase of a cargo." Here, it is evidently taken for granted, that these were the only purposes, for which an owner could bottomry his vessel. The foundation of the contract of bottomry is, that the lender has contributed to build, purchase, or preserve the subject on which he claims a lien, which could not have been done without his aid. It is for this reason, that he has peculiar privileges. He has been the benefactor of the property. No reason of this kind applies to the instrument now in question. The ship was at sea on a voyage home, and the libellants cannot in any manner have contributed to preserve the ship, or enable her to prosecute her voyage. They are common lenders of money, and have taken a mortgage of the ship, to secure their loan. The circumstance of their also insuring the ship by the same instrument, does not, according to well-settled principles, alone make it a bottomry bond. They are mere mortgagees, and whether they have any lien against the respondents, must depend upon the principles of mortgages, not of bottomry bonds. Now, they have never recorded their mortgage, under the statute of Massachusetts (1832, c. 157, § 1). It is therefore void. If, however, the court should be of opinion, that the instrument ought to be called a "bottomry bond," and so comes within the exception of the statute, still I contend, that it is a bottomry of a peculiar kind, not entitled to any peculiar privileges, and that the libellants could have no lien without proving a delivery. All the objections to secret liens on property, apply to this instrument—while none of the reasons in favor of bottomries, on account of advances for the vessel or voyage, plead in its behalf.

Lord Tenterden says, that where owners in England pledge their vessels by bottomry, the holders of the bond cannot resort to admiralty, and then proceeds—"If the contract relate to a British ship, and purport to be, either a present assignment of the ship, liable to be defeated on repayment of the money due at the end of the voyage, or a future assignment, to take effect only upon failure of such payment, it seems, that a compliance with the provisions of the register acts, in regard to the transfer of property in ships, is essential to the validity of the contract." Abb. Shipp. 121. The case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, has

been cited on the other side, to show, that the circumstances of a respondentia loan being made, while the vessel was at sea, and for purposes not connected with the voyage, did not prevent the lender, from having a lien on the property, and holding it against another creditor, viz. the United States, who had levied on the goods, before they came into the possession of the lenders of the money. The authority of this case is not questioned. But the case does not decide, that the respondentia bond gave any lien on the goods. It was the endorsement of the bills of lading to the lenders of the money, which was considered as giving them a title to the goods. No doubt the respondentia bond was valid to secure the loan and maritime interest; but there is nothing in the case, which would lead to the conclusion, that it would itself have given a title, to the goods against bona fide purchasers or attaching creditors. In the present case, the validity of the bond is admitted, as far as it is a personal obligation for the payment of money; but it is denied, that it gave any lien on the ship against a bona fide purchaser. To make the case parallel with Conard v. Atlantic Ins. Co. [supra], the Tremont Insurance Company should have had a bill of sale of the vessel, and a new register, in which case their title to the ship would not have been disputed. In the arguments, in the case of Conard v. Atlantic Ins. Co., most of the authorities on both sides will be found. The great length of time, for which the loan in this case was made, is a strong objection to the bond. It was subjecting the vessel to a secret lien for a great length of time. Though bottomry loans may be made on time, as well as for a voyage, the argument of inconvenience is very strong in this case. There was no right of action, when this libel was filed. The bond was not due till January 6, 1835. The libel was filed, Oct. 1834. There had then been no breach of the agreement.

STORY, Circuit Justice. This is the case of a libel against the brig Draco, upon an asserted bottomry bond. The claimants, Messrs. Stanton, Nichols & Whitney, assert in themselves a title as vendees, and other matters of defence, upon which I shall presently have occasion to comment. In the progress of the cause the vessel was delivered on bail to the claimants upon the usual stipulation; and certain amendments and additions have been made in the libel and answer, with which matters it is unnecessary to intermeddle, until other more important and grave matters are disposed of, which are preliminary in their nature. The cause has been exceedingly well argued on both sides; and I shall now proceed to pronounce the opinion of the court. The asserted bottomry bond is certainly, in its form and actual structure, new in this court; and it has stipulations, which are not to be found in any of those, which have been matter of controversy (at least as far as I have knowledge) in any of the English or American courts. I am, indeed, informed at the bar, that it is of very recent origin, although not at present uncommon in the commercial transactions of the metropolis of this state. On this account, and also, because it constitutes the basis, on which much of the argument at the hearing rests, I shall recite its contents in the very terms of the instrument. (Here the judge recited it verbatim.) The case, then, presented for the consideration of the court is that of an asserted bottomry bond in the form abovementioned, made by citizens of the state of Massachusetts, in the home port of the vessel, in favor of a corporation created under the authority of a charter from the government of the same state. It bears date (as we have seen) in January, 1834, and the present suit was brought in October of the same year, before the period stipulated for the termination of the risk, according to the terms of the instrument, had expired.

The first question arising in the case is that of the jurisdiction of the district court, sitting in admiralty, over the instrument as a fit foundation for a proceeding in rem. It is not doubted, that the jurisdiction exists as to all bottomry bonds executed abroad, either by the master or owner, where such bond is given to obtain supplies for the ordinary exigencies of the ship and the voyage, to enable her to complete it; as for repairs and outfits, and the discharge of the debts and charges on the ship or adventure. But it is denied, that the present is a bottomry bond, or maritime hypothecation, in the sense of the general maritime law, upon which admiralty process lies; and in support of this objection various grounds have been relied on, which I shall presently consider. And, in the first place, it is objected, that the bond was executed by the owners in the home port; and upon such an instrument no admiralty process lies, even supposing it to be in all other respects a bottomry bond or maritime hypothecation. In regard to bottomry bonds executed abroad by the owners in person, instead of the master, no objection has been suggested in the present argument; and I confess myself wholly unable to comprehend, how any objection could, in point of law, be reasoned out to overthrow their validity. Lord Stowell has expressly affirmed it. The Barbara, 4 C. Rob. Adm. 1, 2. Mr. Justice Thompson, in an elaborate opinion, has maintained the jurisdiction upon grounds, which seem to me entirely satisfactory and conclusive. The Mary [Case No. 9,187]. And it is perfectly clear, that securities of that sort, made at the home port, are valid and obligatory, as bottomry claims, in the state of Massachusetts; for the legislature have, in the general act defining the duties, powers, and restrictions of incorporated insurance companies (act of 1817, c. 120), expressly authorized such companies "to loan

to any citizen of this state any portion of their capital stock, not exceeding one half, on respondentia or bottomry." The bottomry bonds here alluded to plainly include loans in the home port to citizens upon the common maritime risks. And this is, as I conceive, entirely conformable to the established doctrine in all maritime countries (at least as far as my researches extend,) ancient and modern. By the Roman law, owners, as well as the master, could clearly hypothecate for a maritime loan, as we shall abundantly see hereafter; and in no modern commercial nation has the power been denied to the owner, where it could be exercised by the master. But, on the contrary, it could be exercised by the owner in cases, where the master could not exercise it. This is certainly true in relation to Scotland, France, Holland, and Italy, and all the other principal commercial nations of continental Europe. See 2 Emerig. Traitè a la Grosse, c. s. 1, s. 2, s. 3; 2 Valin, Comm. lib. 3, tit. 5, arts. 1, 2, 7; Poth. Traitè a la Grosse, notes 1, 7, 9; Bynk. Quest. Priv. Juris. bk. 3, c. 16; Jac. Sea Laws, c. 1, pp. 8–10; Code de Commerce de France, arts. 321, 322; 2 Bell, Comm. bk. 3, pt. 1, c. 5, arts. 459, 460, § 1; Dig. lib. 22, tit. 2; Code, lib. 4, tit. 33. And in England the principal writers, who give a description of bottomry, mention it as a contract of the owner, without any reference at all to the master. We shall see, that so is the description of Mr. Justice Blackstone in his Commentaries (2 Bl. Comm. 457), which will be hereafter cited. Mr. Marshall, follows almost the very words of Blackstone, saying, "Bottomry is a contract in the nature of a mortgage, on which the owner borrows money to enable him to fit out a ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or bottom of the ship (pars pro toto,) as a security for the repayment;" and Mr. Park uses similar language. 2 Marsh. Ins. bk. 2, c. 1, p. 733; Id. c. 2, p. 740; Hughes, Ins. c. 17, pp. 451, 452; 2 Browne, Civ. & Adm. Law, 196, 197; Park, Ins. (6th Ed. 1809) c. 21, p. 552. See, also, Lord Stowell's opinion in The Zodiac, 1 Hagg. Adm. 326. Lord Stowell, in his elaborate judgment in The Atlas, 2 Hagg. Adm. 53, copies the very language of Mr. Marshall, as the common and true definition of the contract of bottomry. Lord Tenterden, in his treatise on Shipping (Abb. Shipp. pt. 2, c. 3, §§ 17, 21), treats expressly of bottomry contracts made by the owners, as well as by the master, and without the slightest distinction, as to their being equally entitled to that character. So that, either upon the principles of the general maritime law, or of the local law, there can be no reasonable doubt, that a bottomry contract, made by the owner in the home port, is, in a just and accurate sense, entitled to that distinctive appellation.

Whether upon contracts so made in the home port, a remedy lies in the admiralty in rem is quite a different question. Lord Tenterden, in his excellent treatise on Shipping (Abb. Shipp. pt. 2, c. 3, § 21), seems to have thought, that no such remedy does lie, founding himself entirely upon a dictum of Lord Holt in Johnson v. Shippen, 2 Ld. Raym. 983, and a dictum of Mr. Justice Lawrence in Busk v. Fearon, 4 East, 319, not however reported in the case. The dictum in each of these cases was purely extra-judicial; and the latter was probably founded entirely upon the former, which was given at a period, when the contest for jurisdiction between the courts of common law and the court of admiralty was maintained with great zeal and pertinacity on each side, flagrante bello. If I might venture, therefore, to make the remark, "pace tanti viri," I should say, that an obiter dictum, under such circumstances, even of so great a mind, is entitled to very little weight. Indeed, the dictum seems, when correctly examined, to import no more, than that the law will not, under such circumstances, imply an hypothecation, since the owner may give a positive security. And this distinction is most important; for in the case of Justin v. Ballam, 2 Ld. Raym. 805, it was held, that for the repairs of a foreign ship in England no implied hypothecation exists, (a doctrine, which has been overthrown by the supreme court of the United States);[2] but if an actual hypothecation or positive security on the ship was given there (it seemed admitted,) a remedy to enforce it would lie in the admiralty. So it was expressly held by the same court in Benzen v. Jeffries, 1 Ld. Raym. 152. Now, in the case at bar, there is, by the very terms of the instrument, an express and positive hypothecation, by way of mortgage and assignment of the brig, for the security of the loan and interest. And I do not perceive, how any sound distinction can be taken between an express hypothecation by a master, or by an owner in such a case, since the same objection applies to each, that it is executed within the realm, and on land, and therefore not within the admiralty jurisdiction as a maritime hypothecation.

The observations of the supreme court of the United States, in the case of Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 332, merely apply to the case of an implied hypothecation, where the loan is made in the home port. "In the case of a bottomry bond, executed by an owner in his own place of residence (say the court,) the same reason does not exist for giving an implied admiralty claim upon the bottom (of the ship); for it is in his power to execute an express transfer or mortgage." But not the slightest doubt was

[2] The Aurora, 1 Wheat. [14 U. S.] 96, 106; The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 341; Turnbull v. The Enterprize [Case No. 14,242]; Clinton v. The Hannah [Case No. 2,898]; and Shrewsbury v. The Two Friends [Id. 12,819],—were all on implied hypothecations brought by material men for services, &c., in the home port.

expressed, that, if the bond was truly a bottomry bond, and an express hypothecation or mortgage was included in its terms, there would be a remedy in rem in the admiralty to enforce it. On the contrary, the doctrine repeatedly held by the supreme court of the United States, in later cases, has been, that where the contract is clearly of a maritime nature, and the local law gives a lien on the ship as a security, (and a fortiori, the rule applies, where there is a positive hypothecation or security given by the party. See Benzen v. Jeffries, 1 Ld. Raym. 152; Justin v. Ballam, 2 Ld. Raym. 805; Johnson v. Shippen, Id. 983). There the admiralty has jurisdiction in rem to enforce it. Such was the doctrine held in the case of The General Smith, 4 Wheat. [17 U. S.] 443; and it has been fully recognized in the late case of Peyroux v. Howard, 7 Pet. [32 U. S.] 341. The ground of the doctrine is, that the admiralty has a general jurisdiction over maritime contracts connected with navigation and foreign trade; but it cannot enforce them by a proceeding in rem, unless the local law attaches a lien on the thing as a security. The case of Wilmer v. The Smilax [Case No. 17,777] is directly in point as to the jurisdiction. It was a case of an express hypothecation of the ship on bottomry; and Judge Winchester, a most learned and pains-taking judge, than whom few have studied the admiralty jurisdiction with more care, or administered it with more ability, did not hesitate to sustain the jurisdiction, although the money was loaned to the owner in the home port. The case of Corish v. The Murphy, 2 Browne, Civ. & Adm. Law, 530, Append., was a case of a bottomry bond in the home port; and after a very able argument, the jurisdiction was sustained. Mr. Justice Thompson, in the case already alluded to, (The Mary [supra]), has placed the subject in a very clear and strong light. After having stated, that he saw no distinction as to the admiralty jurisdiction, whether the bond was made by the owner or the master, he said that the delegation of admiralty and maritime jurisdiction by the constitution of the United States was broad enough to embrace all maritime contracts, and that all civilians and jurists agree, that marine hypothecations fall under this denomination. He then added: "And why should there, upon principle, be any difference as to the jurisdiction of the court, whether the bottomry bond is given by the owner or by the master? If the jurisdiction depends upon the subject-matter of the contract, this is the same, whether the pledge is given by the one or the other. The object and effect of the bond are the same in both cases, creating a lien upon the vessel." The case of The Barbara, 4 C. Rob. Adm. 1, goes far to sustain the same doctrine; and it was there stated by counsel, that the cases respecting domestic bonds, in which a prohibition had been granted, had been chiefly concerning bonds given by the master solely as master. The case of Hurry v. The John & Alice [Case No. 6,923], is, I am aware, the other way. But it was made at a period, when the admiralty jurisdiction was not as well understood and defined, as it has since been by the supreme court of the United States, and when the learned judge, who decided it, had very little experience in maritime causes. That case cannot stand, unless upon the ground, that a bottomry bond given by an owner, in a foreign port, is not cognizable in the admiralty; a doctrine, which is inconsistent with what I cannot but now think to be an established doctrine in our admiralty courts. In Menetone v. Gibbons, 3 Term R. 269, Mr. Justice Buller said, that the form of the bottomry bond does not vary the jurisdiction. The question, whether the admiralty has or has not jurisdiction, depends on the subject-matter. And Lord Kenyon, on the same ground added, that it would be highly inconvenient, if the admiralty had not jurisdiction in such cases, because that court proceeds in rem, whereas the courts of common law can proceed only against the parties. I do not cite this language as being founded on a case, like the present, (for it was the case of a bottomry bond made by the master in a foreign port); but to show the true ground of the admiralty jurisdiction, it being a maritime jurisdiction, and the true nature of it, a proceeding in rem. My own opinion has been long unequivocally expressed, that the admiralty has a rightful jurisdiction over all maritime contracts in personam; but that in cases of that sort it cannot proceed in rem, unless there be a maritime lien, or a positive pledge as security. And, therefore, I have no difficulty in overruling the objection, that the admiralty jurisdiction does not extend to bottomry bonds, given by the owner in the home port, where there is an express pledge as security.

Another objection is, that the bond in this case cannot be deemed to be, in the sense of the maritime law, a bottomry bond. In the first place, it is said, that the very nature of a bottomry bond requires, that the money loaned should be for the necessities or use of the ship for the voyage, as for instance, to purchase a cargo, to repair the ship, or to obtain outfits. The expenditure must be for or on the property; or, to use the expressive language of the counsel for the claimants, the bottomry lender must be a benefactor of the property. If, therefore, the money be lent, while the vessel is at sea, for other purposes, and not to be employed on the vessel, or for the voyage, although it may be (if the words of the instrument are sufficient for this purpose) a valid mortgage, it is not a maritime hypothecation. There is no doubt, that the language used in books of authority countenances this objection, though it is by no means certain, that the authors had in view any such qualification, as it professes to define and enunciate. Their language is rather intended to be descriptive of the most

common forms and occasions of the instrument, than to express the true nature and definition of it. Thus, Mr. Justice Blackstone, in his Commentaries (2 Bl. Comm. 457), says: "Bottomry (which originally arose, from permitting the master of a ship, in a foreign country, to hypothecate the ship, in order to raise money to refit,) is in the nature of a mortgage of a ship, when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (partem pro toto) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, since it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefits of commerce, and by reason of the extraordinary hazard run by the lender. And, in this case, the ship and tackle, if brought home, are answerable, as well as the person of the borrower, for the money lent, &c." And after speaking of respondentia bonds, he adds: "These terms are also applied to contracts for the repayment of money, borrowed not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant £1000, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed; which kind of agreement is sometimes called 'faenus nauticum,' and sometimes 'usura maritima.'" And here it may be remarked, that the learned author makes not the slightest scruple in holding a bottomry bond by the owner to be binding on the ship, as a maritime hypothecation. But, taking the whole language together, it is manifest, that he did not contemplate, that the money must necessarily be laid out for or in the ship, to constitute a genuine bottomry contract. This sort of contract was well known to the ancients, and in the Roman law, it was called "trajectitia pecunia," or "faenus nauticum." The civil law gave this description of it: "Trajectitia pecunia est, quae trans mare vehitur; caeterum, si eodem locum consumatur, non erit trajectitia. Sed videndum, an merces ex ea pecunia comparatae, in ea causa habeantur? Et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim trajectitia pecunia fit." Dig. lib. 22, tit. 2, l. 1. But cases are put in the Pandects, which plainly show, that there are other cases, which fall within the same denomination, where the loan is not employed in the purchase of the identical goods; but the risk only is taken on them. Thus, the case is put of money lent on a pledge of goods in different ships, some of which have been already pledged to other lenders. "Faenerator, pecuniam usuris maritimis dando quasdam merces in nave pignori accepit; ex quibus si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum, propriisque foeneratoribus obligatarum, si quid superfuisset, pignori accepit; quaesitum est, nave propriâ peremptâ, ex qua totum solvi potuit, an id damnum ad creditorem pertineat, intra praestitutos dies amissâ nave? An ad caeterarum navium superfluum admitti possit? Respondi. Alias, quidem pignoris diminutio, ad damnum debitoris, non etiam ad creditoris, pertinet. Sed cum trajectitia pecunia ita datur, ut non alias petitio ejus creditori competat, quam si salva navis intra statuta tempora pervenerit, ipsius crediti obligatio, non existente conditione, defecisse videtur." Dig. lib. 22, tit. 2, l. 6. An answer, that presupposes, that the money may be lent, not only upon goods purchased with it, but upon the ship itself on the risk of the voyage. The succeeding law demonstrates this still more fully, and shows, that a bottomry bond might exist, although the loan was merely on the risk of the ship for the voyage. "In quibusdam contractibus etiam usurae debentur, quemadmodum per stipulationem. Nam, si dedero decem trajectitia ut, salvâ nave, sortem cum certis usuris recipiam, dicendum est, posse me sortem cum usuris recipere." The trajectitia pecunia of the Roman law, was not so entirely confined to money lent for the ship, or for goods to be put on board the ship, as we might at first view suppose; though, doubtless, in the simplicity of the commerce of those times, this was the most common object of the transaction. The Code (liber 4, tit. 33, l. 3,) puts a case, illustrating the principle, of which it is only necessary to state the introductory part, "Cum proponas te nauticum faenus ea conditione dedisse, ut post navigium, quod in Africam dirigi debitor adseverabat, in Salonitanorum portum nave delata, faenebris pecunia tibi redderetur, ita ut navigii duntaxat, quod in Africam destinabatur, periculum susciperes," &c. Emerigon, when rightly understood, confirms this opinion. "That which we call money lent upon maritime loans (a la grosse,)" says he, "was called by the Romans, 'pecunia trajectitia;' not that it was merely lent to the borrower of it, to be transported to another place, but because it was lent to the borrower to employ it in his maritime commerce upon the obligation of returning it in case of a successful voyage with the stipulated nautical interest, and upon the condition, that, if the ship was lost by a peril of the sea, in the course of the voyage, the borrower should not be obliged to return either principal or interest." Emerig. Traité des Contrats a la Grosse, c. 2, tom. p. 384 (406), b; Id. § 2, note 2. Emerigon adds, that it is called in France, "a la grosse aventure," because the lender exposes his money to the accidents of the sea; and he contributes to gross or general averages. The definition of Pothier, which is adopted by Emerigon, is quite as comprehensive. "The contract of a maritime loan (a la grosse aventure,)" says he, "is a contract, by which the lender lends to the borrower a certain

sum of money upon condition, that in case the loss of the effects, on account of which it is lent, taking place by any peril of the sea, or superior force (vis major,) the lender shall not be repaid, unless to the amount of what shall remain." Poth. Traité du Pret a la Grosse Aventure, art. 1, note 1.

If we pursue the definitions of these authors into the analysis, which follows, we shall perceive, that they nowhere intend to insinuate, that it is indispensable, even under the French law, which is narrower than the law of some other countries on this subject, as for instance, Italy and England, that the money should be lent for the purposes of the ship or the voyage. See Emerig. Traité a la Grosse, c. 1, § 3. Thus, Pothier says: "Five things compose the essence of the contract: (1) That money should be lent. (2) That there should be one or more things, upon which the loan should be made, (to contradistinguish it from a mere wager on the voyage, which the French law inhibits). (3) That there should be risks, to which the things are exposed, to be borne by the lender. (4) A stipulated payment should be made by the borrower for the loan, in case of a successful arrival, as a price for the risks run, which is called maritime profit. (5) And there should be the agreement of the parties upon all these things. Now, taking this to be a complete specification of the essentials of a bottomry bond, the present possesses them all in a direct and unequivocal form; and not one of them points to the necessity of the money being laid out for or upon the voyages; but only, that the property, subject to the lien, should be at risk on the voyage." Poth. Traité a la Grosse, art. 2, note 7. Emerigon, indeed, in some places, uses language, which seems to import other distinct qualifications; as that the money should be lent for the necessities of the ship or for the voyage. But, taking its general scope, it does not seem to me to vary intentionally from the definition of Pothier; but to have a special reference to certain texts of the Roman law, or to the express provisions of the French ordinance. Valin defines the contract thus: "A maritime loan is a contract, by which the lender, in consideration of the sum, which he will lose, if the thing, upon which he has made the loan, should perish by inevitable casualty, is authorized to stipulate for an interest or extraordinary profit, in case the thing arrives at the proper port." 2 Valin, Comm. tit. 5, p. 1. And, notwithstanding the positive provision of the French ordinance, giving the privilege of maritime hypothecation for money lent on the hull and keel of the vessel for the necessities of the ship, and, the charges for the payment of the lading for the voyage, which seem to imply, that the privilege is confined to such cases, Valin insists, that it is of no consequence, whether the loan is made before or after the sailing of the vessel on the voyage, since the presumption is, that it has been usefully employed for the thing at hazard, or has been applied to debts contracted on the same account. 1 Valin, Comm. bk. 1, tit. 14, § 16, pp. 364, 366. From this doctrine, however, Emerigon dissents (2 Emerig. Traité a la Grosse, c. 5, § 3); not upon any ground of general principle, but upon the construction of the terms of the ordinance. Mr. Marshall, in his work on Insurance, gives the preference to Valin's opinion; and manifestly supposes, that the English law agrees with it. 2 Marsh. Ins. bk. 2, c. 3, p. 749; Id. c. 4, pp. 749, 750.

I have the rather brought into review the opinions of these eminent maritime jurists, because they were greatly relied on at the argument, as establishing the principle, that a genuine bottomry bond is confined to money lent for the necessities of the ship, or cargo, or voyage. I agree that this seems to be the fair result of the French ordinance, but it stands positively on the text. I agree, also, that this is uniformly the case, where the master takes up money on maritime loan; but this also turns upon the nature and qualifications, and limitations of his powers as master. But I cannot admit, upon general principles belonging to the contract as a maritime loan, that there is any such limitation or qualification applicable to the case of the owners becoming borrowers. The truth is, that contracts of bottomry are not contracts importing, in all countries, precisely the same obligation and extent. And though in all commercial countries they are in use, yet the forms and operation of them are not precisely the same in different countries, but are controlled by the local laws. See The Nelson, 1 Hagg. Adm. 176; The Zodiac, Id. 325. We may apply to them the same remark, which Lord Ellenborough applied to a respondentia bond, that "it is a contract, not of a universal nature and form, but depending upon the particular form of the instrument, varying in different countries;" and, it may be added, variously modified by the municipal laws. And in the definition usually given of it by authors, they confine themselves (as has been already hinted) rather to a description of the most common forms and occasions, in which it appears, than to a strictly juridical definition. Yet it is remarkable, that Blackstone and Marshall, and Lord Stowell, in propounding a definition, speak (as we have already seen) of bottomry contracts of the owner only, omitting those of the master, which are now far more common, and strictly for the necessities of the ship.

In my opinion, there is not the slightest ground to uphold the doctrine, that, in order to constitute a bottomry bond, as such, in the sense of the maritime law, it is necessary, that the money should be advanced for the necessities of the ship, or for the cargo, or for the voyage. Where it is given by the master, virtute officii, it must, in order to

have validity, be for the ship's necessities; for the implied authority of the master extends no farther. But where it is given by the owner, as dominus navis, he may employ the money, as he pleases. It is sufficient, if the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage. The true definition of a bottomry bond, in the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender for a voyage, or for a definite period. See, also, 2 Marsh. Ins. bk. 2, c. 3, p. 742; Id. c. 4, pp. 748–750. See Lord Stowell's opinion in The Atlas, 2 Hagg. Adm. 48, 52, 53, 55, 57, 58. This is the true exposition given of it by Bynkershoek, in his usual strong and masculine manner. After having remarked upon the insufficiency of the definition of Grotius, and that the contract itself had been extended since by little and little, and other and other things (paulatim ad alia, atque alia porrectus est) since the days of Grotius, he says, "Grotii definitio nec legibus nec formulis satis congrua, et multis nominibus imperfecta est." He gives his own definition in the following words; "Ut autem nunc obtinet Bodemery, definio, contractum, quo pecunia creditur magistris navium in exteris regionibus, sive Dominis navium et mercium in his regionibus, ea lege, ut, si navis pereat, creditor jus crediti amittat; si salva advenerit in locum destinatum, sors restituatur cum usuris nauticis vel majoribus vel minoribus, ut pro ratione periculi inter creditorem et debitorem convenit." Bynk. Quaest. Juris. Priv. lib. 3, c. 16. This comprehensive definition embraces precisely the same ingredients, and no more, as the essence of the contract, as are enumerated by Pothier in the passages already cited. This is precisely the view taken of it by Lord Tenterden, in one of the most recent cases, which has occurred on the subject. He considers it to be the very essence of a bottomry bond, as contradistinguished from any other bond, that it is for money taken up on maritime risks, at the hazard of the lender. Simonds v. Hodgson, 3 Barn. & Adol. 50, 56.

Mr. Bell, in his valuable Commentaries upon the Commercial Law of Scotland (2 Bell, Comm. p. 83, c. 5, art. 460, § 1), has given a definition substantially the same, which, he says, contains the essence of the contract, as defined by all the great writers upon maritime law. He says, that, "by the contract of bottomry or respondentia, money is, in contemplation of a particular voyage, lent to the master of a ship in a foreign country, or to the owner of the ship or cargo in a home port; on this condition, that if the subject, on which the money is taken, is lost by sea risk or superior force, the lender shall lose his money; and that if the voyage shall be successful, the sum shall be repaid, with a certain profit or consideration for interest and risk, as agreed upon." And this is clearly the view taken of the contract by the supreme court of the United States, in the case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 436, 437, where the very objections were taken, which have been taken in this case. That, indeed, was the case of a respondentia bond. But upon this point, none of the authorities cited in support of the objections make any distinction between bottomry bonds and respondentia bonds; but they profess to hold both to be governed by the same rules. The objections were, first, that the loans were made after the sailing of the ships on the voyage; secondly, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property, on which the risk was run. What was the language of the supreme court, in reply to these objections? "In our opinion, neither of these objections can be sustained. It is not necessary, that a respondentia bond should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods, on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage." Now, the doctrine here stated, which was the unanimous opinion of the court, is, in my judgment, perfectly conclusive upon the point stated. And I am entirely satisfied, upon a review of the principles upon which it is founded, that it cannot be shaken but by overthrowing principles deeply settled and fixed in the maritime law. I find, too, that my learned friend Mr. Chancellor Kent, adopts this view of the subject, as the true and satisfactory doctrine on the subject. 3 Kent, Comm. Lect. 49, (2d Ed.) pp. 361, 362.

It is also objected, that if the bond is a good bottomry bond, still it is one of a peculiar nature, and does not give any maritime privilege or lien on the vessel; but it is to be treated as a case of a mortgage at the common law. If treated as a mortgage, it is said to be void as against the registration act of Massachusetts, respecting personal property; and if not, still there would be no lien without a delivery of possession, which has not been done. In regard to the terms of the bottomry bond, it is certainly true, that they are of a peculiar nature; but still their import is undeniably, that the loan is upon maritime risks, the ordinary risks in policies of insurance, and the property was at the time of the loan in the borrowers. There are therefore, all the proper ingredients of a

bottomry bond. And as to collateral matters, not displacing these, there can be no doubt, that they constitute grounds of contract, which the parties may modify according to their own pleasure. With respect to the privilege or lien, it is not a case depending upon the effect of any implied hypothecation under the maritime law; for there is an express mortgage and assignment, which is a positive hypothecation; and it being as clear, that it is for maritime risks, it follows of course, that it is a maritime hypothecation, which, in legal contemplation, is neither more or less than a maritime mortgage.

The other point, as to the necessity of registration, depends merely upon the statute of Massachusetts of 1832, c. 157, which provides for the registration of mortgages of personal property. That statute contains the following exception and proviso: "Provided, that nothing herein contained shall affect any transfer of property under bottomry or respondentia bonds, or of any ships or goods at sea, or abroad, if the mortgagee shall take possession thereof, as soon as may be, after the arrival of the same in this commonwealth." As I understand this section, it expressly excepts from the operation of the statute, all transfers under bottomry or respondentia bonds; and the qualification, as to taking possession, is exclusively applied to other cases of transfer of any ship or goods at sea or abroad, by way of mortgage. And this exception is the more reasonable and just; because possession is not usually contemplated to be taken under a bottomry or respondentia bond; and a term of time after the arrival of the ship is often allowed for payment, before any proceedings can be had to enforce any right in rem. If we were to construe the exception in any other manner, and make it applicable to bottomry or respondentia bonds generally, unless possession were taken on the arrival of the vessel, it would create great public inconvenience, and indeed avoid the securities of bottomry and respondentia bonds in many cases; for possession cannot, under the ordinary bonds, be lawfully taken to enforce payment. Besides, the disjunctive "or," completely separates the former member of the sentence from the latter; so that we must read it, "any transfer of property under bottomry or respondentia bonds, or any transfer of any ship or goods at sea or abroad, if the mortgagee shall take possession," &c. of any such ship or goods at sea or abroad, as soon as may be after the arrival of the same. The case of a bottomry bond, being, then, (as I conceive) upon the true interpretation of the statute, entirely out of its purview, this objection, in every variety of its form and pressure, seems to me to be unmaintainable. If the lien be secret, it is nevertheless sacred; for it is such as the law allows upon its own policy. It is not pretended to be a case affected by our ship registry acts; and, therefore, it steers wide of any objection to it, founded upon the peculiar provisions of the British Code. If, then, there was no necessity to record the instrument, and it is not within the registry acts, it can be of no consequence to the present claimants, that they purchased without notice of its existence; for such notice is not required by law, to give such a security validity against a bonâ fide purchaser. The only difficulties, which can arise, are those, which may result from there being a meditated fraud in the case (which is not here pretended;) or some laches on the part of the bottomry lender, which will, in favor of such purchaser, operate as a waiver of the lien or mortgage on the property.

Some objection has been hinted against the bottomry bond, upon the ground, that it is not for a specific voyage, but for a great length of time. But it is very clear that a bottomry bond, may be upon time, as well as for a specified voyage. Indeed, in many cases (as in case of a bottomry bond on an East India or China voyage,) the voyage may last far beyond the stipulated period in the present bond. Even in the Roman law no difference was made, whether the maritime loan was made upon a specific voyage, or for a limited time. Dig. lib. 22, tit. 2, l. 4, l. 6. And this is clearly the law of France, and of other continental maritime countries, as it certainly is of England and America. See 2 Emerig. Traité a la Grosse, bk. 1, c. 8, §§ 1, 263; 2 Valin, Comm. lib. 3, tit. 5, art. 2, pp. 4, 5; 2 Marsh. Ins. bk. 2, c. 4, pp. 748–752.

There is another objection of a very different character, which is presented against the maintenance of the present suit. It is, that the suit was commenced before the bottomry bond became due and payable according to its terms, the suit having been commenced before the year had expired, for which the loan was made. Several answers have been given to this objection. In the first place, that it is at all events maintainable for the first half year's interest, which was clearly due; in the next place, that the insolvency of the borrowers put an end to any further proceedings in the adventure on their part; and in the last place, that the sale of the vessel to the present claimants was a virtual deviation from the risks, or an extinguishment of, or a dispensation from, any further risks, under the bottomry bond, on the part of the lenders. In regard to the interest, it does not seem to me, that though payable semi-annually, it could be recoverable at law, unless the principal were also recoverable. If the brig had been totally lost after the time of the first semi-annual payment of interest had passed, and before the year had expired, nothing would have been payable on the bond, either for principal or interest, for, notwithstanding the preliminary recitals, the very condition of the bond demonstrates, that neither principal nor interest could accrue, unless upon the due ar-

rival of the brig at the expiration of the risk. The insolvency, too, has no bearing upon the case, otherwise than as it may conduce to show, that the contemplated voyage or adventure was broken up; and if it was broken up, it was so by the sale and transfer of the brig to the present claimants. The question, then, as to the breaking up of the voyage, and the consequent discharge of the libellants from any further risk, turns upon the effect of that sale and transfer. There is no doubt, that the bottomry bond originally attached by the sailing of the brig on the contemplated adventure; so that there has been a due commencement of the maritime risks, to be borne by the lenders. We may, therefore, lay out of the case all consideration of what would have been the state of things, if the maritime adventure had never, according to the contemplation of the parties, had an inception. See 2 Marsh. Ins. bk. 2, c. 4, pp. 749, 750. From the time of the execution of the bond, until the sale to the claimants, the brig was clearly at the risk of the lenders at sea and in port.

Now, in point of law, there can be no doubt, that if, after the risk on the bottomry bond has commenced, the voyage, or adventure, is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage, or adventure, or by a deviation, or otherwise, the maritime risks terminate, and the bond becomes presently payable. All writers on the subject of bottomry treat this as indisputable, and governed by analogy to the law of insurance on the same subject. Emerigon, instead of discussing the subject at large, simply contents himself with saying: "All that I have said in my treatise on Insurance, upon the subject of the route, the voyage, and the places within the risk, will apply here. A voluntary change of the route, or of the voyage, discharges the lender from all ulterior risks, though the ship should return to her legitimate track." 2 Emerig. Traité à la Grosse, c. 8, § 4. And afterwards he adds: "After the risk is terminated, the borrower is bound to pay the principal and maritime interest, which he has promised." Id. c. 9, § 1. Bynkershoek lays down the like doctrine (Bynk. Quaest. Priv. lib. 3, c. 16. See, also, 1 Bell, Comm. bk. 3, pt. 1, c. 5, art. 471, § 1); and it is the established jurisprudence of England and America (2 Marsh. Ins. bk. 2, c. 4, pp. 750, 751; Id. c. 5, pp. 755-757). "In general (says Mr. Marshall) as soon as the risk ceases, (discusso periculo) either by the ship's safe arrival, the expiration of the term, or any other event, the marine interest ceases, and the debt becomes absolute." Id. He afterwards adds, in another place, that "the lender, like an insurer, is only answerable for losses, which happen within the time and place of the risk, as specified in the contract. Therefore, if the ship, without necessity, deviate from the voyage described in the bond, the lender will not be liable, any more than an insurer, to any loss, that may afterwards happen." 2 Marsh. Ins. bk. 2, c. 5, pp. 756, 757.

The state of the law being such as from these authorities it would seem clearly to be, that the risk of the bottomry lender terminates under the same circumstances which would terminate the like risks upon a policy of insurance, the question, then, arises, whether in a policy of insurance upon time the risk on the subject-matter continues, after there has been an absolute sale or transfer of the property; for such is the state of the present case, as presented by the record, and insisted on by the claimants. Now, the doctrine is, as I apprehend, very clearly established, that, upon a policy of insurance, the property insured continues at the risk of the underwriter only, while the ownership of the assured continues in the property. If he sell it, or transfer it absolutely, the policy becomes void as to any future risks, and is functus officio. This was the doctrine of the house of lords in Lynch v. Dalzell, 3 Brown, Parl. Cas. 431, and was affirmed by Lord Hardwicke in Sadlers' Co. v. Badcock, 2 Atk. 554. The same doctrine is affirmed in Marshall on Insurance (book 4, c. 2, p. 787; c. 4, pp. 800, 801, 804). The same doctrine has been repeatedly recognised in Massachusetts; and the case of Carroll v. Boston Marine Ins. Co., 8 Mass. 515, is directly in point. That was a policy on a vessel on time; and, before the loss, the vessel was sold to another person; and the court held, that no subsequent loss was recoverable under the policy. The court on that occasion said: "It has been repeatedly decided here, that, under the forms of our policies, none but the parties to the contract, or their legal representatives in case of their death, can avail themselves of the contract, although others may in fact have an equitable or even a legal interest in the property insured." Unless, then, some distinction can be shown between the case of a policy, and the case of a bottomry bond, this doctrine concludes the question. I know of no such distinction; and there is no ground in law or equity to sustain one. The vendee, in case of a sale, is not liable to the bottomry lender for either principal or interest; nor can he, on the other hand, entitle himself, as vendee, to any benefit of the bottomry bond. The sale of the vessel terminates all interest in the borrower; not only his interest in the voyage, but his power over the voyage. The bottomry bond is a contract for any voyage during the limited period, carried on by the borrower, as owner, and not ultra. And no man has a right to say, that personal confidence in the character, business, or interests of the borrower, may not have materially influenced the formation of the contract, and the undertaking of the risk.

But the present case stands upon a stronger ground; for there is certainly a direct interdiction of any such sale during the period of the risk. It is true, that the clause is con-

tained in, or rather follows, a recital, and is inartificially drawn; but it contains terms of positive and direct obligation, which the parties are estopped to deny. The clause, to which I allude, after stating the mortgage and assignment of the brig, as security, proceeds as follows: "And it is hereby declared, that the whole of the said brig is thus assigned over for the security of the bottomry taken up by the said, &c., and shall be delivered to no other use or purpose whatsoever, until payment of this bond is first made, with the premium and interest, that may become due thereon." Can it be said, with any just regard to the true meaning of the language, that this brig has not, by the sale, been delivered up to any other use or purpose, than to pay the bottomry bond? And if the brig has been so delivered up, is not the sale, in the sense of a court of equity (and such, for this purpose, a court of admiralty is, to the extent of the exercise of its own jurisdiction,) a breach of the contract? My opinion is, that the risk has terminated by the abandonment of all further rights and interests in the voyages of the brig by the transfer of the owners. And I am also of opinion, that the sale of the brig constitutes per se a violation of the contract in its substance; and therefore, that the suit is not brought too soon.

I have thus gone, at large, over the main grounds of resistance to the present claim of the libellants, as matter fit for the cognizance and administration of an admiralty court. But it does appear to me, that, if the merits of the case are as I am of opinion they are, the escape from the admiralty court to a common law court would, to use a felicitous expression of Lord Stowell, only be to change postures on an uneasy bed. If this bottomry bond be a good mortgage at the common law, and do not require registration to give it validity (as I think it does not), then it is clear, that the legal property vested in the libellants; and if so, the sale to and use of the brig by the claimants, under an adverse title, is a conversion of the property, for which an action of trover would lie; and in such an action the libellants would be entitled to recover the full amount of the principal and interest due to them by the terms of the bond. There is, therefore, in substance, no controversy between the parties, but the simple question of priority of title; and when that is once settled, it is wholly immaterial in what court the other claims of the parties are to beadjusted. The latter are more a matter of calculation than of general discretionary damages.

The view of the case, which I have taken, renders it wholly unnecessary to examine into the other points suggested by the amended libel and answers, as to the earnings of the brig, and whether the conveyance was merely a security for a debt, or an absolute purchase. I am of opinion, that the libellants are entitled to the principal sum of three thousand dollars, lent at the maritime risk, to the premium of five per cent. on that sum, and to simple interest of six per cent. on the principal sum from the time of the sale to the claimants up to the time of this decree. If there is any question as to the amount, I shall refer it to an auditor to ascertain and adjust it. Decree accordingly.

Case No. 4,058.

In re DRAKE.

[14 N. B. R. 150;[1] 3 N. Y. Wkly. Dig. 50.]

District Court, D. New Jersey. March, 1876.

BANKRUPTCY—ATTORNEY'S FEES.

1. The compensation of the assignee's attorney must be reasonable, and proportioned to the value of the estate.

[Cited in Re Cook, 17 Fed. 330.]

[2. Approved in Re Cook, 17 Fed. 331, on the point that an attorney, in performing the ordinary duties of the assignee, cannot claim from the estate compensation as for professional services.]

[In the matter of Priscilla C. Drake, a bankrupt.]

NIXON, District Judge. The accounts of the assignee having been audited and allowed by the register, and no creditor objecting, they will also be passed by the court, and the assignee is discharged from liability, under section 5096 of the Revised Statutes.

There is also before me a petition from gentlemen, signing themselves as attorneys of the assignee, asking for an additional allowance of two hundred and fifty dollars, for professional services in the settlement of the estate. Upon an examination of the account, I find that the whole assets consist of two items: to wit, proceeds of the sale of personal property, three hundred and eighty-four dollars and thirty cents, and of real estate, nine hundred and seventy-five dollars, making an aggregate of one thousand three hundred and fifty-nine dollars and thirty cents. The disbursements for reducing the assets into money consist principally of two items: to wit, two hundred and forty dollars and sixty-nine cents, paid to these attorneys for their expenses and allowance for filing the petition in bankruptcy, and two hundred and seventy-one dollars and forty-one cents, also paid to them; the bulk of which is an allowance of two hundred and fifty dollars on account of professional services to the assignee. The register makes the assignee's commissions one hundred and thirty-three dollars and ninety-eight cents, and adds, for register's and clerk's fees, seventy dollars and ten cents. Including a few small items for printing, postage, etc., the disbursements amount to seven hundred and twenty-six

[1] [Reprinted from 14 N. B. R. 150, by permission.]

dollars and three cents—more than fifty per cent of the amount collected—leaving for distribution amongst the creditors six hundred and thirty-two dollars and twenty-seven cents. From this sum, before any dividend is struck, the attorneys ask for an additional allowance of two hundred and fifty dollars.

The case seems to be a proper one in which to make some observations in regard to the administration of estates in bankruptcy. It requires a constant and distasteful struggle on the part of the court to keep down expenses. In view of the lack of success in this matter, I do not wonder that so strong a sentiment exists in the public mind for the repeal of the bankrupt law [of 1867 (14 Stat. 530)]; creditors cannot be expected long to favor a system of liquidation and settlement which allows the great bulk of the small estates to go into the pockets of the attorneys, assignees, and other officers. If no power and disposition exist in the court to control the expenses, the sooner the law is repealed the better it will be for the creditors and the public morals. The evil is not new; it has been a source of serious complaint, and has long characterized bankruptcy proceedings in England. Lord Eldon signalized his advent to the woolsack, in 1801, by freely expressing his opinion in regard to the existing abuses in that court, and his determination not only to reduce expenses, but to repress all dishonest practices. It is said by the reporter, at the opening of the sixth volume of Vesey, Jr., Reports, that the lord chancellor took the first occasion to observe with warmth, that "the abuse of the bankrupt law is a disgrace to the country, and it would be better at once to repeal all the statutes than to suffer them to be applied to such purposes. There is no mercy to the estate; nothing is less thought of than the object of the commission; as they are frequently conducted in the country, they are little more than stock in trade for the commissioners, the assignees, and the solicitor. Instead of solicitors attending to their duty as ministers of the court, for they are so, commissions of bankruptcy are treated as matters of traffic," etc.

I am satisfied that the chief source of the extravagant expenditure in the winding up of estates in bankruptcy can be traced to the creditors themselves, who have the largest interest in a faithful administration, and who are the loudest in their complaints of the expenses of the settlement.

First. The act confers upon them the choice of the assignee. This is the most important step in all the proceedings, because so much depends upon his character, qualifications, and habits of business; and yet they rarely give any personal attention to these traits in making their selection. Whenever any of their debtors go or are put into bankruptcy, they generally prove and then surrender their claim to the lawyer—who too often makes it his business to look up such matters for professional management—and after clothing him with full powers by executing a letter of attorney, they dismiss the subject from their thoughts; if afterward they are surprised by a dividend, they regard it as so much saved from a total wreck, and as clear gain; whether this indifference is the result of past disappointments in realizing from the estate in bankruptcy, or whether it comes from their greater absorption in other and more profitable business affairs, I am not able to say—but the fact exists; and I am clear that the most salutary amendment which could be made to the act to-day, would be to take the power of selecting assignees from creditors, and, in the first instance, to vest it in the register, subject to the supervision of the court, on the appeal of any of the creditors.

The case before me is an illustration of the practical working of the present method. The bankrupt was a married woman residing in Hudson county, New Jersey, and carrying on the business of hatting at No. 9 Bowery, New York; she had some eight or ten creditors, whose claims aggregated nearly six thousand dollars; she owned real estate in New Jersey, which one of the creditors, in the course of these proceedings, swore was worth, above the incumbrances, about twelve thousand dollars; her stock of goods, in her store, was valued at four hundred dollars, and this was seized on attachments issued against her husband, and held by the sheriff of New York, for the payment of his debts. Her creditors became alarmed, and finding that she had committed an act of bankruptcy, by allowing her commercial paper to go to protest, they filed a petition of bankruptcy against her in this court; no opposition was made, and an adjudication followed as a matter of course. The register gave notice of the first meeting of creditors for the choice of an assignee, and on the day appointed, one of the members of the legal firm who filed the petition appeared before the register, with eight proofs of claim, from as many creditors, and with eight powers of attorney to vote thereon, and cast the eight votes for the present assignee: whether the creditors knew anything about the gentleman thus selected does not appear. The court knows nothing to his detriment, except that he has given very little attention to a solemn trust, which he voluntarily assumed. If the affidavits of the members of the law firm, filed in these proceedings to exhibit to the court the character and extent of their services, be true, he has done nothing since his selection except to allow these attorneys the use of his name, in the performance of the duties which he undertook when he consented to the appointment.

Second. The bankrupt act gives to creditors a voice, and a large control over the expenses of the administration of estates in bankruptcy. The 28th section of the original law makes provision for the third meeting of

creditors and a final dividend; but before it is declared, it is the duty of the assignee to submit his account to the register, and file the same, and to give notice to the creditors of such filing, and also that he intends to apply for the settlement of his account, and for his discharge from all liability as assignee, at a time to be specified in the notice. Inasmuch as, in this district, under the provisions of the 5th general order, the court does not allow the discharge of the assignee until after a personal inspection and examination of the account by the judge, all creditors have two opportunities to take exceptions to the account: (1) Before the register, and (2) before the judge of the court. But it is my observation that they rarely avail themselves of these opportunities, and when they do, their voice and control are more frequently exercised in increasing than in diminishing the cost and allowances. It has happened more than once, when I have suggested that there must be a reduction of the fees and expenses of settlement, that I am answered by the statement that the creditors, who are the principal parties in interest, have examined and approved the charges before the register. I find also an illustration of this liberal and generous spirit on the part of the creditors, in the case before me. Shortly after the appointment of the assignee, the attorneys of the petitioning creditors came to the court for an order upon the assignee for the payment of their disbursements, and for an allowance for filing the petition and procuring the adjudication. As this is presumed to be a service performed in the common interest of all the creditors, it is usual to award for it a moderate sum out of the common fund. The application of the attorneys was supplemented by a petition, signed by the largest creditors of the bankrupt's estate, setting forth with considerable particularity their knowledge of the meritorious labors of these gentlemen in this regard, and stating that two thousand five hundred dollars "would be no more than a just and reasonable sum" to award them for these services; such an allowance, besides disbursements, was gravely asked for by creditors most largely concerned in the economical administration of the assets, and if the court had yielded to the absurd and preposterous suggestion, and awarded more than the gross assets of the estate, for preparing and filing the petition of bankruptcy, these gentlemen would doubtless have been the noisiest in denouncing the waste and extravagance incident to proceedings in bankruptcy.

And now what is to be done with the present application for further allowance? Here is an estate amounting in the gross to less than one thousand four hundred dollars; more than half of it, seven hundred and twenty-six dollars and three cents, has already been expended in its settlement, and more than one-half of this expenditure has gone into the pockets of the attorneys. We have six hundred and thirty-two dollars and twenty-seven cents for distribution, and from this sum they ask for two hundred and fifty dollars more. If I refuse it, the court is parsimonious and behind the times, in its estimate of the value of professional services; if I allow it, then the bankrupt law is a failure, because the court is not more watchful over the expenses of its administration. In these times, when care, economy, and parsimony in the use of other people's money are by no means prevalent, I shall dare to be singular, and deny the application. I do this the more readily, because the attorneys of the assignee seem to have such a good understanding with the creditors that they have been appointed to represent their interests in voting for the assignee. If the court is illiberal, and is not able to comprehend the magnitude and value of the services rendered, these creditors have it in their power, out of the small dividends received, to allow them such additional compensation as they think in strict justice should be made. The application is refused.

Case No. 4,059.

DRAKE et al. v. CLEVELAND.

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

Circuit Court, District of Columbia. Dec., 1826.

ATTACHMENT OATH—PARTNERS.

The oath to obtain an attachment under the act of Maryland, 1795, c. 56, may be made by one of the copartners, and need not state that he is the acting partner, nor that the other partners were absent.

Attachment under the Maryland act of 1795, c. 56.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that the oath made by one of the plaintiffs, who were copartners in merchandise, in the form required by the act. was sufficient to ground the warrant upon, although he did not state in his oath that he was the acting partner, nor that the other partners were absent.

Case No. 4,060.

DRAKE v. CUNNINGHAM.

[1 McA. Pat. Cas. 378.]

Circuit Court, District of Columbia. Feb., 1855.

PATENTS—JURISDICTION ON APPEAL FROM COMMISSIONER'S DECISION.

[The statute confers no jurisdiction on the judge to hear and determine any appeal on behalf of a patentee from a decision of the commissioner of patents against his claim of priority.]

[This was an appeal by Oliver P. Drake from a decision of the commissioner of pat-

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

ents, in an interference proceeding, awarding priority of invention to Charles Cunningham, assignor to John C. Pedrick.]

R. H. Eddy, for appellant.
N. G. Suethen, for appellee.

MORSELL, Circuit Judge. This is the case of an appeal by a patentee, which is opposed by the appellee on the ground of want of jurisdiction in the judge to entertain an appeal from the decision of the commissioner of patents in said case. It has been on several occasions decided, and the question must now be considered as settled, that the act of congress confers no jurisdiction on the judge to hear and determine any appeal on behalf of a patentee from a decision of the commissioner of patents against his priority of claim, as in the present instance. The said appeal must therefore be dismissed; and the same is so certified by me to the honorable commissioner accordingly, and all the papers returned.

Case No. 4,061.

DRAKE v. FISHER.

[2 McLean, 69.][1]

Circuit Court, D. Indiana. May Term, 1840.

PLEADING—VARIANCE—SURPLUSAGE—DECLARATION ON NOTE.

1. A note dated at Cincinnati, and described in the declaration as dated at Cincinnati, in the state of Ohio, is admissible in evidence; especially where the fact is proved, or admitted, that Cincinnati is in the state of Ohio.

2. The contract being transitory, and the place where it was made having no effect upon its construction, the words, "in the state of Ohio," may be rejected as surplusage, and need not be proved.

3. It is sufficient to describe the note in terms, or according to its legal effect.

Mr. Eggleston, for plaintiff.
Mr. Brice, for defendant.

OPINION OF THE COURT. This action is brought [by Josiah Drake against Elwood Fisher] on several promissory notes, and an objection is made to the introduction of one of the notes in evidence, on the ground that it is not described according to its tenor, or legal effect, in the declaration. The note is dated at Cincinnati, 12 m. 1., 1837, and the declaration describes it as a note given at Cincinnati, in the state of Ohio, to wit: At Indianapolis, in the state of Indiana. And the plaintiff offered to prove that Cincinnati is in the state of Ohio, as alledged in the declaration. This, however, was not done until the objection was made by the defendant's counsel, but the truth of the allegation is not controverted. Several authorities are cited by the defendant's counsel in support of his objection. In the case of Kearney v. King, 2 Barn. & Ald. 301, the declaration stated the note was given at Dublin, to wit: At Westminster, &c.; and at the trial it appeared that the bill was drawn at Dublin, in Ireland. And the court held there was a fatal variance between the proof and the declaration, and a judgment of nonsuit was entered. This variance was material, as the bill being given in Ireland was payable in Irish currency, which was less valuable than English currency, in which it appeared from the declaration, the bill was payable.

Mr. Justice Bayley said: "The court must see upon the face of the record that the bill was drawn in Ireland, and it can not take notice judicially, that a bill drawn at Dublin, is drawn at Dublin, in Ireland. The instrument, it is said, is set out in the same words and letters as the bill produced. But that is not enough; for it must be set out the same in substance and in legal operation, which is not done here. The bill, in the declaration, appears to be for English money, when it is, in fact, for Irish." This authority goes rather to sustain the declaration, as it shows the propriety, and, indeed, necessity in certain cases, where an instrument is dated at a particular place, to alledge in the declaration in what state or country such place is situated. This has been held necessary, it seems, in case of specialties: Cowper, 177, Lord Mansfield says, if the declaration states a specialty to have been made at Westminster, in Middlesex, and, upon producing the deed, it bears date at Bengal, the action is gone, because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. In the case of Alder v. Griner, 13 Johns. 449, where the venue was laid in the margin of the declaration, to wit: "City and county of New York;" and, at the conclusion of the instrument, it was stated to be "done in Boston, in the day and year above mentioned," the court held that the variance was not fatal. They say, had the declaration averred the deed to have been made at New York, they would, probably, have been bound by authority, whatever may have been their private opinions as to the wisdom of the rule, to set aside the verdict on the ground of variance. In the case of Munroe v. Cooper, 5 Pick. 412, the note was described in the declaration as dated at Concord, whereas, on its face, it was dated at Boston. The judge, at the trial, admitted the note, though objected to; and the supreme court say, "As to the supposed variance, it has been usual, certainly, in cases like the present, to set out the true date of the note, both as to place and time, and to lay the venue under the form of a videlicet, and that this was the correct mode of declaring." But the point raised was not

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

decided. To the same effect is the case in 16 Pick. 381. In the case of Houriet v. Morris, 3 Camp. 303, it was objected that there was a fatal variance, the declaration having stated that the notes were made in London, whereas, in fact, they appeared, on the face of them, to have been made in Paris. And, it was insisted, that the constant course is, in declaring on foreign bills, to state that they were drawn at the place where they bear date, adding the venue under a videlicet. Lord Ellenborough said, the contract, evidenced by a promissory note, is transitory, and the place where it purports to be made is immaterial. And that he saw no reason why it might not be stated that the note was made in the parish of St. Mary Le Bow, in the ward of Cheap, though dated at Paris, in the same manner as if it had been dated at York. And in the case of Reagan v. Maze, 4 Blackf. 344, it was held, that a promissory note, dated at Union county, state of Indiana, might be declared on in another county, without noticing the words, "state of Indiana." The court say that this variance is not material.

Now, the objection in the present case is, not that the declaration does not state the place at which the note was given, but that it alledges that such place is in the state of Ohio. Under the strictest rules of pleading, which have, at any time, been observed, this allegation could only require to be proved. And this the plaintiff offered to do, as we think, in time for the proof to be received. But the case has been argued without reference to such proof. There are many cases in which it is material to alledge the place of the contract, as where it is materially affected by the local law, in regard to interest, currency, &c. But where this is not the case, and the action is transitory, no reason is perceived for stating in the declaration the place of the contract. The contract, or note, need not be described in its very words, but may be stated in the declaration according to its legal effect. And if the place where the note was made can have no influence on its legal effect, why should it be averred? In such a case the place is not traversable, and, if not traversable, need it be averred or proved? There are some things which may be omitted, but which, if stated, must be proved. And the rule, in this regard, is laid down by Mr. Chitty to be, "that if the whole of the statement may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but, otherwise, if the whole can not be struck out, without getting rid of a part essential to the cause of action." The supreme court, in the case of Ferguson v. Harwood, 7 Cranch [11 U. S.] 408, decided that a variance is immaterial when it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration. Now, whether this note was made at Cincinnati, in the state of Ohio, or at Cincinnati, in some other state, is immaterial. It has no effect in the construction of the note, or on its legal operation.

By the rules of practice lately adopted in England (4 Wm. IV.) the venue is required to be stated in the margin, and not in the body of the declaration. And this would seem to render unnecessary any allegation of the place where the contract was made under a videlicet, within "the county from which the jury was to come," even in actions on specialties. If the place, however, where the contract was made, be alledged as matter of description, and not as venue, it must, in all cases, be stated truly, and according to the fact, under peril of variance, if the matter should be brought into issue. Steph. Pl. 291. But this issue can be raised only in cases where the law of the place has a material bearing on the contract. This declaration would have been good if the words, "in the state of Ohio," had been omitted; and if these words were stricken out, it would not destroy the plaintiff's right of action. They may then be considered as surplusage, and need not be proved. By the late change the rules of pleading in England have been simplified and improved, and we are more disposed to adopt the improvements, than to follow antiquated precedents, and unmeaning technicalities. In the case of Covington v. Comstock, 14 Pet. [39 U. S.] 43, the note purported to be set out in the declaration according to its tenor, and it was stated to have been made payable generally, but on its face it was payable at a particular place; the court held this was a fatal variance, and the judgment of the circuit court, on this ground, was reversed. And there can be no doubt that strictness is required where the plaintiff purports to set forth the note in terms. Upon the whole, we think, that whether we regard the proof offered, or the words objected to, as surplusage, the objection must be overruled.

Case No. 4,062.

DRAKE et al. v. GOODRIDGE et al.

[6 Blatchf. 151.] [1]

Circuit Court, S. D. New York. June 2, 1868.

EQUITY—PARTIES—JURISDICTION—APPLICATIONS TO BE MADE PARTIES.

1. Where, in a suit in equity, brought by alien plaintiffs against citizens of New York, a person, not stated to be a citizen of New York, applied to be made a party to the suit: *Held*, that he could not be made a defendant, because that would oust the jurisdiction of the court.

2. The act of February 28, 1839 (5 Stat. 321), explained.

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

3. No such practice is known, in equity, as making a person a defendant to a suit, on his own application, or as compelling a plaintiff to join, as co-plaintiff, a person not a party, on the application of such person.

[Cited in Chester v. Life Ass'n of America, 4 Fed. 492.]

In equity. This was a petition by two persons, Morgan and Gooch, to be made parties to the suit, which was a bill filed by aliens against citizens of the state of New York. The application was opposed by the plaintiffs [James Drake and others].

Charles Tracy, for Morgan and Gooch.

Edwin W. Stoughton and Clarence A. Seward, for plaintiffs.

BLATCHFORD, District Judge. As the plaintiffs are stated in the bill to be aliens, and Morgan and Gooch are not stated to be citizens of the state of New York, to make Morgan and Gooch defendants to the suit, would oust the jurisdiction of the court. Consent cannot confer jurisdiction. The act of February 28, 1839 (5 Stat. 321), applies only to a voluntary appearance by a person who is, in fact, made a defendant by the plaintiff's bill. Here, Morgan and Gooch are not made defendants by the bill, and cannot be made so, without ousting the jurisdiction of the court. The act of 1839 does not apply to a case where persons are not made defendants because their citizenship is such that their joinder would defeat the jurisdiction of the court, but it only removes a difficulty as to jurisdiction between competent parties. Shields v. Barrow, 17 How. [58 U. S.] 130, 141. The prayer of the petition of Morgan and Gooch is, that they may be made parties to the suit, and may have leave to file a supplemental bill of complaint. Independently of the difficulty as to jurisdiction, in case Morgan and Gooch were made defendants, it would not be proper to make them defendants on their application. No such practice in equity is known. I had occasion to examine this question recently, in the case of Coleman v. Martin [Case No. 2,985], in this court. But Morgan and Gooch ask, in case they cannot be made defendants, to be made co-plaintiffs. I know of no practice which would authorize the court, on the application of persons not parties to a suit, to compel the plaintiffs to join such persons as co-plaintiffs.

As the bill now stands, the rights of Morgan and Gooch, if they have any, cannot be prejudiced or affected by any decree which may be made in the suit; and they are at liberty to institute a suit of their own, in the proper forum, to enforce their rights. Of course, in deciding upon this application, I do not intend to dispose of any objection which may be properly taken, for want of proper parties, by any person whom the plaintiffs have made a defendant to the suit. The prayer of the petition is denied.

Case No. 4,063.

DRAKE et al. v. GOODRIDGE et al.

[6 Blatchf. 531.][1]

Circuit Court, S. D. New York. Aug. 11, 1869.

VENDOR AND VENDEE—DEFECTIVE TITLE—EXPENSES AND COUNSEL FEES.

Where real estate was sold at auction by a receiver, and the purchaser refused to complete the purchase, on account of an alleged defect of title, and the court made an order directing him to perfect the purchase, and the receiver then gave notice of the withdrawal of such order, and consented that it should be held void: *Held*, that the purchaser was entitled to be paid by the receiver his legal expenses, including reasonable counsel fees, incurred and paid in searching and examining the title, and in resisting the proceedings to have the purchase perfected.

[Cited in Blackburn v. Selma R. Co., 3 Fed. 700.]

In equity. A receiver, in this case, sold at auction, under an order of the court, certain real estate in the city of New York, which was purchased at the sum of $191,000, by parties who paid down ten per cent. of the purchase-money, ($19,100,) besides $60 for auctioneer's fees. The purchasers refused to perfect the purchase on account of an alleged defect of title, but were ordered by the court to perfect it. From this order an appeal to the supreme court was about to be taken, when the attorneys for the receiver gave notice of the withdrawal of the order compelling the purchasers to fulfil the purchase, and consented that such order should be held void and of no effect. On these facts, the purchasers now presented a petition, praying for a return of the purchase-money so paid, with interest, together with the legal expenses, including reasonable counsel fees, incurred and paid in the course of their proceedings in making the purchase.

Charles O'Conor, for petitioners.

Clarence A. Seward, for receiver.

NELSON, Circuit Justice. I perceive no valid objections to the claim, and refer the case to the clerk to ascertain, over and beyond the purchase-money paid, and the interest thereon, the amount of the legal expenses and reasonable counsel fees in searching and examining the title, and, also, in resisting the proceeding to have the purchase perfected.

DRAKE (LATHROP v.). See Case No. 8,109.

Case No. 4,064.

DRAKE v. The LIME ROCK.

[1 Cin. Law Bul. 37.]

District Court, N. D. Ohio. 1876.

MARITIME LIENS—WAIVER—TAKING NOTE.

Held: 1. That the taking of a note by the libellant from the owner of a vessel for a bal-

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

ance due for services rendered on the credit of the vessel, signed by the owner alone, at sixty days' time, does not operate as a release of the libellant's admiralty lien, unless it was the agreement and understanding between the parties at the time that such lien was to be released, and personal liability accepted instead thereof.

2. That on non-payment of the note, the libellant has a right to proceed to enforce his lien by proceedings in rem.

Before WELKER, District Judge.

DRAKE (MERRIAM v.). See Case No. 9,461.

DRAKE v. The ORIENTAL. See Case No. 10,570.

Case No. 4,065.

DRAKE et al. v. REDFIELD.

[4 Blatchf. 116.][1]

Circuit Court, S. D. New York. Nov. 16, 1857.

CUSTOMS DUTIES—ACTIONS TO RECOVER BACK—WHEN MAINTAINABLE.

1. Under the act of February 26, 1845 (5 Stat. 727), to entitle a plaintiff to recover back from a collector money paid as duties, he must establish three facts: 1. That the duties were not authorized by law. 2. That he, at or before the payment of the duties, made a protest in writing, setting forth distinctly and specifically the grounds of objection to the payment of the duties. 3. That the payment was made in order to enable him to obtain possession of the goods upon which the duties were imposed.

2. Where an excess of duties is paid under protest, after possession has been obtained by the importer of the goods on which the excess is paid, such excess cannot be recovered back from the collector.

This was an action [by James Drake] against [Heman J. Redfield] the collector of the port of New York, to recover back an excess of duties. At the trial, the plaintiffs submitted to a nonsuit, after the case had gone to the jury, and now moved to have the suit reinstated on the calendar. The goods upon which the duties in question were imposed, were imported into the port of New York about the middle of September, 1855. An appraisement was made of them by merchant appraisers, in the latter part of that month. It was claimed that that appraisement was illegal. That appraisement increased the value of the importation over the invoice value more than 10 per cent. The payment of the duties, according to the invoice value, was made to the collector on the 26th of September, without objection and without a protest. Upon such payment, a permit was given by the collector, and, in the latter part of September, the goods went out of the possession and control of the collector into the possession of the plaintiffs, who disposed of the same. On the 10th of November, the plaintiffs paid to the collector the excess of duty demanded, and accompanied such payment with a protest.

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

Almon W. Griswold, for plaintiffs.

John McKeon, Dist. Atty., for defendant.

INGERSOLL, District Judge. In the case of Elliott v. Swartwout, 10 Pet. [35 U. S.] 137, it was decided that a collector of the revenue was not personally liable, in an action to recover back an excess of duties paid to him as collector, and by him, in the regular and ordinary course of his duty, paid into the treasury of the United States, he, the collector, acting in good faith, no protest being made at the time of payment, or any notice given not to pay the money over, or any notice that the party paying intended to sue to recover back the amount paid, although the amount paid was an excess not authorized by law; but that, when a collector had received an excess of duties, and the party paying had, at the time of payment, given notice to him that the duties were charged too high, and that he paid the amount to get possession of his goods, and intended to sue to recover back the amount erroneously paid, accompanied with a notice to the collector not to pay over the amount into the treasury, the collector would, if the duties paid could not have been legally demanded, be liable to refund the same, although he might have paid the amount into the treasury of the United States; that, if the duties paid were illegally exacted, the collector was liable to pay them back, even without a protest, if, at the time the suit for their recovery was commenced, he had not paid them into the treasury; and that, if he had paid them into the treasury at the time the suit for their recovery was commenced, he was still liable to pay them back, if, at the time of payment, he was notified by the party paying that the duties were charged too high, that the payment was made to get possession of the goods, and that a suit was intended to be brought to recover back the amount so paid. This decision was made in January, 1836.

Congress, by an act passed on the 3d of March, 1839 (5 Stat. 348), provided (section 2) that all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, should be placed to the credit of the treasurer of the United States, and be kept and disposed of as all other money paid for duties was required by law, or by regulation of the treasury department, to be placed to the credit of said treasurer, and should not be held by the said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible, in any case where money was so paid; but that, whenever it should be shown, to the satisfaction of the secretary of the treasury, that, in any case of unascertained duties, or duties paid under protest,

more money had been paid to the collector or person acting as such, than the law required should have been paid, it should be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the over-payment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated.

Subsequently to the passage of this law, the case of Cary v. Curtis, 3 How. [44 U. S.] 236, came before the supreme court. This was in the winter of 1845. In that case, it was decided that, since the passage of the act of March 3, 1839 (section 2), which required collectors of the customs to place to the credit of the treasurer of the United States all money which they received for unascertained duties, or for duties paid under protest, an action for money had and received would not lie against the collector for the return of duties so received by him; and that the only relief to the party so paying was by application to the secretary of the treasury or to congress.

After this decision in Cary v. Curtis, congress, on the 26th of February, 1845 (5 Stat. 727), enacted, that nothing contained in the above recited act of March 3, 1839, should take away, or be construed to take away or impair, the right of any person or persons who had paid, or should thereafter pay, money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties were not authorized or payable in part or in whole by law, to maintain any action at law against such collector, to ascertain and try the legality and validity of such payment, provided that a protest was made in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.

As the law now is, therefore, it is not every payment of duties, under protest, upon an illegal exaction by the collector, that will entitle the party paying to recover the same back, in a suit at law against the collector. To entitle a plaintiff to recover back from a collector money paid as duties to the collector, he must establish three essential facts. These three essential facts are: 1. That the duties paid were not authorized or payable by law. 2. That he, at or before the payment of the duties, made a protest in writing, in which he set forth distinctly and specifically the grounds of objection to the payment of the duties. 3. That the payment was made in order to enable him to obtain possession of the goods upon which the duties were imposed. And, if he fails in establishing either of these three several facts, he must fail of a recovery. If he establishes two of them and fails to establish the third, he is not entitled to maintain his suit. Before he can recover, he must show an illegal demand, a payment to regain the possession of his property, an inability to regain the possession of the property without submitting to the payment, and a protest. Maxwell v. Griswold, 10 How. [51 U. S.] 242, 256. If illegal duties are demanded, and they are paid under protest, still, if the payment is not made to enable the party to obtain his goods, if, in the language of the supreme court in Maxwell v. Griswold, it is not made by the party "to regain possession of his property," which could not be regained "except by submitting to the payment," the amount paid cannot be recovered back, in a suit against the collector.

Upon the facts in this case, admitting, for the purpose of the argument, that the excess of duties demanded and received by the collector on the 10th of November, was an illegal exaction, and that the protest which accompanied the payment of such excess by the plaintiffs was regular, the question arises, whether such excess can be recovered back, in a suit against the collector. It is clear that it cannot be recovered back, unless the suit is authorized by the act of congress of February 26, 1845. That act authorizes a suit against the collector, only when the payment of the excess of duties demanded was made in order to obtain the possession of the goods imported. The payment made by the plaintiffs to the collector on the 10th of November, was not made to enable them to obtain the possession of the goods upon which the collector claimed the excess of duties to be due. They were not then in the possession of the collector. They had long before, as early as the month of September preceding, with the consent of the collector, gone into the possession of the plaintiffs, and had been disposed of. Upon the facts, then, in this case, either admitted, or as claimed by the plaintiffs, there can be no recovery against the collector. Therefore, the motion to have the case reinstated on the calendar, cannot be granted.

Case No. 4,066.

DRAKE v. ROLLO.

[3 Biss. 273; 2 Ins. Law J. 935; 4 N. B. R. 689; 4 Chi. Leg. News, 284; 18 Int. Rev. Rec. 159.] [1]

Circuit Court, N. D. Illinois. June, 1872.

SET-OFF—MUTUALITY—DEBT NOT DUE.

1. A claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company.

[Cited in Scammon v. Kimball, Case No. 12,-435.]

2. Such claims constitute mutual debts or credits within the meaning of the 20th section of the bankrupt act [of 1867 (14 Stat. 526)].

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Chi. Leg. News, 284, and 18 Int. Rev. Rec. 159, contain only partial reports.]

3. The rights of the parties are to be determined by the state of facts at the time of the loss.

4. Though such set-off gives the complainant a preference, it results from the business relations of the parties as they stood at the time of the loss.

5. If his indebtedness is not due and the company is bankrupt, a bill in equity will lie to establish the set-off.

This was a bill to establish a set-off, filed by John B. Drake against William E. Rollo, assignee of the Merchants' Insurance Company. On the 1st of June, 1869, the complainant borrowed of the insurance company the sum of $75,000, one-third of which was payable June 1st, 1872, and the remainder June 1st, 1874, to secure which he gave his notes and mortgage on certain real estate in Chicago. Subsequently he took several policies of insurance from the company, amounting to $17,000, upon which there was a total loss by the Chicago fire of October 9th, 1871. His claims under the policies were regularly proved up against the company on the 10th of November, 1871, and adjusted at their full amount. The company having been rendered totally insolvent by this fire, on the 17th day of November, of the same year, a petition in bankruptcy was filed against it in the district court for this district, under which it was, on the 18th day of December, adjudged a bankrupt, and Mr. Rollo, the former secretary of the company, was afterwards duly elected the assignee, and took possession of the estate. The complainant did not prove his debt either before the register or with the assignee. The complainant asked that his claims against the company for loss under his policies be set-off against his indebtedness to the company upon the note and mortgage.

Charles Hitchcock, for complainant.

A loss upon a policy of insurance, sustained before the filing of the petition in bankruptcy, may be set off against a claim for money loaned. Kostor v. Easen, 2 Moore & S. 112; Grove v. Dubois, 1 Term R. 112; Bize v. Dickason, Id. 285; In re Globe Ins. Co. 2 Edw. Ch. 626; Holbrook v. Receivers, etc., 6 Paige, 220-231; Osgood v. De Groot, 36 N. Y. 348; Jones v. Robinson, 26 Barb. 310; Bradley v. Angel, 3 N. Y. 475. The debt need not be due. Ex parte Prescot, 1 Atk. 230.

McCagg, Fuller & Culver, for defendant.

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

DRUMMOND, Circuit Judge. The only question in the case is, whether the set-off can be allowed; and we are of the opinion that the plaintiff is entitled to the set-off he claims. It depends upon the 20th section of the bankrupt law. That section is as follows: "That, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate: provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

It is true in this case the plaintiff obtained part of the means which the company possessed with which to meet its liabilities in case of loss, and by permitting a set-off, it enables the plaintiff to receive payment in full of his claim, while the general creditors of the bankrupt company are only partially paid, and thus he becomes a preferred creditor. But it is a preference growing out of the business relations of the parties as they stood at the time of the fire which rendered the company insolvent.

As soon as the loss happened there was the relation of debtor and creditor, and there were no special circumstances qualifying that relation. When the plaintiff complied with conditions of the policy after the loss, and furnished his proofs, as soon as the specified time had elapsed it became a subsisting debt against the company, and, at the same time, the plaintiff was the debtor of the company for money payable in the future. It was then a case of mutual debt and credit, within the meaning of the 20th section above cited. The parties here trusted each other, and when the plaintiff was called on to meet his indebtedness, he would have the right to retain the amount of the loss and pay the balance. The amount thus retained in one sense he does not owe, because the law seizes it in his hands if he so wills, and by its own force extinguishes the debt. And the money loaned not being due at the time the bill was filed, and constituting a mutual credit, it is competent for the plaintiff, the company being insolvent, to call on a court of equity to allow the set-off.

NOTE. Consult Hitchcock v. Rollo [Case No. 6,536], and Sawyer v. Hoag [Id. 12,400], these cases being three from a large number of cases argued and submitted together, being most of the so-called "set-off cases" arising from the great Chicago fire, of Oct. 9, 1871. The other questions involved, the liability on stock subscriptions, and the right of set-off as against money deposited with a complainant as treasurer, are decided in Scammon v. Kimball [Id. 12,435].

Case No. 4,067.

DRAKE et al. v. TAYLOR et al.

[6 Blatchf. 14.][1]

Circuit Court, S. D. New York. Dec. 31, 1867.

EQUITABLE LIENS—PARTNERSHIP—INDIVIDUAL AND FIRM LIABILITIES — ELECTION BY CREDITORS — BANKRUPTCY.

1. An equitable lien cannot be enforced against money, or its representative, unless the money, or a specific substitute for it, can be identified.

2. Where H. individually, and T. individually, signed an agreement, whereby they agreed to account to D. for the proceeds of certain bills of lading, which were simultaneously delivered by D. to H., for himself and T., they being partners, and for any insurance money which should be received as such proceeds, until certain drafts accepted by D., for account of such partnership, against the goods covered by the bills of lading, should be provided for, the bills of lading having been held by D. as security for such acceptances, and the goods having been insured by such partnership, in the name of H., and having been lost at sea: *Held*, that T. and H. were liable, the two jointly, and each of them individually, to fulfill such agreement; and, T. and H. having become insolvent, and assigned their partnership, as well as their individual estates, for the benefit of their creditors, that D. had a right, at his election, to come in, under such assignment, as a creditor of T. and of H. individually, and to exhaust his remedy thereunder, against the separate estate of each of them, and afterward come in on the surplus of the joint estate of the two, after the payment of the joint debts of the two.

In equity. This was a motion for a provisional injunction. The plaintiffs [James Drake and others] were merchants and bankers, residing in London, and composing the firm of Drake, Kleinwort & Cohen. In April, 1867, the plaintiffs, through Simon De Visser, their agent at New York, issued a letter of credit, at New York, to the defendant Henry W. Hubbell, authorizing drafts at four or six months after sight to be drawn on the plaintiffs at London, by a house in Hong Kong and two houses in Manilla, for account of Hubbell and the defendant Robert L. Taylor, (under the name of Taylor & Hubbell, of New York,) against shipments of produce to New York, to the amount of £30,000 sterling, the invoices and bills of lading of the shipments to be sent to De Visser, at New York. Hubbell, for himself and Taylor, agreed to provide funds to meet the drafts at maturity, and pledged to the plaintiffs all the property that should be purchased with the credit and its proceeds, and the policies of insurance on it, and the bills of lading of it, as collateral security for the payment of the drafts, with authority to the plaintiffs to take possession of the property, at discretion, for their security. Under this letter of credit, drafts were drawn on the plaintiffs, to the amount of £29,320. 14s. 9d. sterling, which they accepted. These drafts were drawn against a shipment of 5,699 bales of hemp, and 6,478 bags of sugar, by the British ship Hotspur, from Manilla to New York, and the bills of lading therefor were duly sent to De Visser. This cargo was insured by Taylor & Hubbell, in the name of Hubbell, in New York, under an open policy, for $200,000, which was about the amount of the drafts in the paper currency of the United States. The vessel and cargo were totally lost on the voyage. After the loss, Hubbell applied to De Visser for the bills of lading, and delivered to him a written paper, signed by Hubbell and by Taylor, each individually, in the words following: "Received from Mr. Simon De Visser, of New York, as agent for Messrs. Drake, Kleinwort & Cohen, London, the following merchandise, viz., A 1,899 bales, LL 580 bales, RR 180 bales, L 3,040 bales hemp, B 2,642 bags, C 3,836 bags sugar, as specified in the bill of lading per Hotspur, Capt. Bryant, from Manilla, which we jointly and severally agree to hold, on storage, as the property of the said Drake, Kleinwort & Cohen, with liberty to sell the same, and account to Simon De Visser, or to them, until the bills of exchange, drawn by Peele, Hubbell & Co., upon Drake, Kleinwort & Cohen, and accepted by them, for our account, £—— sterling, due in London, ——, 1867, for the purchase of the said goods, shall have been satisfactorily provided for. We agree to keep the property insured against fire, by policies satisfactory to Simon De Visser, and payable to his order, in case of loss, it being understood that he is not to be chargeable with any expenses incurred, the intention of this arrangement being to protect and preserve unimpaired the lien of Drake, Kleinwort & Cohen in said property. Signed in duplicate. New York, 1 August, 1867. Henry W. Hubbell. Robt. L. Taylor." The bill averred that, after the delivery of this paper to De Visser, Taylor and Hubbell, not having received from him the bills of lading, agreed with him that, if he would deliver to them the bills of lading, they would hold any insurance money they might collect on the cargo, as the proceeds of the cargo, (it having been previously stated by them to De Visser, that they could not collect the insurance money without having possession of the bills of lading,) and would, upon the receipt thereof, pay it over to De Visser, for the plaintiffs. This averment was denied by Hubbell, who swore that the bills of lading were received by the defendants from De Visser, without instructions of any kind as to the appropriation of the funds. De Visser delivered the bills of lading to Hubbell, and Hubbell, in whose name the insurance had been effected, collected and received, on behalf of himself and Taylor, the sum of $200,000, as the insurance money, and applied it without discrimination, to the joint adventures of Taylor and himself, and in paying drafts and notes, and other joint indebtedness, of Taylor and him-

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

self. The drafts drawn on the plaintiffs were not provided for by Taylor or Hubbell. On the 24th of October, 1867, Hubbell and Taylor, each of them, made a separate assignment to the defendants Gardner, Irvin and Sherman, conveying all his estate, real and personal, of every name and description, and wheresoever situated, then owned and possessed by him, or in which he was in any manner interested, "upon trust, to sell and dispose of the same, and apply the proceeds thereof towards the payment and discharge of all and every debt and obligation owing by the party of the first part, or for which he is in any manner liable, without preference, and, in the next place, after the payment and discharge of every debt and obligation of the party of the first part, in full, to render the surplus, if any, to the party of the first part, his representatives or assigns." After these two assignments had been made and accepted by the assignees, Hubbell and Taylor, on the 26th of October, 1867, executed an assignment to the defendants Gardner, Irvin and Sherman, which contained the following recital: "Whereas, the said parties of the first part have been engaged in mercantile operations and business for their joint account, and, in the course and for the purpose thereof, have contracted joint liabilities, now outstanding, which they are not able to satisfy at maturity, and have acquired property and assets belonging to them jointly." It then recited, that each of the assignors had assigned "his property," by the assignment of the 24th of October, 1867, to the same assignees, "in trust for equal distribution among creditors." It then declared that the assignors, "to the end of devoting their joint property to the payment of their debts, as herein provided," assigned to the assignees "all the property, estate, and effects whatsoever, belonging to the said parties of the first part jointly, upon trust, to convert the same into money, and to apply the net proceeds thereof, after first paying thereout the lawful expenses and charges attendant upon the execution of the trust, to or toward the payment of all the joint debts and liabilities of the said parties of the first part, in full, if there be sufficient funds therefor, and ratably, if not sufficient; and, should there be a surplus, after such provision for the joint debts and liabilities, to apply the share of such surplus property belonging to each of the said parties of the first part, upon a due accounting as between them, to the payment of the individual debts and liabilities of such party to whom such share so belongs, in full, if there be sufficient funds therefor, and ratably, if not sufficient, and, should there be a surplus, to render and pay the same to such party to whom the same belongs." The property assigned by all of the assignments was not equal, in value, to the amount of indebtedness.

The plaintiffs claimed to have an equitable lien on the insurance money, and upon that which was the substantial representative thereof, in the hands of the assignees, and to be entitled to have the amount of such insurance money paid to them by the assignees, out of the assigned property. The bill set forth, that the value of the assigned property, in the hands of the assignees, was $1,350,000; that, of that amount, only $50,000 came to their hands as the property of Hubbell; and that the entire residue thereof was conveyed to them by Taylor individually. The bill also averred, that it was the duty of the assignees to marshal separately the assets of each estate assigned to them, and to appropriate the assets of each separate estate, in the first place, to the payment of the debts due by the assignors, severally and individually, before any payments were made by the assignees upon the joint indebtedness of Taylor and Hubbell; that the assets assigned by Taylor were more than sufficient to pay all his individual obligations, and to leave a surplus over for the benefit of the joint creditors of Taylor and Hubbell; and that the plaintiffs were entitled to have the $200,000 insurance money treated by the assignees as the separate and individual debt of Taylor, and to have it paid out of the property assigned by Taylor individually, before any payment should be made by them on account of any of the joint indebtedness of Taylor and Hubbell. The bill also averred, that the assignees had declared it to be their intention to distribute the proceeds of the property conveyed to them by Taylor and Hubbell, pro rata, among all the creditors of Taylor and Hubbell, whether such creditors were creditors of Taylor and Hubbell jointly, or were separate creditors of Taylor and Hubbell individually; and that they had no right so to do. The assignees denied that they had made any such declaration, and averred that some of the liabilities were joint and some of them were several, and that Taylor's individual assets exceeded largely the aggregate of the liabilities contracted in his separate business, and that they believed it would be claimed by Taylor's creditors, that, in the liquidation of his affairs, his individual property was first applicable to the payment of his individual debts, before any of it could be appropriated to the payment of any partnership debt due from him and Hubbell.

The bill prayed, (1) for an injunction restraining the assignees from disposing of so much of the property assigned by Taylor and Hubbell as should leave in their hands insufficient to pay to the plaintiffs the $200,000, with interest and costs; (2) for the appointment of a receiver of so much of the assigned estate as should be sufficient to pay the $200,000; (3) for a decree that the plaintiffs had a prior lien in equity upon so much of the assigned estate, in the hands of the assignees, as would pay the $200,000; (4) if no such prior lien existed, then for a decree that the plaintiffs were creditors of Taylor indi-

vidually, for the $200,000, and, as such, were entitled to be paid out of the assigned estate in the hands of the assignees, which came to them under the individual assignment of Taylor, prior to any payment by the assignees of any debts for which Hubbell and Taylor were jointly and not severally liable, and that the assignees should so marshal the assets of the assigned estates, and so appropriate the payments therefrom; and that, until the final decree in the cause, the assignees might be restrained, by injunction, from disposing of so much of the property assigned to them by Taylor individually, as should leave in their hands a sum not sufficient to pay the $200,000 from the separate estate of Taylor, with interest and costs.

Clarence A. Seward, for plaintiffs.

William M. Evarts, Joseph H. Choate, and Livingston K. Miller, for defendants.

BLATCHFORD, District Judge. The claim of the plaintiffs to have an injunction restraining the assignees from disposing of sc much of the assigned property as shall leave in their hands insufficient to pay the plaintiffs the $200,000, is based on the proposition that the plaintiffs have an equitable lien on the insurance money, and on that which is the substantial representative thereof, in the hands of the assignees, and that they are entitled to a decree that they have a prior lien in equity upon so much of the assigned estate in the hands of the assignees, as will pay the $200,000. In regard to the $200,000 insurance money, the bill avers, that it was converted by Taylor and Hubbell to their own uses, and was placed in their general business, for the benefit of their estate, either joint or several, and was applied by them to and for the benefit of their individual interests. The bill does not pretend that the money, or any specific substitute for it, can be identified. The money was received by Hubbell alone, and Taylor swears that no part of it ever came into his hands or possession, or was added to his estate, and that the property assigned by him to the assignees did not embrace any portion of the proceeds of the policies of insurance. Hubbell swears that the money was applied to the joint adventures of himself and Taylor, and in paying drafts and notes, and other joint indebtedness of Taylor and Hubbell, and was used generally, with other means and funds of Taylor and Hubbell, in protecting and paying their debts and liabilities on joint account. Under these circumstances, the money having been mixed and confounded with other money, and neither it nor any substitute for it being shown to be capable of ascertainment or identification, or to be in existence anywhere, the right of the plaintiffs to follow the money, and to claim a lien upon any thing in respect of it, is gone. 2 Story, Eq. Jur. §§ 1258, 1259. It may very well be, that Hubbell, when he received the insurance money, received it subject to a trust, either to pay it over to De Visser, or to apply it toward the payment of the drafts accepted by the plaintiffs, and that it was wrongfully misapplied by Hubbell. But, unless its identity, or the identity of some property into which it has been wrongfully converted, can be traced, the rights which the plaintiffs may have had in regard to it, while it remained in the hands of Hubbell, or which they would have had in regard to any traceable property into which it was wrongfully converted, are gone. This being so, the plaintiffs are not entitled to a decree that they have a prior lien in equity upon so much of the assigned estate in the hands of the assignees, as will pay the $200,000, nor to an injunction restraining the assignees from disposing of so much of the property assigned by Taylor and Hubbell, as shall leave in their hands insufficient to pay to the plaintiffs the $200,000.

The instrument of the 1st of August, 1867, was a very strange paper to be given by Taylor and Hubbell, and accepted by De Visser, on the existing facts of the case. The merchandise had been lost at sea, to the knowledge of the parties, and yet the paper purports to be a receipt for the merchandise by Taylor and Hubbell, with an agreement by them to hold it on storage, as the property of the plaintiffs, with liberty to sell it, and account to the plaintiffs, or to De Visser, for its proceeds, until the drafts accepted by the plaintiffs, for the purchase of the merchandise, should have been satisfactorily provided for; and the paper declares the object of the arrangement to be, to protect and preserve unimpaired the lien of the plaintiffs in the property. The agreement is signed by Hubbell, individually, and by Taylor, individually, and purports, on its face, to be a joint and several agreement by them. This agreement, taken in connection with the accompanying delivery of the bills of lading by De Visser to Hubbell, for himself and Taylor, on the faith of the agreement, must, I think, be construed to be an agreement by Taylor and Hubbell, jointly and severally, to account to the plaintiffs for the proceeds of the bills of lading, and for the insurance money received as such proceeds, until the drafts accepted by the plaintiffs should be provided for. It created an obligation or duty in Taylor, individually, and in Hubbell, individually, as well as in Taylor and Hubbell, jointly, to fulfill such agreement, and, as a consequence of the diversion of the money, it makes each of them individually, as well as the two jointly, liable to respond, as debtors, to the plaintiffs, for the $200,000. The plaintiffs, coming into this court by this bill, have a right to say, under these circumstances, if they choose to do so, that they will come in first as creditors of Taylor and of Hubbell, individually, and exhaust their remedies, under the assignments, against the separate estate of each of them, and afterward come in upon the surplus, if there

should be any, of the joint estate of the two, after the payment of the joint debts of the two. The plaintiffs say, by their bill, that they desire to have the debt treated by the assignees as the separate and individual debt of Taylor, and claim that, therefore, they are entitled to have it paid out of the property assigned by Taylor, individually, before any payment shall be made by the assignees on account of any of the joint indebtedness of Taylor and Hubbell. I think this claim is well founded. It is doubtful whether any thing passed to the assignees by the joint assignment of the 26th of October. The two assignments of the 24th of October assigned to the assignees all the estate, real and personal, of each assignor, of every name and description, and wheresoever situated, then owned and possessed by him, or in which he was in any manner interested, and the trust in each of these assignments is, to pay every debt owing by the assignor, or for which he is in any manner liable, without preference. It would seem, therefore, that the assignees must hold all the assigned property under the first two assignments, and must administer it under the trusts therein declared. This being so, the plaintiffs, coming into court with a claim against Taylor, individually, as they do, are entitled to a decree that they are creditors of Taylor, individually, for the $200,000, and, as such, are entitled to be paid out of the property assigned by Taylor, individually, prior to any payment, by the assignees, of any debts for which Hubbell and Taylor are jointly, and Taylor is not severally, liable, and that the assignees so marshal the assets of the assigned estates, and so appropriate the payments therefrom. This being so, they are also entitled to an injunction restraining the assignees, until the final decree in the cause, from making any transfer or disposition of any of the property assigned to them by Taylor, individually, which can interfere with such right of the plaintiffs. It does not appear whether the property assigned by Taylor, individually, will be sufficient to pay in full all the debts of Taylor, individually. Therefore, so much of the injunction asked for as would compel the assignees to keep in their hands sufficient of the property assigned by Taylor, individually, to pay the plaintiffs their $200,000 in full, cannot be granted. But they are entitled to an injunction restraining the assignees from disposing of so much of the property assigned to them by Taylor, individually, as shall leave in their hands less than will be sufficient to pay the plaintiffs, out of the separate estate of Taylor, the proper pro rata proportion thereof properly applicable to their claim, upon the principle of paying out of the property assigned to them by the individual assignment executed by Taylor on the 24th of October, all the debts of Taylor, individually, prior to paying therefrom any debts for which Hubbell and Taylor are jointly, and Taylor is not severally, liable.

It may be, that the assignees cannot close their trusts without bringing into some proper court, by a direct proceeding, other creditors, whose interests may be affected by the manner in which those trusts are administered. But that is no reason why the plaintiffs, on making out, as they have done, a proper case for the special relief they ask for, should not have it. So far as any other creditors, who claim under the assignments, are concerned, they are represented, sufficiently for the purposes of this suit, by and through the assignees, against whom alone the plaintiffs ask any relief.

DRAPER (BAKER v.). See Case No. 766.

Case No. 4,068.

DRAPER v. BISSEL et al.

[3 McLean, 275.][1]

Circuit Court, D. Michigan. Oct. Term, 1843.

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM AFTER DISSOLUTION—RATIFICATION.

1. After the dissolution of the partnership, one partner has no power to bind the late firm by giving a note for a partnership debt. But where one partner is authorised by the advertisement, giving notice of the dissolution, that he is authorised to settle all accounts, for and against the firm, it is bound by his settlements, though he may not be authorised to give a new instrument for the payment of the amount. In England the rule is different.

2. Where notes are given by one partner, under the above circumstances, and subsequently the other partner promises to pay the notes, it is a ratification of the power.

Bates & Joy, for plaintiff.
Mr. Hand, for defendants.

OPINION OF THE COURT. This action is brought on three promissory notes, signed by the defendants, as partners, for the sum of twenty-six hundred dollars. They were made payable to Goddard, and by him were indorsed to the plaintiff. Bissel, one of the defendants, having taken the benefit of the bankrupt act, was sworn as a witness, and he stated that the notes were executed by him, the day after the partnership was dissolved, under a public notice of the dissolution, and that "he was authorised to settle all demands for and against the late firm."

It is a well established principle in the supreme court, and indeed generally, by the courts in this country, that after the dissolution of the partnership, neither partner can, by any note or bill, bind the firm for a partnership debt, though the rule seems to be different in England. And I am not prepared to say that the English decisions on this point are not better sustained on princi-

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

ple, than the American. Bispham v. Patterson [Case No. 1,441]. But in this case it is insisted that Comstock is bound, by the authority given to Bissel in the advertisement; and also by an express recognition of the validity of the notes. Bissel was authorised to settle all demands for and against the late firm, and it would seem that this was a clear authority to bind his late partner by a settlement, if it did not authorise him to give notes binding the late firm for the balances due by it. But, however this may be, we can entertain no doubt that Comstock ratified the power of Bissel by agreeing to pay the notes, &c.

Verdict for the plaintiff and judgment.

DRAPER (DAVIDSON v.). See Case No. 3,604.

DRAPER (DENNISTOUN v.). See Case No. 3,804.

DRAPER (EAGLE MANUF'G CO. v.). See Case No. 4,234.

Case No. 4,069.

DRAPER v. HUDSON.

[Holmes, 208;[1] 6 Fish. Pat. Cas. 327; 3 O. G. 354.]

Circuit Court, D. Massachusetts. March, 1873.

PATENTS—PRODUCT—INFRINGEMENT SUITS—EQUITY JURISDICTION—ACCOUNTING.

1. An old article, though made by a new machine, is not patentable as a new article of manufacture.

[Approved in Milligan & Higgins Glue Co. v. Upton, Case No. 9,607.]

2. The right to an account in patent suits in equity, is incident to, and depends upon, the right to injunction and discovery.

[Criticised in Gordon v. Anthony, Case No. 5,605; Atwood v. Portland Co., 10 Fed. 284. Cited in Kirk v. Du Bois, 28 Fed. 461; Hohorst v. Howard, 37 Fed. 97.]

Bill in equity for an injunction to restrain alleged infringement of letters-patent [No. 64,410] for a device for forming letters and figures on type-blocks, originally granted to the complainant [Daniel Draper] May 7, 1867, reissued May 18, 1869 [No. 3,442]; and for an account. The defendant [Thomas S. Hudson] died pending the suit, and his executor was made party defendant. No discovery was prayed against the executor, and there was no proof of infringement by him.

James B. Robb, for complainant.

Walter Curtis and Charles M. Reed, for defendant.

SHEPLEY, Circuit Judge. The first claim in complainant's patent, as reissued, is for the combination of the devices described in his patent for producing letters and figures upon the edges of type-blocks for hand-stamps and other purposes, substantially as set forth. The evidence fails to show any infringement of this claim after the date of the reissued patent. The second claim is for, as a new article of manufacture, a type-block with letters, figures, or characters produced thereon, in the manner substantially as described. The patent itself shows that a type-block such as described was not a new article of manufacture. It describes at least one mode by which a similar type-block had been made before, but which mode consumed considerable time and was very expensive. His type-block is not represented in the patent as a new article of manufacture in any other sense than as an old article made upon a new machine. This is not a new manufacture in the sense of the patent law. It could not have been the intention of the statute that pins, matches, nails, and other old articles in common use should be patented as new articles of manufacture simply because they were fabricated by the use of new and improved machinery, unless the product itself was a new and improved product, and as such possessing novelty of its own, independent of the new devices or processes or arts by which it was produced. The second claim of the patent cannot, therefore, be sustained.

The record in this case shows the death of the defendant. No injunction can issue against the defendant, and, as there is no proof of infringement by the executor, none can issue against him. No discovery is prayed for against the executor, and there is no presumption of any knowledge by him of his testator's acts. When the title to the principal relief, which is the proper subject of a suit in equity—the injunction and discovery—fails, the incident right to an account fails also. Price's Patent Candle Co. v. Bauwen's Patent Candle Co., 4 Kay & J. 727; Baily v. Taylor, 1 Russ. & M. 73; Smith v. London & S. W. R. Co., Kay, 415; Kerr, Inj. 435. Although the jurisdiction of the circuit court in equity in patent causes rests upon statute provisions, it is to be exercised according to the course and principles of courts of equity; and the supreme court of the United States having decided in Stevens v. Gladding, 17 How. [58 U. S.] 455, that "the right to an account of profits is incident to the right to an injunction in copy and patent right cases," it would seem to follow that in a case like the present, where the title to equitable relief fails, the general rule of equity applies, that the incidental relief fails also. Bill dismissed, without costs.

DRAPER (HUDSON v.). See Case No. 6,834.

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

Case No. 4,070.

DRAPER et al. v. MORAN, KELLY & CO.

[N. Y. Times, Nov. 2, 1860.]

Circuit Court, D. New York. Nov. 1, 1860.

PATENTS—NOVELTY—SKIRTS.

[The Doughty & Draper patent for a "woven skeleton skirt" shows patentable novelty, and is valid.]

[Action at law by James Draper and others against Moran, Kelly & Co. for infringement of patent.]

NELSON, Circuit Justice. This was a suit brought by the plaintiffs against the defendants for an alleged infringement of letters patent of Doughty & Draper, for what is known as "the woven skeleton skirt." The case was brought to trial yesterday, and a verdict of $2,000 found by the jury against the defendants. The defence set up by the defendants was that the invention was not new, and was not patentable, and that the patent was void. In all of which the defendants failed, and the patent was sustained by the court and jury.

Case No. 4,071.

DRAPER v. The O. C. CLARY et al.

[N. Y. Times, Jan. 20, 1863.]

District Court, S. D. New York. Jan., 1863.

ADMIRALTY — CONCURRENT ACTIONS IN REM AND IN PERSONAM.

[1. Concurrent actions in rem and in personam may be prosecuted in the same suit, under the supreme court rules.]

[2. There is no practical prejudice in incurring a duplicate responsibility, as the modification of the rules relieves the respondents from the double liability of stipulation or bail in the same cause.]

[3. The stipulation or bond in such a suit only covers the value of the property attached and surrendered.]

[This was a libel by David L. Draper against the brig O. C. Clary and Judson Philbrick and others. Respondents move to compel complainant to elect whether he will proceed in rem or in personam.]

Mr. Heath, for libelants.

Benedict, Burr & Benedict, for respondents.

BETTS, District Judge. The libel in this case was filed to recover for an alleged breach of charter party. Process was issued against the vessel, and also a foreign attachment against the respondents, her owners. The owner of the vessel appeared, and moved that the libelants be compelled to elect whether they would proceed against the defendants in personam or the vessel in rem.

HELD BY THE COURT: That the supreme court rules permit concurrent actions in rem and in personam in the same suit, and the elementary books also declare that to be the practice of the courts. That no practical prejudice can be experienced by respondents, incurring a duplicate responsibility in allowing both forms of action, as the modification of the rules by the supreme court relieves them from being subject to a double liability of stipulation or bail in the same cause. 10 How. [51 U. S.], Rules. The stipulation or bond only covers the value of the property seized and surrendered from arrest.

Motion denied.

Case No. 4,072.

DRAPER v. POTOMSKA MILLS CORP.

[3 Ban. & A. 214; 13 O. G. 276; Merw. Pat. Inv. 678.][1]

Circuit Court, D. Massachusetts. Feb. 12, 1878.

PATENTS—DATE OF INVENTION—REDUCTION TO PRACTICE.

1. An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture or composition of matter, is not patentable.

2. Illustrated drawings of conceived ideas do not constitute an invention, and unless they are followed up by a reasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another.

[Cited in Odell v. Stout, 22 Fed. 165; Christie v. Seybold, 55 Fed. 78. Quoted in Hubel v. Dick, 28 Fed. 140.]

3. A patentee whose patent is assailed upon the ground of want of novelty, may show by sketches and drawings the date of his inceptive invention, and, if he has exercised reasonable diligence in perfecting and adapting it, and in applying for his patent, its protection will be carried back to such date.

[Cited in Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 452.]

[Bill in equity by George Draper against the Potomska Mills Corporation for the infringement of reissued letters patent No. 6,016, granted to G. Draper, August 18, 1874, upon original patent No. 127,159, granted May 28, 1872.]

Chauncey Smith and A. K. P. Joy, for complainant.

Benjamin F. Thurston and D. Hall Rice, for defendants.

SHEPLEY, Circuit Judge. This case has been argued at great length and with great ability, upon a record of over eleven hundred pages of testimony. I will state as briefly as possible the conclusions to which the court has arrived, after a careful consideration of the evidence, and the elaborate arguments of counsel.

First, that the invention by Draper of a combined spindle and bobbin, the spindle

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 678, contains only a partial report.]

consisting of a shaft having a sleeve attached to it which extends down over the tubular and elevated bolster, and below the bolster, to carry the whirl between the bolster and the step, and fitted for a bobbin to extend below the top of the bolster, the bobbin having a bearing above the bolster, and another below the bolster upon the sleeve, as described in his patent, reissue No. 6,016, dated August 18th, 1874, was novel, useful and patentable.

Second, that the said Draper is entitled, upon the evidence in this record, to date his invention as having been substantially made by him as early as May 13th, 1871, and fully perfected and embodied in an operative spindle and bobbin prior to January 19th, 1872.

An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and indeed cannot be, patentable under our patent acts, since it is impossible, under such circumstances, to comply with the fundamental requisites of those acts. Reed v. Cutter [Case No. 11,645]. Illustrated drawings of conceived ideas do not constitute an invention, and unless they are followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another. But a patentee whose patent is assailed upon the ground of want of novelty, may show by sketches and drawings the date of his inceptive invention, and, if he has exercised reasonable diligence in perfecting and adapting it, and in applying for his patent, its protection will be carried back to such date. Reeves v. Keystone Bridge Co. [Id. 11,660]. The drawings made by Draper, and exhibited to Sawyer, May 13th, 1871, exhibit a matured and perfected invention in the mind of the inventor, requiring only an embodiment in an operative spindle and bobbin to entitle him to a patent. As there was no unreasonable delay or want of diligence in perfecting and adapting the invention and applying for a patent, I see no reason, upon the evidence in this record, why the protection of his patent should not be carried back to that date. I therefore find, third; that Draper was the original and first inventor of what is claimed by him in the reissued patent aforesaid, and was not anticipated by any of the persons whose prior knowledge and use are alleged as matter of defence in the answer of respondents.

Upon a comparison of the reissued with the original patent, no new invention is found to be described or claimed in the reissue, or anything which is not clearly indicated and claimed as invention in the original. The "new matter" relied upon by defendants proves to be only new words or phrases more aptly describing the old invention. The same construction and combination of spindle and bobbin are claimed in the reissue as in the original. The fourth conclusion, therefore, is that the reissued patent is valid.

Fifth, the respondents, by constructing and combining their spindle and bobbin, as proved, so that the spindle, bolster and sleeve will permit a quill-bobbin of ordinary size to come down and so encompass the same as to take one bearing upon the sleeve below the top of the bolster, and another upon the spindle above the sleeve or bolster, the sleeve carrying the whirl between the bolster and the step, have infringed the first, third, fourth and sixth claims of the reissued patent.

Decree for injunction and account as prayed for in complainant's bill.

DRAPER (PROUTY v.). See Cases Nos. 11,446 and 11,447.

DRAPER (SMITH v.). See Case No. 13,037.

Case No. 4,073.

DRAPER et al. v. WATTLES.

[3 Ban. & A. 618;[1] 16 O. G. 629.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—PRIOR USE AND SALE—REISSUES.

1. Where a reissue contains nothing that might not have been claimed in the original patent; it is not for a different invention.

2. The mere deposit of a model in the patent office will not warrant an inference that the model was accompanied by an application for a patent.

[Cited in Henry v. Francestown Soap-Stone Co., 2 Fed. 81.]

3. Section 7 of the patent act of March 3, 1839 [5 Stat. 353], as amendatory of that of July 4, 1836 [5 Stat. 117], construed to imply that the purchase, sale, or prior use, etc., of an invention, in order to defeat a patent, shall have been with the knowledge and consent of the inventor.

[Cited in Campbell v. Mayor, etc., of New York, 9 Fed. 504; The Driven-Well Cases, 16 Fed. 411.]

4. The prior sale, purchase, or use of the thing patented, necessary to defeat the patent, discussed.

[Cited in Anderson v. Hovey, 124 U. S. 712, 8 Sup. Ct. Rep. 682.]

5. Whether it is enough to prove that the inventor has sold an earlier and less perfect article, where the thing sold, although within the claim of the patent, is not the whole of the patented invention, quaere.

[Cited in Henry v. Francestown Soap-Stone Co., 2 Fed. 79. Applied in Campbell v. Mayor, etc., of New York, 47 Fed. 521.]

Chauncey Smith and Thomas L. Livermore, for complainants.

Thomas L. Wakefield and D. Hall Rice, for defendant.

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

LOWELL, District Judge. The complainants [George Draper and others] allege that the respondent [Joseph W. Wattles] infringes three patents. The first and principal patent is reissue No. 6,386, granted in 1875, the original being No. 89,025, dated in 1869, for an improvement by William T. Carroll in spinning-frames, described as an improved ring for such frames, composed of a thin cylindrical body or annulus, of substantially uniform thickness, and having races projecting from each end of the annulus.

The specification describes and illustrates the mode of constructing and using this ring. It declares that "this double ring"—that is to say a ring with a race at each end of the annulus—"can be made cheaper than can the ordinary spinning-ring with a shank to fit the ring-rail, and the weight of the double ring, as constructed, is but little in comparison with the weight of the ordinary ring, and this saving of weight, and consequently of metal, is of importance, because it is a saving in the cost of manufacture, and the weight of the ring-rail is decreased materially." The specification also contains the following: "The cylindrical body c is preferably of a length just sufficient to allow the traveller, when running on race a or b, to pass freely; and this improved ring is very light and compact."

The first and second claims are: "1. A spinning-ring composed of an annulus and two connected races, substantially as described." "2. The combination of a ring having two races with a ring-rail, and with holding devices carried by the rail, to operate in connection with the lower or unused race, and confine the ring to the rail and about the spindle-receiving passage through the rail, substantially as and for the purpose described."

For the purposes of this case infringement is admitted, or rather it is admitted that the defendant makes spinning-rings and holding devices, the former of which is exactly the ring drawn and described in the patent, and the latter are testified to be well known equivalents of the plaintiffs' holding devices.

The first objection, that the reissue is fraudulent and void upon its face, when considered with the state of the art, is not sustained, as we intimated at the argument, because the description is all in the original patent, and the reissue claims nothing which might not have been claimed in that patent.

The second and most formidable objection is, that the patentee, Carroll, invented the ring with two races in 1857, and permitted one specimen to be used for a long time at or about that year; and then he sold two sets of such rings in 1866, about six months more than two years before he applied for his patent, which they say is June, 1868.

The evidence tends to show that the inventor did make two rings like Exhibit D more than ten years before June, 1868, and that one of them was probably used as alleged; but whether it was used with the inventor's consent is very doubtful, and, at this distance of time, difficult to prove or disprove. He denies that he either consented to or knew of the use. It seems to us to be proved by a preponderance of the evidence that Carroll sold two sets of double-raced rings early in 1866, and that they were like Exhibits D and F, one or both. He swears that he made the sale in order to discover how the rings would wear in use. The complainants argue that they can carry back the application by evidence that the patentee employed a solicitor, who filed a model in the patent office at a certain time; but, in the absence of evidence of anything beyond this, we cannot infer that the model was accompanied by an application. That the use was experimental is sworn to by the inventor, and there is ground for saying that an invention of this sort can be best tested by actual use in a mill; therefore, if the inventor does not happen to own a mill, he must make use of that of another person.

In the recent case of City of Elizabeth v. Nicholson Pavement Co., not yet reported [97 U. S. 126], the supreme court held that if the use was fairly and honestly experimental, and publicity was essential to the experiment, it would not vitiate the use; and it was said in that case that the inventor might properly enough take payment for the use. Still it is somewhat difficult for a court to qualify, by a supposed intention, not declared at the time, the act of an inventor who sells the patented article on two occasions, apparently in the ordinary course of trade.

The next point taken by the complainants we consider to be sound. The ring which Carroll sold was not the completed and most perfect form of his invention. We think it very doubtful whether in that form the ring would have gone into general use, and that the last and patented article would not be a patentable improvement upon it. The law, at the date of the patent, made it essential to its validity that the improvement should not have been in public use or on sale for more than two years, with the consent and allowance of the inventor. Stat. July 4, 1836, §§ 6, 7, 15 (5 Stat. 119, 123); and Stat. March 3, 1839, §§ 6, 7 (5 Stat. 354). This last section provides that every person or corporation who has, or shall have, purchased or constructed any newly invented machine, etc., prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, etc., so made or purchased, without liability therefor to the inventor or any other person interested in the invention; and that no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or

that such purchase, sale, or prior use has been for more than two years prior to such application for a patent. There is nothing in this section requiring that the sale or use shall be with the consent or allowance of the inventor; but, as that qualification is found in all three of the sections of the act of 1836, to which this is an amendment, and is reasonable, it has always been understood to apply to the sale or use mentioned in this section. The sale or use, to defeat the patent, must have been of the thing patented; and we are of opinion that, in order to defeat the patent, it is not enough to prove that the inventor has sold an earlier and less perfect article—that is, less perfect in the sense of the patent law, even if the thing sold would be within the claim of the patent. In other words, the test is not, necessarily, whether the article sold would infringe the invention by embodying a part of it, but whether it is the invention—that is, embodies the whole of it. The law does not intend to say that a patentee dedicates to the public whatever he sells more than two years before he applies for a patent, but that he dedicates his invention if he sells it for that period.

Of course a mere formal or colorable change to escape the consequences of his own acts would not protect him; nor could he enjoin the use of any specific thing which he had sold; but we are unprepared to say that he might not prevent the general public from using the same sort of thing, if it is included in his new and completed machine or other invention. In this case it is not necessary to decide the full scope of this suggested argument, because the defendant makes the ring which is patented, and which we consider patentable, notwithstanding Exhibit D, if that be considered as dedicated to the public.

The next patent is that of Knight, No. 108,-270, for the holder or supporter of a spinning-ring, with its peripheral cuts arranged obliquely to the circumference of the supporter, and relatively to the motion of the traveller, as described. A good deal of evidence has been taken touching the utility and mode of operation of this invention, and on the question of infringement. The defendant makes holders with cuts at a different angle from those shown in the patent and drawings. They, however, come within the description and claim, and we think they were intended to operate, and that they do operate, to produce a like result, and do infringe.

The third patent is that to Marsh, No. 118,-622, for the cut or kerfed and rabbeted ring-supporter, where the rabbet is cut under or dovetailed, as described. The principal part of the evidence as to this patent has been concerning infringement. With magnifying glasses and calipers, and other proper contrivances, some witnesses find that the defendant's supporters are cut under, and others that they are not. We think the evidence of infringement brings the case to too fine a point, and within the range of those minute things which defy the judgment of a court.

Interlocutory decree for the complainants on two of the patents, reissue No. 6,386, and No. 108,270.

DRASHA (STEWART v.). See Case No. 13,-424.

DRAY v. The RAJAH. See Case No. 11,538.

Case No. 4,074.

DRAYTON v. UNITED STATES.

[1 Hayw. & H. 369.][1]

Circuit Court, District of Columbia. Feb. 19, 1849.

LARCENY OF SLAVES—TRIAL—PEREMPTORY CHALLENGES—PRESUMPTIONS OF SLAVERY.

1. Inducing slaves to go aboard a vessel under a promise to be transported into a free state, *held* not to be larceny under an indictment charging defendant with stealing, taking, and carrying away slaves under the act of Maryland, 1737, c. 2, § 4.

2. *Held*, also, that the right to peremptory challenge did not exist, because the offence, as alleged in the indictment under the Maryland act, was not a capital offence, that the act of congress known as the penitentiary act made the said offence punishable by imprisonment.

3. That color is a prima facie evidence of slavery, but it is a presumption that could be overcome by proof to the contrary.

At law. Writ of error from the criminal court. Indictment for stealing, taking and carrying away two negro slaves of the goods and chattels, property and slaves of one Andrew Hoover, under act of assembly of Maryland, 1737, c. 2, § 4.

James W. Carlisle, Horace Mann, R. Hildreth and D. A. Hall, for prisoner.

P. B. Key and Jos. H. Bradley, for the United States.

Criminal Court, July 27th, 1848. Before the jury was sworn Mr. Mann moved that, as the government had framed two sets of indictments, the court should direct the attorney for the United States to elect which set of cases he should try, and that after so doing an entry of acquittal should be made on the other cases. After argument by the district attorney, the court decided that it could not direct the district attorney to elect, although personally he was opposed to the practice, which had been unbroken in this court. Lewis Winter was called by the district attorney to prove a proposition made by the prisoner to a third party. Mr. Carlisle objected to the evidence. Mr. Key urged its admissibility on the ground of showing the intention of the prisoner. The court ruled the evidence to be inadmissible. At the close of the case for the United States, Mr. Mann opened the case for the defence. In the midst of the argument he read a part of a

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

speech from Senator Foote, of Mississippi, in which the senator had spoken of the French revolution as holding out to man a bright promise of the universal establishment of civil and religious liberty. Mr. Mann had scarcely finished the extract when the judge remarked, "A certain limit is to be allowed counsel in this case, but I cannot permit a harangue against slavery." Mr. Mann explained the course and point of his argument. The judge stated the argument was legitimate, but he objected to the inflammatory matter introduced into the statement of it. After seeing the paper in which the remarks of Mr. Foote was printed, Mr. Mann was allowed to proceed.

After closing the case for the defence, Mr. Mann submitted, among his propositions of law, the following: 1st. Servitude of the slave must be proved, not by the mere statement of the master, but by such circumstances as will bring it within the constitution of the United States, the several acts of Maryland and acts of congress establishing slavery in the District of Columbia, citing act of Maryland, 1715, c. 44, § 22 [1 Laws Md. 115]; 1783, c. 27; 1794, c. 66; 1796, c. 67, § 1; 1798, c. 76; Lee v. Lee, 8 Pet. [33 U. S.] 44; Rhodes v. Bell, 2 How. [43 U. S.] 397. 2d. That to make out a larceny it must be proved that a trespass has been committed within the body of the county by taking the slave from the master's possession. 3d. That the going of the slaves on board the prisoner's vessel in this county, if proved, is no proof that such going on board was with the knowledge and counsel of the prisoner. 4th. That the going on board the prisoner's vessel, if proved, &c., is no proof of larceny unless such going on board was by the procurement of the prisoner. 5th. That the going of the slaves on board of the prisoner's vessel within the county, even if such going on board was with the knowledge and consent and by the procurement of the prisoner, is not such a taking sufficient to charge the prisoner with stealing unless it be also proved that the prisoner knew them to be slaves, citing Birney v. State, 8 Ohio, 230; 1 Russ. Crimes, 435; King v. Burnel, 2 Leach, 588; Rex v. Burridge, 3 P. Wms. 439. 6th. That color is not sufficient evidence of slavery to raise a presumption that the prisoner knew them to be slaves. Citing State v. Dillahunt, 3 Har. [Del.] 551; Scott v. Williams, 1 Dev. 376. 7th. If the prisoner found the slaves on board of his vessel, without any previous act or knowledge on his part, even a subsequent conversion to the prisoner's use would not support a charge of stealing, for the want of a criminal taking. Citing State v. Hawkins, 8 Port. [Ala.] 461; Rex v. Van Muyen, Russ. & R. 118; State v. Hall, Tayl. (N. C.) 126. 8th. That the statute of 1796 virtually repealed the act of 1737 under which these indictments are framed.

Mr. Key replied, relying upon the evidence and upon the decision in this court in the case of the United States v. Lee [Case No. 15,587].

Upon the 1st point the court said: "The ownership of a slave on a trial for stealing him must be proved precisely as the ownership of any other piece of property. It is not necessary to do more than to establish generally that he is owned by the alleged owner, and is held and possessed as such by said owner." The 2d, 3d and 4th were granted by the court. Upon the 5th the court said: "It is not necessary that the prisoner should have positively known the slaves alleged to be stolen to be such. If it were, there never could be a conviction, for such knowledge, if it existed, could not be proved, much less that he should have known them to be Andrew Hoover's slaves. It is sufficient if the jury find from the evidence that they did not belong to the prisoner, and that he had reason to believe that they belonged to some one else, and that he was violating the rights of property of a citizen or citizens of this District, and in point of fact did so violate them." Upon the 6th: Color is sufficient evidence of slavery, but can be easily repelled by proof. The 7th is granted by the court. Upon the 8th, the court said: "I do not think that, to constitute stealing, the original taking away must be with the intent to convert the slave to the prisoner's use, and to derive a profit, advantage and benefit to himself from such use. The stealing must be felonious. The definition of larceny is, 'the felonious taking and carrying away the goods of another.' This definition must be used in construing the act of Maryland, 1737, c. 2. Statutes must be construed by and out of themselves, but when they use terms known to the common law, you must resort to the common law to see what the terms mean. Felonious taking, is the taking animo furandi, or, as the civil law expresses it, 'lucri causa.' This desire of gain, the court is of opinion, need not be to convert the article stolen to his, the taker's, own use, nor to obtain for the thief the value in money of the thing stolen. If the act is felonious and is prompted by the desire to obtain for himself, or another even, other than the owner, a money gain, or any other inducing advantage or dishonest gain, it is, in my judgment, a larceny. The act of Maryland of 1737, so far as it relates to slaves, is not repealed by the act of 1796, c. 87, § 19."

The counsel for the defence took exceptions to some of the rulings of the court.

After the conclusion of the argument for the government, Mr. Carlisle argued that the facts in the evidence would not justify a conviction for larceny under the act of Maryland, 1737, but of transportation of slaves under the act of Maryland of 1796.

After the case was argued by the district attorney, it was given to the jury, who brought in a verdict of guilty.

August 9th, 1848. The following motion was made by Horace Mann and Carlisle: "Daniel Drayton, the defendant on forty-one indictments for larceny, found at the present term of this court, and now pending, which said indictments are now on the docket, Nos. from 90 to 130 inclusive, and being also defendant in 74 indictments for misdemeanors found at the same term and now pending, Nos. from 216 to 289 inclusive, having been tried and convicted on indictments Nos. 118 and 119 for larceny, and having taken exceptions to certain matters of law upon the said trial, and having been brought out of jail, where he is a close prisoner in default of bail to answer said indictments, and now being in court attended by his counsel, the district attorney proposes to pass by the remaining indictments against him, and proceed to the trial of another prisoner; and the said Daniel Drayton thereupon offers himself ready for trial upon each and every of the said 113 indictments, and claims that unless there be sufficient legal cause for postponement or continuance, the said trials be proceeded in; and thereupon the district attorney states and gives notice to the court and to the prisoner, that he claims the right to continue, and does direct the continuance of the said 113 indictments, one and all, to the December term of this court, on the grounds that the prisoner has reserved exceptions to the decision of the criminal court, on several maters of law arising on the said trials of the indictments Nos. 118 and 119; and thereupon the prisoner resists the said continuance, and claims and demands, as a constitutional right, that he be tried on the said remaining indictments at the present term, there being no legal and sufficient cause for the continuance suggested by the district attorney for the United States. And he gives the court to understand that the amount of bail demanded of him in the said remaining cases is about $100,000; so that, if the exceptions taken by him in the cases tried should be allowed by the circuit court at its October term, so that he could be bailed, then the continuation of the remaining 113 cases would unjustly and arbitrarily confine him a close prisoner in jail until the December term of the court, the amount of bail being wholly beyond his ability; and further gives the court to understand that each and every of the said 113 cases opens to him a distinct defence, and that he may altogether lose the benefit of witnesses necessary to his defence therein if the said cases be continued." Refused by the court.

The plaintiff in error was at the June term of the criminal court convicted of stealing two slaves, the property of Andrew Hoover. The act under which he was convicted was that of Maryland, 1737, c. 2, § 4.

Upon the trial of the case, Drayton claimed the right to challenge peremptory twenty jurors. During the trial he prayed the court to give ten certain instructions to the jury, the instructions being to the effect that the offence was not larceny. These were refused by Judge Crawford, and after the trial he moved for an arrest of judgment. This motion Judge Crawford overruled. To all these decisions the defendant excepted, and the judge signed and sealed the following bills of exceptions:

"1st. After the prisoner pleaded not guilty, and a jury being called to try him on the second indictment and plea, and William H. Perkins on the panel having been called to the book, the prisoner challenged him peremptorily. Which peremptory challenge the court overruled and refused to allow the prisoner the right of peremptory challenge, and allowed the said juror to be sworn, no cause of challenging by him having been shown, or why the said person should not be sworn.

"2d. The prisoner by his counsel prayed the court to instruct the jury as follows: 'That in order to convict the prisoner on this indictment the servitude of the persons alleged to have been stolen must be proved, not by the mere claim to hold them as slaves or possession of them as such, but by the evidence of such facts as will bring them within such clauses of the constitution of the United States and such enactments of congress, if any, as authorize slavery in the District of Columbia;' which instruction the court refused to give, but instructed the jury as follows: 'The ownership of a slave on a trial for stealing is to be proved precisely as the ownership of any other piece of property. It is not necessary to do more than to establish generally that he is owned by the alleged owner, and is possessed and held as his slave by said owner.'

"3d. The prisoner prayed the court to instruct the jury as follows: 'That the going of the slaves in this indictment mentioned on board the prisoner's vessel within this county, when, if such going on board was with the knowledge and consent and by the procurement of the prisoner, is not, however, a taking sufficient to charge the prisoner with stealing unless it be also proved that the prisoner knew them to be slaves.' Which instruction the court refused to give, but instructed the jury as follows: 'It is not necessary that the person should have positively known the slave alleged to have been stolen to have been such. If it were, there could never be a conviction, for such knowledge, if it existed, never could be proved, much less that he should have known them to be Andrew Hoover's slaves. It is sufficient if the jury find from the evidence that they did not belong to himself, and that he had reason to believe they belonged to some one else, and that he was violating the rights and property of a citizen of this District, and in point of fact did so violate them.'

"4th. The prisoner prayed the court to instruct the jury as follows: 'That color is no sufficient proof of the slavery of the persons

charged in the indictment to be slaves.' Which instruction the court refused to give, but in lieu thereof instructed the jury as follows: 'Color is prima facie evidence of slavery in this District; but the presumption may be and is easily repelled by proof that the negro passes as free, which being made the parties would be put to direct evidence.'

"5th. The prisoner prayed the court to instruct the jury as follows: 'That to convict the prisoner of stealing as charged the jury must find from the evidence aforesaid that he took the slaves as charged, and that the original taking was with intent to convert the slaves to his (the prisoner's) own use, and to derive a profit, advantage or benefit to himself from such conversion.' Which instruction the court refused to give, and instructed the jury in lieu thereof as follows: 'That to convict the prisoner as charged the jury must find from the evidence that he took the slaves as charged; but I do not think that to constitute stealing the original taking away must be with intent to convert the slave to the prisoner's use, and to derive a profit, advantage and benefit to himself from such use. The stealing must be felonious taking and carrying away the goods of another. This definition must be used in construing the act of Maryland of 1737, c. 2, § 4. Statutes must be construed by and out of themselves, but when they use terms known to the common law you must resort to the common law to see what those terms mean. Felonious taking is taking away animo furandi—as the civil law expresses it, "lucri causa." This desire of gain, the court is of opinion, need not be to convert the article stolen to his, the taker's, own use, nor to obtain for the thing the value in money of the thing stolen. If the act is felonious and is prompted by a desire to obtain for himself or another even, other than the owner, or money gain, or any other inducing advantage a dishonest gain, it is in my judgment a larceny.'

"6th. And thereupon the prisoner prayed the court to instruct the jury as follows: 'That the transportation of a slave, with a view to assist him to escape out of slavery, is not such a conversion as will constitute stealing in this District,' which instruction the court refused to give, but in lieu thereof instructed the jury as follows: 'The mere transportation of a slave with the view to assist him to escape out of slavery is not stealing in this District. But if such transportation be preceded, in the judgment of the jury, by a seduction of the slave from his duty, and a corrupt influence on his mind, which induced him to comply with the desire of his seducer that he should leave his master and go with him, it would, thus accompanied, if the taking were felonious, be a larceny.'

"7th. The prisoner then prayed the court to instruct the jury as follows: 'That to entice or persuade a slave to run away from his master, even if such slave shall actually run away, is not stealing in this District, but is a separate and distinct offence; and if the jury find that to be the offence of the prisoner upon the evidence aforesaid, they must acquit him upon this indictment;' which instruction the court refused to give, but in lieu thereof instructed the jury as follows: 'Merely to entice a slave to run away without further action on the part of the enticer is not larceny. Although the slave should run away, if the jury so believe from the evidence, the defendant ought to be acquitted; that is barely enticing without any felonious carrying away, and that is, the court thinks, what the law of 1751 was intended to guard against.'

"8th. And thereupon the prisoner prays the court to instruct the jury as follows: 'That to assist, by advice, donation, loan or otherwise, the transportation of a slave from this District, or by any other unlawful means depriving a master of the services of his slave, is not stealing, but a distinct and separate offence, and the prisoner cannot be convicted thereof on this indictment.' Which instruction the court refused to give, but in lieu thereof instructed the jury as follows: 'The remarks made in answer to the preceding prayer apply to this one. Merely to transport a slave, or to assist in transporting a runaway slave, is not larceny if it stands alone; but if it be preceded by a corruption of the slave's mind, by artful means decoying him away, and then feloniously taking him out of the possession of his master and transporting him, it is larceny.'

"9th. The prisoner thereupon prays the court to instruct the jury as follows: 'That the act of 1737, c. 2, so far as it relates to the stealing of slaves, is superseded and repealed by the act of 1796, c. 67, § 19.' Which instruction the court refused to give, but in lieu thereof instructed the jury as follows: 'The court does not think the act of 1737, c. 2, § 4, is repealed as to slaves by the act of 1796, c. 67, § 19.'

"10th. And thereupon the prisoner prayed the court to instruct the jury as follows: 'That in order to convict the prisoner on this indictment, it is not sufficient that the jury find from the evidence aforesaid that the prisoner did in fact take and carry away the slaves mentioned in the indictment from and out of the possession of the owner and against his consent, but they must further find from the evidence aforesaid that the taking was with a felonious intention; otherwise they must acquit him of the alleged larceny.' Which instruction the court refused to give as prayed, but gave the same with the following qualification: 'This prayer is granted with the addition that a felonious taking is a taking animo furandi, or as the civil law terms it, "lucri causa," with the desire of making dishonest gain, as before explained in answer to prayer 8.'

"11th. And thereupon the prisoner prayed the court to instruct the jury as follows: 'That if the jury find from the evidence aforesaid that the two slaves mentioned in the indictment were runaways and that the prisoner, having the control of the schooner Pearl, by an agreement with her master, did receive the said runaways on board of her, with intent to transport them beyond the limits of the county of Washington, in the end that they should escape from their owners and go to a state where slavery does not exist, and did in fact so transport them with the intent aforesaid beyond the limits of the said county, then the offence of the prisoner is that which is provided for in the act of assembly of Maryland, 1796, c. 67, § 19, and is not larceny, and he cannot be convicted thereof upon this indictment.' Which instruction as prayed the court refused to grant, but gave the same with the following qualification: 'This is granted with the addition that if the jury believe from the evidence that the prisoner, before receiving the slaves on board, imbued their minds with discontent, persuaded them to go with him, and by corrupt influence and inducements caused them to come to his ship and feloniously took and carried them down the river, he would be guilty of larceny.' To which refusal to instruct as prayed, and to the qualification added by the court in giving the same, the prisoner excepts and prays, &c. Which is done (with the other bills of exceptions) this 2d Aug., 1848.

"T. Hartley Crawford."

Mr. Hildreth opened the case by stating they would confine their arguments to seven points:

1st. That the act of Maryland of 1737 was repealed in fact by the act of 1790. This latter act applies only to aiding and abetting slaves to escape from slavery; that this act by implication repealed the act of 1737, and cited in support of it Nichols v. Squire, 5 Pick. 168; Com. v. Kimball, 21 Pick. 373; Com. v. Cromley, 1 Ashm. 179; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 95.

2d. The act of 1737 makes the offence punishable with death. The act of congress commonly known as the Penitentiary Act makes all offences punishable with death (except treason, murder and piracy) punishable with imprisonment in the penitentiary. Judge Crawford decided that the reason why a right to challenge peremptory was allowed by the act of 1737 was that the offence by that act was capital; and that as the act of congress took away the reason of the right, therefore the right was also taken away, that this decision was unfounded in the strict law of construction, and therefore it should be overruled.

3d. That color is not a presumption of slavery. Judge Crawford refused to give this instruction, but said color is prima facie evidence of slavery in this District, but it is a presumption that can be easily repelled by proof that the negro passes as a free man, which being made, the parties alleging or denying, would be put to positive or direct proof as in other questions. This was not law, and cited 7 La. (2d series) 619; Adelle v. Beauregard, 1 Mart. [La.] 183; 1 Dev. 376; 3 Har. [Del.] 551.

4th. That in order to convict the party of stealing, the servitude of the person alleged to be stolen must be proved, not by the mere claim of the master to hold them as his slaves, or by possession of them as such, but by evidence of such facts as will bring them within such clause of the constitution of the United States and such acts of congress, if any, as authorize slavery in the District of Columbia. In the trial below Judge Crawford declined laying down the law in this manner, and ruled upon this point as follows: "The ownership of a slave on a trial for stealing him is to be proved, as the ownership of any other piece of personal property is to be proved. It is not necessary to do more than to establish, to the satisfaction of the jury that he is owned by the alleged owner, and is possessed and held as his slave by said owner." Mr. Hildreth referred to the acts of Maryland, 1783, 1784, 1796 and 1798, restricting the immigration of slaves into the state, and that unless Hoover's slaves were in the District prior to 1783, or children of slaves here prior to that time, they were not subject to larceny, and that the United States should have been held to proof that these slaves came under this class.

5th. That the prisoner to be convicted, it must be proven that he knew the slaves to be such at the time of taking them, citing 3 Ohio; Nelson v. Whetmore, 1 Rich. Law, 318.

6th. That to constitute the offence of larceny the taking must be proved to have been a taking with an intent to convert to the taker's use. Judge Crawford ruled on this point: "That to convict the prisoner of larceny the jury must find that he took the slaves as charged, but I do not think that to constitute stealing, the original taking away must be with the intent to convert the slaves to the prisoner's use, and to derive a profit, advantage and benefit to himself from such use. The stealing must be felonious. The definition of larceny is the felonious taking and carrying away the goods of another. This definition must be used in construing the act of 1737, but when they use terms known to the common law, you must resort to the common law to see what those terms mean. Felonious taking is 'taking animo furandi'—as the civil law expresses it, 'lucri causa.' This desire of gain, the court is of opinion, need not be to convert the article stolen to his (the taker's) own use, not to obtain for the thing the value in money of the thing stolen. If the act is felonious, and is prompted by a desire to obtain for himself

or another even, other than the owner, a money gain, or any other inducing advantage, a dishonest gain, it is in my opinion a larceny. If a transportation of a slave is preceded by a seduction of the slave from his duty, and a corrupt influence on his mind which induces him to comply with the desire of his seducer, that he should leave his master and go with him, and by corrupt influences and inducements caused them to come to his ship and feloniously took and carried them down the river, he would be guilty of larceny."

Mr. Hildreth cited: 1 Archb.; 2 East, P. C. c. 16, § 2503; 2 Luce, 1089; Rex v. Cabbage, Russ. & R. 293; Rex v. Morfit, Id. 307. Nowhere, he said, did the legislation of the slave states go so far as to make slave stealing anywise different from the stealing of any other property.

7th. That slavery has no legal existence under the constitution, and congress has no power to recognize or legalize it.

November 28th, 1848. Mr. Key followed in reply, but as he was about commencing Judge CRANCH informed the counsel for the case that the following points presented by the counsel for Drayton, viz.: (1) That a prisoner had a right to peremptorily challenge twenty jurors; (2) that color is not prima facie evidence of slavery; (3) that slavery has no legal existence in this District; had been so often decided (negatively) in this court that no further argument would be heard on them.

Mr. Bradley followed Mr. Key on the same side.

November 29th, 1848. Mr. Mann addressed the court in behalf of the plaintiff in error, and confined himself to the four points left for discussion.

November 30th, 1848. Mr. Mann finished his argument.

February 19th, 1849. The great principle involved in this case was the correctness of the definition of larceny given by the judge of the criminal court in the fifth exception, and on which several of the other exceptions were based. Judges CRANCH and MORSEL united in reversing the decision of the court below upon this and the other points dependent thereon, and Judge DUNLOP delivered his opinion, differing from the court and sustaining Judge Crawford.

The following is the order of the court: Said cause having been brought to this court by writ of error, and now coming on to be heard on the transcript of the record from the criminal court, and after argument of counsel, and after mature consideration thereon, the judgment of the criminal court in this cause is hereby reversed because the court below erred in the following particulars, viz: 1st. In giving the instructions stated in the second bill of exceptions. 2d. In giving the instructions stated in the third bill of exceptions. 3d. In refusing to give the instructions prayed by the prisoner as stated in his fifth bill of exceptions, and in giving the instruction therein stated. 4th. In giving the instructions stated in the prisoner's sixth bill of exceptions. 5th. In giving the instruction stated in the prisoner's eighth bill of exceptions. 6th. In refusing to give the instructions prayed by the prisoner as stated in his tenth bill of exceptions, and in giving the instruction in lieu of it as stated in the same bill of exceptions. 7th. In refusing to give the instructions prayed by the prisoner as stated in his eleventh bill of exceptions, and in giving the instruction in lieu of it as stated in the same bill of exceptions. It is therefore ordered, that the judgment of the said criminal court in this cause be and the same is hereby reversed for the reasons aforesaid, and that this cause be and the same is hereby remanded to the said criminal court with directions to award a venire facias de novo.

DRENNEN (UNITED STATES v.). See Case No. 14,992.

DRESDEN, The (SINNOT v.). See Case No. 12,908.

Case No. 4,075.

DRESKILL v. PARISH.[1]

[5 McLean, 213.][2]

Circuit Court, D. Ohio. April Term, 1851.

[Cited in Woodruff v. Barney, Case No. 17,986; Spaulding v. Tucker, Id. 13,221.]

[This was an action by Peter Dreskill against Francis P. Parish to recover damages for hindering and obstructing in the arrest of slaves. See Driskell v. Parish, Cases Nos. 4,087–4,089.]

Mr. Parish, in proper person, moved the court in this case to retax the costs, on two grounds: 1. Because there was no service of a subpoena on Charles L. Mitchell and Andrew J. Dreskill, who appeared several terms, and were examined as witnesses. 2. Because several other witnesses were served with process, more than one hundred miles from the place of holding the court.

BY THE COURT. The second objection is not sustainable. A witness may be summoned if within one hundred miles of the place of holding the court, though his residence be out of the district in which the court is held. But the subpoena runs throughout the district, the same as any other writ. The deposition of a witness may be taken who lives more than one hundred miles from the place of holding the court.

The first objection, we think, is sustaina-

[1] [See Case No. 4,076, following.]

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

ble. The compensation to a witness is allowed. If he attend voluntarily or without summons, his fees cannot be charged against the losing party. The attendance, if not summoned, is voluntary. The indorsement of "Accepted" on the subpoena, never placed in the hands of the marshal or his deputy, by a witness, is not sufficient. Such a service would not authorize an attachment against the witness, for non-attendance. The service must be made by the marshal or one of his deputies. As no such service was made on the witnesses above named, their per diem and traveling expenses cannot be charged to the defendant, but must be taxed to the party summoning them.

Case No. 4,076.

DRESKILL v. PARISH.[1]

[5 McLean, 241.][2]

Circuit Court, D. Ohio. April Term, 1851.

WITNESS—SUBPOENA—TAXATION OF FEES—DEPOSITIONS.

1. A subpoena runs like all other process, throughout the district, and also a hundred miles from the place of holding court.

[Cited in Young v. Merchants' Ins. Co., 29 Fed. 275.]

2. A deposition may be taken of a witness who lives more than one hundred miles from the place where the court is held.

[Cited in Young v. Merchants' Ins. Co., 29 Fed. 275.]

3. A witness who attends voluntarily, is entitled to his fees, from the party at whose instance he attends.

[Cited in Anderson v. Moe, Case No. 359; Spaulding v. Tucker, Id. 13,221; Dennis v. Eddy, Id. 3,793; Re Williams, 37 Fed. 326; Hunter v. Russell, 59 Fed. 966.]

4. But the losing party cannot be taxed with the fee of a witness unless he be regularly summoned, by the marshal or his deputy.

[Cited in Woodruff v. Barney, Case No. 17,986; Anderson v. Moe, Id. 359; Cummings v. Akron Cement & Plaster Co., Id. 3,473; Spaulding v. Tucker, Id. 13,221; U. S. v. Sanborn, 28 Fed. 303; Haines v. McLaughlin, 29 Fed. 70; The Vernon, 36 Fed. 116; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282.]

[This was an action by Peter Dreskill against Francis D. Parish to recover damages for hindering and obstructing the arrest of a slave. See Cases Nos. 4,087–4,089.]

Mr. Stanbery, for plaintiff.

OPINION OF THE COURT. Mr. Parish, the defendant, moved the court to retax the cost bill on two grounds: 1. Because there was no service of a subpoena on Charles S. Mitchell and Andrew J. Dreskill, who appeared several terms and were examined as witnesses. 2. Because several other witnesses were summoned who lived more than one hundred miles from the place of holding the court.

The court said, the second ground is not sustainable. A witness may be summoned if he live within one hundred miles of the place where the court is held, though his residence may be out of the district in which the court is held. But a subpoena runs throughout the district, without regard to the distance, the same as any other writ. The deposition of a witness may be taken who lives more than one hundred miles from the place of holding the court. The first ground is sustainable. The compensation to a witness summoned is allowed. If he attend voluntarily or without summons, his fees cannot be charged against the losing party. The attendance of the witness is voluntary if he be not summoned. The indorsement of "Accepted," as in this case, by the witness on the subpoena, which was never placed in the hand of the marshal, is not sufficient. No attachment can issue to compel the attendance of a witness, under such a service.

In the case of U. S. v. Burr,[3] the court say, an attachment against a witness for non-attendance, pursuant to a subpoena, must be served by the marshal. And in the case of the U. S. v. Caldwell [Id. 14,708], an attachment was refused against a material witness who had not been regularly summoned.

The 6th section of the act of 28th February, 1799 [1 Stat. 626] provides that the compensation to a witness summoned shall be, &c. A witness not summoned, of course, can receive no compensation.

The court ordered the allowance made to Mitchell and Dreskill shall be stricken out of the cost bill taxed against the defendant, and that their attendance be charged to the party summoning them.

[1] [See Case No. 4,075.]

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

[3] [See Cases Nos. 14,692–14,694b.]

Case No. 4,077.

In re DRESSER.

[3 N. B. R. 557 (Quarto, 138).][1]

District Court, D. Maine. 1870.

BANKRUPTCY—BANKRUPT'S FAILURE TO PAY OVER MONEY—CONTEMPT.

The bankrupt court will adjudge a bankrupt guilty of contempt of court who fails to pay over to his assignee money returned "cash on hand," in his schedule of assets, or to the marshal as messenger in involuntary cases. Bankrupt committed and ordered to be detained until he should pay the amount stated on his inventory, together with costs.

[Cited in Re Salkey, Case No. 12,253; Re How, Id. 6,747.]

FOX, District Judge. E. K. Dresser had been adjudged a bankrupt on the petition of his creditors, and a warrant had been issued to the marshal as messenger, requiring him to take possession of all the estate of the bankrupt, and ordering the bankrupt

[1] [Reprinted by permission.]

within ten days to deliver to the messenger a schedule of his creditors, and an inventory of his estate. The schedule and inventory were delivered to the marshal, and from the inventory it appeared that the debtor was possessed of one hundred and fifty-six dollars and fifty cents. This sum had been repeatedly demanded by the marshal, but the bankrupt had never paid over any part of it, at last excusing himself by claiming he had spent it in the support of his family. C. P. Mattocks was chosen assignee of the bankrupt, and not having received this amount, he petitioned the court for an order to show cause why he had not paid over the money, and that he should be adjudged guilty of contempt of the court. This bankrupt was brought into court in Portland, before Judge FOX, and the court decreed that the bankrupt was guilty of contempt in not complying with the warrant of the court, and ordered that he should be committed to the jail in Portland, there to be detained until he should pay the amount stated on his inventory, together with the costs, or until the further order of the court. The bankrupt afterwards paid the amount.

This is the first case in which the district court has been called upon to enforce a compliance with orders and decrees, although in many instances bankrupts have failed to comply with the orders of the court within the time prescribed. We understand that hereafter, in all cases where the orders are not promptly complied with, they will be at once enforced by an arrest of the delinquent.

DRESSER, The E. K. See Case No. 4,324.

DREW (BETTS v.). See Case No. 1,372.

DREW (ELMINGER v.). See Case No. 4,416.

Case No. 4,078.

DREW v. HULL OF A NEW SHIP.

[17 Leg. Int. 405.][1]

District Court, D. Massachusetts. 1860.

MARITIME LIENS—MATERIALS FURNISHED—PAYMENT BY NOTE—RECEIPT.

[1. Lumber sold to a shipbuilder, who has several vessels on the stocks, but not for use in any particular one of them, gives rise to no lien, against one in which part of it is used. Rogers v. Currier, 13 Gray, 129, followed.]

[2. Where a bill is receipted "Received payment by note," the giving of the note must be treated as a payment thereof, in the absence of any evidence to qualify the receipt.]

[This is a libel by E. C. Drew against the hull of a new ship (George W. Jackman and others, assignees, claimants).]

SPRAGUE, District Judge. This is a libel wherein the libellant seeks to recover against the ship for the value of a cargo of hard pine lumber, consisting of 143,000 feet, which he avers he furnished Currier & Townsend, at Newburyport, in April, 1856, to be used in this ship. It appeared that Feb. 6, 1856, Currier & Townsend were ship builders, doing a large business at Newburyport, and had then two large ships on the stocks, and that in February they contracted with Williams and Daland to build another of a thousand tons for them. The written contract for this last was produced and was dated in April following. On the 6th of February, C. & T. gave the libellant an order for this cargo of lumber, specifying its dimensions. The lumber was to come from Georgetown, South Carolina, and had been there sold to the libellant by Resley & Co. The price to be paid for the lumber was $15 per thousand at Georgetown, and C. & T. were to pay the freight at $10 per thousand. The libellant had previously chartered the bark Richmond for a voyage from Boston to Georgetown, with a cargo of ice, and back with naval stores or lumber to Boston or Newburyport. C. & T. applied to him, and obtained this bark to bring the lumber at $10 per thousand. The lumber was laden on board at Georgetown, and C. & T. insured it to Newburyport. The bill of lading was in libellant's name. The bark arrived April 25th, and C. & T. at different times paid the master $600 on account of freight. The lumber was all delivered to them. When they gave the order nothing was said of its being for any particular vessel, nor was there anything in the bill of lading, invoice, or bought and sold note, to indicate this. C. & T. were to have ninety days' credit for the lumber from the date of the bill of lading. Before the lumber arrived the libellant sent C. & T. a bill of it, amounting to about $2,200, and received their note on 90 days therefor, and receipted the bill, "Received payment by note." Shortly after C. & T. failed and took the benefit of the insolvent laws, and the claimants became their assignees. Before their failure they had used some 18,000 feet of this lumber in the ship libelled, and the assignees, after their appointment, used some 45,000 feet more. A portion of the balance was used in another ship, and the rest sold by the assignees. The libellant had paid the freight under his charter party, and now claimed a lien for 63,000 feet of this lumber, at $25 per thousand.

The claimants objected that there was no lien: 1. Because the lumber was not furnished for any specific ship, and because this case came within the decision of Rogers v. Currier, 13 Gray, 129. 2. Because the contract and sale were not in Massachusetts, but in South Carolina, and hence the case came within the decision of Tyler v. Currier, Id. 134. 3. Because the note received, under the receipt in the bill, that it was paid by note, was, in the absence of all controlling evidence, a payment.

[THE COURT held that] under the facts

[1] [Reprinted by permission.]

shown, the case came clearly within that of Rogers v. Currier [supra], and that the lumber, not being shown by the libellants to have been furnished for a particular ship, there was no lien. As this disposed of the case, he did not consider the remaining questions further than to say, that in his judgment it would be difficult for the libellant to maintain his case against the third objection, without reference to the law as held in this state, as to notes being payment, it seemed clear that when the party declared, as in this case, he did receive such note in payment, and did not attempt to qualify this declaration by any evidence, the note was to be treated as payment. Such would be the law under the decisions in England and the courts of this country, irrespective of the peculiarity of the rule in Massachusetts which THE COURT was not disposed to extend. Libel dismissed with costs.

Case No. 4,079.

DREW v. MILWAUKEE & ST. P. R. CO.

[5 Chi. Leg. News, 314.]

Circuit Court, D. Minnesota. March, 1873.

ACTION TO RECOVER FOR INJURIES CAUSING DEATH—DEMURRER TO COMPLAINT.

The plaintiff brought this action to recover of the defendant damages for running over and thereby causing the immediate death of the infant daughter of the plaintiff: *held*, under the common law that the plaintiff could not recover, and that if any action can be maintained it must be by virtue of the state statute and in the name of her personal representative.

This action is brought by the plaintiff [George G. Drew] to recover of the defendant [Milwaukee & Saint Paul Railroad Company] damages for running over and thereby causing, as it is alleged, the immediate death of Iza Drew, the infant daughter of the plaintiff. The negligence of the defendant is properly and fully alleged. The following are the allegations of the complaint, respecting the capacity in which the plaintiff brings the action: "This plaintiff is the father of Iza Drew, a minor, who was one and one-half years of age on the 5th day of May, 1872,"—the date of injury for which the suit is brought—" * * * and this plaintiff, as the father of said minor, was entitled to the services of said minor during her minority, and that by reason of the wrongful and negligent act of the said defendant, in causing the death of the said minor as aforesaid, the plaintiff has been deprived of the services and society of the said minor to his damage in the sum of five thousand dollars," wherefore he demands judgment. The demurrer to the complaint is on the ground that it does not state a cause of action in favor of the plaintiff.

Bigelow, Flandrau & Clark, for demurrer.
Atwater & Babcock, for plaintiff.

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

DILLON, Circuit Judge. This is an action by the father to recover damages for the loss of services of his infant daughter, who is alleged to have immediately died by reason of the tortious conduct of the defendant's servants. Where death has thus ensued, it is a settled principle of the common law that no such action can be maintained. This principle is so well known, and has been so often declared, that it is not necessary to enter upon a review or discussion of the cases. Carey v. Berkshire R. Co., 1 Cush. 475; Green v. Hudson River R. Co., 2 Keys (*41 N. Y.) 294; Id., 28 Barb. 9; Pack v. Mayor, etc., of New York, 3 Comst. [3 N. Y.] 493; Eden v. Lexington & F. R. Co., 14 B. Mon. 165; Hyatt v. Adams, 16 Mich. 180. In this last case it is held that where the death of the person injured does not at once ensue, a person entitled to the service of the one injured may recover for such damages as accrued up to the time of the death, but not for damages caused by reason of such death. See, also, Sherman v. Western Stage Co., 24 Iowa, 515.

The principle above mentioned is so inveterately rooted in the common law, as judicially declared in England and in this country, as to preclude any inquiry by the courts into its policy or wisdom. It is, perhaps, difficult to defend it at this day; and hence in both countries the common law has, in this respect, been modified by legislation. So far, then, as any right of recovery exists where death has immediately ensued from the injury complained of, it is by virtue of express enactment. The statute of Minnesota provides, that "where death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission." Gen. St. p. 546, § 2. If an action can be maintained, it must be by virtue of this statute, and this gives the remedy to the personal representative of the deceased, that is, to his administrator or executor. Boutiller v. The Milwaukee, 8 Minn. 97 [Gil. 72]. Demurrer sustained.

Case No. 4,080.

DREW et al. v. POPE et al.

[2 Sawy. 72.][1]

District Court, D. California. Oct. 20, 1871.

SEAMEN PAID OUT OF PROCEEDS OF WRECKED VESSEL—PAYMENT OF EXTRA WAGES TO CONSUL.

1. The rule of the maritime law, as declared by Mr. Justice Ware, that the seaman is entitled, in cases of wreck, or semi-naufragium, to be paid out of the savings of a wreck, or the proceeds of a condemned vessel, not only his

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

wages, but an additional amount equal to the expenses of his return home, are superseded by the special laws on the subject enacted by congress.

[Cited in Kelly v. Otis, 23 Fed. 905.]

2. When a vessel had been condemned and sold, as not worth repairing; and the master, at the instance of the consul, paid to the latter the three months' extra wages required by law to be paid to him, when a vessel is voluntarily sold; which wages the men failed to receive, or apply for; *held*, that the payment of the extra wages to the consul, discharged the owner's liability therefor; but that the master had no right to deduct from the amounts due the men, a charge for exchange.

[This was a libel by George Drew and others against Pope and Talbolt to recover wages as seamen.]

D. T. Sullivan, for libellants.

Milton Andros, for respondents.

HOFFMAN, District Judge. The libellants in this case were shipped as seamen on board the ship Guiding Star, for a voyage from this port to Hongkong and back. The outward voyage was duly performed, and the return voyage commenced. Shortly after leaving Hongkong, the vessel encountered a typhoon, from which she sustained such injuries, as, in the judgment of the master, to compel her return to Hongkong. On her arrival at Hongkong, a survey was held upon her, and she was found to be in such a condition, as to render it inexpedient to repair her. It was thereupon determined to sell her, and the men were discharged. The vessel was subsequently sold for $5,700.

It is claimed on the part of the libellants that they were entitled, under these circumstances, to receive their wages up to the time of their discharge, together with a further sum sufficient to cover the expenses of their return. The respondents contend that the return voyage having been broken up by perils of the seas, and no freight having been earned thereon, the men were entitled to receive only their wages for the outward voyage, and during one half of the time the vessel lay at the outward port of delivery; and that more than this amount is admitted to have been paid to them.

The right of mariners to be compensated out of the savings of a wreck, which they have assisted in preserving, is recognized by all the authorities on maritime law. Whether this compensation is to be deemed wages earned under their contract, and payable, because the case of shipwreck constitutes an exception to the general rule, that no wages are due where no freight is earned; or, whether the contract is to be regarded as a mere salvage compensation, has been much debated in the courts. The weight of authority is perhaps in favor of the former view. The point is not ordinarily of much practical importance; for it is admitted, by those who maintain that the compensation is in the nature of salvage, that the amount to be paid is merely the wages due; so that, whether it be termed "wages," or "wages in the nature of salvage," is often, as observed by the editor of the 8th edition of Kent's Commentaries, a question of verbal discussion and criticism rather than of a substantial distinction.

In The Two Catherines [Case No. 14,288], Judge Story put the claim of the seamen to wages in case of shipwreck, on the ground of a qualified salvage allowance, but he observes, in a note to the 6th edition of Abbott on Shipping (page 753), that the court intimated that it ought to be put on the ground of an exception to the rule, that no wages are due where no freight is earned; but he did not then think that the rule, upon the authorities had been so construed. In the subsequent case of The Neptune, 1 Hagg. Adm. 227, Lord Stowell, in an elaborate and admirable judgment, allowed seamen their wages, as such, out of the savings of a wreck, recognizing their claim as a distinct exception to the general rule. See Curt. Merch. Seam. 285-290; The Massasoit [Case No. 9,-260]. "That there may be, in the infinite range of human possibilities that may happen in the intercourse of men, circumstances which might induce the court to open itself to their claim as salvors," was admitted by Lord Stowell in The Neptune, supra, and Judge Story in The Two Catherines [supra], observes, "In my judgment there is not any principle of law which authorizes the position, that the character of seamen creates an incapacity to assume the character of salvors." But it is evident that the cases referred to by these great judges, as of possible occurrence, are rare and exceptional, and where the seaman, by some extraordinary exertions or signal display of gallantry and energy, may justly be deemed to have performed services beyond those to which his contract and his duty bound him, and which, therefore, entitle him to an additional recompense. But, as observed by Lord Stowell, "those circumstances must be very extraordinary indeed, for it is the stipulated duty of the crew (to be compensated by wages) to protect the ship through all perils, and their entire possible service for this purpose is pledged to that extent." The Neptune, supra.

In the case of The Dawn [Case No. 3,666] it was held by Mr. J. Ware, after an elaborate examination of the provisions of the ancient laws of the sea, that the maritime law on principles of public policy allows, in case of shipwreck, an extra reward beyond their wages, and in the nature of salvage to seamen according to their merit, against the property saved, which ought not to be less than the expenses of their return home. The case in which this judgment was rendered, was, in all respects, similar to the case at bar. The vessel was compelled by sea perils to seek a harbor of refuge, where, after a survey, she was condemned and sold as a wreck. No extraordinary exertions on the part of the crew beyond the line of their ordinary duty were

shown, and the decision recognises the right of seamen in every case of shipwreck, or of semi-naufragium, where the vessel has been rendered unnavigable by sea perils, and condemned and sold, to a salvage remuneration in addition to their wages, at least equal to the expenses of their return home, unless they have forfeited the right by their misconduct. At the time this decision was rendered, the act of August 18, 1856, had not been passed. By that act it is expressly provided, that in cases of wrecked, or stranded vessels, or vessels condemned and sold as unfit for service, no payment of extra wages shall be required. [11 Stat. 62.] In this act, and the act of 1840, to which it is an amendment, the attention of congress was specially directed to the subject of securing to seamen discharged abroad the means of returning to their homes. Upon the sale abroad, of any vessel not rendered necessary by superior force, damage by tempest, or other casualty, the master is required to deposit with the consul three months' extra pay, two thirds thereof to be paid to the seamen upon his engagement on board any vessel to return to the United States, and the other third to be retained by the consul as a fund, &c.

It may therefore be justly concluded that congress, in this class of cases, intended to exempt the master from the duty of providing means for the return of the seamen; and, if so, the provision in question must be taken as repealing or superseding the rule of the maritime law, as declared by Mr. Justice Ware, even if such a rule had theretofore been recognised and established in our jurisprudence. The point, however, is not material to the present case; for the master has paid to the consul the whole amount of extra wages, which would have been required of him, if the vessel had been voluntarily sold. The men declare that they have not received them; but they do not appear to have demanded them of the consul; and, even if they had done so, and payment had been refused, the default of the consul would not have rendered the master liable to pay them a second time. That the payment was properly made to the consul, and not to the men, is clear from the explicit language of the law, and from the provisions of the act of 1840 [5 Stat. 394] which require that the two-thirds belonging to the men shall be paid them by the consul only, upon their engagement on board of a vessel to return to the United States, and from those of the act of 1856 [11 Stat. 62] which require the consul to pay out of the seamen's share of extra wages any expenses he may have incurred for board or necessaries, after his discharge, and direct him to retain a sufficient sum for the purpose, paying over to the seamen only the balance. It may be objected that this payment was a nullity, because no extra wages were required to be paid by the act of congress, and the claim of the seamen, under the maritime law, cannot be satisfied by a payment to the consul. But they claimed extra wages, and their claim was allowed by the consul, and paid by the master; they cannot now be heard to say that their claim was a different one, and such as could only be satisfied by a direct payment to themselves. Moreover, the master had a right to waive the exception of the law in favor of stranded and condemned vessels, to treat the sale as a voluntary one, and fulfill all the obligations imposed on masters, in cases of voluntary sales.

It is contended by the advocate for the libellants, that the proof of unnavigability of the vessel are insufficient; that the report of the surveyors is inadmissible to prove the truth of the statements it contains, and that it does not satisfactorily appear that the vessel might not have been repaired, and resumed her voyage within a reasonable time. Assuming these positions to be well taken, the result is that the sale must be considered a voluntary one, and the consul was right in exacting, and the master in paying to him, the three months' extra wages required by law; upon doing which, the master was relieved from further liability. The evidence of the payment of the extra wages consists of the master's positive testimony to that effect, corroborated by the deposition of the vice-consul, or consul's clerk, who swears that he has every reason to believe the fact, though he did not see the payment actually made. The master also produces a receipt for the wages, signed by the consul. The men admit that, after receiving their wages earned, they made no subsequent application to the consul for extra wages deposited with him. The payment, therefore, of these wages to the consul by the master must be taken as fully proved.

It is further contended, on the part of the men, that the amounts paid them were less than the wages earned up to the time of their discharge. In support of this allegation, they produce certain slips of paper, upon which the amounts due them are marked, and which they say was all they received. Mr. Nickerson, however, states that these slips were handed to the men before their accounts were made up, merely as an approximate statement of the sums due them, and to be exhibited to the boarding-house keepers by the men, to enable them to obtain credit for board and lodging. That the accounts were accurately made up on the succeeding day, and the full amounts due the men, as shown by the captain's books, were paid them in the consul's office, the men signing a receipt therefor. This receipt is produced and sworn to by the master. It is also identified by Mr. Nickerson, who testifies that it was signed by the men in his presence; and that the sums therein mentioned were paid them, less only the difference in exchange, or cost of procuring American money, and a sum deposited with the

boarding-house keepers as security for board, with the assent of the men, and in accordance with the custom of the place. This evidence is, I think, sufficient to establish that the men received the sums receipted for by them, less only the deductions above mentioned. But I cannot perceive by what right the master deducted from their wages the expense he was put to, in obtaining the funds to pay them. If he had contracted with them to pay a certain sum in American gold coin, in China, it would have been clearly his duty to fulfill his contract according to its terms, and to provide, at his own expense, the means for doing so. In this case, the law imposed on him the duty of paying a certain sum of money; that duty arose upon the happening of a contingency, which he was bound to provide for. He has no more right to say that the fulfillment of this duty was expensive to him, and that expense must be borne by the men, than any merchant who had contracted to deliver a similar sum in American coin at a foreign port, would have, to charge the person with whom he had contracted, the expense incurred in obtaining it. I think that the amount so deducted must be paid to the men. The sum is insignificant, and the deduction was probably made by the master under a misconception of his rights. A decree for the amount charged for exchange, to be settled before a commissioner, if the parties are unable to agree, but without costs, must be entered.

DREW (SMITH v.). See Case No. 13,038.

DREW (UNITED STATES v.). See Case No. 14,993.

DREW (WESTERN DIVISION OF WESTERN N. C. R. CO. v.). See Cases Nos. 17,433 and 17,434.

DREW, The DANIEL. See Case No. 3,565.

Case No. 4,081.

Ex parte DREWRY.

In re WALKER.

[2 Hughes, 435.][1]

District Court, E. D. Virginia. June 14, 1875.

BANKRUPTCY — SALE WITHOUT NOTICE TO LIEN CREDITORS—JURISDICTION TO ADJUDICATE LIENS —PLENARY SUIT.

1. Where real estate incumbered by liens has been sold by order of the bankruptcy court, upon a petition in bankruptcy of which personal notice was not given to lien creditors, and an inquiry and report of liens and their priorities had not been made before the sale, *held*, that the sale was void as to the lien creditors, without personal notice.

2. Where not only a vendor's lien upon real estate which had been purchased by the bankrupt was unsatisfied, but liens were claimed which had attached upon the property before it came to the vendor of the bankrupt, *held*, that the title to the property and the rights of parties cannot be adjudicated in the proceeding in bankruptcy, but resort must be had to a plenary proceeding in equity, either in the district or circuit court, especially if the value in controversy be large enough to give the right of appeal to the supreme court of the United States.

In bankruptcy. By deed of 22d August, 1866, William C. Claiborne conveyed to Samuel D. Drewry his one-seventh interest in his deceased father's property and family residence on Dan river, opposite the town of Danville, Virginia, called "Mount Blanc," containing about 260 acres. Liens existed on this interest at the time against Claiborne which are immaterial to the question now in controversy. This deed was not recorded in the clerk's office of the county of Pittsylvania until the 30th March, 1868. Drewry's original object in purchasing this interest was to hold it for awhile and resell it to F. G. Claiborne, brother of W. C. Claiborne, who were both brothers-in-law to himself, in order that F. G. Claiborne might own the family residence; which afterwards F. G. Claiborne found he could not afford to do. In September, 1867, James M. Walker, the bankrupt, undertook to purchase the Mount Blanc property, through F. G. Claiborne as to several of the shares. In his negotiations with F. G. Claiborne the latter represented to Walker that he controlled the interest which Drewry had purchased from W. C. Claiborne; and he exhibited to him a note addressed to Walker by Drewry, dated September 11th, 1867, in which Drewry stated to Walker that he had "purchased W. C. Claiborne's interest in Mount Blanc for F. G. Claiborne." It resulted from these negotiations that Walker purchased of F. G. Claiborne this and several other interests in Mount Blanc at the rate of $2,000 for each seventh; giving, amongst other things, his note of $2,000 for the purchase-money of W. C. Claiborne's (or Drewry's) interest, and taking a deed from F. G. Claiborne conveying all the interests he purchased, including that of W. C. Claiborne or Drewry, the deed being dated the —— day of September, 1867. A vendor's lien was reserved in this deed for the purchase-money of all the interests that were purchased, the whole agreed price being $7,500, for which it seems notes were given by Walker. During this negotiation no interview whatever occurred between Drewry himself and Walker.

Of the notes given by Walker, the one intended for Drewry was made payable by Walker to J. W. McKinsey for $2,000, at four months, and was inclosed by F. G. Claiborne in a letter, from Danville, to Drewry, in Chesterfield county, with authority to Drewry to put Claiborne's name upon it if he found it expedient to do so, which he did. This note was passed by Drewry to Blanton & Eubank, carpenters, and was by his procurement discounted by W. B. Isaacs & Co., bankers, of Richmond. It was protested for non-payment on the 28th January, 1868; suit

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

was brought upon it by Isaacs & Co.; judgment was recovered against all parties, and execution sued out and twice returned "No effects liable." In fact, however, Drewry took up this note after it had been protested, and the suit was only pro forma in the name of Isaacs & Co., as plaintiffs, who, at Drewry's request, continued to hold the note as ostensible owners. The first return of "No effects" was on the 28th May, 1868. On the 22d day of May, 1868, S. D. Drewry and Alice, his wife, made a deed of the interest in Mount Blanc which Drewry had purchased of W. C. Claiborne, to F. G. Claiborne, duly acknowledged, and Drewry deposited this deed as an escrow with W. B. Isaacs & Co., to be held by them until the payment by Walker of the purchase-money of $2,000 due upon the note. As the note was never paid, and nothing appears to the contrary in the record, it would seem that this deed has never been recorded. Before making this deed of escrow, Drewry had, on the 30th day of March, 1868, duly recorded his deed from W. C. Claiborne of the 22d August, 1866.

J. M. Walker filed his petition in bankruptcy on the 26th day of March, 1868, and was duly adjudged a bankrupt on the 10th day of April, 1868. A petition was in due course, August 5th, 1868, filed in the bankruptcy proceeding, praying that his real estate should be sold free of liens and incumbrances, and the liens thereon transferred to the proceeds of sale. No meeting of creditors was called to show cause against the prayer of the petition, and no notice given them of the petition. In this petition no notice was taken of the title of Drewry to the one-seventh interest in Mount Blanc which had been conveyed to him by W. C. Claiborne by deed dated 22d August, 1866, and recorded 30th March, 1868, which was before this proceeding. No notice of it was given to Drewry by the register or assignees. Drewry, who lived more than a hundred miles off, had no notice at all, except that he was informed by F. G. Claiborne that "Walker's interest in Mount Blanc" was to be sold, in a letter which he received some time before the sale was made. The whole interest of Walker in Mount Blanc embraced by this proceeding for a sale, purported to be four and two-thirds of the seven interests which Walker held in the property, equivalent to two-thirds of the whole. The petition set forth that the interests had been subject to a life estate of the mother of the Claibornes, which had not fallen in until after the petition of Walker in bankruptcy, and had never been reduced to possession by Walker. In pursuance of the assignee's petition for a sale, filed on the 5th August, 1868, and the proceedings had thereon, an order of this court was made on the next day, by its then judge, to wit, on the 6th day of August, 1868, directing a sale as prayed for by the assignee. None of the lien creditors had notice of or consented to this petition for sale except F. G. Claiborne and D. A. Claiborne, who had given consent by counsel. Under the order of 6th August, 1868, a sale was made of the two-thirds interest in question, on the 31st August, 1868, when F. G. Claiborne was accepted as the highest bidder at the sum of $6,000. It turned out that this purchaser was unable to comply with his contract, and there was a petition filed by the assignees on the 6th October, 1868, setting forth that fact, and praying an order for a resale. There is no paper in the cause showing that there was ever an order of court for a resale. The abstract of proceedings certified by the register makes no mention of such an order, and there was none in fact. And at the subsequent sale, which was made by the assignees on the 27th January, 1869, and reported on the 24th March, 1869, W. W. Keen became the purchaser at the sum of $3,000. This sale was confirmed by the court on the 2d December, 1869, the court in express terms in the order stating that it was confirmed "without prejudice to the interests of parties not before the court." In pursuance of this order, a deed was made to persons whom Keen represented in the purchase. No report of liens existing upon the interests in the property sold was ordered until January 31st, 1870, nor made until several months after that date, and after the sale.

On the 12th September, 1871, Drewry filed his petition here, praying that the sale of his seventh interest in the Mount Blanc property should be set aside, and that the said interest might be restored to him by a proper deed to be executed according to the orders of this court. In due course of proceeding this petition and the answers thereto, and the depositions and proofs taken, having been heard, the then judge of this court, on the 4th day of April, 1872, entered a decree declaring the sale to Keen invalid to the extent of the undivided seventh interest derived by Drewry from W. C. Claiborne; declaring that the said seventh interest was the estate and property of Samuel D. Drewry; setting aside as to that seventh the order confirming it, and the deed made in pursuance of the sale; and directing the assignees to reconvey the seventh interest to Samuel D. Drewry. On the 28th day of May, 1872, the assignees made a reconveyance to Drewry in pursuance of this decree. There was an appeal by W. W. Keen from this decree to the supervisory jurisdiction of the circuit court, which was dismissed without prejudice, for failure of the petitioner to prosecute with effect.

A petition of review for errors appearing in the record is now brought in this court, setting forth some of the foregoing facts in this case, claiming that Drewry was bound by F. G. Claiborne's sale and by Claiborne's deed to Walker, and consequently by the sale and resale, to which Claiborne consented, made by the assignees in this cause of Walker's

two-thirds interest in the Mount Blanc property. Upon this petition, after a full hearing, the question now to be decided is upon setting aside and annulling the decree of this court, made on the 4th of April, 1872.

HUGHES, District Judge. There are two questions to be decided in this case: (1) What was Drewry's interest, after the bankruptcy of Walker, in the one-seventh of the Mount Blanc property derived by him from W. C. Claiborne? (2) Was that interest affected by the proceeding of the assignees for a sale, and by the sale which they made?

1. I cannot consent to the proposition that Drewry's letter to Walker, of the 11th of September, 1867, saying that he had purchased W. C. Claiborne's seventh of Mount Blanc for F. G. Claiborne, exonerated Walker as purchaser from F. G. Claiborne from the effect of the rule caveat emptor, and relieved him of the duty of looking to the title. Suppose F. G. Claiborne had been a minor or a married woman, would such a letter to Walker have justified him in accepting a deed of the property from F. G. Claiborne? Certainly it was his duty to see that his vendor was competent to make a deed. The universal custom is for the purchaser of real estate to look to the record. That custom and the rule of caveat emptor required Walker to go to the deed-books of the county of Pittsylvania, and to withhold payment of the purchase-money until he had ascertained the competency of F. G. Claiborne to convey W. C. Claiborne's interest in Mount Blanc, by finding W. C. Claiborne's deed to F. G. Claiborne for that interest on record, or something equivalent to a deed. The letter of Drewry contained no such assurance of title. It was equivalent to declaring to Walker that he had purchased and held the title to the property himself, but did so for F. G. Claiborne, when Claiborne should entitle himself to a conveyance of it, and that Claiborne could in meantime act for him as his agent, to the extent that agents for the sale of real estate may legally act. It was indeed notice to Walker that Drewry owned the property. A brief note, such as that of Drewry to Walker, cannot be held to authorize a third person, mentioned as F. G. Claiborne was, to make a deed of the property to the purchaser. If so, what would become of all those wise provisions of law requiring formal conveyances of real estate to be made by solemn deed, express personal acknowledgments of them to be made before magistrates or clerks of courts, and privy examinations of married women as to relinquishment of dower, to be solemnly taken. A brief note such as that in question cannot be held to have passed Drewry's title to Claiborne, and can be allowed no other construction than that of making F. G. Claiborne its author's agent to make a contract of sale. F. G. Claiborne's deed to Walker, therefore, was a nullity as to the seventh interest of Drewry, so far as Drewry could be affected by it, and it conveyed neither legal nor equitable title to Walker. But this letter or note followed by Drewry's accepting Walker's negotiable note for $2,000 in purchase of Drewry's seventh interest, did bind Drewry to the sale made by Claiborne, as his agent. The deed of W. C. Claiborne to Drewry, duly recorded on the 30th of March, 1868, before the adjudication of Walker in bankruptcy, and before the appointment of Walker's assignee, was notice of Drewry's title in the property to the assignees, and put them to the duty of inquiring after the deed of escrow, which Drewry deposited with Isaacs & Co. on the 22d of May, 1868, shortly after the appointment of the assignees. Walker's interest was only an equitable one, subject to the deed of escrow.

On the whole, the present condition of the title is this, the deed is still an escrow; it will be ineffectual to convey Drewry's interest to the assignees of F. G. Claiborne, who now are the assignees of Walker, until the note for the purchase-money of $2,000, with interest, is paid, and in the meantime the equitable title belongs to the assignees of Walker, the maker of the note. Of course, all this is said without reference to any lien previously existing, which may have followed the interest when it was transferred by W. C. Claiborne to S. D. Drewry. So far as the decree herein of April 4th, 1872, is inconsistent with the condition of the title as thus defined, it is erroneous, and, after proper proceedings, should be corrected, for it was error to decree that this seventh interest in Mount Blanc was absolutely the property of Drewry. The legal title only is in Drewry until the purchase-money due upon it, with interest, is paid. Then, and not before, must the deed go upon record, and then only would the title pass to the assignees of Walker.

2. The equitable title of that seventh interest having been in the assignees of Walker, in August, 1868, subject to the lien of Drewry, under his deed of escrow, the second question is, was the proceeding for the sale of Walker's interest in Mount Blanc, affecting this seventh, such as to bind Drewry? That question does not admit of doubtful answer. The petition for the sale was filed in this court on the 5th of August, 1868, and on the next day, without notice of its filing to any human being in interest, a decree of sale was made. There had been a previous consent by F. G. Claiborne and I. A. Claiborne by counsel to the sale, so far as their own respective interests were concerned, but the decree of sale, if binding anybody at all, binds nobody who was then interested in the Mount Blanc property, except those two men. There is not a particle of proof, nor is there even a pretence, that in giving that consent, F. G. Claiborne acted as agent of Drewry. It is contended, on the contrary, that Isaacs & Co., who still formally held Walker's note, were then agents of Drewry, and it is alleged that they had notice of the petition. If they were

agents of Drewry at all, they were so only as to the note. They were merely holders of paper owned by Drewry, and secured on real estate, the legal title to which was in Drewry, a title which could not be affected except by personal notice to Drewry. But even if Isaacs & Co. were agents of Drewry, both as to the note and as to Drewry's legal title in the seventh interest in Mount Blanc, they had no notice. They not only are not proved to have had notice, and did not have notice of the petition for sale, but it was impossible for them to have had it, living as they did in Richmond, a hundred and fifty miles from Danville, where the petition was filed. Even if they had had notice, the notice of one day would have been insufficient and an absolute mockery. The truth is, that no lien creditor had notice of the petition for this sale. It was filed on one day, and the decree granted on the next. Such a decree, without previous notice to lien creditors and without any time allowed them to have got wind of the proceedings, was absolutely null and void so far as it concerned them. Both sales made under this decree, as well the first sale at which F. G. Claiborne became the purchaser as the second sale under which W. W. Keen became the purchaser, and also the decree in confirmation of the resale, and the deed made in execution of it, were null and void as to the seventh interest of Drewry. I am not called upon to speak of its validity as to any other interest; but I will say that since I have come upon the bench in January, 1874, personal notice to lien creditors and a specific ascertainment of liens and their priorities, have been cardinal prerequisites to sales of real estate by assignees, and it is impossible for me to confirm any sale where they have been wanting. In this case they have been wholly wanting, grossly wanting.

The order of this court made upon the petition of Drewry on the 4th April, 1872, setting aside the sale as to Drewry's interest, must therefore stand. There could be no ground of claim for its validity, except the one now urged in Keen's petition, to wit, that Drewry allowed two years after the cause of action arose to elapse before bringing his petition to set aside the decree of December 2d, 1869. But Drewry's petition was filed on the 18th September, 1871, which was less than two years after the decree of December, 1869, and after the sale of his interest; though more than two years after the decree of sale of August 6th, 1868. There is no limitation of time, however, to a petition in a proceeding in bankruptcy. The 2d section of the bankrupt act [of 1867 (14 Stat. 518)] limits the time for bringing "suits at law or in equity" to two years, but contains no such limitation upon a proceeding in bankruptcy as such. This objection, therefore, does not hold good in the present case.

I have but one other question to consider, and that is, as to the proper manner of trying the rights of all parties contestant, in respect to this seventh interest of Drewry in the Mount Blanc property. Not only is this a question between Drewry's and Walker's assignees, but it is alleged that there are holders of liens upon this seventh interest which accrued before Drewry derived this interest from W. C. Claiborne. These lienors had nothing to do with the bankrupt, or his assignees, or with the proceeding in bankruptcy. Their interests cannot be affected by a summary proceeding here of any sort. They have a right to a full hearing in a plenary proceeding, and must have it if they ask for it. I will set aside so much of the decree of the 4th April, 1872, as adjudges the absolute title and interest in that seventh to Drewry, leaving the deed from the assignees as it is, but this shall be without prejudice to the right of Drewry or the assignees to institute a proper proceeding for the authoritative adjudication of that title. The value at issue is large enough to give the right of appeal from the district or circuit court to the supreme court. If the right be tested here by petition in bankruptcy, there would be only an appeal to the supervisory jurisdiction of the circuit court, and no appeal would be allowable thence to the supreme court. An adjudication of the title in a proceeding in bankruptcy would cut off this right of appeal, and such adjudication must not be made.

In order to preserve this right to the party who may lose the case in the inferior court, the rights of parties must be adjudicated upon a plenary bill in chancery, brought either in the district or circuit court.

DREXEL (SPARHAWK v.). See Case No. 13,204.

Case No. 4,082.

In re DREYER.

[2 N. B. R. 212 (Quarto 76).][1]

District Court, S. D. New York. Oct. 3, 1868.

BANKRUPTCY—DISCHARGE—FRAUD.

Vague and general specifications reciting fraud, &c., will not be received in opposition to discharge.

[Cited in Re Carrier, 47 Fed. 440.]

I, Thaddeus Smith, of North Hadley, Massachusetts, having proved my judgment and claim against the estate of said Frederick A. Dreyer, bankrupt, and having received notice of his petition for discharge from his debts, do hereby oppose the granting of said discharge; and for grounds of such opposition, file the following specifications: First. That the debts and each and every one of them which the judgment and claim proved before the register, Isaac Dayton, Esq., were created by the fraud of said Frederick A.

[1] [Reprinted by permission.]

Dreyer. Second. That said bankrupt has wilfully sworn falsely in his affidavit annexed to his schedule and inventory of his property. Third. That said bankrupt has concealed part of his estate and effects. Fourth. That said Frederick A. Dreyer has given fraudulent preference to his brother (or other relative), Dreyer and others, contrary to the provisions of the act under which the discharge is sought. Fifth. That said Frederick A. Dreyer, since the passage of said act, has destroyed, mutilated, and altered his books, documents, papers, writings, and other securities, and has made false and fraudulent entries in his books of account and other documents, with intent to defraud his creditors. Sixth. That the said Frederick A. Dreyer has made a fraudulent transfer or assignment of part of his property to one —— Dreyer, and others, for the purpose of preferring said persons, and for the purpose of preventing his property from being distributed under the said act in satisfaction of his debts. Seventh. That said Frederick A. Dreyer has wilfully and fraudulently omitted a number of his creditors from his schedules in his application for his discharge herein. Eighth. That the said Frederick A. Dreyer has, in contemplation of becoming bankrupt, made prepared pledges, absolutely or conditionally with said Thaddeus Smith, and other creditors herein, for the purpose of preventing his property from coming into the hands of the assignee, and of being distributed under this act, in satisfaction of his debts. Thaddeus Smith, per N. Millard. Attorney.

BLATCHFORD, District Judge. The specifications filed in opposition to a discharge are altogether too vague and general to be triable. A discharge is granted.

DREYFOUS (RICHMOND v.). See Case No. 11,799.

DREYFUS, Ex parte. See Case No. 8,043.

DRIGGS (KETCHUM v.). See Case No. 7,-735.

Case No. 4,083.

DRIGGS v. MOORE.

[1 Abb. (U. S.) 440;[1] 3 N. B. R. 602 (Quarto, 149).]

Circuit Court, E. D. Michigan. March Term, 1870.

BANKRUPTCY — INVALIDITY OF PREFERENTIAL ASSIGNMENTS—WHAT IS INSOLVENCY.

1. When an insolvent debtor gives a mortgage in favor of one creditor, with intent to secure to him a preference over other creditors, and such creditor has, at the time, reasonable cause to believe the debtor insolvent, the mortgage is void, by the provisions of the bankrupt law of 1867 [14 Stat. 517].

2. If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say, in support of the transaction, that the debtor did not intend to create one.

[Cited in Re Silverman, Case No. 12,855; Goodenow v. Milliken, Id. 5,535; Walbrun v. Babbitt, 16 Wall. (83 U. S.) 581; Curran v. Munger, Case No. 3,487; Alderdice v. State Bank of Virginia, Id. 154.]

3. The question of insolvency is a question of fact, and depends, in part, upon the usage and understanding which prevails in the locality with reference to which the question arises.

4. The rule that a trader who is not able to pay all his debts in the usual ordinary course of business as persons carrying on trade usually do, is to be regarded as insolvent,—approved, as a general rule.

5. Failure to pay a single debt when due, is not sufficient to establish insolvency.

This bill in equity was filed by Frederick E. Driggs, as assignee in bankruptcy of the estate of Tonkin & Trewartha, against the persons composing the firm of Moore, Foote & Co., to recover assets of his assignors, which defendants had sold in virtue of a claim to them under a mortgage executed by the assignors.

Driggs & Pond, for complainant.
Meddough & Lothrop, for defendants.

WITHEY, District Judge. Tonkin & Trewartha, of Eagle Harbor, in the upper peninsula of Michigan, being indebted to defendants, merchants of Detroit, for merchandise, and also on a claim transferred to them in favor of Allan Shelden & Co., amounting in the aggregate to about twelve thousand dollars, on May 9, 1868, to secure the payment thereof, executed to the defendants a chattel mortgage on all or nearly all their personal property, including two stocks of goods at Eagle Harbor. To induce the giving of the mortgage, defendants extended time for payment, so that the first payment of eight hundred dollars would become due July first after the date of the mortgage, and a like sum monthly thereafter until the whole sum of twelve thousand dollars, with interest, should be paid. On July 15, the first installment not having been paid, defendants took possession of the mortgaged property, and a few days after sold the same at public vendue. On August 3, Tonkin & Trewartha filed a petition to be declared bankrupts, and were afterwards duly adjudged to be such. Their assignee, the complainant, files a bill against defendants to recover the value of the property taken and sold under said mortgage, alleging that the mortgage was made within four months before the petition in bankruptcy; that Tonkin & Trewartha, at the date of the mortgage, were insolvent; that it was made with a view to give a preference, and that defendants had reasonable cause to believe their debtors insolvent, and the transaction to be in fraud of the provisions of the bankrupt act. The giving of the mortgage, and the then insolvency of Tonkin & Trewartha, are admitted by the

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defendants, but they deny that their debtors made the mortgage with a view to give a preference, and deny that defendants had reasonable cause to believe their debtors insolvent, or that the mortgage was made in fraud of the provisions of the bankrupt law.

The bill of complaint presents a case under the first provision of section 35,—viz: of a transfer with a view to give a preference; —and it is urged by defendants' counsel that this provision is not within the operation of the third paragraph of the section, which declares: "And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." The question is, what "sales, assignments, transfers, and conveyances" are referred to in the clause just read? It follows two provisions, the first of which declares that "any payment, pledge, assignment, transfer, or conveyance," made within four months by the insolvent debtor, "with a view to give a preference," &c., shall be void; the second, that "any payment, sale, assignment, transfer, conveyance, or other disposition," within six months by the insolvent debtor of his property, "with a view to prevent his property from coming to his assignee in bankruptcy," &c., shall be void. It was said at the argument, the clause as to what shall be prima facie evidence of fraud, does not refer to the first provision; among other reasons, because the word "pledge" is not in the fraud clause, and is in the first provision; and so the word "sale," employed in the second provision but not in the first, is used in the third or fraud clause. The same reasoning would prevent the third paragraph from applying to either of the former provisions; for the word "payment," employed in both of them, is not used in the fraud clause, and the words "other disposition," employed in the second paragraph, are not in the third. The words "sale, assignment, transfer, or conveyance," employed in the third paragraph, are of comprehensive import, and embrace almost every disposition of property, whether absolute or conditional. Both the antecedent paragraphs refer to and are designed to protect the property of the insolvent, and the clause as to fraud is also designed to the same end. All these provisions relate to the same subject or thing,—namely, the property,—and all three aim to protect property of insolvents from fraudulent disposals. My conclusion is in harmony with the rulings in the courts of bankruptcy so far as decisions have come under my notice, and with the opinion of the supreme court of Massachusetts in reference to a like provision in the insolvent laws of that state. When, therefore, it was shown in this case that Tonkin & Trewartha were insolvent, and gave a chattel mortgage of their goods to secure a debt which they owed, there was established a case of fraud prima facie—for that mode of transfer by a trader of his goods, is not one in the usual and ordinary course of his business, but is unusual and exceptional.

We are now to inquire whether the mortgage was made with a view to give a preference to defendants. Whether it was, rests upon the facts, and I refer to Trewartha's testimony first. He says: "I knew"—May 9, 1868, the date of the mortgage—"if we were called upon to pay all our indebtedness at the time, it would be impossible to do so; our only hope was to continue in business, and by using profits yet to be made, we might pay our debts. Next, Mr. Tonkin testifies: "In March, 1868, on reviewing the state of my business, I felt that if demands were pressed upon me for all the debts I owed, I should fall far short of paying them." And they say they were averse to giving a mortgage to defendants; they did so only when pressed, and becoming satisfied it was their only way to ward off the blow which threatened their business. Mr. Maynard went from Detroit to Eagle Harbor in May, and obtained from Tonkin & Trewartha the mortgage on their goods, as the agent and attorney of defendants. He testifies: "Trewartha said he did not see why we wanted securities, as he had given me a full statement of their standing, and that we could see that they had a surplus of between twelve and thirteen thousand dollars. I said to him that in case security was given, I should be willing to fix the time and amount of payments to be made to suit their convenience." He then states that Tonkin "expressed some dislike to giving a chattel mortgage," and "wanted to know if they could rely upon the defendants giving them additional credit in case they should execute the mortgage. I informed them they could." Now it turns out that the statement which Tonkin & Trewartha made of their standing to Mr. Maynard, at the time of giving the mortgage, was not truthful; that in fact they owed more than their assets amounted to. They covered up their real condition by a false statement, well knowing the result if their true condition was made known. It may be true that they hoped to work out, and one means to that end was to obtain time in which to pay their debts. The learned counsel for defendants claim that Tonkin & Trewartha's view was not to give a preference, but to gain time, and, from profits to be realized from trade, pay their debts: that while the mortgage has operated to give defendants preference, it is because of the failure of the mortgagors to realize their hopes and expectations, and is but an incident, and was not the object of the mortgage. It is said, too, their reluctance and aversion to giving a mortgage is evidence that they did not give it with a view to a preference.

If we pause and ascertain first, that the mortgagors knew they were utterly insol-

vent; that they had large indebtedness past due to these defendants and others, which they were wholly unable to pay, and that, bad as their credit was before giving the mortgage, it would be utterly gone after executing it with every one who should know of its existence—and that its existence would be open to all in the town clerk's office—there would seem no escape from the conclusion that Tonkin & Trewartha must have known and realized that a mortgage to defendants of their property would be a preference. It is wholly untenable to say, that traders who know themselves to be insolvent, can mortgage their property to secure a pre-existing debt without entertaining the view that such action is a preference. The court is to judge of the transaction from Tonkin & Trewartha's standing at the time, and if it appears that their condition was such that a mortgage must operate as a preference, it cannot be allowed, because there was a possibility of their earning in the future enough to pay all their debts, and hoped so to do, that, therefore, there was no intention or view to give a preference. It matters not what was their principal motive; if they were actually insolvent and knew it, they will not be allowed to pledge all their property, or any part of it, to one creditor, leaving the other creditors dependent in whole or in part upon the trader's subsequent good or ill fortune in business enterprises. The court regards this view to be in harmony with the spirit and intention of the bankrupt act; any other view renders the provision of the law under consideration as worthless as a rope of sand, and as opening a door to evade one of the most salutary provisions of the bankrupt act. Mr. Justice Swayne, in Farrin v. Crawford [Case No. 4,686], used the following language: "Assuming, then, that he (the debtor) was insolvent and knew it, it follows at once that any payments then made by Farrin to any creditor in full, were with intent to prefer, and, therefore, acts of bankruptcy within the meaning of section 39 [14 Stat. 536]." Section 39 employs the same language as section 35, viz: "With a view to give a preference." Hence the ruling of Mr. Justice Swayne is applicable to the case at bar. The court holds the mortgage by Tonkin & Trewartha to defendants to have been made with a view to give a preference.

And the question remains whether defendants had reasonable cause to believe Tonkin & Trewartha insolvent, and that the mortgage was made in fraud of the provisions of the bankrupt act. This is frequently one of the most difficult, as it is one of the most important questions arising under the law, involving, as it often does, large amounts growing out of payments, mortgages, and transfers by a debtor, and involving questions of construction and fact. Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the bankrupt laws, and I know of no better general rule by which to be governed in considering the facts of a case. It is neither too broad nor too narrow; while, in my opinion, it would be quite too narrow and restricted to hold that failure to pay some one debt when due is evidence of insolvency in all cases under the act, though I believe it has been held that if a trader does not pay a debt when it matures, he is to be regarded insolvent. This, as a rule applicable to traders generally in this country, I cannot indorse. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency, depends somewhat upon the magnitude of the debt, upon the locality of the debtor, and upon what is the ordinary course of business and custom in that respect of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. Suppose a debtor residing in a small country town, in an agricultural district, or in the mining regions of this state, where debtors are not usually prompt to meet their debts as they mature, and an item of indebtedness is not paid at maturity, while at the same time the debtor is of known responsibility, having two dollars or ten dollars of assets to one dollar of indebtedness, and enjoying good credit—to say such debtor is insolvent simply because he fails to pay the debt at maturity, is obviously incorrect. It ignores the usage and course of business recognized between the creditor and debtor class in that locality, and would present the spectacle of the mercantile class saying a trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is, whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is true, that insolvency in New York, Boston, Philadelphia, and other commercial centers, is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is prima facie insolvent; whereas in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law, as was said at the argument; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere. The rule first stated, that a trader who is not able to pay all his debts in the usual ordinary course of business, as persons carrying on trade usually do, is to be regarded insolvent, is sufficiently liberal to admit all the necessary tests in determining the ques-

tion of insolvency. What now are the facts from which we are to draw our conclusions, whether the defendants had reasonable cause to believe their debtors insolvent at the time Tonkin & Trewartha made the mortgage—May 9, 1868?

[2][Defendants commenced selling to the bankrupts goods on credit in 1866, and continued up to about November 10, 1867, when they sold the last bill prior to the mortgage. Then Tonkin & Trewartha owed defendants an amount, past due, of two thousand five hundred dollars. The November purchase added to the indebtedness three thousand seven hundred dollars, and Tonkin & Trewartha also gave defendants, at that time, their draft for five hundred dollars on Head & Perkins, of Boston, at ten days, which was never paid. Tonkin & Trewatha at that time gave defendants their six notes for eight hundred and seventy-five dollars, due monthly thereafter. There was also five hundred and ninety-nine dollars in account, falling due December 7; total indebtedness, six thousand three hundred and forty-nine dollars. They also purchased from Allan Shelden & Co., of Detroit, and were indebted to them for merchandise, at the same time, four thousand six hundred dollars. They gave Allan Shelden & Co. a draft for five hundred dollars, at ten days, on the same parties as the draft to defendants, which was not paid. The indebtedness to Allan Shelden & Co. also came due monthly. We may presume that the November credit was induced largely by a statement made by Tonkin & Trewartha, in October previous, showing assets, thirty-nine thousand dollars; liabilities, eighteen thousand dollars; surplus, twenty-one thousand dollars. But it appears that on the 9th of January following, defendants had received no payment from their debtors, and learning there was a mortgage on the stock to Chicago parties to secure the payment of seven or eight thousand dollars, became solicitous about their debt, and wrote Hubbell & O'Grady, attorneys at Houghton, inclosing a statement of their debt, with that of Allan Shelden & Co., and also of J. J. Bagley, in the aggregate amounting to over twelve thousand dollars. In their letter of instructions appears the following: "We wish you to go at once to Eagle Harbor and examine closely into their affairs, and in the first place, see if their statement made accords with their condition. We don't want to break them up if they can go through, nor do we want to jeopardize our claims by waiting until every one else has their claim secured or paid. Please be particular, and see what shape the debt was in that they gave chattel mortgage for—as we think the bankrupt act would force them in to take pro rata with other creditors, if Tonkin & Trewartha could not pay in full. But if statement made by Tonkin when here was true, they must be solvent. After looking into their matters, we want you to take such steps with inclosed claims as in your judgment may seem best for our interest." The October statement was sent to Hubbell & O'Grady, as a guide to their investigations, and January 20, Mr. O'Grady wrote defendants, "I am happy to inform you that their matters are sound, in my best judgment."

[Now, Tonkin & Trewartha state their assets at fifty-two thousand dollars; liabilities, twenty-five thousand and thirty-one dollars; and Mr. O'Grady writes, if two thousand dollars are deducted from accounts—calling them three thousand dollars—and ten thousand dollars are deducted for excessive estimate of stock, "this leaves them nearly fifteen thousand dollars ahead." He reports as incumbering their merchandise a mortgage for eight thousand dollars, dated October, 1867, payable one thousand dollars monthly, on which fifteen hundred dollars only was paid; and another mortgage given December 24, to secure three thousand two hundred dollars, on which five hundred dollars was unpaid, and due forty days from date of mortgage. This mortgage, he states, was given to prevent their goods being attached for a bill bought in November. Tonkin & Trewartha's statement, transmitted to defendant by Mr. O'Grady, omitted indebtedness upon the two five hundred dollar drafts before alluded to, and this was noticed by defendants, and Mr. O'Grady's attention called to the fact, who accounted for the omission as inadvertence on Tonkin & Trewartha's part. He says, in his reply, "I have set a good, careful, and vigilant watch upon the concern." One of defendants, having in charge this business, Mr. Bagley, testifies that when he received Mr. O'Grady's statement, he believed Tonkin & Trewartha were sound. Early in March defendants procured Mr. Hoar, a man of mercantile experience at Houghton, to go to Eagle Harbor and look after their debt. On the 29th of February, defendants purchased Allan Shelden & Co.'s debt against Tonkin & Trewartha, at fifty cents on the dollar; most of it was past due; so that in March defendants held about twelve thousand dollars of Tonkin & Trewartha's indebtedness. Mr. Hoar testifies that, after looking into their affairs, and making inquiries of them, he was satisfied Tonkin & Trewartha were good. He so reported to defendants, and stated their assets over liabilities at twenty thousand dollars. Mr. Chadburn accompanied Mr. Hoar in the interest of defendants, and his testimony accords with that of Mr. Hoar.

[The next step is in the early part of May, 1868, when defendants, being without remittances from their debtors, procured their attorney, Mr. Maynard, of this city, to go to Eagle Harbor and look after their debtors' standing. Mr. Bagley testifies that his instructions to Mr. Maynard were, "If they were sound, not to disturb them, but give

[2] [From 3 N. B. R. 602 (Quarto, 149).]

them all the time they wanted; if they would give security we would carry them through —means by that we would give them goods until they were able to turn themselves and pay their debts." Mr. Maynard testifies that defendants "expressed to him a good deal of anxiety about the claim," and wished him to go to Eagle Harbor and examine into Tonkin & Trewartha's pecuniary condition, and do whatever he thought best for their interests. If satisfied they were good, with sufficient means to pay what they owed, and go along in business, time might be given them, and defendants would give them additional credit, provided security was given to pay defendants' bill. Mr. O'Grady, of Houghton, accompanied Mr. Maynard from that point. Both agree substantially as to what was said and done. Arriving at Eagle Harbor, inquiry was made of resident parties concerning the condition of Tonkin & Trewartha, and they were told that while trade was dull, the parties were regarded sound, and that any statements they might make concerning their standing and affairs could be relied upon. Tonkin & Trewartha now made their last statement before executing the mortgage, and it exhibited: assets, thirty-one thousand seven hundred and four dollars; liabilities, eighteen thousand eight hundred and seventy-six dollars; assets over liabilities, twelve thousand eight hundred and twenty-eight dollars. They were urged to give defendants security, but said in reply, "They were perfectly good, and could pay every dollar they owed as soon as they could convert their property into money, and would have a handsome surplus left." Mr. Maynard says: "I answered that to go along successfully with their business, and meet their liabilities from the sale of their goods and the collection of their accounts, they would require a long extension on at least a portion of their indebtedness, and that they would necessarily need additional credit; and that inasmuch as our claim comprised nearly two-thirds of their entire indebtedness, I thought it not unreasonable to ask security. I said to them that in case security was given, I should be willing to fix the time and amount of payments to be made to suit their convenience." Thus the business was talked up, and, therefore, we obtain the views of the parties, and a pretty good understanding of how defendants regarded the debtors' standing and prospects when the mortgage was given. Mr. Allan Shelden testifies that defendants said they wanted to buy Allan Shelden & Co.'s demands against Tonkin & Trewartha, because their debt was past due, and they desired to control both; thought their debtors good, and could collect. Mr. Shelden further says, about the time they transferred their claim to defendants, February 29th, the failure of Tonkin & Trewartha to pay was a subject of conversation between them and defendants. He also says they sold their debt, amounting to four thousand six hundred and fifty dollars, for fifty cents on a dollar, because they considered the debt doubtful, and concluded they would rather take that than take the risk. Now, we must remember that Allan Shelden & Co. and defendants were alike conversant with Tonkin & Trewartha's statements, and both experienced business houses. July 1st, the the first of the notes secured by the mortgage came due, and was not paid. Mr. Bagley arrived at Eagle Harbor just before the middle of the month, and caused the mortgage to be enlarged to cover accessions to Tonkin & Trewartha's stock, amounting to about two thousand dollars, of which six hundred dollars were purchased from defendants in June on credit. Mr. Bagley testifies: "Their statement then made (in July, when he arrived at Eagle Harbor) was different from the statement made before; I was satisfied there was a leak, or that they hadn't the assets they represented to me they had; I made up my mind it was no object to go on and advance four thousand or five thousand dollars more goods, and I took possession of the stock." An inventory was now taken of the property covered by the mortgage, which amounted to seventeen thousand three hundred and eighty-four dollars. On a sale this property brought ten thousand two hundred and seventy-six dollars. The only other fact I deem it important to state is, that it appears in evidence that it is a common occurrence for traders in the Lake Superior region to fail in paying their debts at maturity.

[Such are the principal and controlling facts of this case, and now the question recurs, had the defendants reasonable cause to believe their debtors insolvent? The several statements put in evidence, furnished by Tonkin & Trewartha to defendants, are important in the consideration of this question. The one made in October, 1867, represented twenty-one thousand dollars assets over liabilities; that of January following, represented twenty-six thousand nine hundred and sixty-seven dollars; Mr. Hoar, who investigated the condition of the bankrupts in March, reported twenty thousand dollars; and that made to Mr. Maynard and Mr. O'Grady, when the mortgage was taken in May, exhibited not quite thirteen thousand dollars of assets over liabilities. All these statements were made within a period of seven months. Tonkin & Trewartha were surrounded by, and mostly dependant upon a mining population for trade. Mining operations were not active during the winter of 1867-8—copper was low, and business much depleted—and Tonkin & Trewartha's trade had been very light during that winter. The facts were understood by both debtors and creditors.

[In the light of these facts, let the four statements of the debtors be examined; and we must assume that defendants did not fail

to notice the discrepancies. Between the October and January exhibits—about three months—there was shown to have been gains of nearly six thousand dollars, and yet in the time not a dollar paid to Allan Shelden & Co. or defendants, that I can discover, and certainly nothing after November 10th. Besides, trade was dull. The March statement exhibited a shrinkage since January 20th, of nearly seven thousand dollars. I think defendants, in view of such varying statements, might well question the correctness of such exhibits, and feel exceedingly anxious concerning their debt, when, about the first of May, they sent Mr. Maynard to Eagle Harbor. Again, Mr. Maynard and Mr. O'Grady must be presumed in possession of the facts to which we have referred, at the time of their visit to Tonkin & Trewartha. Now, the statement made showed assets over liabilities between twelve and thirteen thousand dollars, and compared with the last preceding statement of March, the shrinkage was more than seven thousand dollars—in about two months—while, by a comparison with the January statement, the assets of Tonkin & Trewartha had shrunk over fourteen thousand. Taken in connection with other facts, I regard these statements sufficient to afford reasonable evidence to an impartial judgment that Tonkin & Trewartha's solvency was to be distrusted—quite as much in May as in July following. That there was reason to believe them insolvent in July, is admitted by Mr. Bagley, one of the defendants. He says, when he arrived at Eagle Harbor in July, "Their statement then made, was different from statement made before, and I was satisfied that there was a leak, or that they hadn't the assets they represented to me they had." If a difference between the July statement and former statements was cause to conclude Tonkin & Trewartha had not the assets they represented themselves to have, then the difference or discrepancy between previous statements, afforded equal ground to regard them not as good as they represented. When Mr. Bagley went to Eagle Harbor in July, it does not appear that he made any detailed examination of the debtors' condition before taking possession of the stock under the mortgage; but on seeing and talking with them, became satisfied from the statement then made, that they were no longer able to pay their debts. I can discover nothing in the testimony to justify the conclusion that Tonkin & Trewartha were less able to pay than at the time the mortgage was made, except the single fact that they had now failed to make the July payment of eight hundred dollars on the mortgage. As early as February 29th, Allan Shelden & Co. realized the doubtful responsibility of Tonkin & Trewartha by selling to defendants their debt for fifty cents on a dollar. Is it probable that they would have done this if they had regarded Tonkin & Trewartha solvent? Do business men dispose of their bills receivable against solvent debtors at fifty cents on a dollar?][2]

There are, to my mind, exhibited by the facts in this case very strong reasons for defendants not only to have suspected, but believed their debtors insolvent, outside of the consideration that there was other past due indebtedness of considerable amount. Defendants did feel extremely anxious as to the ultimate payment of their debt, as is shown by the evidence. That they distrusted Tonkin & Trewartha's solvency is apparent from their sending, on three different occasions, agents and attorneys to investigate their debtors' standing; also, from information received that there had been placed upon the debtors' stock two mortgages for considerable amounts; and again, from the fact that defendants were not only anxious to obtain security for their debt, but did not rest satisfied until it was accomplished. Now, considered in relation to their own past due debt, it would seem to be the policy of the bankrupt act not to allow a creditor, under such circumstances, to take a transfer of a debtor's property by way of preference, payment, or security. Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures, and in the usual mode of paying debts, are prima facie valid. On the other hand, whenever a creditor is in possession of such facts and circumstances in reference to his debtor's standing as arouse suspicion with regard to his solvency or ability to meet his indebtedness, the creditor is so far put upon inquiry that he will not be allowed to shut his eyes to those facts and circumstances, and obtain payment of a debt, otherwise than as it matures, or take security or a transfer of property from the debtor to the prejudice of other creditors. If he does so, and his debtor comes into bankruptcy within four or six months, as the case may be, the creditor must be held to have had reasonable cause to believe his debtor insolvent, and that the transfer was in fraud of the provisions of the bankrupt act. Any other view detracts greatly from the most wholesome operation of the law. Not paying debts in the usual and ordinary course of a trader's business from lack of present means and want of ability to raise means, must be regarded as prima facie evidence of insolvency, and the creditor who has knowledge of such facts must act in view of them. It is undoubtedly true that defendants and their agents and attorneys had no idea of the utterly insolvent and bankrupt condition of their debtors, as the proofs now show their debtors' condition to have in fact been. But we must not forget that there is a clear distinction between insolvency and bankruptcy. A trader may be insolvent and yet not be bankrupt.

There is one view of this case which settles

[2] [From 3 N. B. R. 602 (Quarto, 149).]

the question we are discussing, and it is this: Tonkin & Trewartha were largely indebted, most of it past due, and they professedly wholly unable to meet that indebtedness or any considerable part of it, in the usual course of business as those debts matured, and this was known to defendants. Tonkin & Trewartha were not only unable to pay as their debts matured, but confessedly unable to do so within a reasonable time, either from present means or through the aid of their credit and property, which solvent men are usually able to do. They were not, in May, and for months before had not been, able to pay their debts past due. They were pressed from time to time for payment or security, and month after month continued to dishonor note after note as they matured. Their condition was such as to cause their pecuniary standing to be discussed by their creditors, and their over-due and unmatured paper to sell at fifty cents on the dollar. This state of things betokens beyond any chance of mistake, not only that Tonkin & Trewartha were insolvent within the rule of not being able to pay their indebtedness as it became due, in the usual and ordinary course of their business, but, as all this was known to defendants, that they had reasonable cause to believe their debtors insolvent when the mortgage was made; not that they believed, but had reasonable cause to believe. It follows, as a necessary inference, that a mortgage made under such circumstances was a fraud upon the provisions of the bankrupt act. Having already found that the mortgage was made with a view to giving a preference, it follows that there must be a decree in favor of complainant for the value of the property taken by defendants. I shall adopt the amount brought on sale as the fair value. This was ten thousand two hundred and seventy-six dollars, from which is to be deducted the mortgage lien on the property paid by defendants, one thousand eight hundred and twenty-five dollars, the remaining sum, with interest thereon to this date—one year and seven months—being nine hundred thirty-six dollars and sixty-four cents,—gives the amount of the decree, nine thousand three hundred and eighty-seven dollars and sixty-four cents. Decree accordingly.

Case No. 4,084.

DRIGGS v. RUSSELL et al.

[3 N. B. R. 161 (Quarto, 39);[1] 1 Chi. Leg. News, 353; 2 Am. Law T. 206; 1 Am. Law T. Rep. Bankr. 160.]

District Court, E. D. Michigan. June Term, 1869.

SEPARATE PROPERTY OF MARRIED WOMEN — EMPLOYMENT OF HUSBAND—HUSBAND'S CREDITORS.

1. Mrs. Russell, a married woman, carried on, managed, and controlled an iron foundry and other business interests in her own name, with funds loaned her by friends to whom she gave her own notes, with whom she advised as well as with her husband as to proposed investments. The husband, who was insolvent, was hired by the wife, and received a monthly compensation. *Held*, that the property used in the business and that purchased by her and standing in her name, was her individual property, and not liable to be taken to satisfy the claims of her husband's creditors.

2. *Held*, that a married woman may carry on business on her own account and for her own interest; that she may employ all needed labor, workmen, and agents, and that she may employ her own husband and pay him.

WITHEY, District Judge. This is an application by the assignee to have property, real and personal, held by Anna E. Russell, turned over to the assignee in bankruptcy for the benefit of George B. Russell's creditors, and is based on the claim that the property in question has been acquired in the name of Mrs. Russell, but for her husband's benefit. If the claim is supported by the proofs, then the order to transfer the property to the assignee in bankruptcy should be made; otherwise it should be denied. We have not time to enter as fully into a discussion of the merits of the question as its importance demands, but we have not failed to examine the facts, and should be glad, if our time permitted, to give in full the views which have led to our conclusion. We shall attempt, therefore, little more than a statement of the result of our examinations.

In all Mrs. Russell's purchases of property, there is no evidence that her husband furnished one dollar of the purchase-money. In her business operations in carrying on the iron foundry and other business interests, there is no evidence that her husband had any control whatever, furnished any capital, or dictated in the slightest manner. Mrs. Russell had friends who loaned her money. She advised with friends as to proposed investments, as to business she began and carried on, and she also advised with her husband in reference to these subjects, as she had a right to do. She gave her individual notes for moneys loaned. She pledged property which she had bought, to secure payment. Her husband's name does not appear in any of these transactions. Mrs. Russell began without means; her husband was a bankrupt without credit, hopelessly insolvent. Her credit was better than his, because she was not involved in debt, and he was. There is no presumption, therefore, that his credit or his means had any influence in promoting her credit or her acquisition of the property or any part of it. But Russell did work a portion of the time for his wife, and received from her a monthly compensation. How does this fact affect the right of property? How does it show that her acquisitions were for his benefit? Not in the slightest, if a married woman may carry on business on her own account and for her own interest. If she may

[1] [Reprinted from 3 N. B. R. 161 (Quarto, 39) by permission.]

do this, she may employ all needed labor, workmen, and agents. If she may hire the services of any one at all, she may employ her husband and pay him. That the husband is primarily bound to support his family, may be conceded; but suppose he cannot, and suppose the wife can, she may do so. But there is nothing in the case to show that Russell did not, through his own earnings, support his family. If it should be established that his earnings went into her property, then he would own an interest in the property. But this fact does not appear. The petitioner comes and asserts that Russell, and not Mrs. Russell, is the person in whose real interest the property was acquired, that the wife was but a cover, holding it for the husband. The petitioner is bound to establish what he asserts by proofs, before he can ask the court to find that this claim is correct. It is probable the petitioner and his learned counsel commenced these proceedings upon such information as entirely justified not only the claim set up, but afforded great assurance of success. The proofs must, in a great measure, come from Mrs. Russell and Mr. Russell. They were called and examined, and, we think, exhibit great candor, frankness, and truthfulness. The facts taken altogether, as we think, fail to show any interest whatever, in the husband, in any respect, to any of the property in question.

It makes no difference that Russell had failed; it is at most a circumstance which is to be considered in weighing the proofs if, because he could not buy and sell and carry on business, he was using his wife's name as a cover for doing what in his own name he could not successfully do. But, as a circumstance or fact, it amounts to very little in view of the proofs. It is asked if credit would have been given to Mrs. Russell had it not been for the confidence placed by others in her husband's business ability? We can only reply that we think if Russell's business reputation was one of the main inducements for giving his wife credit and loaning her money, such fact ought not to be allowed as affecting her rights to property acquired by means of such credit. She had a right to all the advantage which would or did flow to her from her own or her husband's business tact and foresight, so long as his means, services, and earnings, did not enter into her business. Mrs. Russell stated that her husband spent more time than she did in her business, but when this statement is considered with reference to all that she states, and the other proofs, it is without any significance. Russell was employed, that is, a portion of the time, to and about Mrs. Russell's business, but she paid him wages regularly, as she paid other employees. Mrs. Russell managed and controlled everything. She was conversant with all her business, and her testimony exhibits business qualities quite equal to those exhibited by successful business men. In Michigan, the wife may acquire, hold, and own property in her own right, and she may carry on business in her own name. Hence the presumptions are all in her favor on the question of the ownership of this property. The legal title is indisputably in her. She has possession. The proofs do not overcome these presumptions. We cannot take her property and hand it over to her husband's creditors. We think the authorities cited by counsel sustain us in our conclusions. It may be said we have taken a one-sided view of the facts of this case, failing to discuss fully the proofs which tend to show a different result. We admit this—but our time has not been sufficient to enter upon as full a discussion as we have desired. We have not failed, however, to consider both sides in our investigations, but a desire to dispose of the case now is the excuse for the partial discussion we make in announcing the result. The application is denied.

Case No. 4,085.

DRINKWATER et al. v. The SPARTAN.

[1 Ware (149) 145;[1] 3 Am. Jur. 26.]

District Court, D. Maine. June Term, 1828.

SHIPPING — CHARTER-PARTY — DEMISE OF SHIP — LIEN FOR DISBURSEMENTS — MASTER'S WAGES — ADMIRALTY JURISDICTION — OWNER'S LIEN ON FREIGHT—ENFORCEMENT.

1. A libel on a charter-party for freight due is a cause of admiralty and maritime jurisdiction; and a court of admiralty has cognizance of the cause, provided the penalty is not demanded.

2. The circumstance that the instrument is under seal, does not take away the jurisdiction which the court has over it as a maritime contract.

3. The admiralty has a general jurisdiction to enforce maritime liens.

[Cited in Gloucester Ins. Co. v. Younger, Case No. 5,487.]

4. The ship-owners have a lien on goods for the freight due for maritime transportation, which may be enforced in the admiralty by a libel in rem. And it is immaterial whether the contract is by a bill of lading, or a charter-party.

[Cited in The Rebecca, Case No. 11,619; The Gold Hunter, Id. 5,513; The Perseverance, Id. 11,017; The Volunteer, Id. 16,991; Ward v. The Panama, Id. 17,159; Thatcher v. McCulloh, Id. 13,862; The Merchant, Id. 9,434; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 420; Stone v. The Relampago, Case No. 13,486; The Maggie Hammond v. Morland, 9 Wall. (76 U. S.) 452; The T. A. Goddard, 12 Fed. 179.]

5. But where, by the terms of the contract, the charterers have the possession and control of the ship, the charter-party is not a contract for the transportation of goods, but it is a letting of the ship, and the charterers are considered as owners for the voyage.

[Cited in The Erie, Case No. 4,512; The T. A. Goddard, 12 Fed. 178. Distinguished in Shaw v. U. S., 93 U. S. 235.]

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

6. In this case the general owners have no lien on the cargo for the hire of the ship.

[Cited in Hill v. The Golden Gate, Case No. 6,491; The Wilmington, 48 Fed. 568.]

7. Where by the terms of the contract a ship was chartered for a voyage to be made by the charterers from Portland to the Western Islands and back to her port of discharge, they to pay the expense of victualling and manning, and all port charges, &c., and to deliver her up to the owners on the termination of the voyage, it was held that the possession was with the charterers, and they were owners for the voyage, notwithstanding one of the owners was named in the charter-party as at present master.

[Cited in Eames v. Cavaroc, Case No. 4,238; Richardson v. Winsor, Id. 11,795; Donahoe v. Kettell, Id. 3,980; Leary v. U. S., 14 Wall. (81 U. S.) 607; Grand v. The Ibis, Case No. 5,682.]

8. The master has a lien on the freight for his necessary disbursements for incidental expenses, and the liabilities which he contracts for these expenses during the voyage, and also for his own wages.

[Cited in Ex parte Clark, Case No. 2,796; The Larch, Id. 8,085; The Eolian, Id. 4,504; The Atlantic, 53 Fed. 608.]

9. Where the charterers of a vessel failed before the termination of the voyage, and transferred all their property to assignees in trust to pay their creditors, including the cargo on board the ship, and it appeared that the freight due on the merchandise taken on freight was exhausted by prior claims, it was *held* that the master's wages were a privileged claim against the merchandise he had brought home for the charterers, and that he was entitled to a satisfaction out of it, before it went to the general creditors.

[Cited in Fox v. Holt, Case No. 5,012.]

This was a libel [by Joseph Drinkwater and others against the freight and cargo of the brig Spartan, Jacob Quincy, Charles Fox, Joseph E. Foxcroft, and Robert H. Thayer being claimants] on a charter-party, by the terms of which the owners let to freight the whole of the vessel with her appurtenances, for a voyage to be made by the charterers to one or more ports in the Western Canary and Madeira Islands, and back to her port of discharge in the United States, and to Portland. The owners covenanted that in and during the voyage she should be tight, stanch, and strong, and sufficiently tackled and apparelled for such a ship and voyage, and that it should be lawful for the charterers or their agents or factors, as well at Portland as in foreign ports, to load and put on board such loading and goods as they should think proper, contraband excepted. On the part of the charterers, it was agreed that they should pay for the full freight or hire of the brig $—— per month during the time of the service, in thirty days after the termination of the voyage, and pay the charges of victualling and manning, and all other charges, and deliver her, on her return to Portland, to the owners or their order. The charter-party is dated the 12th of September, 1827; the brig performed the voyage and returned to Portland the 25th of April, 1828, with a cargo, part of which was taken on freight, and part shipped on account of the charterers. One of the owners is named in the charter-party as master, but he being unable to go in her when she was ready for sea, a new master was appointed. A question of fact, about which the parties were not agreed, was, by whom the new master was appointed; but it appeared from the evidence, though the owners were desirous that the person who finally went as master should be the man, that the right of appointing him was claimed and exercised by the charterers. Before the return of the vessel, the charterers having become embarrassed in their business, made an assignment of all their property, including this cargo, to Messrs. Quincy & Fox, in trust, to pay their creditors in a certain order of preference, fixed by the terms of the assignment. The property was also attached, immediately on its arrival, by several creditors of the charterers. This libel was filed for the purpose of recovering the amount due on the charter-party from the freight of that part of the cargo taken on freight, and from that part of the cargo directly which was shipped for the charterers. The master also claimed a lien on them for his wages.

Claims were interposed by the assignees, by the sheriff, and by Mr. Thayer, each setting forth their title to the property, but the merits of these conflicting claims were in a course of litigation before the state courts, and it was unnecessary to decide upon them in this case. The questions raised in this case were, first, whether under this charter the owners of the vessel had a lien on the freight and cargo for the charter, and secondly, whether the master had such a lien for his wages. They were very elaborately argued at the June term, and the case held under consideration to July 1, when the following opinion was pronounced.

Mr. Emery and C. S. Daveis, for libellants.
Mr. Longfellow, for Quincy & Fox.
Fessenden & Deblois, for Foxcroft.

WARE, District Judge. This is a libel by the master and owners of the brig Spartan, founded on the charter-party, and brought for the purpose of enforcing the stipulated hire of the vessel, from the freight and merchandise. The master and owners of the ship have united in the libel, and there was a distinct allegation by the master, claiming a lien also on the freight and that portion of the cargo which is owned by the charterers, for his wages. Whatever objections to the union of these different causes of action in one libel may exist in point of law, they were considered as waived, by the counsel, and of course the attention of the court has not been directed to this subject. The other points in the case have been argued with distinguished ability, and justice requires me to acknowledge the very material aid I have received in examining the case, from the thorough and acute discussion of all the questions it involves, in the learned and copious arguments of the counsel on both sides.

A preliminary objection is urged by the respondents, to the jurisdiction of the court, which must be disposed of before we can approach the case on its merits. It might be sufficient for this court, in claiming jurisdiction over the case, to refer simply to the decision of the circuit court in the case of De Lovio v. Boit [Case No. 3,776] in which the whole learning on the vexed question of extent of the admiralty jurisdiction is completely exhausted. In that case, the jurisdiction of the admiralty over bills of lading and charter-parties is distinctly asserted, and as that was a decision of the appellate court, which has the authority to correct the errors of this, it is beyond question binding upon me, unless it has been reversed by the supreme court. The case of De Lovio v. Boit [supra] has, I know, in a recent case, been questioned by one of the judges of that court, Mr. Justice Johnson, in Ramsey v. Allegre, 12 Wheat. [25 U. S.] 611, but the court left its authority untouched. The decision, therefore, I should hold still to be binding here, if I did not in my private judgment concur, as I most fully do, in the doctrines maintained in that very learned and masterly opinion. It has been now for twelve years before the public, and though several attempts have been made to answer it, I have yet seen none in which the reasoning is met or the conclusions shaken.

The question now before me, was not then in judgment before the circuit court; and as it was not a point directly decided, the counsel for the respondent has urged the objection as one still open to argument. Without falling back on the authority of that case, I feel no objection to meet the question and give my own opinion on the point now in controversy. The argument is, that this is a sealed contract, and that the admiralty cannot take cognizance of a contract under seal. The 2 Browne, Civ. & Adm. Law, 96, is referred to as confirming this doctrine. That the courts of common law in England will grant a prohibition in such a case, is admitted. It has long been the established law of that country, and is not to be controverted. Howe v. Nappier, 4 Burrows, 1944; 1 Strange, 962; 1 Salk. 31. But I consider it as equally well established, that the decisions of the common law courts in England, as to the limits and extent of the admiralty jurisdiction, have not an authority in this country beyond the reasons on which they are founded. Every admiralty court in this country probably, most of them certainly, have in repeated instances taken cognizance of cases in which a prohibition would go in England. Without multiplying citations, I will refer to one or two only. The case of The General Smith, 2 Wheat. [15 U. S.] 432. was a suit by material-men, and not the slightest doubt was expressed of the jurisdiction of the court. It was again positively and distinctly asserted over that class of causes in The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409. Yet it is perfectly clear that a prohibition would go in these cases to the high court of admiralty. The contract is both made and executed on land, and within the body of a county, either of which circumstances is held to be conclusive, by the courts of the common law, against the admiralty jurisdiction. This court must, therefore, in deciding this point, be governed by the nature of the case, and the decisions of our own courts. No case directly in point has been cited at the bar or is recollected by me.

The first thing to be considered in deciding the question, is the subject-matter or consideration of the contract, whether maritime or not. It is the hire of a vessel for maritime service, and the whole service, from its inception to its termination, is on the high seas. The judiciary act (2 Laws U. S. c. 20, § 9) gives to this court "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." I shall be glad to hear any definition of causes of admiralty and maritime jurisdiction which will exclude this. The counsel do not, however, put their objection on this point. They rely on the fact that the contract is under seal. But if the jurisdiction attaches to the subject-matter, is it defeated by the peculiar form which the parties have chosen to give to their contract, by annexing to it a seal? The reason given by the common law courts of England, for ousting the jurisdiction of the admiralty in such cases, is, that this court is governed by the civil law, and requires two witnesses to prove a deed, when the common law is satisfied with one. Smart v. Wolff, 3 Term R. 348, per Justice Buller. If that is the rule of the admiralty in England, it may be a good reason for prohibiting the court from taking cognizance of sealed contracts. In this country, a deed is proved in the admiralty by the same evidence that is held to be sufficient by the courts of common law, and is interpreted by the same rules. The reason, therefore, which may be good in England, fails here, and "cessante ratione cessat lex." Yet the rule is flexible in England, for there the admiralty has an undisputed jurisdiction over bottomry bonds. In fact, though Browne, in the place referred to in the argument, does state the law of England to be as is contended, that is, that a prohibition will go from the common law courts; yet in a subsequent part of the same chapter he says, that if a suit is instituted in the admiralty on a charter-party for freight, he does not see how the court could refuse to entertain it (page 122); and the Case of The Jenny, cited in the same volume, which was a decision of the court of admiralty in Ireland, is directly in point to sustain the jurisdiction (page 535). The court ruled that the jurisdiction of the admiralty was excluded only when the penalty was sued for.

But there is another ingredient in this case which I hold to be conclusive in favor

of the jurisdiction. I yield to the argument, which was very forcibly urged in another case as well as in this, that this court has a general jurisdiction to enforce maritime liens. I assume the fact in this stage of the inquiry, which is supposed by the suit, and on which it rests as its only foundation, that a lien is created by the maritime law. If there is here an implied hypothecation raised by the law, it can be enforced by no other than an admiralty court. It is a right adhering to the thing, a jus in re, which is to be made available by process against the thing in specie. It was admitted by the learned counsel for the respondent, that the course of the common law allows of no process upon the hypothecation by which the subject itself is directly reached and a satisfaction for this right extracted from it. If a court of admiralty cannot entertain jurisdiction of the case, then the law has given the right, it has provided the security, but has refused the only means by which it can be rendered with certainty available. It holds out the right, and holds back the remedy. The libellants assume the fact that theirs is a privileged debt, and for the decision of this point in the case it must be admitted to be true. They claim the right to be paid out of the property for which the service has been rendered, and by which its value has been augmented, before any part of it goes to the general creditors. And when they apply to the only court which can put them in possession of their rights, shall they be told that this court has no jurisdiction of the case? Shall they be told that the law sanctions their privilege and holds it sacred, but refuses to them the power to enforce it? Until I am otherwise instructed by the authority of a higher court, I shall not willingly admit that the law thus "palters in a double sense, and keeps the word of promise to the ear, while it breaks it to the hope." On the contrary, where the law raises a lien for maritime service, I hold that this court has the power to carry it into effect.

We come then to the case on its merits. The general right of the master and owner to retain the merchandise for the freight due upon it, has not been denied. It is too well established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confirmed by numerous decisions of the highest courts, both in this country and England. Nor does there appear to be any difference in principle, nor is any recognized in law, whether the merchant takes the whole vessel by a charter-party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter-party, as it is for the freight stipulated in the bill of lading. In both cases the claim is privileged in the same degree and to the same extent. They are contracts of the same general nature, differing only in some unimportant particulars. A charter-party is for the whole or a large or specified part of the vessel; a bill of lading is usually for a smaller and an indeterminate portion of the vessel's capacity. Both contracts, in one aspect, are the hire of the whole or a part of a vessel; both, in another, are contracts for the transportation of merchandise. Boucher, Droit Maritime, par. 879. In both cases the owner is the carrier, and he has a lien on the merchandise for the transportation.

There are, however, two kinds of contracts passing under the general name of "charter-party," differing from each other very widely in their nature, their provisions, and in their legal effects. In one, the owner lets the use of his ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact and in contemplation of law the carrier of whatever goods are conveyed in his ship. The charter-party is a mere covenant for the transportation of merchandise or the performance of the service which is stipulated in it. In the other, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for a lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use but the entire control of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him, and if, by the barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. If he ships his own goods, he is his own carrier.

Under a charter-party of the former description, the charterer may hire the use of the whole vessel, and it may be employed in carrying his own goods, or the goods of other merchants on freight. His own goods become liable to the owner of the vessel for the charter, to the full extent of their value, and though he is entitled to the freight of the goods shipped by the sub-freighters, the owner of the ship has a lien on that freight for the charter of the vessel; and his lien extends to the goods of each sub-freighter for the amount of freight due on his shipment. This was the decision in the case of Paul v. Birch, 2 Atk. 621, and it has ever since been held to be law. Holt, Shipp. 471. It is so recognized in Christie v. Lewis, 2 Brod. & B. 410, and in Faith v. East India Co., 4 Barn. & Ald. 630.

In a charter-party of the second kind, not only the entire capacity of the ship is let, but the ship itself, and the possession

is passed to the charterer. The entire control and management of it is given up to him. The general owner loses his lien for freight, but the lien itself is not destroyed; the charterer is substituted in his place, in whose favor the lien continues to exist when goods are taken on freight. But the general owner has no remedy for the charter of his vessel, but his personal action on the covenants of the charter-party. It is a contract in which he trusts to the personal credit of the charterer. These principles appear to be firmly established by the cases cited at the argument. It was on this principle that the case of Hutton v. Bragg, 2 Marsh. 339, was decided; and afterwards that of Master, etc., of Trinity House v. Clark, 4 Maule & S. 288. The authority of these cases, especially the former, was indeed powerfully attacked in the very able argument of the libellant's counsel, and it may be considered as in substance overruled by that of Saville v. Campion, 2 Barn. & Ald. 503, and still more decisively in that of Christie v. Lewis, 2 Brod. & B. 410. But on an examination of the cases in which the authority of Hutton v. Bragg [supra] has been called in question, it will be found that they have rather overruled the case than the principle. The application of the principle, as made in that case, has been shaken, and not the rule of law which the court professedly assume as the ground of their decision. The principle is, that when the owners let the entire ship and part with the possession, they lose their lien for freight. The application of the principle is, that when the owners let the whole ship, or nearly the whole, by a charter-party, containing certain technical terms of demise, the legal possession passed to the charterers, notwithstanding the general owner appointed and paid the master and crew. The court interpreted this to be a contract, not for the transportation of goods, but for the lease of the vehicle. The Case of the Trinity House, though agreeing in the terms of the charter-party with that of Hutton v. Bragg, is distinguished from it in the nature of the service for which the ship was hired, and may well be defended on its own peculiar circumstances. But the case of Christie v. Lewis agrees in all its material facts with Hutton v. Bragg, yet the court, Dallas, C. J., dissenting, reversed the decision and held that the owner retained his lien. But it was so ruled on the express ground that the owner retained the legal possession of the ship by his master and crew. In this case, as well as in that of Faith v. East India Co., it is clearly admitted that when the owners part with the possession, they lose their lien. The principle of Hutton v. Bragg remains untouched, but the rules of interpretation applied to the charter-party in that case are overturned. All the English cases are reviewed by Holt, in his Law of Shipping, 460–471, and the result of the whole is, that a ship may be so let to hire as to constitute the charterers owners under the charter-party, provided such appears to be the intention of the parties; and that this intention may be collected either from the necessary construction of the terms of the instrument, or from the nature of the service for which she is hired. But the right of the owner is strongly favored, and while he appoints the master and crew, his lien for freight can only be excluded by the most express and absolute terms of the charter-party, or by unavoidable implication. But there is no case where the owner's lien has been sustained, unless where he has retained the possession by the appointment of the master.

No American case was cited in which this point has come up directly in judgment. But in Kleine v. Catara [Case No. 7,869] Mr. Justice Story expressed a decided opinion that where the charterer becomes owner for the voyage, the general owner has no lien for the freight, but that the rule is confined to cases where the carrier for freight is owner for the voyage. I think it clear, both in principle and authority, that where the owner parts with his possession, he parts at the same time with his lien.

This case, therefore, must turn wholly on the question whether the general owners, or the charterers are to be considered as owners for the voyage, and as having possession of the ship. The language of the charter-party leads very clearly, if not unavoidably, to the conclusion that this was a letting of the ship. Violence must be done to several parts of it, before it can be interpreted into a contract on the part of the owners for the conveyance of goods. It is not simply a letting of the whole ship; this, it is admitted, would not alone be conclusive, but she is let for a voyage to be made by the charterers. The owners covenant, not that they or their master will receive and load the merchandise provided by the charterers, but that it shall be lawful for the Quincys or their agents to load her; and the charterers agree, not only to pay the charter, but also the charges of victualling and manning, and all other charges, and finally, after she has performed the voyage, to deliver her up to the owners. It would seem that language more expressive and significant of an intention on the one side to part with the possession, and on the other to take the possession of the ship, could scarcely be found. How could the charterers perform their covenant to deliver up the possession to the owners after the voyage was completed, if the possession was not to be in them during the voyage?

The libellants rely on the fact that one of the owners is named in the charter as at present master, as a circumstance showing that it was the intention of the owners not to part with the possession. If the intention, as collected from the operative parts of the instrument, was doubtful, this might be entitled to weight,

and the inclination of a court to support the equitable lien of the owners, would give it all the weight it could justly have. But this of itself is not sufficient to control the general tenor and whole apparent intent of the charter-party. The appointment of the master and crew by the owners, is not in all cases conclusive; though they may also be paid by them. As is remarked by Lord Ellenborough, in the case of Master, etc., of Trinity House v. Clark, the vessel may be hired, and with it the services of a certain number of persons paid by the owners, and necessary to the use of the vessel. In point of fact, however, the master named in the charter-party did not go the voyage, though it was the intention of both parties that he should.

The libellants offered to introduce parol proof that the new master was appointed by the owners, but the counsel on the other side objected to the admission of this species of evidence to control the operation of the charter-party. The testimony was received, de bene esse, subject to the respondents' objection. It is unnecessary to decide on the influence which this fact ought to have, if proved, on the construction of the written agreement. The evidence in support of it is at best but loose and vague, while that by which it is met on the other side is direct and positive, that the new master was appointed by the charterers. Upon this part of the case, my opinion is that the libel cannot be supported; that the owners parted with the possession of the vessel, and constituted the charterers owners for the voyage, and that they have, therefore, no lien on the cargo for the charter. So much of the libel as claims a lien for the charter, is dismissed. This, of course, can be no bar to any right of action which the owners may have personally against the charterers or their assignees. This view of the question being in my opinion decisive, renders it unnecessary for me to examine other points which were made and strongly urged in the defence.

The master also claims in this libel a lien on the freight and cargo, that is, on that part of the cargo belonging to the charterers, for his own wages and as an indemnity for his liability to the crew for their wages. The decree, which has just now been made on the libel of the seamen, is, I think, a sufficient answer to the claim of a lien as an indemnity. Whatever his rights may have been in this respect, that decree, it appears to me, must be held at present as a full protection against his liability to the seamen. Upon his claim for his own wages, I have found more difficulty in coming to a conclusion satisfactory to my own mind, than on any part of this case; and the opinion which I have adopted as most reasonable and equitable, I do not profess to hold free from all doubt. The books are extremely barren of authorities on this point.

It is a well settled principle of law in this country that the master has no remedy for his wages against the vessel. Whether this be a principle of the general marine law, may perhaps admit of doubt. By the law of France, the master is allowed the same privilege against the ship for his wages, and in case of misfortune, against the savings from the wreck, as the seamen. This is the provision of the Ordinance de la Marine, L. 3, tit. 4, arts. 8, 21; 1 Valin, 701, 752; and this provision is continued in the Code Napoleon (Code de Commerce, 352). I cannot see on what principle of justice or policy the master is to be excluded from all benefit from the savings from a wreck, while the right of the crew is admitted. But the general principle is too firmly established in this country, to be called in question. The Grand Turk [Case No. 5,683]; Gardner v. The New Jersey [Id. 5,233]. One reason assigned for making this distinction against the master, is, that he contracts on the personal responsibility of the owners. But this, instead of a reason, is manifestly little more than another mode of stating the principle. Another, and a more satisfactory reason given is, that he is the proper person to receive the earnings of the ship, and pay them over to those to whom they of right belong (Gardner v. The New Jersey [supra]); and that he has a lien on this freight for his own wages (The Grand Turk [supra]). He is intrusted with the control and management of the vessel, as the confidential agent of the owners, and is often, in the course of the voyage, called upon to incur responsibilities and make advances in the ship's service for their benefit. It is a necessity which arises from the nature of his employment. In cases of imperious and overruling necessity, he may hypothecate the ship, and even the cargo; but it is very questionable, at least, whether he must not first exhaust his own means and credit before he can resort to this extraordinary and onerous mode of relief. The Hero, 2 Dod. 139; Holt, Shipp. 342, 343; Jac. Sea Laws, 354. Besides these incidental responsibilities, he is, according to universal usage, by the very terms of the contract, made directly answerable to the seamen for their wages; and this is in conformity with a rule of the marine law, as old as the law itself. On what principle could this rule have been so universally established, but this plain and sensible reason, that the captain is entitled to receive the freight, the common fund out of which not only wages but every other ordinary charge on the voyage is to be paid. In the case of Goodridge v. Lord, 10 Mass. 487, it is said by the court that the captain may retain freight in his hands to pay the seamen's wages; and in that of Lane v. Penniman, 4 Mass. 92, it is ruled, Chief Justice Parsons giving the opinion of the court, that he has a lien on the freight for the necessary disbursements which he makes during the voyage, which takes precedence of the owner's title to it. This decision is fully supported by that of White v. Baring, 4 Esp. 22. Roccus, note 31,

is full to the same point. The captain had rendered himself liable for the amount of some repairs which became necessary in the course of the voyage, and the owners had become bankrupt before its termination. The shippers, after notice had been given them by the master of his demand against the freight, paid it over to the assignees of the owners. The master brought a suit against them for the amount of his liabilities, and also for his primage, which was purely a personal demand due to him as master. Lord Kenyon said that the captain "having contracted and rendered himself personally liable for articles furnished the ship, he thereby acquired a lien on the goods as well as freight, that his lien is coextensive with his liabilities to the ship's creditors, and of course the payment made by the defendants was made in their own wrong." Lord Kenyon, in the short abstract of his opinion, avoids touching on the claim of primage, and in the brief report of the case it does not appear whether this was or was not included in the verdict.

I have no doubt of the soundness of the doctrine of these cases. Why does not his prior right for his wages rest on as good ground as for his liabilities or disbursements? The money is as much due to him in one case as the other, and the credit has in each grown out of the same service, a service which has contributed to create the fund against which his claim is made. I can see no sufficient reason for making a distinction between them. His wages are as much a charge on the earnings of the ship as those of the seamen, or as the advances which he makes for incidental expenses. What remains, after these are discharged, constitute the net freight of the owners. Besides, if the reason given for excluding the master from admiralty process against the ship, that he has a lien on the freight, means any thing, it means that he is a privileged creditor against the freight. A lien ex vi termini imports a privilege. If it is not this, it is nothing. Upon the whole, finding that he has a lien on the freight for his disbursements, and seeing no reason in law or justice for making a distinction between this claim and that for his wages, I do not feel the authority for introducing a distinction against him which I do not find established.

But in point of fact, the freight on the goods taken on freight had been attached, before the filing of this libel, by the seamen, and a decree has passed in their favor which will absorb the whole fund. This necessarily brings up the other question, whether the master's lien for his wages extends to the merchandise of the owners, which he has brought home. Without touching this as a general question, I put my opinion on the peculiar facts of the present case. The charterers here are the owners for the voyage. The master is hired by them, and is in their employment. He fulfils his part of the contract, and performs the voyage successfully, but when he arrives in safety, bringing with him his whole earnings for seven months' service, he finds that his employers, two months before the service is completed, without making any satisfactory provision for his wages, had assigned their whole property, including what was in his hands, for the benefit of their general creditors. It was, in effect, not only an assignment of all his wages earned up to the time of the assignment, but of all the additional wages which would accrue to the completion of the voyage. He is named, it is true, as a creditor, in the assignment, but his claim is postponed to several more favored creditors for a large amount; in the mean time the fruits of his service are taken out of his hands, and he is left to pick up a satisfaction from the remnants of an insolvent estate. This is certainly a case of very strong equity, but it is admitted that the books contain no decision in point to sustain the master's claim. In the argument it was compared to the lien of a factor for his commissions, and to the vendor's right of stoppage in transitu, on the insolvency of the purchaser. It has some points of analogy and some points of difference with both these cases. It is like the factor's lien, inasmuch as the goods are in his hands, and the claim is for a meritorious service to these goods; and it is assimilated to the vendor's right of stoppage in transitu by the insolvency of his employers, with this distinction in his favor, that the possession is with him, and he retains all the priority over other creditors which that can give. His case may also be likened to the lien which an artisan has, for his pay, on the particular thing about which he has expended his labor and skill, an equitable lien, which is always favored in law. It is repugnant to all our ideas of equity that the master should be required to part with these goods to the creditors of his employers, claiming either under the assignment or attachment, until he has a compensation secured to him for the time, labor, and diligence which he has bestowed for the benefit of this identical merchandise. It is, on the principles of natural justice, a charge on the specific goods, and the owner, on his insolvency, cannot, consistently with these principles, assign them but subject to the charge. Sitting in a court, which, while it adheres to the principles of law, is required by its duty to decide ex aequo et bono, and by its constitution is enabled to deal with the cases falling within its jurisdiction in a larger and more liberal spirit of equity than the severe and technical rules of the common law will admit, after the most diligent examination which I have been able to give the case, I have come to the conclusion that I can do justice between the parties, without impugning any of the rules of law, but consistently with those rules, and I accordingly decree in favor of the libellants' lien.

Case No. 4,036.

In re DRISCO.

[14 N. B. R. 551.][1]

Circuit Court, D. Massachusetts. Sept. 2, 1876.[2]

BANKRUPTCY—DISCHARGE—ORDER NUNC PRO TUNC—NEW PETITION IN BANKRUPTCY.

If there is an omission to enter an order refusing a discharge, the bankrupt court may make it nunc pro tunc, if no rights of third parties have intervened which can be prejudiced by making the record speak the truth. If a party has contracted new debts since the filing of the first petition, he may file a second petition in bankruptcy.

[Cited in Re Brockway, 23 Fed. 585.]

[In the matter of Perrin C. Drisco, a bankrupt. Petition by Gustavis Bret and others to review the rulings of the district court.]

E. M. Johnson, for petitioners.

S. K. Hamilton, for respondent.

CLIFFORD, Circuit Justice. Sufficient appears to show that the petitioners are creditors of the alleged bankrupt; and they allege in their petition, filed in this court, that the bankrupt, on the 14th of March, 1872, filed a petition in bankruptcy in the district court, and that he was adjudged to be a bankrupt; that he afterwards applied to the district court for a discharge from his debt, under the bankrupt act; that the present petitioners filed objections to his discharge, alleging that he had committed certain frauds against the provisions of the bankrupt act, and that the charges of fraud were sustained by the district court, and that the petition for discharge was thereupon suspended; that a suit between the petitioners and the bankrupt, then pending in the state court, was by agreement prosecuted to judgment, to ascertain the amount due the petitioners from the bankrupt—they having proved no claim in the bankruptcy proceedings against his estate; that no order refusing the discharge of the bankrupt was made at the hearing, nor did the bankrupt then ask or require that such an order should be made; that the petitioners subsequently recovered judgment, in the suit pending in the state court, for twenty-one hundred dollars and costs of suit; that the bankrupt, on the 13th of July, 1875 (his former petition being still pending, and their claim being still unpaid), filed a second petition in bankruptcy, and was again adjudged bankrupt by the district court; that the petitioners, being notified of the second petition, filed a motion in the district court to dismiss the same, upon the ground that the bankrupt having, under his first petition, been proved guilty of frauds under the bankrupt act, and not having been discharged under the same, he could not again avail himself of the benefits of the bankrupt act; and that the former petition, inasmuch as he was not discharged under it, is a bar to any subsequent proceedings under that act. Hearing was had upon the motion to dismiss the second petition in bankruptcy; but the district court entered an order nunc pro tunc, as of the date when the objection under the first petition to the discharge of the bankrupt was sustained, refusing his discharge, and at the same time overruled the motion of the petitioners that the second petition in bankruptcy should be dismissed.[3] These two rulings of the district court are assigned for error in the present petition for review, which is filed in the circuit court under the first clause of the second section of the bankrupt act (14 Stat. [518]).

Certain proceedings took place in the district court under the second petition in bankruptcy, before the rulings of the district court were made, which are now assigned for error, to which it becomes necessary to refer before attempting to consider the alleged erroneous rulings. Notice having been given of the second petition in bankruptcy, the present petitioners appeared and filed an answer, in which they set up the first petition of the bankrupt and the proceedings under it, and alleged that the district court in that case denied the right of the bankrupt to a discharge, and refused to grant the same by reason of the frauds which he committed against the bankrupt act; and they pleaded that the said refusal is a bar to the second application for the benefits of the bankrupt act, and prayed that the order adjudging the party a bankrupt may be vacated, and that the petition in bankruptcy may be stricken from the files of the court. Due reply was made by the petitioner in bankruptcy to the answer and objections of the present petitioners, in which he alleged that his second petition in bankruptcy ought not to be dismissed, because, as he says, that subsequent to those proceedings he contracted debts exceeding three hundred dollars, provable under the bankrupt act, which he was owing and unable to pay at the time the second petition was filed; and he denies that the former proceedings in bankruptcy, and the order refusing his discharge, are a bar to his second petition. Both parties, it seems, proceeded upon the ground in their pleadings that a discharge had been refused to the bankrupt in the former proceedings, and the clear inference is that the error was not discovered until the hearing on the pleadings. Enough also appears in the petition for review to warrant the conclusion that the record in the bankrupt court was left incomplete, by consent of the parties, in order that the suit pending in the state court might be prosecuted to final judgment. Be that as it may, it is conceded that the reason for the delay in perfecting the record no longer existed; and the court here is of the opinion that it was entirely competent for the dis-

[1] [Reprinted by permission.]

[2] [Affirming Case No. 4,090.]

[3] [See Case No. 4,090.]

trict court, sitting in bankruptcy, to supply the omission, as no rights of third parties had intervened which could be prejudiced by making the second speak the truth. Power to supply such an omission is beyond question, as appears by numerous authorities. Gray v. Brignardello, 1 Wall. [68 U. S.] 627; Campbell v. Mesier, 4 Johns. Ch. 334; Bank v. Weiseger, 2 Pet. [27 U. S.] 331; Vroom v. Ditmas, 5 Paige, 528; Lothrop v. Page, 26 Me. 119. Viewed in the light of these adjudications, no doubt is entertained that the order to perfect the record was properly made, and for the reasons given by the district judge in his very satisfactory opinion. In re Drisko [Case No. 4,090].

Suppose that is so, still it is insisted by the present petitioners that the bankrupt act does not contemplate a second voluntary bankruptcy, where the party remains undischarged under a former petition, nor where he was refused a discharge under a former petition for cause adjudged to be good by the bankrupt court. Support to that proposition is attempted to be drawn from the fact that the bankrupt act does not, in terms, make any provision for the proceedings on any such second petition; but the bankrupt act provides that, "any person * * * owing debts, provable under the act exceeding three hundred dollars," may apply by petition for its benefits; and the act contains no provision prohibiting a person from such second application for debts contracted subsequent to a prior unsuccessful application, or for the reason that he was refused a discharge under a prior application. Conditions, it is true, are by a recent act, annexed to the right to proceed in bankruptcy a second time; but they have no application to the case before the court, and, if they do apply to it, give no support to the theory that the first petition of the bankrupt is a bar to the second, in a case where it appears that the second petition is based upon debts contracted subsequent to the time when the proceedings under the first petition were closed.

Much aid in construing the different provisions of the bankrupt act may be derived from the decisions of the supreme court of Massachusetts, in respect to the corresponding provisions in their insolvent law, as it is well known that the framers of the bankrupt act followed pretty closely the leading features of that law. Questions of a like kind were twice presented to the supreme court of Massachusetts, in which they decided the respective controversies in the same way as the district judge decided in the case before the court. Fisher v. Currier, 7 Metc. 424; Gilbert v. Hebard, 8 Metc. 129. Nothing need be added to the remarks of the district judge, in applying those decisions to the case under consideration, except to say that they may well be regarded as furnishing the true rule of decision in the present case. Attention is called to certain English decisions, where it appears that a contrary rule prevails. Suffice it to say, upon that subject, that the court here is of the opinion that the cases referred to are inapplicable to the act of congress, for the reasons assigned by the district judge in his well-considered opinion. Difficulties, it is suggested, may arise in administering the law in a case like the present, where one or more of the old creditors have not been paid. Due consideration has been given to that suggestion, which is certainly entitled to considerable weight; but those difficulties are well answered in the opinion given by the state supreme court, to which reference has already been made. Old creditors may come in, or stay out, at their election; but if they do come in, they must be content with an equal distribution of the assets, as provided in the bankrupt act. The petition in review is dismissed, with costs.

DRISCOLL (UNITED STATES v.). See Case No. 14,994.

Case No. 4,087.

DRISKELL v. PARISH.

[10 Law Rep. 395; 5 West. Law J. 206.]

Circuit Court, D. Ohio. Nov. Term, 1847.

SLAVERY — ACTION FOR OBSTRUCTING ARREST OF FUGITIVES—PENALTIES—EXAMINATION OF JURORS —PEREMPTORY CHALLENGES.

1. Peremptory challenges of jurors need not be made at the same time, but the parties may alternate.

2. The jury cannot be asked generally, whether their conscientious scruples on the slavery question will prevent them from giving a verdict for the plaintiff, but such a question may be put to the members separately.

3. Where a party charged with obstructing the claimant of fugitive slaves, is proved to have driven the slaves into a house, the door of which he closed against the claimant, it is incompetent for the counsel for the claimant to inquire whither the slaves had been since the door was closed. The alleged act of obstruction was the closing of the door, the effect of the obstruction formed no part of the cause of action.

4. In an action under the statute of February 12, 1793 [1 Stat. 302], containing separate counts for harboring slaves and obstructing claimants, several penalties cannot be recovered for the same act, whatever may be the number of persons affected by the course of the defendant, nor can the same act be separated into distinct charges.

5. Facts stated, which must be established to substantiate the charges of harboring and obstructing.

6. The same act cannot be construed both as a harboring and obstruction.

This was an action of debt brought [by Driskell against Parish] to recover the penalty prescribed by the act of congress of February 12, 1793, respecting "fugitives from justice, and persons escaping from the service of their masters." By the 4th section of this statute, it is provided, that if any person shall knowingly and willingly obstruct or

hinder the claimant of a fugitive slave, his agent or attorney, in seizing or arresting a fugitive from labor, or shall harbor or conceal said fugitive after notice that he or she is a fugitive, such person shall, for either of these offences, forfeit and pay to the claimant the sum of five hundred dollars, in addition to any right of action which the claimant may have for injuries received or other damages. [The case was previously tried at the July term, 1845, but the jury disagreed. See Case No. 4,089.]

H. Stanberry and J. H. Thompson, for plaintiff.

S. P. Chase and J. W. Andrews, for defendant.

Some preliminary questions were raised in regard to the impanelling of jurors, and the court ruled: 1. That the two peremptory challenges of jurors allowed to each party by the Ohio statute, need not be made together, but the parties may alternate—the plaintiff making one challenge, and then waiting for the challenge of the defendant, before he exhausts his other peremptory challenge. 2. That the question cannot be asked of the jury generally, whether the conscientious scruples of any of them are such on the subject of slavery as to prevent them from giving a verdict for the plaintiff, should his case be made out in proof, but that it might be asked of each individual. The court, however, suggested the following as a better form of the question:—"Have you any bias which will prevent you in this case from giving effect to the evidence, and the law as it may be made known to you by the court?" To this the jurors all responded in the negative, and no further objections being taken, were sworn in.

The plaintiff's case rested chiefly on the evidence of Col. Mitchell: "I am acquainted with Peter Driskell, the plaintiff. He lives three quarters of a mile from me, about a quarter of a mile from the river, and about six miles from Maysville, Kentucky. Jane and Harrison Garrison were his slaves, together with four other children of Jane Garrison. On the 26th of October, 1844, I was called upon by Mr. Driskell to go in pursuit of them. They had escaped on the preceding night. We followed them, but a rain coming on soon obliterated all traces of their path, and we who were pursuing returned home. I never saw those slaves afterwards until the 28th of February, 1845. I was then in pursuit of the six slaves, in company with Andrew Jackson Driskell, the son of the plaintiff. On the 26th of February, I saw the boy Bill (one of the slaves,) at Sandusky city, near the tavern where I stayed. I employed a sub-agent, a small boy, to play marbles with Bill, and through him ascertain where all the boys were. I found by this where all were but one. I then employed an Irishman to induce Bill to come to my room at the tavern, told him what he was then to do, and how he was to go immediately after the rest. I had understood that Jane and Harrison Garrison were at Mr. Parrish's, and a little after twelve o'clock on that day I made my way there. Near his house, I met Parrish, defendant. I accosted him, and asked him if a woman calling herself Jane Garrison, and her boy Harrison, were at his house. He said they were. I asked him if I could see them. He replied, if Jane wished it I could do so. We then returned toward the house, and I stood by the gate on the outside, whilst he went in. He came out in a very few minutes, with the woman Jane. She stood on his left hand. She spoke to me as if she recognized me, but she had a defect in her speech, and I will not pretend to recollect what she said. She advanced quickly toward me, however, when Parrish put out his hand and arrested her progress. I, in a short time, asked her for Harrison. She looked at Mr. Parrish in an inquiring way, and he made an assenting motion, I think both with his head and his hand. She then went in the house and brought the boy. He also made a motion to approach me, but Parrish again interposed. I then informed Mr. Parrish that these persons were the slaves of Peter Driskell, of Kentucky, and that I wished to take them. 'By what authority?' My reply was, 'By a power of attorney from Peter Driskell,' laying my hand at the same time on the instrument in my breast pocket. 'You need not show me your power of attorney,' replied Mr. Parrish, 'I want judicial authority for this.' I told him I did not know what judicial authority was, if this was not. I then demanded to arrest them, and he replied that I could not arrest them there, or something to that effect. He then shoved them into the house, went in himself, and closed the door after him, and I bowed and went away. In about fifteen minutes I saw Parrish again, and had some conversation with him. I was trying to arrest two of the other boys." Mr. Stanberry here wished to ask what Parrish said with regard to those other boys, to show, (as he said) that he was aiding in their protection, and by this means, to find the quo animo with which he closed the door as above. This was objected to as belonging to a totally different transaction, and the objection sustained by the court. Mr. Stanberry then wished to ask whether the slaves had been seen since the door was thus closed behind them—to show that "the obstruction had been effectual." This was objected to by counsel for defendant, on the ground that the effect of the obstruction formed no part of the cause of action, which would have been equally complete whether any ultimate results had been produced by the interference or not. The objection was sustained, and the question overruled. Mr. Stanberry then wished to ask whether Mr. Parrish did not afterwards say that the slaves were no longer to be found in his house, which question the

court allowed to be put, and the witness proceeded: "After this conversation, I heard Parrish say the slaves left his house that night. The power of attorney under which I acted is here." (The power was produced, and proved to be authority to Mitchell to arrest the fugitives.)

Cross-examined: "I had been several times in pursuit of these slaves before. When I saw Parrish I said nothing about wanting to arrest the slaves before they came out. Mr. Parrish was afterwards called as a witness in the court-house without my consent. I did not pay much attention to what was asked of him. During the trials there he made a statement of what transpired at the gate. I don't know that I assented to any part of it; I certainly did not to all. I think Parrish admitted I had made the demand, but not that he pushed the woman in the house—there we differ. He may have only waived them in, and immediately closed the door. At the court-house nothing was said of a 'fair trial,' and Mr. Parrish used no other words in the place of 'judicial authority.' I never told Mr. Barbour or any other person that Mr. Parrish had conducted himself in a gentlemanly manner—that I had no reason to complain of him—nor that he had zeal as an abolitionist, but was an honest man. At the last term of this court I did take a walk with Mr. Barbour, to find out how our testimony agreed, and correct myself if I was wrong, but we disagreed soon and parted. I was employed to catch these persons, at $1.25 per day and expenses paid—have no interest in this suit, save the establishment of the principle."

McLEAN, Circuit Justice. This action is brought to recover penalties under the act of congress in relation to fugitives from service. That act has been held to be constitutional, but it is penal in its character, and must be strictly construed. The penalties given by it go to the plaintiff. The defendant is charged with harboring and concealing two fugitive slaves of the plaintiff, and with obstructing their arrest. The declaration contains two counts for harboring and concealing, and two for obstruction; but several penalties cannot be recovered for the same act, whatever be the number of persons harbored, or whose service is obstructed: nor can the same act be separated into distinct charges of harboring and obstructing, and thus be made the foundation for the recovery of distinct penalties. To establish the charge of harboring and concealing there must be satisfactory proof that the defendant, with full knowledge that the persons harbored were slaves escaped from another state, concealed them with intent to elude the vigilance of the master and defeat his claim. To establish the charge of obstruction there must be proof that the plaintiff, in person, or by his authorized agent, attempted to arrest the fugitives, and that the defendant, with the same full knowledge, wilfully obstructed the arrest. The important fact to establish is that Colonel Mitchell attempted to make the arrest. He must have apprized the defendant that these were escaping slaves—that he was authorized to make the arrest, and that he did attempt to make the arrest, and was prevented by the defendant. To secure a fair trial to persons claimed as fugitive slaves, and to insist upon a fair trial in their behalf is laudable: but such efforts should be made in good faith. It is the province of the jury to weigh the evidence. If they are satisfied beyond a reasonable doubt, that the defendant has harbored and concealed the fugitive servants of the plaintiff, and has obstructed their seizure by such acts as the court has defined, they will find for the plaintiff; otherwise they will find for the defendant.

The case was then submitted to the jury. After having been out about an hour, the jury sent a request to the court to define the manner in which their verdict should be given; whether they were obliged to find on all the counts of the declaration, or might give in a verdict as to a part. The court instructed them that the two counts for obstructing related to one offence, and the two counts for harboring to one offence. For each of these offences five hundred dollars can be claimed. The same act cannot be construed both as a harboring and obstructing. There must be two distinct acts to constitute these two offences. If there is but one, the jury must decide whether it is an obstruction or a harboring. The jury then retired, and afterwards returned a verdict for the plaintiff—finding the defendant guilty both of harboring the slaves and obstructing the master. The obstruction consisted in the conduct of Mr. Parrish at the gate; the harboring in permitting the slaves to remain in his house until nightfall—an "intent to elude the vigilance of the master" being inferred. The next morning Messrs. Chase and Andrews moved for a new trial, because the verdict was against evidence.

[NOTE. This case was again tried at the November term, 1849, resulting in a verdict for plaintiff for $500. See Case No. 4,088. Afterwards it was heard on defendant's motion to retax the costs. See Cases Nos. 4,075 and 4,076.]

Case No. 4,088.

DRISKELL v. PARISH.

[5 McLean, 64;[1] 7 West. Law J. 222.]

Circuit Court, D. Ohio. Nov. Term, 1849.

SLAVERY—ACTION FOR HINDERING AND OBSTRUCTING ARREST OF FUGITIVE — WHAT CONSTITUTES THE OFFENCE—HARBORING.

1. To sustain the allegation of hindering or obstructing the arrest of a fugitive from la-

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

bor under the act of congress of February 12, 1793 [1 Stat. 302], some act of interference, on the part of the defendant, must be proved, tending to impair the right of recaption, secured by the statute.

2. The statute imposes no obligation on any one, to aid in the recaption of such fugitive; and the penalties of the act of congress are not incurred, by one who is merely passive, in the attempt of the owner or his agent, to arrest the alleged fugitive.

3. An inquiry, made in good faith, as to the authority by which the arrest is sought to be made, is not a violation of the act of congress. Neither are the penalties of the act incurred by insisting that the person claimed as a fugitive shall have a fair trial, on the question, whether such person is a fugitive.

4. It is not necessary, to constitute a hindrance or obstruction, within the meaning of the act, that force or violence should be resorted to, to defeat the arrest.

5. The refusal to permit an arrest on the premises of another, after notice that the person sought to be arrested is a fugitive from labor, and a demand of permission to arrest such person, is a hindrance or obstruction.

6. The withdrawal or removal of the alleged fugitive, by the order or direction of another, so as to prevent an arrest, is a hindrance and obstruction.

7. The person seeking to make the arrest is under no obligation to commit a trespass, or breach of the peace, in carrying out his purpose to arrest.

8. Under the count for harboring or concealing, it must appear that the harboring or concealing was with the intention to elude the claim of the owner of the alleged fugitive.

9. A temporary shelter afforded to a fugitive, without any design to conceal him or her from the pursuit of the owner, or his agent, is not a harboring or concealing, within the meaning of the act.

LEAVITT, District Judge. This was an action in the case, brought [by Peter Driskell against Francis D. Parish] under the last clause of the act of congress of 1793. The allegations of the declaration are, in substance, that Jane Garretson and Harrison Garretson, being the slaves of plaintiff, residing in the state of Kentucky, escaped from his service into the state of Ohio—and, that the defendant hindered or obstructed the plaintiff's agent in the arrest of the slaves: also, that he harbored and concealed them, &c. The plea was, not guilty.

[For reports of former trials, see Cases Nos. 4,089 and 4,087.]

H. Stanbery and H. C. Noble, for plaintiff.

Judge Lane, T. Corwin, and J. W. Andrews, for defendant.

The evidence in behalf of the plaintiff, was as follows:

Col. Charles S. Mitchell. He states, that the persons named in the declaration were the slaves of the plaintiff, who resides in Mason county, in the state of Kentucky—that they were on his plantation in that county, in October, 1844, and that about that time, they disappeared, and have not been in the plaintiff's possession since. In February, 1845, witness was employed by plaintiff, under a written power of attorney for that purpose, to go in pursuit of the slaves, in company with A. J. Driskell, a son of the plaintiff. They reached Sandusky city, in the state of Ohio, the latter part of February, and ascertained that the two persons referred to, together with some other slaves, belonging to the same family, were in that place. About 12 o'clock, noon, they proceeded to the residence of the defendant—had passed the house a short distance, when they saw defendant coming out of the gate, opening from the front yard, into the street. The witness inquired of him, if two colored persons, Jane Garretson, and her little boy, Harrison, were at his house. Defendant said they were. Witness then asked if he could see them—to which defendant replied, he could, if they wished it. Defendant went into the house, and returned shortly after, with the woman; she standing near the defendant, on the front porch or portico, and witness and Driskell, being outside the gate, in the street. The woman recognized the witness and Driskell, and some conversation took place between them respecting the family of plaintiff. Witness then requested to see the boy, who was also brought out, and stood on the portico. He smiled, and seemed also to recognize Mitchell and Driskell, and was coming forward as if to shake hands with them. Mitchell said, "Let the little fellow come and shake hands with me;" but defendant interposed, saying it was not necessary to shake hands with the gentleman. Mitchell then stated to the defendant, that the woman and boy were the slaves of Peter Driskell, of Kentucky; that he was there, as his agent, to reclaim them; and that he demanded the privilege of arresting them. Defendant asked, by what authority—to which witness replied. "By a power of attorney;" at the same time putting his hand to his pocket, and offering to produce it. Defendant said, "You need not show it, as nothing but judicial authority will do;" saying also, that witness could not arrest the negroes there. He then, by a motion of his hand, directed the woman and boy to go into the house. They went in, and the defendant immediately followed them, shutting the door after him, and leaving witness and Driskell standing in the street. Witness never saw the slaves afterwards. Understood from defendant, in the course of the riot trial, that they left his house in the evening or night of the day on which the interview, mentioned by the witness, took place.

A. J. Driskell, also a witness for plaintiff, corroborated the statement of Mitchell, as to what occurred in front of defendant's house. He does not state the facts with the same minuteness as Mitchell, and differs with him, in this—that he states, the defendant pushed the woman and boy into the house, instead of directing them, by a motion of the hand, to go in.

Sarah Gustin says, she lived in the defendant's family, at the time of the occurrence testified to by Mitchell, and heard a part of the

conversation between him and defendant. Heard defendant say to Mitchell, he could not arrest the woman and boy, without lawful authority.

The evidence for the defendant, was substantially as follows:

A. H. Barber. Some two or three days after the interview between Col. Mitchell and defendant, referred to by Mitchell, there was a trial at the court house in Sandusky, on a charge for a riot, made against Mitchell and Driskell, and one Martin; that on this trial, the defendant, at the request of the counsel for the defendants in the riot case, was sworn as a witness; that he related, minutely, what took place in front of his house, between Mitchell and himself; admitting, that in that conversation he had said, he was a law-abiding man, and was only desirous that the colored persons should have a fair trial; but saying nothing of any demand to meet them; or, of any demand of lawful or judicial authority, to make the arrest; or of any refusal by defendant to permit the arrest. This statement, so made by the defendant, was assented to by Mitchell, with the exception that defendant had omitted to state the offer to shake hands with the boy, and the interference of defendant to prevent it. This witness further states, that on the trial of the riot case, Mitchell having observed, that he wished to set himself right before that community, by permission of the court, made a statement of what took place in front of defendant's house; which agreed, substantially, with that made by defendant on oath. Witness also says, that Mitchell stated, he had nothing to complain of, in reference to defendant's conduct, and that he had treated him like a gentleman. This was stated in a stage coach, as they were on the road from Sandusky to Columbus.

Judge Saddler. Was also present at the trial referred to by Mr. Barber. He corroborates Barber's statement. Says, that the defendant in giving testimony in the riot case, related what took place at defendant's gate, in front of his house; stating that when Mitchell informed him the colored woman and boy were fugitive slaves, and that he had come to take them, the defendant remarked, if he had any legal right to take them, he would not object, but would see that they had a fair trial. Witness understood this, as referring to the trial of the question, whether they were slaves—and supposed the only controversy between Mitchell and defendant was, the place where, and the person before whom, this trial should take place. After defendant had closed his statement, he asked Mitchell if it was correct—and Mitchell replied, it was, except that he had not stated what took place as to his offer to shake hands with the boy. In the course of the trial, Mitchell also made a statement of what took place at the gate, in which witness did not understand him as having said anything about offering to produce authority to make the arrest, or as having made any demand to make the arrest. Mitchell admitted, that defendant had treated him like a gentleman.

Mr. Beecher. This witness stated with great minuteness what took place on the trial of the riot case, agreeing essentially with the statements of Mr. Barber and Judge Saddler.

The depositions of Z. W. Barker, C. S. Mackey, and John N. Sloane, were read by defendant's counsel. Their testimony related to what happened on the trial referred to, and was confirmatory of the statements of the preceding witnesses.

Col. Mitchell. In reply to the inquiry of counsel on that subject, says, he never has made any statement or admission of what took place at defendant's gate, varying in any essential particular from that made by him on this trial, and the preceding trials, between these parties. He now thinks, that the defendant's evidence, in the riot case, was not materially different from that which the witness now gives. Witness understood defendant's testimony on that occasion, as referring to the trial of the two boys, who had been arrested, and that what he said about a fair trial, related to them, and not to the woman and boy. Does not recollect that the matter of the offer to arrest the woman and boy, was in any way in controversy on the trial of the riot case. What he admitted, in regard to the fair conduct of defendant, related to the transaction at the gate, and not to any other matter in which defendant had an agency. Witness also says, that before leaving Sandusky city, he made arrangements with a view to a suit against the defendant for his interference with plaintiff's rights.

Mr. Wheeler. The deposition of this witness was read by the plaintiff. He was one of the counsel employed for the defendants in the riot case, and was present at the trial. His testimony is corroborative of that given by Mitchell. The counsel for plaintiff here offered evidence, tending to prove the active agency of the defendant in getting up, and carrying on the prosecution for the riot, before mentioned: also, a complaint for an assault and battery, in the arrest of the two boys—and an application for their discharge, by writ of habeas corpus, as showing the quo animo of defendant, in his interference with the offer to arrest the woman and the boy. This testimony was objected to, on the ground of its irrelevancy to the matters in issue in this suit.

THE COURT, referring to the fact, that this evidence had been held to be inadmissible, on a former trial between these parties, when Judge McLean was present, now overruled it.[2]

[2] [See Case No. 4,089.]

Judge LEAVITT stated to the jury the points of law arising in the case, in substance, as follows:

The constitution of the United States, in the second section of the fourth article, declares, that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." Under the power conferred by this provision, congress, on the 12th of February, 1793, passed the act, entitled, "An act respecting fugitives from justice, and persons escaping from the service of their masters." By the third section of this act, it is provided, that when any person held to labor in one state, shall escape into another, the person entitled to the labor or service of such person, may seize or arrest him or her, and convey him or her before any of the judicial officers designated, within the state in which the arrest was made, for the purpose of making proof that such fugitive owes service to the person setting up such claim, and obtaining a certificate to that effect. The fourth section provides, "that any person who shall knowingly and willingly obstruct, or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or, shall rescue such fugitive from such claimant, &c.; or, shall harbor or conceal such person, after notice that he or she was a fugitive as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered, by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving, moreover, to the person claiming such service or labor, his right of action for or on account of the said injury, or either of them."

This action is brought under the last clause of the section just quoted. The declaration contains two counts: the first, for obstructing or hindering the arrest of the fugitives; the second, for harboring or concealing them. To sustain the first count, there must be evidence of some act of interference by the defendant, tending to impair the right of reception, secured by the statute. No precise rule can be laid down, by which to determine what act shall constitute an obstruction or hindrance, within the prohibition of the statute. The right of arrest is conferred by the constitution and the act of 1793, in the most explicit terms, and without any express restriction or qualification. It may be inferred, that this power was thus conferred, in part, at least, from the consideration, that the arrest is in the nature of a preliminary proceeding, and not conclusive of the rights of the suspected fugitive. When arrested, such person is to be conveyed, without any unreasonable delay, before some one of the judicial officers named in the statute, within the state in which the arrest is made, for the purpose of a legal inquiry whether he or she is, in fact, a fugitive from labor. And, it is only by the exhibition of proof establishing the affirmative of this inquiry, that the person arrested can be retained in custody, and removed to the state where "labor and service" are due. On failure to prove this fact, the person arrested is entitled to his discharge; and, it is presumed, would have a right of action against the person making the unlawful arrest, for damages. It may also be suggested, that there is a further security against a lawless and oppressive arrest, in the fact that by the statutes of many, if not all, the non-slaveholding states, the penalty of the crime of kidnapping is incurred by an unauthorized arrest of any one on pretence that such person is a fugitive from labor, and the attempt to convey him or her to a slaveholding state, to be held in servitude.

It is very clear, that the penalties provided by the act of congress, are not incurred by one who is merely passive, in the attempt of the owner, or his agent, to reclaim and arrest an alleged fugitive from labor. The statute imposes no obligation on any one to aid in the recaption. Under a law so penal in its character, it would be monstrous, by mere implication, to recognize such an obligation. Nor, will the mere inquiry, made in good faith, by what authority an arrest is sought to be made, bring a party within the prohibition of the statute. The penalty is denounced against any one, who "knowingly and willingly" obstructs or hinders an arrest. In the case of one, who has had no agency in the escape of the suspected fugitive, and is not to be presumed to be apprised of the fact, that the person is a fugitive from labor, and who has taken such person into his employment, or under his protection, without any improper intention, the penalty is not incurred, by merely inquiring into the authority to make the arrest. Such an inquiry, in the case supposed, would be entirely justifiable. Neither is it deemed to be a violation of the rights of the claimant, to insist that the alleged fugitive shall have a fair trial, upon the question, whether he or she owes "labor and service" to such claimant. On the other hand, it is clear the penalty of the statute may be incurred, without a resort to violence, in hindering or obstructing an arrest. Any act done, with the intention of defeating the arrest, and which tends to that result, is a violation of the rights of the claimant. If, after knowledge of the fact that a person is a fugitive, a demand is made to arrest on the premises of another, and refused, such refusal subjects the party to legal liability. An offer having been made to arrest, the party making it is under no obligation to commit either a trespass or a breach of the peace, in carrying his purpose into effect. The withdrawal or removal of the person of the alleged fugitive, by the order or direction of another, so

as to prevent an arrest, is also a hindrance and obstruction within the meaning of the statute.

Having stated these principles, as applicable to the count for obstructing and hindering the arrest, I will briefly notice the count for harboring or concealing. The learned judge, who presided in this court, on the trial of an action between these parties, brought to recover the specific penalty provided for by the statute, has held that "the words 'harbor' or 'conceal,' were not used in the statute as constituting two distinct offences, but as descriptive of one offence." And he has also held, that, "to harbor or conceal a fugitive from labor, within the meaning of the statute, it must be done with a view to elude the claim of the master." There can be no question, that this is the correct construction of the law. By the express words of the statute, to constitute the offence of harboring or concealing, there must be notice or knowledge, that the person harbored or concealed, is a fugitive from labor. This presupposes that there must be an intention to prevent a recaption. The intention therefore decides the character of the act. Hence the same eminent judge, in the case before referred to, says, "If a shelter be afforded to the fugitive, for an hour, a day, or a week, when there is manifestly no design to conceal him from the pursuit of the master or his agent, or in any way to defeat the legal right of the master to his service, there is no violation of the statute."

Keeping these principles in view, it is for the jury to decide, whether the defendant has harbored or concealed the fugitive, as alleged in the second count of the declaration. From the evidence, it does not appear, except as a matter of vague inference, that the defendant had knowledge that the woman and boy were slaves, till so informed by Col. Mitchell. And there would seem, therefore, to be no sufficient ground for assuming, that he had been guilty of any violation of the statute, prior to his obtaining such knowledge from Mitchell. It is insisted, however, that he harbored or concealed the fugitive, after being notified that they were slaves. The only proof in support of this position is, that the defendant said, the woman and boy left his house the evening following the interview between him and Col. Mitchell; having been informed by defendant, that they could remain no longer with him. If, from motives of humanity, the defendant permitted the fugitives to remain with him, for a short time, after notice of their real character, without any design thereby to elude the claim of the owner, he did not "harbor or conceal" them, within the contemplation of the statute.

It is strenuously contended by the counsel for the defendant, that the testimony of the witness Mitchell is unworthy of credit. Several intelligent witnesses have been called, who state in substance that on the examination which took place at the court house, in Sandusky, in reference to a charge for a riot, made against Mitchell and Driskell, and one Martin, the defendant was examined as a witness, and made a statement of the facts occurring at his gate, during the interview between him and Mitchell, varying in some essential particulars from the facts as stated by Mitchell, in his testimony in this case. To the correctness of the statement of the defendant, the witness Mitchell gave his assent. It also appears, from the testimony of the witnesses of the defendant, that Mitchell, on the same occasion, gave a narration of the facts occurring during the interview referred to, agreeing essentially with the statement of the defendant, then made, and in which there was an omission of some important facts, now stated. The credit due to witnesses belongs exclusively to the jury. It will be their duty to reconcile conflicting statements, in such a manner that, if possible, the whole may be regarded as consistent with truth and the integrity of the witnesses. But, if the statements of witnesses are so discrepant that they can not be thus made to harmonize, it will be for the jury to say where the truth lies.

I have now only to suggest, that although this action has originated in the existence of slavery in an adjoining state, the views of the jury, in relation to that subject in the abstract, should exert no influence in their conclusions as to the merits of this controversy. Like every other case tried in a court of justice, it should be decided according to the law and the evidence. If the plaintiff has suffered a wrong, for which the law gives him redress, it is the plain duty of the court and jury to aid him in obtaining that redress. It can not be disguised, that the subject of slavery is at this time a fruitful source of public agitation. Unfortunately, it has become a chief element of political excitement in our country. Whatever may be our individual views of this subject, it is clear, we shall best acquit ourselves of the responsibility now resting upon us, by taking care that the rights of the parties to this action are in no way affected by the existing state of public feeling, on the question of slavery. In Ohio, popular sentiment is no doubt strongly against that institution; and, there are few, if any, of her citizens who do not rejoice, that its admission into the state is precluded by a barrier, that may well be deemed insurmountable. Still, it may be taken for granted, that with very few exceptions, the citizens of that state are disposed readily to accord to the citizens of states in which slavery is tolerated by law, the rights solemnly guarantied to them by the constitution of the Union, and the laws passed in pursuance thereof. The act of 1793, under which the plaintiff has sought redress in this action, has been repeatedly brought to the notice of the supreme court of the United

States, and that tribunal—on such questions, the only authoritative one in the Union—has adjudged it to be a constitutional law. It can, therefore, only cease to be a law when repealed by the same authority by which it was enacted.

The jury returned a verdict for the plaintiff, on the count for hindering and obstructing the arrest—assessing the damages at $500, the proved value of the slaves in question, at the time of their escape. On the count for concealing and harboring, the verdict was for the defendant.

A motion was filed by the defendant for a new trial, which was overruled, and judgment entered on the verdict.

[NOTE. This case was afterwards heard on defendant's motion to retax the costs. See Cases Nos. 4,075 and 4,076.]

Case No. 4,089.

DRISKILL v. PARRISH.

[3 McLean, 631;[1] 5 West. Law J. 25.]

Circuit Court, D. Ohio. July Term, 1845.

SLAVERY — ACTION FOR HINDERING ARREST OF FUGITIVE — AUTHORITY OF AGENT TO ARREST — PENALTY—WHAT CONSTITUTES THE OFFENCE.

1. Where a written power of attorney is given to an agent, authorising him to arrest a fugitive from labor, and he acts under such power in attempting to make the arrest, the power must be produced, or its contents proved, in an action against an individual for hindering the arrest.

[Cited in Giltner v. Gorham, Case No. 5,-453.]

2. No one incurs the penalty under the act of congress [1 Stat. 302] for hindering or obstructing the arrest, who does not act "knowingly." He must have notice that the colored persons are fugitives from labor, and that the agent has authority to arrest them.

[Cited in Giltner v. Gorham, Case No. 5,-453; U. S. v. Weld, Id. 16,660.]

3. The principle is the same, whether the arrest be made with the view of removing the fugitives out of the state, or taking them before a judicial officer.

4. The power of attorney is in the nature of process, and should be shown, if demanded.

5. No one incurs the penalty who hinders an arrest by persons who have no authority to make it.

6. To obstruct the arrest is an offence, and the guilt of the party charged should be clearly established.

7. There can be but one penalty for the same act, in hindering an arrest, of one or many fugitives from labor. And so of harboring one or many at the same time.

[U. S. v. Grant, 55 Fed. 415.]

8. The penalty is not given as a compensation to the master, but as a punishment for the offence.

9. To harbor or conceal under the statute, there must be a manifest design to elude the claim of the master.

10. An open and fair action, with an intention to procure a fair legal hearing for the fugitive, is no violation of the act.

[This was an action by Peter Driskell against Francis D. Parish for hindering and obstructing the arrest of a fugitive slave.]

Mr. Stanbury, for plaintiff.

Lane & Chase, for defendant.

OPINION OF THE COURT. This action is brought under the fourth section of the act of congress of 1793, respecting fugitives from labor. The section provides, "that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor," &c., "or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars." The declaration contains four counts; two for hindering and obstructing the arrest of Jane Garretson, a colored woman, and her son, slaves of the plaintiff, who were fugitives from labor; and two counts for harboring and concealing them. The defendant pleaded not guilty.

Col. Mitchell, a witness, states that he called with Driskill, son of the plaintiff, at defendant's house in Sandusky city, and inquired of him whether a colored woman named Jane Garretson was there. The defendant answered she was; the witness then asked if he could see her; defendant replied, "Yes, if she wishes it." Witness said, "She was a slave of Peter Driskill, had escaped from her master, and that he was authorised to take her to Kentucky." The defendant went into the house and soon returned, the woman following him. She recognized the witness, spoke to him, and was approaching him, when the defendant interposed his hand, though he did not touch her. She called young Driskill "Master Jackson." Some conversation was had respecting the death of her young mistress, who had died, as she said, before she left Kentucky. The boy was then asked for, and he was brought out. He also knew the witness and Driskill, and by his approach seemed to wish to shake hands with the witness, when the defendant interposed his hand and said, it was not necessary to shake hands. The witness then claimed the right to arrest these two persons, to take them before some judicial officer, and show the right of the plaintiff to their services. The defendant asked by what authority; the witness replied by virtue of a power of attorney from the master, and laid his hand upon the paper; the defendant objected to the authority and said, that nothing less than judicial authority was sufficient or would satisfy him. He then by words or signs directed the woman and her son to return into the house, which they did, and he followed them, shutting the door after him. The witness states that he lives near to the farm of the

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

plaintiff in Kentucky, and is well acquainted with Jane and her son, and that they are the slaves of the plaintiff. That they absconded from his service some months before, with other colored persons owned by him. Driskill being sworn, with less minuteness, relates the leading facts as stated by Col. Mitchell. He differs from Mitchell in saying that the defendant pushed Jane and her son into the house. Sarah Gustin was an inmate of the defendant's house. She stood in the passage and heard a part of the conversation. She heard the defendant say to Col. Mitchell, that he could not take the colored persons unless he had lawful authority. Parol evidence was then offered to prove the authority of Col. Mitchell to arrest the fugitives, as agent of the plaintiff. This was objected to by the defendant, on the ground that the authority was in writing, and consequently could not be proved by parol.

This is an important question. Mitchell did not claim to act in his own right but as the agent of the plaintiff, and he referred to a written power of attorney as his authority. The defendant can take no exception to the power, from the fact that it was not shown to him. He declined an examination of it, alleging that judicial authority was required to make the arrest. In this he was mistaken; and his error, in this respect, constitutes no excuse. The question is not strictly whether a parol authority may not authorise an arrest of a fugitive from labor, but whether a written authority may be abandoned, and a parol one substituted. We are aware that there are many things in writing which may be proved by parol, without proof of the loss of the writing. But does this power of attorney come within this rule? In the case of Johnson v. Tompkins [Case No. 7,416], it is said, "If the person arrested is not a servant or slave, or the person making the arrest has not the authority of the master for so doing, he is in either case liable for the illegal arrest." And Mr. Justice Washington, in Hill v. Low [Case No. 6,494], says, "that it was sufficient to bring the defendant within the provisions of the law, if having notice either by the verbal declarations of those who had the fugitive in custody, or were attempting to seize him; or by circumstances brought home to the defendant, that the person arrested was a fugitive, or was arrested as such." The object of the arrest in the present case was avowed to be, to take the fugitives before a judicial officer. But the same principle applies where the arrest is made for the purpose of taking the fugitive by force out of the state, and without judicial sanction. This the claimant or his agent may lawfully do, under the constitution of the United States, according to the doctrine laid down by a majority of the judges in the case of Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539. This then, as claimed, is no ordinary power. It sweeps aside state laws and state sovereignty, and enables an individual who claims to act as agent to take any person, white or colored, as a fugitive from labor, without any exhibition of his personal authority, or of the claims of the master.

The constitution of the Union, and the laws made in pursuance of it, are declared to be paramount to the laws or constitution of a state. But from this it does not follow that the remedy under the federal power, against fugitives from labor, being in the hands of the master, may be exercised without restriction and without regard to the rights of others. The common law doctrine of recaption is adverted to as authorising this remedy, independently of the constitution and the act of congress. The right of recaption was limited to the sovereignty in which the right was sanctioned. Neither the laws of nations nor the common law authorise the master to recapture his slave beyond the jurisdiction in which slavery is sanctioned. The constitution and the act of congress give the remedy in this case. It may be admitted as between the master, or his agent, and the fugitive, the inquiry would be, whether the master had a legal claim to the services of the fugitive. And if this claim were not sustained, the person making the arrest would be responsible in damages. The authorities above cited, from Baldwin's and Washington's Reports, seem to place the person who shall obstruct or hinder the arrest on the same footing, in this respect, as the fugitive. But we cannot assent to this view. The fugitive stands upon the fact of service, and if this be against him, by whatever means he may be returned to his master, he could recover no damages. But the defendant cannot be subjected to the penalty of five hundred dollars, under the act, unless he "knowingly and willingly" obstructed or hindered the arrest. This is called in the act an "offence," and had not the statute given a civil action for the penalty, it might have been recovered by an indictment. Now, can an individual commit this offence unless he have reasonable knowledge, not only that the persons claimed are fugitives from labor, but that the person making the arrest has authority to make it? The character of the fugitive may be made known by himself, or by those who arrest him. Or the knowledge of the defendant may be inferred from circumstances. But the authority of the agent must be made known. If he act without authority, no person who "hinders" the arrest incurs the penalty. It is no answer to this to say, that such person acts on his own responsibility and must meet the consequences. He must act "knowingly," which presupposes a knowledge of such facts as authorise an arrest. If he act in ignorance of these facts, he does not act "knowingly."

Bail, it is said, may arrest their principal

wherever he shall be found. This is admitted, because the principal as a condition of the recognisance, is delivered to the custody of his bail. But they must have a bail piece as the evidence of their authority to arrest him. "An officer acting out of his precinct is bound to show his warrant." Lord Kenyon observed, "that he did not think a person is bound to take it for granted, that another who says he has a warrant against him, without producing it, speaks the truth." "It is, therefore, very important in all cases where the arrest is made by virtue of a warrant, that the warrant should at least, if demanded, be produced, to leave a delinquent no excuse for resistance." 1 Chit. Cr. Law, 51. "If a warrant be defective, or the officer exceed his authority in executing it, if killed, it is only manslaughter; and any third person may lawfully interfere to prevent an arrest under it." 1 East, P. C. 310; Leach, 206; 1 Barn. & C. 291. The agent in this case referred to his power of attorney and was ready to produce it, but its production was waived by an objection to its sufficiency. Having acted under this power, must it not be produced in evidence? It is in the nature of process. In fact it was the warrant of the agent. It having been given in writing, precludes the presumption that it was given by parol. Whatever conversation may have taken place between the agent and his principal on the subject of his agency, at length and as the last act, in accordance with legal advice, the power of attorney was executed. Now this power must speak for itself. It is as important as a warrant can be to an officer, and it would seem that in this action, which is brought to subject the defendant to a penalty, it must be produced, or its contents proved, after establishing its loss. This imposes no hardship on the master or his agent. It would be required in claiming an estray horse, found in the possession of any one. The power may be defective. It may authorise the arrest on conditions which did not happen. Viewing then this power as process, and considering that the same principle must govern, whether the arrest be with the object to take the fugitive before a judicial officer to establish the right to his services, or to take him out of the state, we consider the power to be of high importance. The consequence resulting from its exercise is important to the fugitive, to the claimant, and to the state from whence he is taken. And as a written power of attorney would impose a form to the proceeding, and tend to prevent abuse, we are strongly inclined to say, it is necessary to authorise an agent to make the arrest. But this point is not necessarily involved in the case, and we do not decide it. We think that the power in question, under the circumstances, must be produced or its contents proved. Some evidence was given to prove the loss of the power; but nothing was shown from which its loss could be inferred.

The evidence of the plaintiff being closed, a motion for a non-suit was made, and the ground that the declaration charged the defendant with having "harbored and concealed" the fugitives, and not in the language of the act, with having "harbored or concealed them." It is alleged that these words are not synonymous, and that they are not so used in the statute. And that both allegations must be proved. If the import of these words were different, as contended, still there is no ground for a non-suit. In the act, they are used in the disjunctive, so that, although they are alleged conjunctively in the declaration, the proof of either would sustain the action. In slander, it is now allowed to be sufficient if the plaintiff prove some material part of the words laid; and, if his count contain several additional words, he is entitled to a verdict on proving some of them. Compagnon v. Martin, 2 W. Bl. 790. If a plea in trespass aver two matters, either of which is a good justification, though both be put in issue by the replication, proof of one is sufficient. Spilsbury v. Micklethwaite, 1 Taunt. 146. So, where a declaration for a false return to a fi. fa. against the goods of two, averred that both had goods, it was held sufficient to prove that one had goods within the bailiwick. Jones v. Clayton, 4 Maule & S. 349. So in an indictment, only so much need be proved as charges the defendant with a subsequent crime. Rex v. Hunt, 2 Camp. 583; Rex v. Williams, Id. 646; 2 East, P. C. 515.

Defendant's Evidence: Mr. Barbour—was present at the trial in the court house, at Sandusky city, and heard defendant relate the occurrences before his door, which were assented to by Col. Mitchell as correct, with the exception of the advance of the boy to shake hands with him, which was omitted by defendant. This statement, thus assented to by Col. Mitchell as correct, did not contain any demand by him, in relation to the arrest. He admitted that defendant said he was a law abiding man, and wanted only a fair and legal trial. And Col. Mitchell said that he did not complain of the defendant's acts, for that he had treated him as a gentleman. To this the defendant replied, that Col. Mitchell had acted like a gentleman. Mr. Beecher—who was present at the court house on the same occasion, and heard the statements made by Col. Mitchell and the defendant, corroborates the relation made by Mr. Barbour; in some parts, stating the facts more minutely than he did. Mr. Henry—heard only a part of the conversation at the court house. So far as he goes, he corroborates the statements of Barbour and Beecher, except, he has no recollection of hearing any thing said about a fair trial. Col. Mitchell—being again called, says, he cannot recollect distinctly the words, at the various conversations had at the court house.

He admits that he assented to the facts stated, as related by Mr. Barbour and Mr. Beecher, except the remark of the defendant, "that he was a law abiding man, and wanted only a fair trial;" which remark, he says, was not made before the defendant's door, but after that interview, and at a different place. He repeats, that, at the first interview with the defendant, before his door, and in the presence of the colored persons, he claimed the right to arrest them as fugitives.

The above, gentlemen of the jury, is a concise, but substantial statement of the evidence in the case. As the court have excluded parol proof of the authority of the agent, he having acted under a written power, the plaintiff does not rely upon the two first counts for "obstructing and hindering" an arrest. He relies upon the other two counts in his declaration, which charge the defendant with having "concealed and harbored the fugitives." The action is founded upon the statute, which subjects any one "who shall conceal or harbor" a fugitive from labor, after notice that he is such fugitive, to a penalty of five hundred dollars. The language is in the singular number, and as the declaration charges the defendant with having harbored two fugitives, which the evidence has conduced to prove, the plaintiff claims the penalty of five hundred dollars in each case. This construction of the act, the court think, is not sustainable. There can be but one penalty for concealing or harboring at the same time, whether there be one or many fugitives. The act is a penal one, and was not framed with the view of giving a compensation to the master for the injury done. In the same section which gives to the master this action for the penalty, it is added, "saving, moreover, to the person claiming such labor or service, his right of action for or on account of the said injuries, or either of them." There can be no doubt, that the same individual may be convicted of "hindering" an arrest of the fugitive, and also of "harboring" him, which will subject him to two penalties, the acts being distinct, and at different times. But whether the "hindering" of the arrest, or "harboring," be of one or many fugitives, at the same time, the penalty is the same. It is the act of "concealing" the fugitive, or for "obstructing" his arrest, that is punished. If this penalty were to be enforced by indictment, as might have been provided, the act must have received the same construction. An individual who counterfeits the coin of the United States, is liable to be punished, whether he counterfeit one piece or many pieces. So for stealing one or many articles of property. The punishment, in some cases, is inflicted under the exercise of a limited discretion of the court; but where the offence is stealing one or many letters, by a post master, from the mail, the punishment cannot be less than ten years confinement in the penitentiary. Where the punishment is fixed, the court can exercise no discretion. If the defendant be guilty in this case, neither the court nor jury can exercise any discretion in regard to the penalty.

The charge against the defendant is, that he "harbored and concealed" the fugitives in question, after notice that they were fugitives. That "notice," in this relation, means "knowledge," has been decided by the supreme court. And, from the evidence, it would seem that the defendant was informed by the agent, who held a power of attorney from the master, that the colored persons were fugitives from service. It is also inferrible from the conversation of Jane with the witness, in the presence of the defendant. Did the defendant harbor or conceal the fugitives? To answer this inquiry, we must understand what is the true import of the words, "harboring or concealing." By Worcester, the word "harbor" is defined, "To entertain; to shelter; to rescue; to receive clandestinely and without lawful authority." By Webster, "To shelter; to rescue; to secrete; as to harbor a thief." Worcester defines the word "conceal," "To hide; to keep secret; to secrete; to cover; to disguise." And Webster, "To hide; to withdraw from observation; to cover or keep from sight."

It is insisted, that any one who shall permit a fugitive from labor, after notice that he is such fugitive, to enter his house, and remain for any time, is liable, under the statute, for harboring or concealing him; and that the intention with which the act is done is of no importance, as the act constitutes the offence. This position as laid down is unsustainable. The intention with which an act is done, gives the character of guilt or innocence to the act. Homicide may be committed innocently. If, in the performance of a lawful act, and without any intention to do evil to any one, by shooting at a mark or otherwise, a person should be killed, no crime is perpetrated. An officer arrests a fugitive from labor for debt, or a breach of the peace, and retains in his custody such fugitive, the penalty is not incurred. So, if the fugitive be stricken down by sudden disease, and a person, through motives of humanity, shall take him to his house and endeavor to alleviate his distress, no offence is committed. So if an individual shall seize a fugitive from labor, without authority, with the view of returning him to his master, and, in the act of doing so, the fugitive should escape, it would hardly be contended that, for such an act, the master can claim the penalty. And if an individual employ a fugitive from labor, with the view of detaining him until notice can be given to his master, and he gives the notice, but the fugitive escapes, is the individual guilty of "harboring or concealing" him under the statute? These cases are put, because the counsel for the plaintiff will not controvert them; and

they show, that the intention must enter into and give a character to the act of harboring or concealing a fugitive, the same as in every other act of good or evil, of innocence or guilt. This is the great criterion of human judgment, and, as we believe, will be the criterion of man's final destiny.

The words, "harbor" and "conceal," were not used in the statute as constituting two distinct offences, but as descriptive of the same offence. All our statutes abound with unnecessary verbiage. It would be impossible for an individual to conceal a fugitive who might not be charged with harboring him, in the sense of the statute. In 1 Chit. Gen. Pr. 567, cases are referred to where it has been decided, that the employment of an apprentice after notice, is a harboring of him, which gives an action to the master for his wages. The master is entitled to his labor, and, consequently, when he labors for another, who has notice that he is an apprentice, the employer is bound, on equitable principles, to pay the master. But the foundation of the action under consideration is an "offence," so denominated in the act, and for which a penalty is inflicted. To harbor or conceal a fugitive from labor, within the meaning of the statute, it must be done with the view to elude the claim of the master. If a shelter be afforded to the fugitive for an hour, a day, or a week, when there is manifestly no design to conceal him from the pursuit of the master or his agent, or in any way to defeat the legal right of the master to his service, there is no violation of the statute. The intention is ascertained from the nature and circumstances of the acts done. From these, no unbiased mind can fail to form a just opinion. Has the conduct of the defendant been fair, open, and such as becomes an individual who respects the laws of his country? Has it been consistent with a desire to give effect to the law, by an impartial inquiry? If these can be answered in the affirmative, he is not guilty. On the contrary, if he harbored the fugitives after he had notice that they were fugitives from labor, so as to defeat the claim of the master, or in a way that was manifestly designed to defeat it, he has incurred the penalty. Gentlemen, it is not our province to consider abstract principles in regard to slavery. We deal with legal rights and established law. From these we cannot depart, without a violation of our duty.

(The jury retired, and after having been out several hours, returned into court and declared they could not agree. The court discharged them, and continued the cause.)

[NOTE. There were two subsequent trials of this case, one at November term, 1847, and one at November term, 1849, the latter resulting in a verdict for plaintiff in the sum of $500. See Cases Nos. 4,087 and 4,088. Afterwards the case was heard on motion by defendant to retax the costs. See Id. 4,075 and 4,076.]

Case No. 4,090.

In re DRISKO.

[2 Lowell, 430;[1] 13 N. B. R. 112.]

District Court, D. Massachusetts. Sept., 1875.[2]

BANKRUPTCY—NEW PETITION—DISCHARGE—ORDER NUNC PRO TUNC.

1. A bankrupt, who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts, may file a new petition in bankruptcy.

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

2. Semble, that whenever an involuntary petition may be sustained, a voluntary petition may be.

3. Semble, that those who were creditors when the first petition was filed may prove their old debts against the assets in the new bankruptcy; and that a discharge under the new petition would apply only to new debts, and to such old debts as had been proved anew.

4. A discharge may be refused nunc pro tunc where the parties had neglected to have the order entered at the time the decision of the court was announced, but had acted on the theory that the order was in force.

[Cited in Re Brockway, 23 Fed. 585.]

This was a voluntary petition for the benefit of the bankrupt act. A creditor having an attachment on mesne process upon the chattels of the bankrupt petitions that the proceedings may be stayed and annulled, on the ground that the bankrupt has before applied for the benefit of the act, in March, 1872, and that in February, 1875, his discharge was refused, by reason of certain frauds specified and proved against him. To this it was replied that Drisko had contracted new debts since the date of the former proceedings, and before his second petition was filed, amounting to more than $300. The facts alleged on both sides were admitted to be true; and it was further agreed that the bankrupt had some property upon which these proceedings might operate, if they could be sustained, being in fact the same property which the objecting creditor had attached.

E. Avery and E. M. Johnson, for objecting creditor, cited In re Farrell [Case No. 4,680]; In re Thompson, 58 Law T. 399; In re Sydney, 10 Ch. App. 208; In re Russell, Id. 255.

C. W. Eaton and S. K. Hamilton, for bankrupt, cited Fisher v. Currier, 7 Metc. [Mass.] 424; Gilbert v. Hebard, 8 Metc. [Mass.] 129.

LOWELL, District Judge. A very interesting question is presented by this petition, which I understand is likely to be carried to the circuit court. I have thought it my duty, however, to consider it with as much attention as if my decision would be final.

It was twice decided in Massachusetts, that, when a discharge had been refused to a bankrupt or insolvent, he might yet apply

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

[2] [Affirmed in Case No. 4,086.]

again for the benefit of the statute, if he had contracted new debts sufficient in amount to give the court jurisdiction. Fisher v. Currier, 7 Metc. [Mass.] 424; Gilbert v. Hebard, 8 Metc. [Mass.] 129. In the former of these cases, the arguments on the one side and the other were given by Shaw, C. J., with his accustomed thoroughness, and the conclusion reached was that the policy of the law would be best subserved, and its true intent be met, by distributing newly acquired assets equally among the new creditors and such of the old creditors as chose to come in, and by permitting a discharge from the new debts. It was taken for granted that the decree of discharge could not operate upon debts which were proved or provable under the earlier bankruptcy, because as to these it was res judicata that the bankrupt was not entitled to it; and it was said that the discharge in the new proceedings must be limited in terms to the new debts, unless the old creditors, or some of them, elected to come in and share in the new assets. The reasoning of the chief justice and the decisions in those cases have proved satisfactory to the profession, I believe, and they are entirely so to my mind.

But there have been cited here some provisions of the bankrupt act, and some recent decisions in England, which are relied on to countervail the older arguments and decisions. By section 5116 of the Revised Statutes, it is enacted that no person who has once been discharged and becomes bankrupt again upon his own petition, shall be entitled to a discharge, unless his estate is sufficient to pay seventy per cent. of the debts proved, or unless three-fourths of his creditors assent; but a bankrupt who proves that he has paid all his old debts, or has been voluntarily released from them, may have a discharge as if he had not before been bankrupt. The argument from this section is, that it cannot be believed that congress intended to put a bankrupt, who had been refused his discharge for fraud, in a better condition than one who had received it for upright and honorable conduct; and, therefore, as no disability is imposed on one who becomes bankrupt a second time, not having received his discharge the first time, it is to be taken that congress intended that such a person should not become bankrupt at all. This construction appears to me to stretch an inference beyond its legitimate bearing. The insolvent law of Massachusetts, from which so much of the bankrupt law was taken, had a provision somewhat similar to that of section 5116, but applied it to all second insolvencies, and not merely to those where there had been a discharge, nor to voluntary cases. It seems probable that the idea in the mind of the framers of the bankrupt law in thus modifying the insolvent law was, that a man who had never been discharged had never had the full benefit of the statute. They overlooked, perhaps, the question of fraud, and said a man may be bankrupt a second time, whose first bankruptcy was compromised or dismissed for one reason or another, or who neglected to apply for his discharge in due season. That there may be such cases is shown by the authority cited by counsel. In re Farrell [Case No. 4,680]. It would have been easy to say that no one whose discharge had been refused for cause should again become bankrupt, and that the decisions in Massachusetts should not be applicable, if such had been the intent; and as there is nothing in any part of the statute to prevent a man becoming bankrupt a second time, and many implications that he may, I think it a sounder construction to hold that this particular case was overlooked, than that a prohibition against all bankruptcy by a person once refused his discharge should be inferred from a section which says nothing whatever about that class of cases.

It was admitted at the argument that a man may be made bankrupt a second time by his creditors, if he has committed new acts of bankruptcy, and has newly acquired property on which the proceedings may operate. Now, under our system, a voluntary petition is an act of bankruptcy; and I have repeatedly held, and it is the foundation of an ordinary practice in this court, that, after such a petition has been filed, any creditor may carry on the proceedings, if the debtor fails or neglects to do so. None of the able members of this bar practising in bankruptcy have ever objected to this practice, and most of them have availed themselves of it. Indeed, I look upon it as a fundamental and most important part of our system, that although the mere fact of insolvency is not enough to authorize proceedings in invitum, yet if the debtor admits by a solemn act in court that he is hopelessly insolvent, the system takes effect, and his assets are to be equally divided. I am inclined to think that there is no case in which an involuntary petition may be maintained against any one in which a voluntary petition by him will not be. It is true that acts of bankruptcy may be committed by a solvent person; but when a person solemnly in court admits his insolvency, no one can contradict him; and if he was solvent the moment before he filed his petition, he is insolvent the next moment.

The English system differs from ours in two respects, among others: 1. Excepting during the eight years that the statute of 1861 was in operation, no one has ever been permitted to become bankrupt on his own petition. Connected with this was the notion which runs through all the decisions that the proceeding is to be begun solely for the benefit of the creditors. Bankruptcies concerted with the debtor have been repeatedly set aside in England. It has been held that a creditor ought not to begin proceedings unless there are assets to distribute. The mere discharge of the debtor is not ground enough for a bankruptcy. 2. The property of a

bankrupt who had not received his discharge belonged to his assignees, to the end of the bankrupt's life, and consequently a second bankruptcy was void at law, and would be enjoined in equity, unless the assignees under the first bankruptcy had estopped themselves by their acquiescence in the debtor's contracting new debts on the faith of new property. This doctrine has been a good deal modified by the statute of 1869; but even now the bankrupt can acquire no property until his discharge or the close of the first bankruptcy, and not then unless certain conditions are fulfilled. It will be seen at a glance that our law is much more favorable to the debtor, and encourages proceedings by him for his own benefit as well as for the distribution of his property; and his future earnings and acquisitions are his own from the time of filing the petition. Examined in the light of these marked differences between the English statute and ours, the cases cited will be found to support rather than to shake the conclusion to which I have come. Under the statute of 1869 the debtor may propose a liquidation by arrangement, which has many of the features of our voluntary bankruptcy, but leaves more power with the creditors, and is not bankruptcy unless the creditors choose. But so far as the property goes, it resembles bankruptcy; and, if the liquidation is not closed, the property will all belong to the trustee, whether newly acquired or not, unless the creditors vote a discharge. Under this law, it was held in the cases cited, that while one composition remained unsatisfied, a new one could not be upheld, even though it brought in new creditors or new property, unless this property had been released by the old creditors, and in that case it might be the subject of a new arrangement.

Our statute itself releases after-acquired property from the operation of the old proceedings. When, therefore, the cases cited decide that newly-acquired property, which is not subject to the old liquidation, may be the subject of a new one, they decide the point in the same way, mutatis mutandis, as the courts of Massachusetts decided it. It is true that by our law the new property remains liable to process if the debtor does not receive his discharge; but this is not at all the liability of the English law. With us it remains liable to ordinary process by any creditors, old or new, who may be in a situation to attach or levy; while in England, in unfinished bankruptcies, it remains solely the property of the old creditors represented by the assignee. With us, when there are new debts and new assets, there are the same reasons for a second bankruptcy that there were for the first; while in England the second can have no operation until the close of the first, however long it may be kept open, or until a discharge is granted, whatever may happen in the mean time. Which system is better in itself I do not say; but probably each may be the fitter for the country in which it obtains. Our system undoubtedly leads to second bankruptcies, but it has been found to work well, and is more just to the new creditors, while not unjust to the others.

I have thus far assumed the truth of the facts admitted by the parties, but I now find, on examining the record and my notes, that the discharge of Drisko was never formally refused. A hearing was had, and it was proved that all, or nearly all, the creditors, excepting the firm now opposing the petition, had been paid, but that a fraud has been committed with the intent to prevent these very creditors from recovering their debt; and it was intimated by me that Drisko was not entitled to his discharge; upon which the parties agreed to try the case pending between them in the state court, as if the bankrupt could not receive his discharge. No one ever asked me to enter an order refusing the discharge. Under these circumstances, I doubt whether this case should be permitted to proceed until the old case is disposed of. Upon hearing the parties again as to this last point, I find that the case which was pending in the superior court of the state by these objecting creditors against Mr. Drisko proceeded to judgment as if his discharge had been refused; and by the effect of that judgment these creditors hold the sureties on his bond, who would have been discharged if that judgment had not been obtained. It happens, unfortunately, that the sureties are now bankrupt, and these creditors have not obtained as much advantage as they expected, but they have all the legal results of the debtor's failure to obtain his discharge.

Under these circumstances, I think I am bound, at the bankrupt's request, to refuse the discharge in the former proceedings, nunc pro tunc, and then the petition to vacate will be dismissed, and it is so ordered.

Case No. 4,091.

The D. R. MARTIN.
The MOONACHIE.

[10 Ben. 532.][1]

District Court, E. D. New York. July, 1879.

COLLISION AT FERRY-SLIP—STEAMBOAT AND FERRY-BOAT—SPEED—NEGLIGENCE.

1. Where a fast steamboat on her regular run down the North river to Coney Island was making for a landing, near the Hoboken ferry, and came at full speed close in to the piers, and struck a ferry-boat just coming out of her slip: *Held*, that the steamboat was in fault for running at such high speed in that locality, with knowledge of the position of the ferry-slip and the presence there of the ferry-boat.

2. The ferry-boat was not in fault for attempting to back, to avoid the collision, instead of going ahead.

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

3. To attempt to pass a ferry-slip at such a rate of speed as renders it impossible to stop in time to avoid hitting a ferry-boat, in case one should come out, is negligence.

A ferry-boat [the Moonachie] of the Hoboken Ferry Co., running between New York and Hoboken, N. J., was coming out of her slip on the New York side, a little behind time, but very slowly, and her sister-boat was lying in the stream waiting to go in. The D. R. Martin, a steamboat able to run 15 to 18 miles an hour, and then plying between various points in New York and Coney Island, was making for her landing, a short distance below the ferry-slip; and being pressed by another vessel, came in very close to the piers and without slackening speed. Neither vessel could see the other, till the Moonachie began to show outside the long slip. She came out at the slowest speed, immediately saw the D. R. Martin, and backed into the slip again, but not in time to escape collision. Immediately on seeing the ferry-boat, the pilot of the D. R. Martin rang to stop and reverse, adding the danger-signal; but the headway of the steamboat could not be checked, and she struck the ferry-boat on the forward quarter. Each vessel libelled the other for the damage done.

Abbett & Fuller, for ferry-boat.
P. Cantine, for steamboat.

BENEDICT, District Judge. The evidence given by the wheelsman who was at the wheel of the D. R. Martin with the pilot, and who is called as a witness by the owners of the D. R. Martin in respect to the collision which forms the subject of these two actions, is decisive of the controversy. It appears from the testimony of this witness, that the D. R. Martin on her down trip and when bound for her landing, at the end of the pier at the foot of Le Roy street, in the North river, felt obliged, by reason of a vessel approaching from below, to sheer in close to the piers. While the D. R. Martin was proceeding at her usual full speed, and approaching the Hoboken ferry, which is just above Le Roy street, the Hoboken ferry-boat Moonachie was observed by the pilot to be moving out of her slip on her regular trip from her ferry-slip in New York, to her slip in Hoboken. Immediately on seeing the ferry-boat at the mouth of the slip, the engine of the D. R. Martin was reversed with all possible speed, the danger-bell being given to the engineer to ensure the greatest activity on his part, notwithstanding which the D. R. Martin struck the ferry-boat just off the mouth of the slip, doing damage. It thus appears that the Martin was proceeding close along the piers towards the Hoboken ferry-slip, at such a rate of speed that it was impossible for her, after the ferry-boat came in sight moving out of the ferry-slip, to stop her headway before reaching the ferry-slip. That slip is so situated that by reason of sheds constructed upon the piers on each side, it is impossible for any one on board the ferry-boat to see a vessel coming down the river, until she is close at the mouth of the slip, and equally impossible for a boat approaching from above to see a ferry-boat moving out, until she appears at the mouth of the slip. This condition of the slip was known to those on board the D. R. Martin, who also knew that there was a ferry-boat in the slip about to come out, the latter fact being indicated by the presence of the inbound ferry-boat in full view waiting for the Moonachie to come out. Under circumstances such as these, it was negligence on the part of the Martin, when running near the piers and approaching the ferry-slip, to be going at a rate of speed that rendered it impossible for her to stop her headway before reaching the ferry-slip. I do not say that it was negligence for her to come down sufficiently near to the piers, above the ferry-slip, to enable her to make her landing at Le Roy street; but I do say that it was negligence to approach that ferry-slip at such a rate of speed as to render it impossible for her to stop in time to avoid hitting a ferry-boat, in case one should happen to come out at that time. Her ability to pass the slip in safety, at the rate she was going, was made to depend simply upon the chance that no boat should be coming out; and she had no right to run that risk. A lower rate of speed would have enabled her to make her landing without risk of collision, and no necessity existed warranting the rate of speed at which she was running. How many miles per hour she was running may be a subject of dispute—I do not undertake to fix the number; but there is no disputing the fact that the moment the ferry-boat appeared at the mouth of the slip, all the bells, including the danger-bell, were pulled on board the D. R Martin, but it was found to be impossible to stop her before reaching the mouth of the slip. Such a speed in that locality I hold to be negligence.

I find no fault in the ferry-boat, for the weight of the evidence is that she was passing out of the slip at the lowest rate of speed possible. If I found the fact to be, as is contended by the D. R. Martin, that the ferry-boat was moving out at her full speed or nearly so, I should consider her in fault likewise, inasmuch as the character of that locality and slip requires the greatest care on the part of the ferry-boat, in moving out of the slip. But the weight of the evidence is that in this instance the ferry-boat was moving out as slowly as was possible. It is claimed that the ferry-boat was in fault for reversing her engines, and in endeavoring to get back into the slip, instead of going ahead when she saw the D. R. Martin. Several witnesses who saw the disaster express the opinion that there would have been no collision if the ferry-boat had kept on. The pilot of the Martin thinks that if the Moonachie had kept on instead of endeavoring to get back to the slip, he would have cleared

her by twenty feet. But if it was a mistake in the pilot to back when he did, it was not a fault that renders the ferry-boat liable, because it was caused by the danger created by the close approach of the Martin at a high and improper rate of speed.

There must be a decision in favor of the libellants, in the first case, with an order of reference to ascertain the amount of the damage. In the second case, the libel must be dismissed, with costs.

Case No. 4,092.

The D. R. MARTIN.

[See Case No. 1,030.]

D. R. MARTIN, The (BARNEY v.). See Case No. 1,030.

Case No. 4,092a.

DROPE v. MILLER.

[Hempst. 49.] [1]

Superior Court, Territory of Arkansas. April, 1827.

EQUITY—ISSUE FOR JURY.

Issue directed out of chancery to ascertain whether a partnership, asserted by complainant and denied by defendant, was formed as alleged.

[This was a bill in equity by William Drope against John Miller.] Order to try disputed facts.

Before JOHNSON and ESKRIDGE, Judges.

OPINION OF THE COURT. In this case it is alleged by the complainant that he formed a partnership in trade with the defendant, in April, 1819, which fact is denied by the defendant. It is, therefore, ordered that a jury come at the next term on the law side of this court to ascertain by their verdict, whether there was or was not a partnership in trade formed by said Drope and Miller, in April, 1819, and that the verdict of the jury be immediately certified to this court as a court in chancery.

DRUET (CLARKE v.). See Case No. 2,850.

Case No. 4,093.

In re DRUMMOND.

[1 N. B. R. (1873) 231 (Quarto, 10); [2] 1 Am. Law T. Rep. Bankr. 7.]

District Court, D. Indiana.

BANKRUPTCY—FRAUDULENT PREFERENCES—PLEADING AND PROOF.

1. Every failing debtor who gives a preference to a part of his creditors, thereby commits an act of bankruptcy, and a judgment that he is a bankrupt must follow.

[Cited in Re Silverman, Case No. 12,855; Re Ryan, Id. 12,183; Curran v. Munger, Id. 3,487; Re Jacobs, Id. 7,159.]

2. When two distinct matters, each of which contains a good cause of action or defence, are alleged conjunctively, it is enough if either of them be satisfactorily proved.

[Cited in Re Sutherland, Case No. 13,638; Re Dunkle, Id. 4,160; Re McKibben, Id. 8,859; Re Marter, Id. 9,143.]

On the 19th of July last, several mercantile firms in Cincinnati filed in this court a petition against John T. Drummond, charging that, on the 20th of March last, he committed several acts of bankruptcy, and praying that he be declared a bankrupt. They claim that they are creditors to the aggregate amount of $2,784.36. The acts of bankruptcy specified are as follows: 1. That on the 20th of March, 1867, at St. Paul, in Indiana, Drummond, being possessed of certain estate, property, rights, and credits, including a stock of merchandise, transferred and sold the same and all his other property to one James Trimble and John Read, with intent to hinder, delay, and defraud his creditors. 2. That said Drummond, on the day aforesaid, in contemplation of insolvency, sold the said property to said Trimble & Read, to whom he was indebted, and did afterward pay and assign certain notes, and accounts, to other of his creditors, with intent to defeat, and delay, the operation of the bankrupt act, and to give a preference to said creditors. Drummond has filed a plea denying all the charges, and the parties have by agreement submitted the issue thus made for trial to the court without a jury.

The evidence is substantially as follows: That on the 20th of March last, the petitioners were and still are, creditors of Drummond, as alleged in the petition. That for more than a year past, Drummond has been, and now is, a resident of St. Paul, in Shelby county, Indiana. That in May, 1866, said Trimble & Read, then, and still residents of St. Paul, were the owners of a store of country merchandise in that town, and then and there sold the same to Drummond for several thousand dollars, and in part payment received from him a conveyance of 200 acres of land at the price of $1,000, the residue of the price of the goods, to wit: $1,500 remaining unpaid till the 20th of March last, on which day, Drummond finding, as he swears, that he could not carry on his business and pay his debts, proposed to Trimble & Read to sell his store to them in payment of his debt to them, and in order to pay his other debts which he had in the mean time contracted with merchants at Cincinnati to keep up his stock of goods. That Trimble & Read assented to this proposition; and it was agreed between them that the goods should be invoiced, and taken by Trimble & Read at wholesale Cincinnati prices; that they should take back said land at $1,000, and that

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [Reprinted from 1 N. B. R. 231 (Quarto, 10), by permission.]

they should pay for the whole by relinquishing their said debt of $1,500, and by paying for the residue in cash on credit. That in pursuance of this arrangement, the parties proceeded to inventory the goods, which employed them two or three days; and, in the mean time. several of Drummond's other creditors, hearing of these proceedings, came to St. Paul, and found the parties invoicing the goods, and declared to them that, unless their respective claims were secured, they would proceed to law to attach the goods; whereupon an arrangement with these creditors was made, by which Trimble & Read, after satisfying their own debt, should pay the balance of the price of the goods and land to these importunate creditors—and to the creditors Drummond also assigned book accounts to the amount of $1,500 to secure them. That, upon this arrangement, the invoicing proceeded, and when it amounted to $4,000 it was agreed that the residue—a parcel of unsaleable goods—should be taken by Trimble & Read in a lump at $575.

The evidence proves that this arrangement swallowed up all the property of Drummond; and that the petitioners and other absent creditors, whose debts amount in the aggregate to more than $3,000, were left without any means of paying them. It is proved that the goods, accounts, and land thus disposed of included all the property owned by Drummond; and were worth about $6,000, and that Drummond's debts then amounted to about $8,000. Drummond swears that at the time of these transactions, he had made no estimate of the amount, either of his debts or his assets; that, in thus transferring his property, he had no intent to defraud, hinder, or delay any of his creditors; that, up to the time when said invoice had been made to the amount of $4,000, he supposed that he had enough property to pay all his debts; that in this, however. he discovered he was mistaken as soon as the invoicing had reached $4,000; and notwithstanding said discovery he afterwards proceeded to consummate said arrangement with Trimble & Read, and other creditors. The evidence also shows that all the debts of Drummond were due at the time of these transactions. Does this evidence establish any of the acts of bankruptcy charged in the petition?

McDONALD, District Judge. Those provisions of the bankrupt act, which relate to the points under consideration, are found in the 39th section [14 Stat. 536], and declare that every person who shall "make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors," shall be deemed to have committed an act of bankruptcy; and that every person, "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, who shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, * * * with intent to give a preference to one or more of his creditors, * * * or with intent, by such disposition of his property, to defeat or delay the operation of the bankrupt act, * * * shall be deemed to have committed an act of bankruptcy." The counsel for Drummond have contended that, to make him a bankrupt under any of these provisions, the wrongful intent must exist on the part of the persons receiving his property, as well as on the part of Drummond. This is undoubtedly the rule in cases arising under the statutes against fraudulent conveyances. And it may be the rule under the 35th and 39th sections of the bankrupt act in a suit by an assignee against a preferred creditor. But it is clearly not the rule in the case on trial. Here we look only to the interest of the party charged with an act of bankruptcy. If he intends, by his act, to delay, hinder, or defraud his creditors, or to give a preference to any of them, or to defeat or delay the operation of the bankrupt act, he clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor, or the person to whom the transfer is made.

The petition first charges that Drummond transferred his property with intent to delay, hinder, and defraud his creditors. Is this charge proved? Is it proved that such an intent existed in his mind when he made the transfer to Trimble & Read? I construe the intent under consideration to mean an actual design in the mind. Drummond positively swears that he had no such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely. I hold, therefore, that the first charge of bankruptcy is not proved as alleged in the petition.

The second charge of bankruptcy set out in the petition is that Drummond, in contemplation of insolvency, transferred, by way of payment to certain creditors, his property with an intent to defeat and to delay the operation of the bankrupt act, and to give a preference to said creditors. This averment really contains a charge of two acts of bankruptcy—the intent to defeat and delay the operation of the bankrupt act, and the intent to prefer some of his creditors. The counsel for Drummond have argued that, in order to success, the petitioners must prove both these. In this I think they are mistaken. It is never good pleading to make averment in the alternative, nor is it sufficient evidence to prove that either one or the other of the two propositions is true, but leaving it uncertain which of them is true. But when two distinct matters, each of which contains a good cause of action or defence, are alleged conjunctively, it is enough that either of them be satisfactorily proved. As to the charge that Drummond disposed of his property with intent to defeat and delay the operation of the bankrupt

act, the same reason seems to apply as we have applied to the first act of bankruptcy charged in the petition. I do not think that, in the transactions above detailed, it is sufficiently proved that Drummond intended to defeat and delay the operation of the bankrupt act. Rather, I think from evidence, that he had no thought at all concerning that law, as it had only been passed eighteen days before—had not then been published, and even lawyers were ignorant of its provisions. As to the charge that Drummond transferred all his property to some of his creditors with intent to give them a preference over his other creditors, I do not see how he can escape it. It appears, indeed, that no intent to prefer any creditor existed in his mind at any time before the inventory already mentioned amounted to $4,000. For up to that time he supposed he had enough assets to pay all his debts, and he seems to have intended to pay them all out of those assets. But he himself swears that, when the invoicing reached that amount, he perceived that his property was not sufficient to satisfy his creditors. At that moment he was an insolvent man; and he then clearly saw it and knew it. At that time his arrangement with Trimble & Read was incomplete. No delivery of any property had been as yet made to them. They had paid him nothing on the contract; they had executed no writing in relation to it, and it clearly had not proceeded to such a consummation as to make it binding on anybody. The locus poenitentiae then existed, and he had at that moment a perfect right in law to drop the whole matter, and refuse to carry out his arrangement with Trimble & Read. Had he done so, it is plain that they could have maintained no action, on it, against him. But, with this knowledge of his insolvency, he proceeded to transfer all his property for the benefit of a portion of his creditors, then well knowing that he was thereby giving them a preference, and that he had not a dollar left to apply to the debts due by him to the petitioners.

Now, it is a rule that every sane man is presumed to intend the probable consequences of his voluntary act. The consequences of this transfer by Drummond of all his property to a portion of his creditors, were not only that it would probably give them a preference, but that it would necessarily and certainly produce that effect. He must have known that this consequence would follow that act; and he must, therefore, be conclusively presumed to have intended it. In so doing he committed an act of bankruptcy, and a judgment that he is a bankrupt must follow.

It is due to the parties concerned to say that I see no moral turpitude in this matter on the part of any of them. Under the law, as it stood before the bankrupt act took effect, a debtor had a right to prefer a portion of his creditors, and the most diligent creditor generally obtained the preference. The equity maxim was "vigilantibus, et non dormientibus, jura subveniunt." But the bankrupt act abolished this rule; and now every failing debtor, who gives a preference to a part of his creditors, thereby commits an act of bankruptcy; and the bankrupt law will not allow the preference. But our bankrupt act took effect March 2, 1867. The transactions under consideration occurred only eighteen days afterwards, and, though every man is bound at his peril to know the law, yet as this act was not published till several months afterwards, it is probable that these parties were not in fact aware that they were violating its provisions. It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in this case. Whether they are bound to bring into the general fund of the bankrupt's estate, the amount which they have received from Drummond, must depend, to some extent at least, on other considerations and other evidence not relevant to the present adjudication. And indeed as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest except so far as it fixes the status of Drummond as a bankrupt.

Case No. 4,094.

In re DRUMMOND.

[4 Biss. 149.][1]

Circuit Court, D. Indiana. Jan., 1868.

PREFERENCE—SURRENDER.

1. No creditor of a bankrupt, who obtains a fraudulent preference from him, can take any benefit thereby.

2. Every creditor receiving a fraudulent preference, who, after adjudication of bankruptcy, and before he is sued on account of such preference, voluntarily surrenders to the assignee all property, money, and advantage received by him under such preference, may prove his debt and have his dividend in like manner as if no preference had been given. But he forfeits all right to prove his claim or have a dividend, if he fails voluntarily to deliver up what he has obtained under such preference, or only delivers it up at the end of a law-suit.

In bankruptcy.

Hendricks, Hord & Hendricks, for Keen & Co.

Rand & Hall, for opposing creditors.

McDONALD, District Judge. On the petition of some of his creditors, this court, several months ago, declared Drummond a bankrupt. The matter was then referred to the proper register, before whom those creditors proved their claims. Afterwards, January 13, 1868, Keen & Co., of Cincinnati,

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

as creditors of Drummond, presented to the register proper proof of a claim of theirs amounting to eleven hundred and sixty-eight dollars and ninety-three cents. This proof was sufficient for the allowance of the claim, if the objection made to it, as hereinafter stated, does not preclude its allowance. On the presentation of this claim, the creditors, on whose petition said adjudication of bankruptcy was obtained, appeared before the register, and, in resistance of the allowance of the claim, filed a written statement of their objections to it.

This statement is substantially as follows: That on the 20th of March, 1867, Drummond, being a bankrupt, and in contemplation of insolvency, for the purpose of giving to Keen & Co., and to certain other creditors, a fraudulent preference, sold to one Trimble and one Read two hundred acres of land at one thousand dollars, and his stock of merchandise at the price of four thousand five hundred and seventy-five dollars, making together the aggregate sum of five thousand five hundred and seventy-five dollars, thereby paying to them a debt of fifteen hundred dollars which he owed them, and taking for the residue of the five thousand five hundred and seventy-five dollars their notes for upwards of two thousand dollars, and causing them to execute to said Keen & Co. a note for upwards of eight hundred dollars, and causing the said land to be conveyed to Keen & Co. and to Howe, Pumfrey & Co. (other creditors of Drummond), and transferring book accounts to the amount of sixteen hundred dollars to the two last-named companies; that all this was done fraudulently to pay and prefer Keen & Co. in regard to the same claim which they are now seeking to have allowed; that Keen & Co. accepted said payment and preference, having reasonable cause to believe that a fraud was, in said transactions, intended by Drummond on the bankrupt act, and that he was insolvent, and owed three thousand dollars not provided for in said transfers; that said transfers were the very grounds on which Drummond was adjudged a bankrupt; and that after Bradshaw was appointed his assignee, Keen & Co., on his demand, delivered over to the assignee all the money, notes, accounts, and other property so received by them by way of payment and preference as aforesaid, admitting that they held them in fraud of the bankrupt act [14 Stat. 517], and that they had received them with a knowledge of the insolvency of Drummond.

Keen & Co. contended before the register that these objections, even if they were all true, did not preclude the allowance of their claim. They also denied that they ever had reasonable cause to believe that Drummond, in making said payments and transfers, intended a fraud on the bankrupt act, or was insolvent. On these points an issue in law, as well as an issue of fact, was made before the register; and he, with the consent of all parties, certifies these issues to me for trial. The issue in law presents for my decision this question: On the supposition that all the matters set forth in said written statement are true, do they preclude the allowance of the claim in question?

It cannot be doubted that if a fraudulent payment was made, or a fraudulent preference given, by Drummond to Keen & Co., and if the latter received such payment or preference with notice of such fraud on the part of Drummond, their claim cannot be allowed so long as they retain the benefit of such payment or preference. But they contend that, having turned over to the assignee everything which constituted such payment and preference, and put all parties and all assets in statu quo, they are now precisely in the same condition as if they had never received any payment or preference. Whether this is so, must depend on a proper construction of the provisions of the bankrupt act relating to the question. There are but two sections in that act which throw any light on the subject. Section 23 provides that: "Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference." The 39th section, after pointing out the various grounds on which a debtor may be forced into bankruptcy by his creditors, —and among the rest, the transfer of money or property in violation of the bankrupt act, —declares that if any person "shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, assigned, sold, or transferred contrary to this act: provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy." At first view, these two provisions of the act seem to be irreconcilable. And if they really are so, then the former must fall and the latter prevail. Such is the rule in regard to repugnancies in a statute. Dwar. St. 660. But this rule is not to be resorted to till all other rules of interpretation fail; for it is the duty of courts, if possible, to give effect to every part of a statute, and to hold no part of it void.

Let us then inquire whether any reasonable construction can be given to the two provisions of the bankrupt act above cited, so as to make them both stand consistently with each other. It is suggested by the creditors who oppose the allowance of the claim of Keen & Co., that the apparent re-

pugnance in question may be reconciled by construing the clause cited from the 23rd section as only applying to cases of voluntary bankruptcy, and the provision copied from the 39th section as relating only to cases of involuntary bankruptcy. This suggestion is, at first blush, plausible; but I think it cannot bear a strict scrutiny. And, for the following reasons, I am disposed to reject it: First. The provision in the 23rd section is too comprehensive to be restricted to cases of voluntary bankruptcy. In terms it applies to "any person" who accepts "any preference," having reasonable cause to believe that the same was made or given by the debtor "contrary to any provisions" of the bankrupt act. This language as plainly and as strongly applies to involuntary as to voluntary bankruptcy; and to confine it to voluntary cases only, would be doing violence to the express words of the section. Secondly. Such a construction would be unfair and unjust as between preferred creditors. The creditor who receives a preference from a debtor, who is afterwards forced into involuntary bankruptcy, is certainly chargeable with no greater wrong than the creditor who receives a like preference from a debtor who subsequently becomes a voluntary bankrupt. In equity and conscience, they occupy the same ground. And if they both repair the wrong, by delivering up to the assignee whatever they received by way of preference, and thus equally put everything in statu quo, it would be most unfair to hold that in the voluntary case the creditor shall have his dividend, and that the creditor in the involuntary case shall be utterly precluded from asserting any claim on the estate of the bankrupt. Such a construction is so glaringly inequitable, that I cannot presume that congress intended it.

Counsel for Keen & Co. suggest that the provision cited from the 39th section is applicable only to such preferred creditors as do not voluntarily deliver up the money or property by which they obtained the preference, but hold to it till it is forced from them by a lawsuit. I am inclined to adopt this interpretation. It does no violence to the language of the provisions in question; and it reasonably reconciles the portions of them which on first view would seem repugnant. Moreover, I think the language cited from the 39th section will fairly bear this construction. That language is that "the assignee may recover back the money or other property so paid, conveyed, assigned, sold, or transferred, contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent; and "such creditor" shall not be allowed to prove his debt in bankruptcy. Now, whom does the phrase "such creditor," in this provision, comprehend? Does it mean all preferred creditors in bad faith? Or does it only refer to such creditors, as in bad faith have received a preference, and have refused to disgorge it till it was forced from them by a lawsuit? The phrase "such creditors" must refer to some creditors named before in the act. Grammatically, it is in the nature of a relative pronoun; and, like a relative pronoun, it has reference to an antecedent; and the rule in law, as in grammer, is that it generally refers to the last antecedent to which it may fairly apply. Here the last antecedent is obviously the preferred creditor whom the assignee in an action at law has forced to give up the money or property by which such creditor acquired a preference. To this sort of creditor only, I think, does the phrase "such creditor" apply; and surely it does no violence to any words or provisions of the act, so to apply it. On the contrary, I think that such a construction aids the other provisions in question by giving force and effect to them all, and is, at the same time, fairly consistent with all the words of the 39th section. No unfair, unjust, or absurd consequences follow this construction. It leaves the locus poenitentiae to every preferred creditor, whether in a case of voluntary or involuntary bankruptcy. It in effect says to him, "If you will voluntarily surrender the property or money by which you obtained a fraudulent preference, and thereby put all parties interested in statu quo, you may have a fair dividend in the bankrupt's assets; but if you hold on to your unjust preference till it is forced from you by a lawsuit, and thus delay the proceedings in bankruptcy, to the injury of honest creditors, you shall, as a just punishment for your obstinacy and your fraud, be entirely precluded from asserting any claim on the assets of the bankrupt arising out of your fraudulently preferred debt."

I think, therefore, that the following rules are fairly deducible from these two sections of the bankrupt law: 1. Every creditor, who receives a preference by way of payment of his debt, or security for it, having at the time reasonable cause to believe that the debtor is insolvent, or intends by such preference to violate any of the provisions of the bankrupt law, shall take no benefit by such preference. 2. Every creditor, receiving any fraudulent preference, who, after adjudication of bankruptcy, and before he is sued on account of such preference, shall voluntarily surrender to the assignee all property, money, benefit, and advantage received by him under such preference, may prove his debt and have his dividend, in like manner as if no preference had ever been given him. 3. Every creditor receiving any fraudulent preference, and not voluntarily surrendering the property, money, &c., which gave him such preference, or not surrendering the same till he is forced to do so by suit, shall, as a punishment for his fraud and obstinacy, forfeit all right to prove the debt so preferred, or to claim any dividend thereon.

With these views I must decide, as I do, that

on the supposition of the truth of all the matters set out in the written statement filed by the creditors who oppose the allowance of the claim of Keen & Co., they are nevertheless entitled to have their claim allowed, and to have their just dividend thereon. It follows that there is no necessity for me to try the issue of fact certified to me; for, even if that issue were decided against Keen & Co., they would be allowed their claim and dividend. It is ordered that the clerk certify this decision to the register.

NOTE. The surrender of a fraudulent preference must be made before judgment, but it lies in the discretion of the court to allow the creditor to surrender after suit brought and before judgment. In re E. R. Stephens [Case No. 13,365]. See In re Kipp [Id. 7,836]. A voluntary surrender, absolves the creditor from fraud and allows him to prove his debt, but not otherwise. In re Davidson [Id. 3,599]; In re Hunt [Id. 6,882]. A fraudulent conveyance cannot be surrendered so as to allow the creditor to prove his claim. Bingham v. Richmond [Id. 1,415]; Same v. Frost [Id. 1,413]; and Same v. Williams [Id. 1,413]. Paying a judgment recovered against the creditor is no surrender. In re Tonkin [Id. 14,094].

DRUMMOND (ALDRIDGE v.). See Case No. 156.

DRUMMOND (BLANE v.). See Case No. 1,531.

DRUMMOND (THATCHER HEATING CO. v.). See Case No. 13,865.

DRURY (BATES v.). See Case No. 1,100.

Case No. 4,095.

DRURY et al. v. EWING et al.

[1 Bond, 540.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1862.

INJUNCTION—ATTACHMENT FOR CONTEMPT—COPYRIGHT—FOR WHAT GRANTED—INFRINGEMENT.

1. On a motion for an attachment for a contempt in violating an injunction, the original decree can not be impeached, except for fraud, or defect of jurisdiction in the court, as to the subject matter of the suit.

2. The chart copyrighted to the complainant's wife, as published on a single sheet, containing diagrams representing a system of taking measures for, and cutting ladies' dresses, with instructions for its practical use, is a "book" within the meaning of the first section of the act of congress of February 3, 1831 [4 Stat. 436], and is entitled to the protection of the statute.

[Cited in Bullinger v. Mackey, Case No. 2,127; Baker v. Selden, 101 U. S. 107; Harper v. Shoppell, 26 Fed. 519. Distinguished in Munson v. Mayor, etc., of New York, 3 Fed. 338.]

3. In deciding whether a publication is an infringement of one for which a previous copyright had been obtained, the true inquiry is, whether the work alleged to be a piracy is substantially the same as that copyrighted; and mere colorable variations intended to evade liability for an infringement, will not destroy the legal identity of the two.

[Cited in Fishel v. Lueckel, 53 Fed. 500.]

4. If a material part of the copyrighted publication is used, though the alleged piratical work may be in some respects an improvement, it is still an infringement of the exclusive right of the author.

5. The substantial identity of the system of the defendant's wife with that copyrighted by the complainant being established by the evidence, the former is adjudged guilty of a violation of the injunction in using and selling her guide, and is ordered to surrender all the copies in her possession or within her control, as also the plate on which it is printed, to the clerk of this court, within twenty days, and to pay the costs of this proceeding.

[This was a bill by Jonas Drury and Lavinia Drury, his wife, against John Ewing and Sarah C. Ewing, his wife, and others, for infringement of copyright.]

Lincoln, Smith & Warnock, for complainants.

A. J. Pruden, for defendants.

OPINION OF THE COURT. The bill in this case was filed June 28, 1860. The complainants aver that the said Lavinia Drury is the "authoress and proprietress" of a chart entitled, "The ladies' chart for cutting dresses and basques for ladies, and coats, jackets, etc., for boys," a copy of which was duly deposited in the office of the clerk of the district court of the United States for the southern district of Ohio, April 25, 1859, by which the exclusive right of publishing, using, and vending the same was secured to her, by the act of congress on that subject, for the period of twenty-eight years. The bill further alleges that the said Sarah C. Ewing, in conjunction with her husband and others, has caused to be published and sold a large number of said charts, and was then publishing and selling the same, without any license or authority from the said Jonas and Lavinia Drury, and in violation of their rights and greatly to their injury. The bill prays for an injunction to restrain the defendants from any further publication of said charts, and for other relief. A provisional injunction in accordance with the prayer of the bill was ordered July 2, 1860. The answer of Ewing and wife was filed September 3, 1860. The answer admits, in substance, the sale of Mrs. Drury's charts, but alleges they were sold or used under an arrangement between the parties, by which Mrs. Ewing was constituted the agent of Mrs. Drury, and as such was authorized to vend and use the charts. And the defendants deny that they have in any way infringed the exclusive right of the complainants by such sale and use. The case came on for hearing on the bill, answer, exhibits, and proofs, January 21, 1861, and resulted in a decree for the complainants, and the award of a perpetual injunction against the defendants. On May 10, 1862, upon a proper showing by the complainants, a rule was entered

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

against Ewing and wife, requiring them to show cause why they should not be attached as for a contempt in violating the injunction. This rule was duly served, and the defendants, Ewing and wife, appeared and in response thereto filed an answer denying that they had violated the injunction, or had intentionally disregarded the order of the court, and praying to be discharged from the rule. In the progress of the investigation growing out of the motion for an attachment, it was made to appear that in September, 1860, Ewing and wife had deposited, in the office of the clerk of the district court of the United States for the eastern district of Missouri, a copy of what is described as "the ladies' guide" for taking the measures and cutting garments for females, of which Mrs. Ewing claimed to be the authoress or inventress, and for which she had thus secured a valid copyright. It was also proved on such hearing, and not controverted by the defendants, that Mrs. Ewing had printed a large edition of her guide, and that she had sold many copies of the same after the service of the injunction upon the defendants. In resisting the application for an attachment, it was assumed by the counsel of the Ewings, that the guide which they had copyrighted in Missouri was substantially different from Mrs. Drury's, and that the use and sale of them did not therefore involve a violation of the injunction or any infringement of her rights. This posture of the application for an attachment presented the question of the identity of Mrs. Drury's chart and Mrs. Ewing's guide. And, upon this issue, a great mass of testimony has been taken by these parties, and, after a protracted hearing and very elaborate arguments, the question has been submitted for the action of the court. In this connection, it should be stated, that in addition to the issue of identity if the court should adjudge it to be established by the testimony, it is strenuously urged by counsel that the motion for an attachment can not be entertained, and the Ewings held to be guilty of a contempt, for the reason that the copyright of Mrs. Drury is a nullity as not being a legitimate subject of a copyright within the scope and intention of the act of congress.

This point first claims the attention of the court. And in relation to it, it is obvious to remark, that whatever ground there may have been for contesting the validity of the copyright on the hearing of the original case, it is now too late to do so. The defendants are clearly concluded by the admissions of their answer, and by the facts adjudged true by the decree of the court, and which could properly have been contested at the hearing on the merits. The bill, as before noticed, contains the distinct averment that Mrs. Drury is the authoress and proprietress of the chart copyrighted to her, and that the exclusive right to publish, use, and vend the same vested in her. These allegations are not controverted or put in issue by the answer. They are, at least by the strongest implication, admitted to be true. The answer does not allege the invalidity of Mrs. Drury's copyright, either on the ground that it is not within the act of congress, or that it was not her original invention. Indeed, these points are conceded in the answer, as in that, the Ewings rest their vindication of the sales of the charts up to that time, on the ground that Mrs. Ewing was the agent of Mrs. Drury. This is wholly inconsistent with the position now taken, that her copyrighted charter is a nullity in law. This point not having been brought to the notice of the court at the hearing, it was clearly not its duty, sua sponte, to pass upon it, even if there had been doubts as to the validity of the copyright. The court therefore found the facts alleged in the bill to be sufficiently verified, and entered a decree to that effect. The decree assumes that Mrs. Drury's copyright was valid, and that she was entitled to protection against its infringement. It also finds that the defendants had so violated that right as to justify an order for an injunction, and the award of damages in favor of the complainants in accordance with the statute. In this state of the case no proposition can be clearer than that the defendants, upon the pending motion, can not impeach the decree thus entered. Several entire terms of the court have intervened since its entry, and it would be an unheard of exercise of jurisdiction, in this collateral way, to revise and reverse it. No court will do this in a proceeding looking only to the enforcement of the decree, except on a clear showing of fraud in its rendition, or a want of jurisdiction as to the subject-matter of the suit. There is no pretense or allegation of fraud in the decree, nor is there a doubt of the jurisdiction of the court in the suit. This is given in such express terms by the statute, as to leave no room for controversy. If there was any error in the facts found by the decree, or the legal conclusions of the court, the obvious and only remedy was an appeal to a higher court having ample power to revise and reverse the decree. This principle is so well settled as scarcely to need the citation of authorities for its support. It has been repeatedly affirmed by this court, and distinctly held by the supreme court of the United States. [Voorhees v. Jackson] 10 Pet. [35 U. S.] 474; [Huff v. Hutchinson] 14 How. [55 U. S.] 588.

But it is by no means clear that the objection now urged to the validity of the complainant's copyright could have been sustained, if it had been presented in the proper way and at the proper time. The point made by the defendants' counsel is, that the chart copyrighted to Mrs. Drury is neither a "book," nor a "chart," nor a "print," within the terms of the act of congress, and therefore not within its protection. Upon this

point, no American authorities have been referred to, nor am I aware that it has been decided in this country. In the English courts I know of but one case in which it has been fully considered. This will be presently referred to as having a direct bearing on the question adverted to. Section 1 of the act of congress of February 3, 1831 (4 Stat. 436), secures to the author of any book or books, map, chart, or musical composition, or to any one who shall invent, design, etch, engrave, work or cause to be engraved, etched, or worked from his own design, the exclusive right of printing, reprinting, publishing, and vending the same for the term of twenty-eight years, by complying with certain requirements of the statute. The question presented is, whether the chart for which Mrs. Drury has procured a copyright under the statute falls within any of the foregoing designations. I do not propose to consider this question at any length. As a first impression, from an inspection of the chart, the mind repudiates the conclusion that it is a "book;" and when the point was first suggested, it occurred to me it would require a forced construction of the statute to bring it fairly within the meaning of that term. The chart as printed and published for use is contained on one large sheet, representing a series of diagrams, interspersed with printed instructions as to the mode of using them in taking measurements for and cutting certain parts of ladies' dresses. As necessary to the practical use of the diagrams, they are pasted on thick paper or pasteboard, corresponding with and showing precisely the forms of the diagrams. The exact dimension and form of every part of the garment intended to be cut is indicated by a series of numerals placed along the outer edges of the diagrams thus arranged, and by means of dots or marks at the proper figures, the exact size and course of each section of the garment is ascertained with mathematical precision.

Now, it may well be conceded, that the chart as printed on the sheet, or as pasted in parts for practical use, is not a "book," according to the more popular sense of the word. But, in giving effect to the statute according to its obvious design and spirit, I can see no necessity for restricting the word to a volume. The origin and derivation of the word "book" does not justify this restricted sense. Without intending to make any show of learning on this subject, or attempting a critical investigation, I may remark what is well known, that the Latin word "liber"—book—had no reference to the collection of writings in a volume, but primarily signifies the bark of a tree. Webster, in his dictionary, says our word "book" is derived from the Saxon, "boc," meaning "a beech-tree;" and in other languages of the north of Europe, it has the same derivation. The supposition is, that either the bark of the beech, or what is more probable, thin polished plates of the wood of that tree, were used for writing. It is a fact well established that the Chinese, before the discovery of the art of making paper, used the latter mode for that purpose. It is also well known to readers of the Bible and other ancient writings that in referring to books the collection of literary materials in a volume is not intended. The papyrus was first used for writing, and at a later period the skins of animals made into parchments; but they are called "books," though the manuscripts were in the form of rolls or loose leaves, unbound, and not in volumes, according to the modern sense of the term. But I should certainly have hesitated in adopting this view as a judicial conclusion, if it was not sustained by an authority entitled to high respect. The English courts, after the fullest investigation, have decided this question in a case to which I will now refer. The statute of 8 Anne, on the subject of copyrights, enumerating in section 1 the works intended to be protected by it, contains the words "book or books" precisely as in our statute. In the case of Clementi v. Golding, 2 Camp. 25, the court held that the form of the publication was not material in determining whether it was or was not a book, within the meaning of the statute. That was a suit for a piracy in reprinting and selling a song, which had been published on a single sheet, and in that form copyrighted. The objection was made, that it was not a "book" entitled to the protection of the statute. Lord Ellenborough, contrary to his opinion in a previous case, overruled the objection and directed the jury to return a verdict for the plaintiff, with leave to move for a new trial. He is reported to have said: "I do not see at present why a composition printed on a single sheet of paper should not be entitled to the privileges of the statute. * * *" He adds: "I was at first startled at a single sheet of paper being called a 'book,' but I was afterward disposed to think it might be so considered within the meaning of the act of parliament, and when the matter came before the court, the other judges inclined to the same opinion." After the argument of the motion for a new trial, the reporter adds: "The judges seemed unanimously of opinion that it could not depend on the form of the publication, whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be a 'book' within the meaning of the legislature, and that the verdict of the jury ought not to be disturbed." See same case, 11 East, 244 (new Ed. vol. 6, 125); also case of Hime v. Dale, decided in 1803, referred to 2 Camp. 27, note; Curt. Copyr. 105 et seq.; 2 Eden, Inj. 322.

It will be seen by reference to the case of Clementi v. Golding [supra] that the question was very fully and carefully considered by the full court. No case has been referred to, and I am not aware there is any in

which the doctrine then settled has been reconsidered or overruled by the English courts. And the construction of the statute of Anne, on the point under consideration, may be regarded as law in England. And I can not perceive on what ground the principle can be impugned as against good sense and reason. I am, therefore, inclined to adopt the liberal construction given by the English courts to their statute, and to hold that Mrs. Drury's chart is within the protection of our statute. She could doubtless have given it to the world in a succession of sheets, bound together and constituting a volume, but it is obvious that the chart for practical purposes is more easily understood, and therefore more useful, printed on a single sheet large enough to exhibit all the diagrams at one view. I can not perceive why her rights as an authoress or inventress should be prejudiced by this form of publication. If the chart, as the court is bound, for reasons before intimated, to presume, is original with her—the product of thought and mental toil—her claim is by no means destitute of merit, and she is justly entitled to all the benefits which the law confers. It is clearly no objection to the validity of her copyright, that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright; and it is well known there are works of great practical utility, having no pretension to literary merit, which are yet within, not only the words, but the scope and design of the statute. Adopting this view of the law, it is not necessary to decide whether Mrs. Drury's copyright can be sustained as a "chart" or "print." These words are used in the statute as legitimate subjects of a copyright, and it would not imply a very forced construction to hold that the copyrighted work of Mrs. Drury is included in one or both of these terms. The authorities, I think, would fully sustain such a conclusion.

The only question which remains is, whether the complainants' chart and Mrs. Ewing's guide are legally identical. If they are so, it follows necessarily that the use and sale of the latter is an infringement of Mrs. Drury's exclusive right and a violation of the injunction. And here the true inquiry undoubtedly is, not whether the one is a fac simile of the other, but whether there is such a substantial identity as fairly to justify the inference that in getting up the guide, Mrs. Ewing has availed herself of Mrs. Drury's chart and has borrowed from it its essential characteristics. And the decision of this question is in no way affected by the fact—if conceded to be the fact—that the guide is in some respects an improvement of and of superior utility to the chart of the complainants. This would confer no right to appropriate and use the prior invention or discovery of Mrs. Drury. The law on this subject is stated by Judge McLean, Story v. Holcombe [Case No. 13,497], as follows: "The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts on the same principle, however its structure may be varied, is an infringement of the patent. The second machine may be recommended by its simplicity and cheapness, still if it act on the same principle of the one first patented, the patent is violated." And in the same case, the learned judge asserts the principle strongly, that in the case of a copyright, if the work alleged to be a piracy is of a character to render the original "less valuable by superseding its use in any degree, the right of the author is infringed." In the case of Folsom v. Marsh [Id. 4,901], it is decided that it is "not necessary to constitute an evasion of a copyright, that the whole of a work should be copied, or even a large portion of it, in form or substance. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author substantially, to an injurious extent, appropriated by another, that is sufficient in point of law to constitute a piracy pro tanto. The entirety of the copyright is the property of the author, and it is no defense that another has appropriated a part, and not the whole of any property." To the same effect are the views of Judge Story, in the case of Emerson v. Davies [Id. 4,436]. He says: "To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout, but only that there should be an important and valuable portion, which operates injuriously to the copyright of the plaintiff." In the same case the learned judge, in defining a piracy of a copyright, after a reference to the English authorities, says: "I think it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not, is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only, to disguise the use thereof." Judge Woodbury, on this point says, the true inquiry in these cases is, "whether the book of the defendant, taken as a whole, is substantially a copy of the plaintiff's; whether it has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers by introducing no considerable new matter, or little or nothing new except colorable deviations." Webb v. Powers [Case No. 17,323]. To the same effect are the numerous English decisions on this point. 2 Mylne & C. 740; 30 Eng. Law & Eq. 461; 36 Eng. Law & Eq. 321.

These authorities seem to be decisive of the point under consideration. And the single inquiry in this case therefore is, whether there is a substantial identity as between the chart copyrighted to Mrs. Drury and the guide used and sold by Mrs. Ewing. On this

issue, I shall not attempt a critical notice of the mass of testimony introduced on the hearing of the present motion. It is to be regretted that under the impulse of their heated passions and intemperate zeal, these excited females have put themselves to unnecessary trouble and expense in taking depositions on the question of identity. It lies within narrow limits and presents no great difficulty in its solution. It is to be borne in mind that Mrs. Ewing does not allege, and has not proved, that she is the inventress or authoress of the system copyrighted to her; nor does she deny in her original answer, nor does she now deny, that Mrs. Drury's chart is the basis of her guide. Her claim is simply that she has so far varied from and improved the chart as to constitute her guide an original work, and that, therefore, it is no infringement. But it is obvious from inspection that the two embody substantially, if not literally, the same principle. The diagrams in each are essentially the same in form, dimensions, etc., and have the same arrangement of numerals. It is true, the different scales or rules for taking measurements are designated by names differing in the guide from those used in the chart, but this does not destroy the identity of the two. In practice they produce the same curves or forms for the same identical purpose. The device of Mrs. Ewing in placing on what she calls the back scale one number higher than on the front scale, thus making a seeming difference between her plan and that of Mrs. Drury's, can not affect the question of legal identity. This clearly involves no change of principle. And the same remark applies to the claim of a want of identity, on the ground that Mrs. Ewing's plan as alleged, requires five measurements, whereas Mrs. Drury provides for three only. The mere increase of the number of measurements does not constitute an essential difference in the two plans. But it is by no means clear, that Mrs. Ewing, in her system as copyrighted, requires more than the three measurements. The weight of evidence well justifies the conclusion that until this controversy arose, in practice three only were used, and that the subsequent addition of the two measurements, was an afterthought resorted to for an obvious purpose.

But there is one fact that seems wholly conclusive on this question of identity, and dispenses with the necessity of a minute inquiry into the alleged discrepancies between the two plans. Some nine or ten witnesses, practical and intelligent dressmakers, well acquainted with the theory and practice of taking measurements, and cutting dresses upon the plan of these parties, testify that the two are substantially the same, and in practice produce the same result. Some of these witnesses swear they have cut dresses by both plans, and that when the directions of each are strictly pursued, the results are substantially the same. One witness with great apparent candor and intelligence states, that by an actual experiment with the two plans, when he dropped the surplus number on the back scale of Mrs. Ewing, the measurements were precisely identical, and that when that number was used there was but a trifling difference. Such an experiment affords an unerring test of truth, and if the witness is credible, the force of the fact stated by him can not be overcome by the speculative opinions of any number of witnesses testifying adversely to him.

Without noticing other material discrepancies between the chart of Mrs. Drury and Mrs. Ewing's guide, I am led to the conclusion that they are essentially the same, within the scope of the authorities to which I have referred. Mrs. Ewing has, with some adroitness, so arranged and transposed some parts of Mrs. Drury's diagrams as to present to the unexperienced eye the impression that they are dissimilar, but in doing this she has utterly failed to prove that there is any difference in the principle of the two. There is, also, a substantial identity between the printed directions and instructions accompanying the chart and the guide. True, the words and sentences used by Mrs. Ewing are not the same as those used by Mrs. Drury, but they are of the same import, and intended for the same purpose. In this remark, I do not forget that it is strenuously urged by the counsel for the complainants that what is designated by Mrs. Ewing as her third pupil's instruction is more full and minute than those connected with the chart, and so far unlike them. It is enough to say, in reference to this, that the evidence fully warrants the conclusion that these constituted no part of the rules or instructions as claimed by Mrs. Ewing, and copyrighted to her in Missouri. They have been appended recently with the obvious purpose of negativing the identity of the two plans. It is another evidence of the consciousness of Mrs. Ewing, that something was needed to avoid the otherwise inevitable conclusion, that in getting up her guide she was interfering with and pirating on the prior exclusive right of Mrs. Drury. It can not be doubted that she has adopted all the essential parts of Mrs. Drury's system, and that so far as there are any apparent alterations they are colorable and evasive. It must be conceded that Mrs. Ewing's course does not commend her to the favorable consideration of a court of equity. She seems to have taken a dishonorable advantage of her position as the agent of Mrs. Drury, with the expectation of pecuniary benefits, to which she was neither morally nor legally entitled. Her intelligence and adroitness, as developed throughout this controversy, repel the inference that she acted in ignorance of the fact that she was invading the just rights of the complainants. And when by the decree of this court an injunction was granted to restrain her from the further sale and use of her guide, it was a duty of which she could

not have been ignorant, to respect and obey it. She has willfully violated the injunction, and the complainants, as they had a right to do, have asked for and obtained a rule to show cause why she should not be dealt with as for a contempt of court. No sufficient showing against such a judgment has been made, and I can not do otherwise than find her guilty of the alleged contempt.

The only embarrassment on the part of the court arises from the difficulty of determining what order shall now be made in the case. It is necessary that the supremacy of the law should be vindicated, and the rights of the complainants protected as far as practicable. To this end, it is unquestionably competent for the court to order the imprisonment of Mrs. Ewing, as a punishment for the contempt. But in the case of a female, I am exceedingly reluctant to make such an order. And if any assurance can be given that there will be no repetition of the offense, and that the rights of the complainants will hereafter be respected, I will not now adopt that stringent course. For the present, with the intimation that such future action, as circumstances may require, will be taken by the court, it is now ordered that the defendants, Ewing and his wife, surrender to the clerk of this court, within twenty days, all the published copies of the guide in their possession, or within their control, together with the plate or plates on which they are printed; and also that within that time they pay the costs of this proceeding.

Case No. 4,096.

DRURY v. FOSTER.

[1 Dill. 461.][1]

Circuit Court, D. Minnesota.[2]

CONVEYANCES—ACKNOWLEDGMENT—FILLING BLANKS.

1. The facts stated by the officer in the certificate of acknowledgment of a deed or mortgage is not conclusive under the statute of Minnesota.

2. In Minnesota due acknowledgment is necessary to bar dower, or enable a married woman to convey her real estate, and a deed void when acknowledged, by reason of containing blanks, cannot be ratified except by a reacknowledgment of the instrument.

In this cause, which was a bill filed by the mortgagee, Drury, in 1863, to foreclose a mortgage made by the defendants, Foster and wife, the defence was, in substance, that the mortgage, when executed and acknowledged, contained several material blanks, which were afterwards filled up without the knowledge of the wife, who never assented to or ratified the instrument as thus perfected.

As to acknowledgments, the statute of the state provides: "All conveyances, etc., which shall be acknowledged may be read in evidence * * * without further proof, but the effect of such evidence may be rebutted by other competent testimony." Comp. St. c. 35, § 26, p. 400. As to conveyances, the statute provides that "a married woman may bar her right of dower in any estate conveyed by her husband * * * by joining in the deed of conveyance, and acknowledging the same, as provided in the preceding chapter." Id. c. 36, § 13, p. 408.

Greenleaf Clark and Henry Hale, for complainant.

James Gilfillan, for respondents.

An elaborate opinion was delivered (afterwards affirmed by the supreme court of the United States,—Drury v. Foster, 2 Wall. [69 U. S.] 24), in which it was held (dismissing the bill as to the wife) by

NELSON, District Judge. 1. Under the statute of Minnesota, above copied, a certificate of the officer as to the due acknowledgment of a deed or mortgage is not conclusive; and parol evidence may be received to show that when the instrument was executed and acknowledged by the wife, there were material blanks left therein, which were afterwards filled up.

2. Under the statute of Minnesota, above mentioned, a married woman can pass her real estate or bar her dower only by executing and acknowledging the deed; and a deed void when acknowledged by the wife by reason of containing material blanks, cannot be ratified by subsequent consent on her part, unless given in accordance with the statute, viz.: by a re-acknowledgment of the instrument.

NOTE. As to effect of subsequently filling blanks in conveyances: See Simms v. Hervey, 19 Iowa, 274, and cases cited and classified; Owen v. Perry, 25 Iowa, 412. As to controverting certificate of acknowledgment; O'Ferrall v. Simplot, 4 Iowa, 381; McHenry v. Day, 13 Iowa, 445; Morris v. Sargent, 18 Iowa, 90; Dodge v. Hollingshead, 6 Minn. 25 [Gil. 1], followed in Edgerton v. Jones, 10 Minn. 427 [Gil. 341], also hold with Judge Nelson, that under the statute of Minnesota the facts stated in the certificate of acknowledgment are not conclusive.

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

[2] [Affirmed in Drury v. Foster, 2 Wall. (69 U. S.) 24.]

DRYER (McFEELY v.). See Case No. 8,791.

DRY OX AND COW HIDES (UNITED STATES v.). See Case No. 14,9[illegible]5.

Case No. 4,097.

DRYSDALE v. The RANGER et al.

[Bee, 148.][1]

District Court, D. South Carolina. Sept., 1799.

SEAMEN'S WAGES—FORFEITURE.

Wages not always forfeited by disobedience of a captain's orders, unattended by aggravating circumstances.

[Cited in The Mentor, Case No. 9,427; The Maria, Id. 9,074; Smith v. Treat, Id. 13,117;

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

The Cornelia Amsden, Id. 3,234; The Antioch, 11 Fed. 166.]

Before BEE, District Judge.

The only question in this case is, whether the actor has forfeited his wages, as mate of the Ranger, by misbehaviour on board. The articles are in the usual form. The logbook has been produced, and a number of witnesses examined to shew that Drysdale, on the 4th of August last, behaved to Captain Booth in so improper a manner as to work a forfeiture of the wages he now sues for. It appeared from this evidence that Drysdale was first mate, and had the watch on deck. That a short time before his watch expired, the captain came on deck, and gave some order to the man at the helm, which the mate contradicted; asserting that the watch was his, and that he had the direction of the vessel. A dispute soon after arose as to the hour of the day, respecting which there was a difference of three minutes. This trifling circumstance led to all the subsequent consequences. Drysdale went so far as to call the captain a fool; and said he knew his own duty. The captain complained of this as being insolent, and ordered the mate to go below. He refused to obey till the time of his watch on deck should expire. Captain Booth then struck him, and ordered the second mate to tie him; which, however, was not done. He was struck again, and then went below, making no further resistance, but calling on the carpenter and gunner to stop the captain from beating him, for that the captain was mad. It was contended on the part of the claimant that, by the articles, these wages are forfeit. And 2dly, that exclusively of any contract in writing, an obligation is imposed on seamen to obey orders; and that their refusal to do so causes a forfeiture of wages.

The articles stipulate that the seamen shall not, on any account, leave or desert the vessel, till the voyage be ended and the vessel discharged. The act of congress has a similar provision. The articles also stipulate that the crew shall do their duty as becomes good and faithful seamen. But neither the contract nor the act says that disobedience of orders shall work a forfeiture of wages.

We must recur, therefore, to the marine law. The Laws of Oleron declare, "that if a mariner commit a fault and do not submit, the master may, at the next place of landing, discharge him; and, if he refuse to go on shore, he shall lose half his wages, and all his goods in the vessel. But if the mariner submit, and the master will not receive his submission, he shall have his whole wages." By the same laws, if a mariner commit a wilful or negligent fault, to the damage of ship or goods, the mariner shall be liable. In all cases of barratry, a partial or total forfeiture of wages, as the case may be, is the constant practice of the court. The case reported in Lex Mercatoria from 15 Vin. Abr. 234, is, that if a mariner, who has been rebellious, repent in time, and offer amends, he may, in case the master refuse, follow the ship and obtain his hire. It is clear, therefore, that disobedience is not necessarily attended by forfeiture of wages. Let us, then, examine the particular circumstances upon which the court is now to decide.

The cause of dispute was, at first, trifling, and the behaviour of the mate highly improper. It was his duty to yield implicit and ready submission to the captain's orders; by not doing so, he subjected himself to confinement and correction. He did, indeed, receive two blows, to which he made no resistance; and the captain would have been justified in further moderately punishing him. He chose rather to send him out of the ship, and refused to take him back; and he seems to have considered this as punishment enough, for he afterwards promised, in presence of the captain of the Penelope, to pay the mate his wages upon their arrival in Charleston. Whatever were his motives for not receiving Drysdale again into his vessel, I am willing to suppose them proper; but he ought certainly to make good his promise as to the wages, especially as the mate had ample revenge in his power, if he had chosen to give information to the British frigate of the tearing out of some of the leaves of the logbook. This he refused to do; and this, added to the proof before the court of his contrition, certainly extenuates his offence.

It appeared also, that no other instance of this sort had occurred throughout the voyage; and I am unwilling to construe the articles so strictly as to decree a forfeiture for this single fault. The circumstances were not so aggravated as they frequently are on this rough and dangerous element. If, indeed, resistance had been made, and this man's hand lifted against his captain, I should have decreed a forfeiture of wages without hesitation. As the seaman's life is a hard one, and as the actor did his duty faithfully for a long time, with this only exception, I shall order and adjudge that his wages be paid. But as the motive of the claimant in withholding them was a due regard to discipline, and his duty to his owners, I decree that each party pay his own costs.

Case No. 4,098.

The D. SARGEANT.

[Blatchf. Pr. Cas. 576.][1]

District Court, S. D. New York. Dec., 1863.

PRIZE — VIOLATION OF BLOCKADE — CONTEST BY CITIZEN OF INSURRECTIONARY STATE—CLAIM BY AGENT.

1. The decision of the supreme court in The Prize Cases (2 Black [67 U. S.] 635) as to the questions of war and blockade, applied to this case.

2. A citizen of a state in insurrection has, legally, no locus standi in a court of the United States, to contest a prize seizure.

3. Effect of a claim and answer in a prize suit, put in and verified by an agent, and not by the owner.

4. Vessel and cargo condemned for a violation of the blockade.

BETTS, District Judge. The vessel and cargo in this case were captured March 12, 1863, off Galveston, by the United States vessel-of-war Kittatinny, as lawful prize. The vessel as being unseaworthy, was sent into New Orleans, and was left there, after being appraised and valued at $1,500. Her cargo was transmitted to this district for adjudication, and was here arrested, by due process of law, and proceeded against for condemnation, in the present suit. The libel was filed May 12, 1863. The warrant and monition issued thereon were returned by the marshal duly served June 2, and an answer and claim on the part of the claimant was filed June 16 thereafter.

Two broad lines of defence are assumed by the claimant in his pleadings. He asserts his absolute exemption from liability to the arrest and prosecution of his vessel and cargo as prize, for the reasons—First, "that no war existed between the United States and any other people or nation or power, whereby any forfeiture or condemnation of the said vessel or cargo has been incurred;" and, second, that "no blockade of any port or ports existed or was known to the claimant, whereby the vessel and cargo were liable to any seizure, capture, or condemnation." It is sufficient to observe, upon these points of defence, that, contemporaneously with the unlawful conduct of the vessel and cargo, pursued and directed through the personal agency of the claimant, the supreme court of the United States declared and pronounced each and every of these positions of the claimant to be erroneous and utterly fallacious in judgment of law. The Prize Cases, 2 Black [67 U. S.] 635. The express denial, in the answer, "that the vessel, at the time of her capture, was attempting to violate any blockade, or any proclamation by which any blockade had been established," demands no inquiry or consideration by the court, since the owner and master of the vessel testifies, on his preparatory examination, that he knew that the port of Galveston was under blockade, and that he intended, on this voyage, to elude that blockade if he could. He could scarcely hope to cover that culpability by asserting that he came out of one of the passes by the harbor, and did not see either of the blockading vessels at the time. The other witness, Brown, states the matter with more openness. He says that he knew that Galveston was blockaded; that he saw the blockading vessels off the bar; that when he shipped he knew it was the intention to run out and elude the blockading vessels; and that the vessel ran out of the St. Louis pass, and did not see any of those vessels at the time. Both of the witnesses testify that the vessel came out of Galveston under the Confederate flag. The vessel and cargo were purchased by the claimant in Texas, in February, 1863. The register of title was executed to him by the Confederate government, February 27, 1863, on his own oath of citizenship and ownership, in Texas. This appears upon the face of the register. So, also, the bill of sale of the vessel, dated in Houston, Texas, February 18, 1863, conveys the vessel to the claimant, who is described therein as of that place, for the consideration of $8,000. The shipping articles or agreement signed by the claimant February 17, 1863, as master, and by the crew, stipulate for a voyage to Honduras, or for a market, "and back to a port or place in the Confederate States of America." Those articles are certified, on the back of them, by the collector of Galveston, February 28, to be a true copy of the original then on file in his office. The master filed the manifest of his cargo, and obtained the clearance of his vessel at the custom-house at Galveston, on the same day. He testifies that he had no other than Confederate colors and papers on board, and that he sailed out under a military pass from Houston. He asserts himself to be a native of Copenhagen, in Denmark, and says that his home for the last twenty years has been in New Orleans during the winter, and in the northern states during the summer. His own oath to his being a citizen of Texas, taken at Houston, on obtaining a registry of this vessel to himself, in February, 1863, concludes him as to the fact that he was then a citizen of an insurrectionary state, and an enemy of the United States. The claim interposed in his name would, accordingly, be a void paper, as he has legally, being a rebel, no locus standi in a court of the United States, to contest a prize seizure. But, furthermore, the claim filed in this case was interposed by an agent of the owner of the vessel and cargo, who does not assume to have personal knowledge of the facts he suggests; and the statement and attestation by way of test oath thereto, in that method, inures in no way as evidence, nor does it amount to more than an argument by counsel on the instructions of the principal

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

party. The court is not thereby called upon to moot the point whether such suggested circumstances would constitute a defence to the suit under the doctrines of international law.

The counsel for the claimant refers to a decision of the circuit court at the present term, in the case of U. S. v. The General C. C. Pinckney [Case No. 5,309], reversing a decision rendered in this court in the year 1862, in an analogous case. It appears, however, that the principle of law adopted by the district court was not discountenanced by the appellate court, but that the judgment was placed upon the further proofs introduced into the case after its appeal. The report of the new decree does not set forth the facts upon which the circuit court ultimately acted. It is needless for this court to remark, that if it were made to appear that this suit comes before this court with the same features presented by the one carried to the circuit court, the judgment of the latter would be entirely conclusive over this tribunal.

Certainly, in a leading particular, the cases differ. The proof which controlled in the case of The General C. C. Pinckney was accumulated evidence, as noticed in the decision of the appeal, demonstrating, beyond question, that the honest purpose of the claimant was to remove entirely his family and effects out of the rebel country so soon as the war was set on foot; whilst, in this case, there is not an iota of proof, written or oral, that the claimant had any other motive for the voyage he undertook, than to realize the advantage of a probably profitable mercantile adventure. He sought a neutral market for his cargo, and pledged himself, in the adventure, to return, with his vessel, within the Confederate States. The defence puts no other aspect upon the enterprise than that of a bold daring by the claimant of the hazard of running an efficient blockade of Galveston, with the enemy flag displayed, and, perhaps, the aid of the obscurity of night, or the use of greater dexterity and speed in the movements put forth than would be employed against his effort. The defence does not indicate that the claimant was seeking the protection and security of a friendly hand to favor his enterprize, for, on the record, he contemns all authority or right on the part of the United States to take cognizance of his open and flagrant violation of the blockade in this attempt. Only on being arrested in committing the guilty act does he assume the bearing of an oppressed man seeking to fly from rebel tyranny, and to shelter himself and his property under the guardianship of the United States. The avowal of that intention is suspiciously late. I am of opinion that the case is a clear one for the condemnation and forfeiture of the vessel and cargo. Decree accordingly.

D. S. CAGE, The (BROWN v.). See Case No. 2,002.

Case No. 4,099.

The D. S. GREGORY.

[2 Ben. 166.][1]

District Court, S. D. New York. Feb., 1868.[2]

COLLISION IN NEW YORK HARBOR — VESSEL AT ANCHOR—FOG—SPEED OF FERRYBOAT.

1. Where a steamer, coming into New York harbor in a fog, was anchored by the pilot in charge of her about opposite to the slip of a ferry, coming to anchor there because the river was full of vessels, and her position was known to those on board of a boat plying on such ferry, and she sounded her whistle at proper intervals, and rang a bell, and used all proper precautions to make her position known, and, about nine o'clock the next morning, the fog still continuing, she was run into by such ferryboat: *Held*, that, on the evidence, it was not a fault in the steamer, contributing to the collision, to anchor where she did, and keep her anchorage during the fog.

2. The fact that the ferryboat collided, in a fog, with a vessel at anchor, which used all proper precautions to give notice of her position, it being already known to the ferryboat that she was at anchor there, was sufficient evidence that the speed of the ferryboat was too great, there being no special circumstances to justify her maintaining the speed she did. *Held*, that the ferryboat was, therefore, liable for the damages.

[Cited in The Louisiana, Case No. 8,537; The Atlas, Id. 633; The Colorado, Id. 3,028; The Hansa, Id. 6,037; The City of Panama, Id. 2,764; The City of New York, 15 Fed. 629; The Alberta, 23 Fed. 812.]

This was a libel by Alfred Holt and others, owners of the steamship Talisman, to recover for a collision which took place about nine o'clock on the morning of the 15th of January, 1863, in the Hudson river, between the city of New York and Jersey City, between the steam ferryboat D. S. Gregory and the steamship Talisman. The Talisman was at anchor. She had come in from sea during the previous afternoon, and had then anchored nearly in the middle of the Hudson river, about opposite to the foot of Courtlandt street in the city of New York. The D. S. Gregory plied regularly between the foot of Courtlandt street and a slip in Jersey City nearly opposite. The Talisman came in during a very thick fog, which continued all through the night, and down to the time of the collision. She anchored where she did because the river was full of vessels, moving and at anchor, and a collision with some of them was feared if she proceeded further. She was anchored under the direction of the pilot who brought her in from sea. The position of the Talisman at her anchorage was known to those in charge of the D. S. Gregory, and they saw her after she had taken up her anchorage. Her position was not substantially changed down to the time of the collision. At that time she was headed up the river, the tide being ebb. She blew her steam whistle at proper intervals before and down to the time of the collision, and also sounded her bell,

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

[2] [Affirmed in Case No. 4,102.]

and used all proper precautions to make known her position. The D. S. Gregory was on a trip from Jersey City to her berth at New York, and came in contact, during the fog, with the Talisman, on the port side of the latter, and damaged her seriously.

D. D. Lord, for libellants.
E. S. Van Winkle, for claimants.

BLATCHFORD, District Judge. The answer sets up that it was a fault in the Talisman to anchor where she did in the fog, it being claimed that her anchorage place was in the line of the usual path of the ferryboat. I do not think, on the evidence, that it was a fault contributing to the collision, in the Talisman, to anchor where she did, and keep such anchorage during the fog. I regard the Talisman as wholly free from fault, so far as the collision is concerned. The only question, therefore, is whether the D. S. Gregory was in fault in coming into collision with this vessel at anchor; and it is impossible to resist the conclusion that she was. Her rate of speed was too great. No positive rate can be prescribed. What would be a moderate rate of speed under one state of facts, would be an immoderate one under another. A steam vessel must, in a fog, reduce her rate of speed to a moderate rate, or abide the consequences of an immoderate one, unless some special reason is shown for maintaining the rate of speed adopted. The fact that the D. S. Gregory, while under way in a fog, collided with a vessel at anchor, which used all proper precautions to give notice of her position (it being already known to the D. S. Gregory that she was at anchor there), is sufficient evidence that the speed of the D. S. Gregory was not moderate, there being no special circumstances existing in the case to justify her maintaining the rate of speed she did. And this is true, without regard to what her actual rate of speed was, and without regard to the question whether she did or did not slow, stop, and back before the collision, and without regard to the question whether the manoeuvres she made at the moment of collision were or were not correct. The collision resulted from her coming in contact, while under way, with the vessel that was at anchor, and was a consequence of the speed at which she was moving. In such a fog, her speed ought to have been as much less than it was, as would have been sufficient to enable her to avoid the vessel at anchor. She ought not to have gone so fast as not to have been able, by slowing, stopping, and backing, to avoid a collision; and, if the fog was so thick that, at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion is irresistible that her speed was not that moderate speed in a fog which is required by the well-settled rules of navigation.

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

NOTE. This decision was affirmed by the circuit court, on appeal, in August, 186). [See Case No. 4,102.]

Case No. 4,100.

The D. S. GREGORY and The GEORGE WASHINGTON.

[2 Ben. 226;[1] 1 Am. Law T. Rep. U. S. Cts. 95.]

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

COLLISION IN NEW YORK HARBOR — STEAM VESSELS CROSSING—SPEED—KEEPING COURSE—PASSENGER—SUNDAY LAW—DAMAGES.

1. A steam ferryboat, crossing the Hudson river, as she approached her slip on the New York side, saw a steamboat coming down the river about two hundred yards out from the piers, and blew one whistle as a signal and ported her wheel, and, as she saw that the other vessel did not change her course, blew another single whistle, and kept on with unslackened speed, till she was struck on the port side by the other steamboat.

2. The steamboat, coming down the river at the rate of twelve miles an hour, saw the ferryboat coming, and blew two whistles, and kept on with unabated speed and without any change of course, although she saw that the ferryboat paid no attention to her signal, until just before the collision, when her engine was stopped.

3. A passenger on the ferryboat, on her way to New York to attend divine service (the day being Sunday), was severely injured by the collision: *Held*, that both vessels were in fault.

[See note at end of case.]

4. When each vessel signaled, it was seen by her that there was "risk of collision," within the meaning of the 14th and 16th articles of the rules for avoiding collisions, contained in the act of April 29, 1864 (13 Stat. 60), and it was the duty of each of them to have then slowed and stopped.

[Cited in The City of New York, 15 Fed. 627; The Grand Republic, 16 Fed. 429; The New York, 53 Fed. 559.]

5. As the vessels were crossing, it was the duty of the steamboat, having the ferryboat on her starboard hand, to keep out of her way, according to the 14th article, *Held*, that it was the duty of the ferryboat, under the 14th and 18th articles, to have kept her course, and she was in fault in porting her helm.

6. The libellant could recover her damages against both vessels.

7. The libellant was not within the provisions of the Sunday law of the state of New York (1 Rev. St. pt. 1, c. 20, tit. 8, art. 8, § 70). If she had been, it would be no defence to her right of recovery.

8. On the evidence, the libellant was entitled to recover the expenses to which she had been put in consequence of the injury, including the value of some care and service which was gratuitously bestowed on her. *Held*, that she was also entitled to recover, for the injury, the damages consequent on her not being able to earn so much after it as before, and also compensation for the pain and mental distress

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. U. S. Cts. 95, contains only a partial report.]

suffered by her, but nothing for exemplary or punitive damages.

[Cited in The Hope, 5 Fed. 825; Behrens v. The Furnessia, 35 Fed. 800; The Mineola, 44 Fed. 144.]

9. Decree for libellant for $10,000, one-half to be paid by each vessel.

[Cited in The Atlas, Case No. 633; The Helen R. Cooper, Id. 6,335.]

[See note at end of case.]

On the morning of Sunday, the 16th of September, 1866, the steam ferryboat D. S. Gregory, a vessel belonging to the New Jersey Railroad and Transportation Company, and plying regularly across the Hudson river, as a ferryboat, from a slip at the foot of Montgomery street, in Jersey City, in the state of New Jersey, to a slip at the foot of Desbrosses street, in the city of New York, left her slip on the New Jersey side, about twenty minutes past 10 o'clock a. m., with the libellant, Ann Cavan, on board, as a passenger, bound for her slip on the New York side. The libellant was on her way to New York to attend church. She took her seat on the right-hand side of the ladies' cabin, in the forward part of the same, toward the end nearest to New York, the ladies' cabin being on the port side of the boat, and the libellant's face being to the northward, and her right side to the eastward. Her back was thus toward the solid partition which separated the ladies' cabin from the portion of the boat occupied by wheeled vehicles. When the D. S. Gregory had reached a point within about two hundred yards of the entrance to her slip on the New York side, and was off pier 39, which forms the lower side of the slip, a collision occurred between her and the steamboat George Washington. The stem of the George Washington struck the port side of the D. S. Gregory about ten feet from what was then the easterly end of the ladies' cabin, and nearly opposite where the libellant sat, with such force as to go entirely through the width of the cabin, up to and through the partition before mentioned, and nearly up to the body of the vessel below, the cabin being built up upon the guard. The libellant was driven by the blow through the partition and thrown upon the deck, and buried under the wreck of crushed timbers and planks. She was very much bruised and cut, her right leg was broken in three several places, and her left leg was broken in one place. The libel alleged that the collision was caused by negligence and want of skill on the part of each vessel, and by their joint negligence and fault, and averred that each was in fault in not stopping and backing in season, after it became apparent that there was risk of collision from continuing on their respective courses, or in not keeping a good lookout, or other fault or mismanagement, and claimed damages from both vessels, or from either, to the amount of $10,000.

The answer of the D. S. Gregory was, in substance, that, after she left her slip at Jersey City, she proceeded in a northeasterly direction, on her accustomed route, toward her New York slip; that, while on her passage, her pilot discovered the George Washington approaching and coming down the river in a southerly course, the George Washington then being about six hundred yards off; that, when the D. S. Gregory was about five hundred yards off from the George Washington, and about the same distance from the New York slip, the pilot of the D. S. Gregory gave, as a signal, one short distinct blast of the steam whistle, indicating his intention to port his helm and pass to the right of the George Washington; that, at the same time he gave the signal, he ported his helm, with the expectation that the George Washington would port her helm and pass to the right of the D. S. Gregory, in accordance with the signal long established by the laws of navigation; that said signal was loud and distinct, sufficient to be heard on board of the George Washington, but the pilot of the George Washington entirely disregarded said signal, and continued his course in the same direction and at the same rate of speed, which was about twelve miles an hour; that thereafter, and when the George Washington had approached to within about three hundred yards of the D. S. Gregory, said signal of one short distinct blast of the steam whistle was again given, and again disregarded by the George Washington; that thereupon the D. S. Gregory stopped her engine, her speed being then about seven miles an hour; that the George Washington, in total disregard of the signals so given by the D. S. Gregory, continued her course without the slightest perceptible deviation, approaching the D. S. Gregory, the latter having, by means of porting her helm, changed her course more eastwardly; that the George Washington did not change her course at all, and did not stop her engine or moderate her speed until within fifteen or twenty yards of the D. S. Gregory, and then, with her speed but little, if any, diminished, ran violently into the D. S. Gregory, at right angles.

The George Washington was an excursion boat, and was, at the time of the collision, bound from the dock at the foot of Christopher street, New York, to the dock at the foot of Barclay street, New York, and thence on an excursion down the bay. The answer of the George Washington averred that she was going down in the usual track; that the D. S. Gregory would, in the usual course of things, have passed under her stern, but that, in consequence of the incompetence and want of skill of those on the D. S. Gregory, they approached the George Washington, and the latter blew two blasts, which indicated that she was going ahead of the D. S. Gregory; and that, finding that no attention was paid to such notice, and that the D. S. Gregory was attempting to pass ahead of the George Washington, the latter stopped and backed, but the collision could not be avoided.

[The answer of the Washington set up as a separate defense that the libellant could not recover because she was traveling on Sunday, in violation of the law of the state.] [2]

C. Van Santvoord and T. M. Adams, for libellant.

S. Webster and J. C. Jackson, for the D. S. Gregory.

Beebe, Dean & Donohue, for the George Washington.

BLATCHFORD, District Judge. This collision occurred in open day, and in clear weather, and when there was nothing to interfere with the power of vision or the capacity of manoeuvring on the part of either boat. The first fault was on the part of the George Washington. The testimony is, that, after she had left the dock at Christopher street, which was at pier 50, and was on her way down, at a speed of about twelve miles an hour, and at a distance out from the ends of the piers of about two hundred yards, and had reached a point about off the foot of Spring and Canal streets, between piers 42 and 43, she blew a signal of two blasts of her steam whistle. This signal was intended to indicate to some other and approaching vessel that the George Washington designed and intended to pass to her own left, and that such approaching vessel must pass to her own left. The approaching vessel was the D. S. Gregory. She was at no great distance. Her place of destination, the slip at the foot of Desbrosses street, between piers 39 and 40, was well known to the George Washington. The George Washington was above the entrance to such slip, and was on a course that would necessarily cross the course of the D. S. Gregory, and the D. S. Gregory was below the entrance to such slip, and was on a course that would necessarily cross the course of the George Washington, because the D. S. Gregory was proceeding from a starting point west of the course of the George Washington, to a point of destination east of such course. The signal by the George Washington was given because she saw that the courses of the two vessels were crossing, and because she saw there was risk of collision. She could have had no other object in giving the signal. The signal was made in view of the crossing course of the approaching ferryboat, and was intended for her, and was made in contemplation of risk of collision. It was an utterance by the George Washington as to the manoeuvre she intended to adopt in reference to the D. S. Gregory. This is shown by the answer of the George Washington. The answer avers, that the D. S. Gregory approached the George Washington, and that the latter blew two blasts (meaning one signal consisting of two blasts), which indicated that she was going ahead of the D. S. Gregory (that is, that she was going to her own left and was going to leave the D. S. Gregory on the starboard side of the George Washington). It is quite certain, on the evidence, that this signal was given by the George Washington before any signal was given by the D. S. Gregory. To this signal by the George Washington there was no response by the D. S. Gregory. The answer of the George Washington avers, that the D. S. Gregory paid no attention to the signal; and such is the evidence. It does not seem to have been heard on board of the D. S. Gregory. If it was heard, it was not responded to by the D. S. Gregory, nor was any manoeuvre made by the D. S. Gregory, which indicated any assent by her that the George Washington should go ahead of her or to the left. Yet the George Washington kept on, with undiminished speed and without any divergence from her course, until she discovered that a collision must ensue, and then she stopped her engine, and reversed it. In this course of action, the George Washington violated the plain statutory rules of navigation. She had the D. S. Gregory on her own starboard side, and was, therefore, bound, by article 14 of the act of April 29, 1864 (13 Stat. 60), to keep out of her way, there being risk of collision from their crossing courses. The George Washington manifested her idea that there was risk of collision, by giving the signal she did. The D. S. Gregory was approaching on the starboard side of the George Washington. Under these circumstances, the George Washington had no right to keep on at such a rate of speed as twelve miles an hour toward the entrance to the slip of the ferryboat. It was her duty to keep out of the way of the ferryboat. Instead of that, she ran directly, with undiminished speed, into her way. She had no right to dictate, by signal, to the ferryboat, what course the ferryboat should pursue, much less had she a right, when she found that her signal was not responded to and not heeded, to persist in maintaining her course and her speed. When she gave her signal, indicating, in her judgment, risk of collision, she ought to have slackened her speed, or, if necessary, stopped her engine and reversed it. Article 16 of the act before mentioned is imperative, that every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. The expression, "risk of collision," as used in the 14th and 16th articles of the act, has a different meaning from the expression, "immediate danger," used in the 19th article. "Risk of collision" means chance, peril, hazard, or danger of collision merely, and not immediate danger. In view of the fact that the George Washington herself apprehended peril of collision, as manifested by her signal that she was going to adopt a certain course to avoid such peril, she cannot now be heard to say that there was not, at the time she gave the signal, any risk of collision. It was her duty

[2] [From 1 Am. Law T. Rep. U. S. Cts. 95.]

at that time to have slackened her speed, so as to have been controllable. If she had done so, she would have been able to fulfill her duty of keeping out of the way of the ferryboat. Her failure to do so makes her responsible for the collision.

As to the D. S. Gregory, she knew that it was the duty of the George Washington to keep out of her way, and that it was her own corresponding duty to keep her own course, and thus permit the George Washington to keep out of her way. Instead of keeping her course, she changed it. Her answer sets forth fully the faults of her navigation, and they are fully proved. The courses of the two vessels were crossing, and the ferryboat had the George Washington on her own port side. It was, therefore, by articles 14 and 18 of the act, the duty of the ferryboat to keep her course, if there was risk of collision. That there was risk or peril of collision apprehended by the ferryboat is shown by the fact that, simultaneously with the change of course, she gave a signal to the George Washington consisting of one blast of her steam whistle. The answer of the ferryboat states, that this signal indicated her intention to port her helm and pass to the right of the George Washington, and that, at the same time she gave the signal, she ported her helm, with the expectation that the George Washington would port her helm and pass to the right of the ferryboat; that this signal was given when the George Washington was about five hundred yards distant; that the signal was unheeded by the George Washington, which continued her course in the same direction and at the same speed of twelve miles an hour; that, when the George Washington had approached to within about three hundred yards of the ferryboat, the latter gave another signal, consisting of one blast of her steam whistle; and that this second signal was also unheeded by the George Washington. These averments of the answer are sustained by the proof, and are sufficient, of themselves, to convict the ferryboat of faulty negligence. Her answer states, that the effect of porting her helm was to change her course more eastwardly. This was the fact. It brought her course more toward a right angle to the course on which the George Washington was running. This change of course by the ferryboat was a violation of her duty. It contributed to the collision, and makes her responsible for the collision. It was not a change of course caused by any danger of navigation, or by any other special circumstance, and it was not a manoeuvre caused by the pressure of immediate danger, so as to be within the exceptions contained in article 19 of the act. This change of course was persisted in by the ferryboat, notwithstanding she perceived that her new course was every instant involving greater peril of collision, and although the George Washington paid no heed to her signals, and did not respond to them, but kept her course. And, even if it should be admitted, that the ferryboat adopted her new course at such a distance from the George Washington as to make it a course which she was entitled to keep, under article 18, as against the duty of the George Washington, under article 14, to keep out of her way as well after such change of course as before, still it was the duty of the ferryboat, under article 16, to have slackened her speed, and stopped her engine, and reversed it. She did not do so. She gave her signal, ported her helm, received no response to her signal, kept on at her speed, gave another signal, received no response to it, still kept on, and then rang the jingle bell to put on all the steam that could be got, which was done, and the crash came. Greater and more culpable recklessness in navigation cannot well be conceived. At the time she whistled, because there was risk of collision, it was her duty, because there was such risk, to have slowed, if not to have stopped her engine and reversed it. When she whistled a second time, if not before, it was her duty to have stopped her engine and reversed it. And she was conscious that this was her duty, for her answer avers, that, when she found that her second signal was disregarded by the George Washington, the engine of the ferryboat was stopped. This is utterly untrue. Not a single witness asserts it. On the contrary, the testimony is clear, that the speed of the ferryboat was not slackened. Her engineer says that the jingle bell to go ahead fast was rung and obeyed just after the first signal was given by the whistle of the ferryboat. Her full speed was kept up to the moment of collision. If she had slowed, as was her duty, when she first whistled, she would have been under control, and could have manoeuvred to avoid a collision, notwithstanding the course taken by the George Washington. And this is equally true in regard to the George Washington. If she had slowed, as was her duty, when she whistled, she would have been under control, and could have manoeuvred to avoid a collision, notwithstanding the change of course by the ferryboat, and notwithstanding the ferryboat's failure to diminish her speed.

It is very plain, on the evidence, that each boat was attempting to head off the other. Neither would give way to the other. Whether each failed to hear the signal or signals given by the other or not, each saw plainly what the other was attempting to do, and each blindly and recklessly rushed into the impending peril. Each violated two of the clearly prescribed rules of navigation in regard to steam vessels, and each must bear the consequences of its acts. These views would equally apply if either or each vessel were prosecuting the other for damages caused by the collision. As respects the libellant, the obligation of the ferryboat to her, growing out of the contract for carriage, to

be guilty of no negligence from which she could suffer, was more immediate than the obligation of the George Washington toward the libellant. But the facts of the case are such as to make both vessels responsible to the libellant for the damages she suffered by this collision, which was caused by the contributing, concurrent, and co-operating negligence of both. She has a right to join both of them in one suit in the admiralty, and have a decree therein against each or either, for her damages. The New Philadelphia, 1 Black [66 U. S.] 62, 76; Gordon v. The Mary J. Vaughan and The Telegraph [Case No. 5,617]; Colegrove v. New York & N. H. R. Co., 20 N. Y. 492.

The answer of the George Washington sets up, as a defence against the libellant's right to recover, that, at the time of the collision, she was traveling in this state on Sunday, in violation of a law of the state. The libel avers, that the libellant took passage on the ferryboat for the purpose of attending divine service at her usual place of worship in the city of New York. The testimony establishes this fact, and also that the place of worship was within twenty miles of her residence, from which she departed. The statute of New York which forbids traveling on Sunday (1 Rev. St. pt. 1, c. 20, tit. 8, art. 8, § 70), excepts the case of a person going to or returning from a church or place of worship within a distance of twenty miles. But, even if it were shown that the libellant was at the time violating the statute in question, that would be no objection to her right to recover in this suit. The state alone can take cognizance of her violation of the law, and punish her for it. This court cannot punish her by withholding from her her right to damages for this collision. Philadelphia, W. & B. R. Co., v. Philadelphia & H. de G. Steam Towboat Co., 23 How. [64 U. S.] 209. If such an objection could be set up in any case, it could scarcely be the policy of the law to permit it to be taken on behalf of a vessel which was at the time running as an excursion boat on Sunday, and assisting in the violation of the very statute invoked.

It only remains to fix the amount of damages which the libellant is entitled to recover. She was confined to her bed for nearly three months, and suffered very great pain during all that time. She is, and, on the evidence, always will be, unable to work for her support as she did before. One of her legs is shorter than the other, and the medical testimony is, that she will never entirely recover from the effects of the accident. It is shown that she herself paid out, for nursing and care of herself, the sum of $100. She was a domestic at service in a family as a nurse of children. The bill of the surgeon who attended her amounted to $613. His services were skillful, and are shown to have been worth fully that sum and more. Besides the nursing and care so paid for, she received much that was gratuitously bestowed, and was necessary to her comfort, and contributed greatly to ameliorate her condition. The value of this she is entitled to recover, as it was bestowed upon her because of her humble condition and her pecuniary need. I think an allowance for medical attendance and care and nursing, of $1,000 in all, is not an exaggerated amount. This sum represents actual outlay. Then, as to what she has lost by the accident. She was receiving, at the time, $12 a month and her board, as wages. She was a competent and faithful person, and capable of continuing to earn that amount. She can no longer earn it, and the evidence is satisfactory that, but for a charitable feeling on the part of kindly disposed friends, she could earn nothing steadily, regularly, and certainly. This, then, is a loss to her of $144 a year, and of her board, which it is reasonable to put at $6 a week, or $312 a year, making a total loss of $456 a year. The libellant was, at the time of the accident, about 40 years of age. The sum required, according to the Northampton tables, to produce, at that age, an annuity for life, of $456, is $4,881.48. This sum, added to the $1,000 before mentioned, makes $5,-881.48. Thus much the libellant is entitled to recover, as if she were a portion of the cargo of the ferryboat, which its owner is entitled to have restored, repaired, and replaced in the condition in which it was at the time of the collision. The aggregate sum named includes nothing for any attendance which it seems probable, from the evidence, she will require because of her disabled condition, and nothing for the physical pain and suffering which she has undergone, and which the medical testimony shows she must continue to suffer while she lives, and nothing for the distress of mind she has suffered, inseparable from the crushing of all hopes for the future in one dependent on the labor of her hands for her daily bread. Such physical pain and such mental distress are a legitimate ground for damages in a case of this kind, and are to be compensated by a pecuniary reward. Ransom v. New York & E. R. Co., 15 N. Y. 415; Curtis v. Rochester & S. R. Co., 18 N. Y. 534. I think an allowance, on this ground, sufficient to bring up the entire sum to the amount claimed in the libel, $10,000, is proper. The claim made by the libellant is a moderate one, and has been urged in no spirit of exaggeration. The injury to her was caused by the grossest negligence, particularly on the part of the ferryboat, because the slightest negligence on the part of the ferryboat was gross and culpable, in view of the obligation to the libellant as a passenger; and I am satisfied that a jury, if the pleadings were in a shape to admit of it, would award more than the sum of $10,000. I allow nothing for exemplary, punitive, or vindictive damages. The case is not one of malicious or wilful injury, although one of reckless negligence,

and is not a proper case for exemplary damages. Let a decree be entered against both vessels for $10,000, with costs.

NOTE. This decision was affirmed by the circuit court, on appeal, in October, 1868, with such modification as is shown by the following decree made in the cause by the circuit court: "This cause having been heard, on the pleadings and proofs, on the appeals of the New Jersey Railroad and Transportation Company, the claimants and owners of the steam ferryboat D. S. Gregory, and of William Meyers, Egbert Meyers, Jacob Meyers, and Michael Sherman, claimants and owners of the steamboat George Washington, from the decree of the district court of the United States for the southern district of New York, made on the 18th day of March, 1868, and having been argued by the advocates for the respective parties, and due deliberation having been had thereon; it is now ordered, adjudged, and decreed, that the said decree of the said district court be, and the same is hereby affirmed; and it is further ordered, adjudged, and decreed, that the libellant Ann Cavan recover from the steam ferryboat D. S. Gregory, her engines, tackle, &c., or her said claimants, and the steamboat George Washington, her engines, tackle, &c., or her said claimants, the sum of ten thousand dollars, the amount of the damages decreed to her by the decree of the said district court, together with three hundred and ninety-eight dollars and six cents, her costs, as taxed in said district court, in all amounting to the sum of ten thousand three hundred and ninety-eight dollars and six cents, adjudged to the said libellant by said decree of said district court; and it is further ordered, adjudged, and decreed, that the said libellant recover of said steam ferryboat D. S. Gregory, her engines, tackle, &c., or of her said claimants, and of the steamboat George Washington, her engines, tackle, &c., or her said claimants, interest on the amount of said damages and costs, so adjudged by said decree of said district court, from March 18th, 1868, the date of said decree in the said district court, to the date of the entry of this decree, amounting to the sum of three hundred and ninety-eight dollars and sixty cents, together with the costs on the appeal to this court, taxed at two hundred and forty-one dollars and thirty cents, for all of which said damages, costs and interest adjudged to said libellant, amounting, in the aggregate, to the sum of eleven thousand and thirty-seven dollars and ninety-six cents, it is hereby adjudged and decreed, that the respective claimants of each vessel shall be held and are responsible to said libellant; and it is further ordered, adjudged, and decreed, that, as between the claimants of the respective vessels, the said amount of damages, interest and costs, and accruing interest and charges, be equally apportioned and paid between and by the said steam ferryboat D. S. Gregory, her engines, tackle, &c., or her said claimants, and the said steamboat George Washington, or her said claimants; and it is further ordered, adjudged, and decreed, that, on the payment by the claimants of either vessel of one-half of the said amount of damages, costs and interest, with accruing interest and charges thereon, the proceedings of the libellant be stayed as to such vessel and her claimants, for the collection of the residue, until the return by the marshal of an execution unsatisfied against the claimants of the other vessel, for the other half part of said amount, or until it shall otherwise appear that the said libellant is unable to enforce or collect the other half part of said amount of damages, costs and interest, with accruing interest and charges, against the claimants of the other vessel, by process from this court; and any of the parties are to be at liberty to apply to this court, if occasion shall require, touching the enforcement of the decree."

On appeals taken by the claimants the decree of the circuit court was affirmed by the supreme court upon the same grounds, substantially, as those stated by Judge Blatchford in the foregoing opinion. See The Washington v. Cavan, 9 Wall. (76 U. S.) 513.]

Case No. 4,101.

The D. S. GREGORY.

[7 Ben. 499.][1]

District Court, S. D. New York. Dec., 1874.[2]

COLLISION ON HUDSON RIVER — FERRY-BOATS — CROSSING COURSES — FOG.

1. Two ferry-boats, the P. and the G., were bound from their respective slips on the New York side of the Hudson river to their slips on the New Jersey side. Their courses crossed each other, the P. having the G. on her starboard side. It was night. There was a dense fog, and the tide was ebb. Each vessel was blowing her steam whistle, and each pilot heard the whistle of the other boat, and understood from it that another steamboat was crossing his course. The pilot of the P., when he heard the whistle, stopped his boat and continued to blow his whistle, and, as the other whistle indicated the nearer approach of the other boat, he backed his boat before he saw the lights of the other boat, and the wheels of his boat were revolving backward when the collision occurred. The pilot of the G. did not slow or stop his boat when he heard the whistle of the P., but kept on at the same speed as before, the tide bearing his boat down on the P., and did not stop or back his engine till he saw the lights of the P. The G. struck the P. on the starboard side: *Held*, that the 19th (now 23d) rule has no application to a case of such a dense fog; and, though it would have been the duty of the G. to have kept on, without alteration of her course, if the P. could have seen and known her exact position, the pilot of the G. was, under these circumstances, in fault for not sooner stopping and backing his engine.

2. The P. could not be held in fault for not having avoided the G., when she, by stopping her headway, was obeying the 16th (now 21st) rule, which required her to go at a moderate speed in a fog.

3. The navigation of the P. was without fault, and the G. must be *held* responsible for the collision.

In admiralty.

William D. Shipman, for libellants.

Welcome R. Beebe, for claimants.

BLATCHFORD, District Judge. The Erie Railway Company, as owners of the steam ferry-boat Pavonia, bring this suit against the steam ferry-boat D. S. Gregory, to recover for the damages sustained by them in consequence of a collision which took place between those two ferry-boats, in the Hudson river, on the morning of January 3d, 1873, at about 7 o'clock. The Pavonia was on a trip from the foot of Chambers street, New York, to her slip at Pavonia, on the New Jersey side. The D. S. Gregory was on a trip from the foot of Desbrosses street, New York, to her slip at Jersey City,

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

[2] [Affirmed in Case No. 4,103.]

on the New Jersey side. Desbrosses street being higher up the river than Chambers street, and the Pavonia slip being higher up the river than the Jersey City slip, the courses of the two boats crossed each other. The tide was ebb, and there was a dense fog at the time. Both vessels were side-wheel boats. The Pavonia was struck on her starboard side a little forward of her starboard wheel, the D. S. Gregory going in under her guard, and knocking a large hole in her.

The libel avers, that, immediately before the collision, the pilot of the Pavonia heard a steam whistle, which proved to be the steam whistle of the D. S. Gregory, and which, from the sound, indicated that the D. S. Gregory was proceeding directly across the track of the Pavonia; that thereupon the pilot of the Pavonia immediately caused her engine to be stopped, and she had come to a stop before the collision, and was backing at the time of the collision; that, in the mean time, her fog-whistle was continually sounded, and as rapidly as possible; that the persons navigating the D. S. Gregory, disregarding the signal of the Pavonia, bore rapidly and directly down upon the Pavonia, apparently at full speed, immediately on observing which the pilot of the Pavonia reversed his engine, but, owing to the density of the fog, and the speed of the D. S. Gregory, and her near proximity before she was discovered, he was unable to get out of the way of the D. S. Gregory; that the collision was occasioned by negligence, inattention and want of care and skill on the part of the D. S. Gregory; that she was running at a dangerous and improper rate of speed, under the circumstances, rendering it impossible for her to avoid the collision when the position of the Pavonia was discovered; that the persons navigating the D. S. Gregory were negligently inattentive to the fog signals of the Pavonia, by due attention to which the position of the Pavonia might have been known to the D. S. Gregory, and the collision avoided; and that the collision was not occasioned by any fault on the part of the Pavonia.

The answer avers, that the D. S. Gregory, as she proceeded, heard, from time to time, off her port hand, a whistle, which was believed to be from a ferry-boat crossing from New York to New Jersey; that the D. S. Gregory kept steadily on her course, slowly feeling her way along, and blowing her whistle at short intervals, until she made a green light ahead and very close; that the bell of the D. S. Gregory was then rung to stop and back, and about four revolutions were made before the vessels came together; that, if the Pavonia had been on her usual and proper course to her slip on the New Jersey side, on an ebb tide, or had she kept steadily on the course she was on, or had she stopped in time, or backed when her green light was first seen, no collision could have taken place; that she did not back until the collision had taken place or the vessels were in the act of striking; that, as the courses of the two vessels were crossing, and the Pavonia had the D. S. Gregory on her starboard side, it was her duty to avoid the D. S. Gregory; that the collision was occasioned by carelessness and want of skill on the part of those navigating the Pavonia, she having at the time no lookout, or from inevitable accident; and that the navigation of the D. S. Gregory was without fault, she having a careful lookout and a competent pilot, and running at a slow rate of speed, and constantly blowing her whistle, and stopping and backing immediately upon making the green light of the Pavonia.

The evidence in the case is clear and abundant to establish that the D. S. Gregory was solely in fault for the collision. The case was not, as is suggested in the answer, one of inevitable accident. There was, it is true, a very thick fog, and its existence required, on the part of both boats, the exercise of great care and caution in navigation; but all the circumstances indicate that the collision would have been avoided, or would have produced no injury, if the D. S. Gregory had been as cautious and prudent as the Pavonia. Each boat knew that the other was running on a regular ferry. The Pavonia knew that if, as she proceeded on her way, she heard a whistle off her starboard hand, such whistle was quite likely to be from a boat proceeding from Desbrosses street to Jersey City, on a course crossing the course of the Pavonia. The Pavonia heard such whistle on her starboard hand, she having been before that time running slowly and blowing her own whistle. When she heard the whistle from the other boat, she stopped her engine, and continued to blow her own whistle. As the sound of the whistle from the other boat indicated the nearer approach of the other boat, the Pavonia's engine was backed. This was done before the Pavonia discovered the light of the D. S. Gregory, and the wheels of the Pavonia were revolving backward when the vessels struck. In like manner, the D. S. Gregory knew, that if, as she proceeded on her way, she heard a whistle off her port hand, such whistle was quite likely to be from a boat proceeding from Chambers street to Pavonia, on a course crossing the course of the D. S. Gregory. The D. S. Gregory heard such whistle on her port hand, yet she kept on, at the same speed as before, the tide aiding to carry her down upon the Pavonia, and did not stop or back until she discovered the light of the Pavonia. The character of the wound inflicted on the Pavonia indicates what the force of the headway of the D. S. Gregory must have been, the Pavonia, because of her having been previously stopped, in the ebb tide, and then having backed before she saw the light of the D. S. Gregory, not having any forward motion. It was reckless in the D. S. Gregory to

so navigate. It was her duty to have stopped sooner, as the Pavonia did, and the more because she was moving with the tide. If she had sooner stopped, so that her motion towards the Pavonia would have been only that of the tide, no material damage could have ensued from the collision.

There is no evidence to show that the Pavonia was not in the place and on the course where she might properly have been looked for if there had been no fog. It is sought to be imputed to her, as a fault, that she did stop, and that she did not proceed with unabated speed; and it is claimed, that, if she had not stopped, she would, at the time of the collision, have been beyond the reach of the D. S. Gregory, and that it was the duty of the D. S. Gregory to proceed on her course, because it was her duty to keep her course, and not embarrass the Pavonia in discharging her duty of keeping out of the way of the D. S. Gregory, because she had the D. S. Gregory on her starboard side, and the courses of the two vessels were crossing. The rule thus invoked has no application to a case of such a fog. If the Pavonia could have seen and known the exact position of the D. S. Gregory, then the rule would have been applicable. But, having stopped, on hearing the approach of the D. S. Gregory, and then having backed, the D. S. Gregory being all the time invisible because of the fog, the Pavonia cannot be held responsible at all events for not having avoided the D. S. Gregory, when she was obeying the other rule, of going at a moderate speed in a fog, by stopping her headway entirely, while the D. S. Gregory was not going at a moderate speed in the fog, and was maintaining, of herself and with the tide, such a speed as made it impossible for the Pavonia to discover her in season to avoid her. If the Pavonia had kept on, instead of stopping and then backing, it would have been impossible not to have held her to have been in fault. There must be a decree for the libellants, with a reference to a commissioner, to ascertain the damages sustained by them by the collision.

[NOTE. On appeal by the claimants, the decree was affirmed by the circuit court. See Case No. 4,103.]

Case No. 4,102.

The D. S. GREGORY.

[6 Blatchf. 528.][1]

Circuit Court, S. D. New York. Aug. 7, 1869.[2]

COLLISION—FERRY-BOAT AND STEAMER AT ANCHOR—FOG.

1. Where a steamship came in from sea and anchored, in a thick fog, in the Hudson river, between the city of New York and Jersey City, about in the usual track of the ferry-boats running on a ferry between the two cities, and one of the ferry-boats, in one of her trips, passed under the stern of the steamship and saw her just as she was dropping her anchor, and afterward, during the same fog, the same ferry-boat collided with the steamship, so at anchor: *Held*, that the ferry-boat was in fault.

[Cited in The Lady Franklin, Case No. 7,-984; The Rockaway, 19 Fed. 451. Followed in The Rockaway, 25 Fed. 775.]

2. The steamship was not in fault, in anchoring where she did.

This was a libel, in rem, filed in the district court, against the steam ferry-boat D. S. Gregory, by the owners of the steamship Talisman, to recover for the damages sustained by the latter, in a collision which occurred between the two vessels, in the port of New York, on the morning of the 15th of January, 1863, about half-past nine o'clock. The district court decreed for the libellants [Case No. 4,099], and the claimants appealed to this court.

Daniel D. Lord, for libellants.

Edgar S. Van Winkle, for claimants.

NELSON, Circuit Justice. The D. S. Gregory was one of the ferry-boats running from the foot of Montgomery street, in Jersey City, across the Hudson river, to the foot of Courtlandt street, in New York. The Talisman came into the port on the afternoon of the 14th of January, and anchored in the river, about in the usual track of the ferry-boats running between the two points above mentioned. When she arrived, there was a thick fog, and the river was full of vessels at anchor and moving, so that some difficulty was experienced in finding an open space sufficiently large to anchor her without her being in dangerous proximity to other vessels. The D. S. Gregory, in one of her trips, passed under the stern of the Talisman, and saw her just as she was dropping her anchor, on her arrival in the river. The fog continued through the night and the next morning, so that it was difficult to see a vessel at a distance of a ship's length ahead. The D. S. Gregory, on one of her trips from the New Jersey side to the New York side, struck the Talisman about amidships, on her port side, head on, doing considerable damage. The court below found the ferry-boat in fault, upon the facts; and, after the best examination I have been able to give to the case, I am inclined to concur in that view.

The main and strongest argument against this conclusion is, that the Talisman was in fault, in anchoring in the usual track of these ferry-boats. She was in charge of a New York pilot at the time, who, of course, well knew their usual track; and, if I could agree that there was fault in anchoring a vessel there, I should have but little difficulty in coming to a different conclusion. But I am not willing to establish, as a rule of navigation in that part of the river, that vessels arriving must take care to anchor outside the line of any and all of the ferries

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

[2] [Affirming Case No. 4,099.]

crossing it at that place. There are some seven of them, within a comparatively short distance from each other; and it is apparent, that, to lay down any such rule, would seriously interfere with navigation and commerce upon that river. The tracks of these ferries, regarding winds and tides, are of no inconsiderable width, and would, in the aggregate, occupy a very large portion of the river, which would be forbidden to the accommodation of vessels engaged in foreign or domestic commerce. I must hold, therefore, that the Talisman was not in fault in taking the position she did in the river, especially under the circumstances in which she found herself on her arrival. It was the duty of the D. S. Gregory to take every reasonable precaution in her power to avoid the Talisman. In this, I think, she failed. She knew that the Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position down to the time of the collision, and the ferry-boat was passing her every trip she was making, the ferry-boat is chargeable with notice of her position, and should have been so navigated as to avoid her. Decree below affirmed.

Case No. 4,103.

The D. S. GREGORY.

[16 Blatchf. 542; 8 Reporter, 487; 27 Pittsb. Leg. J. 40.] [1]

Circuit Court, S. D. New York. July 31, 1879. [2]

COLLISION—FERRY-BOATS—FOG.

1. In this case, two steam ferry-boats collided in a fog. The one which had the other on her port hand was held solely in fault, she having kept on while the other had come to a stand still, each having heard the blasts of the steam whistle from the other.

2. The responsibility of keeping out of the way in a fog is upon both of two approaching steam vessels.

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

This was a libel in rem, filed in the district court, in admiralty. That court decreed for the libellant [Case No. 4,101], and the claimant appealed to this court.

The following facts were found by this court: "About seven o'clock in the morning of January 3d, 1873, a collision occurred, near the middle of the Hudson river, opposite New York, between the steam ferry-boat Pavonia, owned by the libellant, and the steam ferry-boat D. S. Gregory. The river is about one mile wide at this point. An unusually dense fog prevailed at the time. There was no wind. The tide was the first of the ebb. Both vessels were side-wheel steamers, employed on ferries across the Hudson river between New York and New Jersey, and well known to each other. The Pavonia connected with the Erie Railroad, and the D. S. Gregory with the Pennsylvania Railroad. The Pavonia was on one of her regular trips from the foot of Chambers street, New York, to her slip in Pavonia, on the New Jersey side, and the D. S. Gregory was on one of her regular trips between Desbrosses street, New York, and Montgomery street, Jersey City. As Desbrosses street was higher up the river than Chambers street, and Pavonia higher up than Montgomery street, Jersey City, the courses of the two boats crossed each other. The regular course of the Pavonia, after leaving her slip, was about north-west, and that of the D. S. Gregory south-west, or, south-west by west. This brought the point of crossing near the middle of the river. The full speed of the Pavonia was about twelve miles an hour, and that of the D. S. Gregory scant eleven. Both boats were in charge of experienced and competent pilots, and had their lights properly set and burning. The D. S. Gregory had two lookouts performing their duty, and both standing on the upper deck, one on each side of the pilot house. The Pavonia had one lookout on the upper deck, performing his duty and standing near the pilot house. Another lookout was on the deck below. The Pavonia started out of her slip at full speed, but, as soon as she got outside, slowed down to half speed and headed on her regular compass course. She sounded her fog whistle at proper intervals. Soon after she got out, she heard a whistle off her starboard hand, which she recognized as that of the D. S. Gregory, or one of the other Desbrosses street boats. After this she kept on for a little time at half speed, but, as the sound from the whistle of the D. S. Gregory came nearer, concluded to stop and let that boat go by ahead. Accordingly, her bell was rung to stop, and the order was promptly obeyed. She still continued to blow her fog whistles, but, after her engine had been stopped a little time, hearing the noise of the wheels of the D. S. Gregory from a direction which indicated danger of collision, she sounded the alarm whistle and rang her bell to back. Almost immediately afterwards the D. S. Gregory appeared through the fog and ran into her on the starboard side, just forward of the starboard wheel. The bell was rung to back and the alarm whistle sounded before the D. S. Gregory, or her lights, came in sight. The forward part of the Gregory passed under the guards of the Pavonia and knocked a large hole in her side. The wheels of the Pavonia made four turns back before the boats came together, but she had not acquired much, if any, backward motion. The D. S. Gregory, when she left her slip, slowed down to half speed and took her regular course by compass for her New Jersey landing. She sounded her own fog

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 27 Pittsb. Leg. J. 40, and 8 Reporter, 487, contain only condensed reports.]

[2] [Affirming Case No. 4,101.]

whistles, and heard those from the Pavonia, and recognized them as coming from a boat passing from New York to Pavonia, on that ferry. She kept her course at half speed, however, until she saw the Pavonia looming up before her out of the fog, when she rang her bells to stop and back, but, before her headway was materially affected, the collision took place. Both the Pavonia and the D. S. Gregory were respectively in places, on their courses, where they might properly have been looked for if there had been no fog. The damage done to the Pavonia by the collision amounted to $3,812.54, at the date of the decree below."

William D. Shipman, for libellant.
Welcome R. Beebe, for claimant.

WAITE, Circuit Justice. While I cannot say I am as certain as the district judge seems to have been that the Pavonia was entirely free from fault, I have, on the whole, come to the conclusion that the preponderance of testimony is that way. My doubt has been as to whether she did not keep on at half speed too long, but it is clearly proven that she did stop her engine some time before the Gregory appeared in sight, and that she rang her bell to back as soon as the sound of approaching wheels indicated special danger. She did with the simple stoppage of her engine, come almost, if not quite, to a stand still, before the point was reached on which the courses crossed. This showed caution and special attention to moderate speed. Had the Gregory done as much, it is almost certain that a damaging collision could not have occurred. Instead of that, she seems to have assumed, that, because the Pavonia was on her port hand, she had the right of way, and might keep her course and speed with impunity. In this, I think, she was in fault.

It is true, the statutory sailing rules provide, that, "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other" (Rev. St. § 4233, rule 19), and that, in such case, "the other shall keep her course" (rule 23), having regard "to any special circumstances which may exist in any particular case, rendering a departure * * * necessary, in order to avoid immediate danger" (rule 24). This evidently has reference specially to cases where the vessels can be seen from each other and their movements directed accordingly; and so the supervising inspectors must have understood, when, under the authority (sections 23, 29) of the act of February 28, 1871 (16 Stat. 449, 450, now Rev. St. §§ 4405, 4412), they adopted their rule 4, which is as follows: "When steamers are running in a fog or thick weather, it shall be the duty of the pilot to cause a long blast of the steam whistle to be sounded, at intervals not exceeding one minute, and no steamer shall, in any case, be justified in coming in collision with another vessel if it be possible to avoid it." To this must be added statutory rule 21, which provides, that "every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed;" and, taking all together, it seems to me clear, that the responsibility of keeping out of the way in a fog is thrown upon both of two approaching steam vessels. The reason is obvious. In the midst of a fog, sound takes the place of sight, as the means of ascertaining the position of approaching vessels; and as, for such purposes, sound is more uncertain than sight, the greatest caution is required on all sides. Hence it has been established, that, under such circumstances, steamers shall take no risks. They are not to be justified in colliding with any other vessel in a fog. Having complete control over their own movements, they can, if they will, come to an understanding as to the manner in which they shall pass each other, before any serious collision can occur. It may cause some inconvenience to those who are in haste, but it will be more likely to ensure safety.

Here, each boat knew of the close proximity of the other, and their well-understood crossing courses made a collision possible. Each heard and recognized the signals of the other. It was easy to communicate by signals that experienced pilots would readily interpret. By moving slowly and cautiously, there was no great difficulty in feeling their way, until there was a perfect understanding as to what each should do. All it needed was to act in accordance with the spirit of rule 3 of the supervising inspectors, framed for another purpose, and "both slow to a speed barely sufficient for steerage way until the proper signals had been given, answered and understood." This the Pavonia attempted to do when she stopped and finally backed her engine. So as not to run any risk of being confused as to her bearings, she kept her course while she held on to let the Gregory by. If she could have seen, she might have steered out of the way. In the fog, however, it was clearly easier to retain the knowledge of where she was by holding on, rather than changing, her course. Had the Gregory been equally cautious and watchful, I cannot but think no damage would have been done.

The "rule of the road," to "keep to the right," always yields to a contrary agreement between the parties. Sometimes, safety requires that this agreement should be made before dangerous proximity is reached. The rule contemplates certainty as to position and movements. If there is doubt, an attempt should always be made to arrive at a mutual understanding of what is to be done. Especially should this be the case when vessels are navigating a crowded harbor in a fog.

The Pavonia was not "laying by" or "drifting," within the meaning of those terms in rule 10 of the supervising inspectors, and, consequently, she was not required to use the special signals contemplated by that rule. She was simply holding on to let the Gregory go by, and, therefore, only bound to give the usual fog signals to indicate her locality.

The damages below, as agreed upon, included interest to the date of the decree. The libellant is entitled to recover, in this court, the amount allowed below, with interest, from the date of that decree, on the actual amount of damages as stipulated, not including any interest as calculated below. An entry may be prepared accordingly.

Case No. 4,104.

The D. S. STETSON.

[4 Ben. 508.][1]

District Court, S. D. New York. Feb., 1871.

COLLISION IN THE KILLS—STEAMER AND SCHOONER — CHANGES OF DIRECTION IN A CHANNEL — BURDEN OF PROOF.

1. A steam-tug and a schooner came in collision in the day time, in a narrow channel. The steamer set up that the collision was caused by the schooner's changing her course: *Held*, that the tug was prima facie liable, and that the burden of making out a defence was on her.

2. On the evidence, the schooner made no changes of course except such as were proper and necessary, with the wind as it was, in the channel, and those in charge of the tug were bound to suppose she would make such changes, and be prepared for them.

3. The tug was liable for the collision.

In admiralty.

C. Donohue and W. J. Haskett, for libellants.

Emerson, Goodrich & Wheeler and R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner T. P. Abell, to recover for the damages sustained by them through a collision between that vessel and a barge in tow of the steam-tug D. S. Stetson, on the 1st of May, 1868, about half-past six o'clock, a. m., in the Kills, between Bergen Point light and the corner stake, and off Shooter's Island. The schooner was going to the westward, to Elizabethport, and was sailing close-hauled, the wind being a little east of north. The tug, with a barge on her port side, in tow, was going to the eastward, from Elizabethport. The barge projected some 20 feet ahead of the tug. The starboard bow of the barge struck the starboard bow of the schooner, and the schooner was crushed in, so that she sank in a few minutes. The tide was strong ebb, running to the eastward.

On the part of the schooner, it is contended that she was upon the regular course through the channel between Shooter's Island and Staten Island, with the wind as it was, and that, at the time of the collision and for some time before, she was laying her course north northwest or thereabouts, for the buoy at the corner stake, around which she would have to pass. The defence set up in the answer, on the part of the tug, is, that the schooner, after rounding Shooter's Island, kept to the southward, to avoid a pile of stones which ran out from that island, "and then headed up again to the northward," and then "suddenly sheered again to starboard and then again to port; that she thus made several changes in her course, during which time the steamer gave several single whistles, keeping her course, till the master of said steamer, fearing a collision, stopped his engine, but the schooner again sheered to port and ran across the steamer's bow, when the barge struck her."

The tug is prima facie liable for the collision, and is to make out this defence by proof. She has not done so, in my judgment. On the contrary, the weight of the evidence is, that the schooner made no changes in her course, except such as were proper and necessary, with the wind as it was, in the channel she was in. Those changes being a part of the proper navigation of the schooner, were changes which the persons in charge of the tug were bound to know the schooner would make, and it was their duty to be prepared for them. On the evidence, the last of those changes was to a course about north northwest, and which would carry the schooner direct to the buoy, and was made at a sufficient distance off from the tug to have enabled the latter, with ordinary care, to have avoided the schooner. The pilot of the tug is shown, from his language at the time of the collision, to have acted on the idea that it was the duty of the schooner to keep out of the way of the tug. The fact that the schooner kept her course after she got upon it for the buoy some time before the collision, and down to the time of the collision, is not only shown by the witnesses who were on the schooner, but by two witnesses who were on the shore on Staten Island and unconnected with the schooner.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages.

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

DUANE (GOLDHAWK v.). See Case No. 5,511.

Case No. 4,105.

DUANE v. GOODALL.

[1 Cal. Law J. 283.]

District Court, N. D. California. March 7, 1863.

MARINE TORTS—JOINT TRESPASSERS — STATUTE OF LIMITATIONS.

1. There is no fixed limitation of time within which suits must be brought in the admiral-

ty; it is discretionary with the court to determine whether a demand has become too stale to support an action.

2. Where D. was forcibly taken on board a steam-tug of which G. was master, and carried without the Heads of the Bay of San Francisco, and there delivered over to the steamer Golden Age, of which W. was master, and thus carried to sea against his will, G. and W. are joint trespassers in the act or wrong, and a recovery and satisfaction against W. bars an action against G. for the same wrong.

[This was a libel by Charles P. Duane against Charles Goodall.]

HOFFMAN, District Judge. The principal allegations of the libel, and that the facts therein stated constitute a marine tort, for which this court has jurisdiction to award damages, are admitted.

It is objected (1) that the demand is barred by prescription, or that it has become stale. In the admiralty there is no fixed limitation of time within which suits must be brought. The court will not, it is true, entertain stale demands, but it is left to the discretion of the court to pronounce whether, in view of all circumstances of each particular case, the demand be so stale as to be deemed neglected and abandoned. Pars. Mar. Law, 665; Ben. Adm. §§ 574, 575. It is unnecessary to detail all the circumstances of this case at bar. They are such as, in my judgment, are abundantly sufficient to account for and excuse the long interval which elapsed between the commission of the wrongs complained of and the institution of the suit.

The second exception of the respondent presents a much graver objection. It sets up, in substance, that the libelant has already sued and obtained judgment against James Watkins, master, and —— Watson, mate, of the Golden Age, for the tort now complained of, and that that judgment has been satisfied. It is a familiar principle that, when several persons are jointly concerned in the commission of a wrong, each is separately responsible for the damage done by the acts of all. He may, therefore, be sued separately, and a full indemnity recovered of him by the injured party. He cannot object that the other joint trespassers are not joined; nor can they, if subsequently sued, plead in abatement, or bar, that a suit is pending, or that judgment has been recovered against him. But if that judgment has been satisfied, and the injured party has received what a jury has awarded to be a full indemnity for the tort, it is obvious that he should not be permitted any further compensation from the other joint trespassers. The rule, therefore, that against joint trespassers there may be several recoveries, but only one satisfaction, is founded on reason and justice. If, then, in the case at bar, the tort complained of was a joint tort in which the party now sued and those heretofore sued were jointly concerned, it is obvious that the satisfaction of the judgment against the latter is a bar to any further claim for compensation against the former. The inquiry, therefore, is: Is the cause of action in both cases a joint tort?

The libel alleges that the libelant was, on the 5th day of June, 1856, forcibly and against his will, etc., carried from and out of the Bay of San Francisco in the steamtug Hercules, whereof the respondent was master; that he was kept a prisoner on board said tug by an armed band of kidnappers, who were then and there aiding, assisting, combining and confederating with the respondent in a nefarious design to abduct and carry away libelant out of the state; that, in pursuance of such nefarious design and intention, the respondent caused the said steamtug to be kept and lying in waiting off the Heads of this port until an opportunity to transfer the libelant to another vessel occurred; and that the respondent, having combined and agreed with said kidnappers to abduct and carry out of the state the libelant, kept the steamtug in waiting off the Heads until the steamer Golden Age, commanded by one Watkins, approached, and, in pursuance of an understanding and agreement had between the respondent and persons on board the tug and the master of said Golden Age, the said steamer was stopped, at about one hundred yards' distance from the steamtug, for the express purpose of aiding and assisting said Goodall in his said nefarious and unlawful attempt and design of abducting and carrying away the libelant. It is further alleged that said Goodall, well knowing the libelant was on board the steamtug as a prisoner, handcuffed and guarded, and intending maliciously to abduct and carry him away as aforesaid, and combining and confederating as aforesaid with said kidnappers and the said master of the Golden Age, did navigate and employ the steamtug as a means and instrument to accomplish and carry out said nefarious and unlawful abduction, and did, by said means, abduct and carry away the libelant, against his will, to said place on the high seas, where he was transferred from said steamtug to said steamer Golden Age, in pursuance of said agreement and understanding between said Goodall and the said kidnappers and said master of the Golden Age. The libel further sets forth that libelant was carried away in the Golden Age to Acapulco, where he escaped from the duress and imprisonment to which he was subjected on said steamer, and which was but a continuation of the said unlawful combination and confederation of the respondent and the beforementioned persons to abduct and carry away libelant from the state. The fruitless attempts of libelant to return to this port, his voyage to Panama and destitute condition at that port, his voyage to New York and arrival there in enfeebled health, and with blasted reputation, by reason of the wrongs

inflicted on him, are set forth, and damages claimed in the sum of $25,000. The allegations in the libel against the master and mate of the steamer Golden Age are nearly identical with the foregoing.

That libel sets forth the arrest and imprisonment of the libelant by the vigilance committee; the sentence of banishment by that body; the carrying him on board the steamtug in irons; his imprisonment there; the conveying him to the Heads, where he was transferred to the steamer, which hove to, to receive him; his abduction from the port and transportation to Acapulco; his escape at the latter port; his attempts to return to San Francisco; his being obliged to go to Panama, and thence to New York; his destitution and sufferings on board the steamer, on the Isthmus, and at New York, with the illness and loss of reputation and distress caused by the wrongs inflicted on him. It distinctly charges that Watkins, the commander, and Watson, the mate, of the Golden Age, combined "and confederated with said kidnappers, or persons on board the Hercules, to join and aid them" in completing and carrying out the nefarious, forcible, wicked, and malicious intention and design of abducting and kidnapping the libelant, etc.; that, in pursuance of said combination and confederation, the said Watkins caused his steamer to approach the Hercules, and "stopped and kept her in waiting for the accomplishment of the aforesaid malicious and wicked design of abducting, kidnapping, and forcibly carrying away said libelant."

It is not easy to conceive more direct, explicit and emphatic charges of combination and conspiracy among several persons to commit a joint tort and carry out a common design than are contained in the allegations of the libelant in these cases. Not only is the common design expressly and repeatedly stated, but it is clearly to be inferred from the acts of each in furtherance of the common purpose; and that purpose is expressly declared to be the execution of the so-called "sentence" of the vigilance committee, to the carrying out of which the respondent, in each case, is charged to have lent his own services and the use of his vessel. The facts as they appear in evidence, or as admitted, abundantly sustain these allegations. There can be no doubt that Goodall voluntarily and knowingly received on board his vessel the vigilance committee prisoners, with the intention of conveying them to the steamer, in execution of their sentence, and that the commander of the steamer, in furtherance of the same end, and in pursuance of a previous understanding and agreement, approached the place where the steamtug was waiting for her, in order that the prisoners might be transferred on board and carried to Panama in accordance with the determination or sentence of the committee.

It seems not easy to imagine a plainer or a stronger case of a joint trespass, for the whole of which each person concerned is severally liable. "Where an immediate act is done by the co-operation or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally for the injury done by all, provided that they acted in concert." 2 Hil. Torts, p. 441; Brown v. Wheeler, 18 Conn. 199. So, all who aid, command, advise, or countenance the commission of a tort by another, are liable as if they had done the tort with their own hands. Judson v. Cook, 11 Barb. 642. So, where several were engaged in playing a game of ball in the public highway, and a traveler lawfully passing was struck and injured accidentally by the ball, it was held that all were liable in trespass, and not merely the individual who threw the ball. 1 Cush. 453. So, to constitute a joint conversion of personal property, the acts of several defendants need not be contemporaneous if their acts all tend to the same result. 35 Me. 86. Thus, if the defendants are actually present, aiding another in the unlawful design of removing the plaintiff's slaves from the state, even though it be for the use and benefit of his wife, each act in furtherance of the common design is the act of all, and all are guilty. 27 Ala. 407. In all these and similar cases the joint liability depends upon the fact that the defendants acted in concert, or that the act of the one sued naturally and ordinarily produced the acts of the others. Guille v. Swan, 19 Johns. 381. "A recovery against one of several parties to a joint tort frequently precludes the plaintiff from proceeding against any other party not included in the action." Thus in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in a field, where several persons are concerned, the recovery against one will be a bar to an action against others. 2 Hil. Torts, p. 460.

From the above authorities it is clear that all persons who aid and abet, and especially those who actively co-operate with each other in the commission of a tort, are joint trespassers. Nor is it necessary that all should be present at every part of the transaction, provided they acted in concert, and that the tort was done in execution of a common design, to which each contributed his allotted part. Under the allegations of the libelant himself, or the admitted facts, of the case, I cannot perceive room for a doubt that Watkins and Goodall were joint trespassers, engaged in carrying out a common design, and that each is liable in this court for the whole marine tort committed. Indeed, the jurisdiction of the court over the case mainly rests, not on the conveyance of the libelant in the steamtug a few miles down the bay, but not beyond the body of the county or the local jurisdiction, but on his abduction and asportation beyond seas and to a foreign country; and this, it will be perceived, forms the gist of the complaint in both cases. As, then, he has recovered a

judgment and full satisfaction for this wrong against Watkins, who carried him to Acapulco, I am unable to perceive how he can maintain this action against the cotrespasser charged and admitted to have aided and abetted in consummating a design common to both.

Even if, under the allegations and proofs, it were possible legally to separate these acts and to treat the tort of the respondent as separate and distinct from that of Watkins, it would be hardly practicable to measure the damages; for the tort of the respondent would, in that case, be considered as terminating when the prisoner reached the deck of the steamer. The statement of his subsequent asportation and other grievances, for which he has been compensated, would be disregarded, and the recovery limited to an indemnity for the isolated act of carrying him from the wharf to the Heads.

But it is said that the judgment obtained against Watkins was not a judgment on the merits, and is therefore no bar to a subsequent suit against a cotrespasser for a complete indemnity for the whole wrong. The decree entered against Watkins was a consent decree. It is true that the court was not called on to estimate the damages; but the facts were admitted by the parties, and a sum agreed on as a compensation for the wrong. For this sum a decree was entered, the amount decreed was paid, and a satisfaction piece filed. I am unable to see how I can regard this as any less a satisfaction for the tort than if the same sum had been awarded by a court or jury, and accepted by the injured party. That the sum is less than would probably have been decreed as a compensation for the grievous wrongs inflicted on the libelant may be admitted; but he has chosen to accept it in satisfaction of a joint trespass for which various parties were severally liable, and the case presented is not distinguishable from that put in the books, viz. that a recovery and satisfaction against one joint trespasser is a bar to an action against another for the same tort.

Affidavits have been presented with a view of establishing whether the sum decreed was paid and received as a satisfaction for the whole wrong, or only in discharge of the personal liability of Watkins. But the affidavits are conflicting as well as inadmissible. The record in the case of Watkins shows for what injuries the decree was entered, and for those injuries the sum paid was accepted as a compensation. The record and proofs in this case show that the tort now sued on was the same, or, rather, that it was a joint tort committed by several parties acting in concert and pursuance, as the libel so frequently avers, of a common design. In any view I have been able to take of this case, it has appeared to me that recovery and satisfaction obtained in the former suit is a bar to this action.

As a decree was entered against Watkins after the commencement of this suit, the libelant is entitled to his costs, for which a decree will be entered.

DUANE (HOLLINGSWORTH v.). See Cases Nos. 6,614–6,618.

Case No. 4,106.

DUANE v. RIND.

[1 Cranch, C. C. 281.][1]

Circuit Court, District of Columbia. Dec. Term, 1805.

SECURITY FOR COSTS.

If the plaintiff has not a domicil in this district, he may be ruled to give security for costs.

[Cited in Miller's Adm'r v. Norfolk & W. R. Co., 47 Fed. 265.]

Motion, by the defendant, for a rule on the plaintiff, to give security for costs, on the ground that the plaintiff is a non-resident. The facts admitted were that the plaintiff has a large bookstore in this city, and occasionally resides here during the winter, has a family, and now resides at Philadelphia. His family never has resided here. He has a storekeeper here. The marshal has applied at the store and received pay for fees regularly. See Act Md. 1796, c. 43, § 12.

THE COURT (KILTY, Chief Judge, absent) was of opinion that the rule ought to be laid. The act of assembly, 1796 (chapter 43, § 12), must be understood to refer to the domicil, the place where the party resides, with his wife and children, if he has any.

DUANE (ROMAYNE v.). See Case No. 12,028.

DUANE (UNITED STATES v.). See Cases Nos. 14,996 and 14,997.

DUBOIS (FITZPATRICK v.). See Case No. 4,842.

Case No. 4,107.

DUBOIS v. McLEAN.

[4 McLean, 486.][2]

Circuit Court, D. Illinois. Dec. Term, 1848.

CHAMPERTY — DEEDS — LIMITATION OF ACTIONS — CONSTITUTIONAL LAW — EXECUTOR'S SALES.

1. A deed executed for land, which is held adversely to the grantor, by an individual in possession, is void under the champerty act.

2. The statute of limitation can only run against the legal title.

3. A law authorizing executors to sell so much land of the estate, as shall be necessary to pay the debts of the estate, is held by the supreme court of Illinois, to be unconstitutional. In the case before the court, the law passed March, 1819—the sale was made in 1823. In

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

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

analogy to the statute of limitations, the power expired. The sale of 1828, was, therefore, void. The debt on which the land was sold, was contracted by the executor, after the law of 1819 was passed.

[Cited in Atkins v. Fibre Disintegrating Co., 18 Wall. (85 U. S.) 301.]

POPE, District Judge. The plaintiff, one of the heirs of Ionissant Dubois, who died in 1846, shows a patent for the land to his father, dated in 1845. The patent is based upon a governor's confirmation, ratified by the act of congress, of 1809; by this act the patent is authorized to be issued. The defendant, to show an outstanding title, produces a deed to Bradley, dated in 1825, from plaintiff. The plaintiff denies that this deed includes the land in controversy, and adduces proof. But it is unnecessary to consider the proof because the defendant does not claim under the deed to Bradley, either immediately or remotely, but adversely to it. He, therefore, can not avail himself of the estoppel that might defend Bradley. There was an adverse possession to Dubois at the date of the deed; and it was therefore void under the laws against champerty and maintenance. The defendant shows a deed dated in 1828, from the executors of Dubois, for the premises in controversy, to those under whom the defendant claims. The executors profess to sell the land by authority conferred on them by the act of the Illinois legislature, of the 4th of March, 1819; the second section was repealed in 1820. This act authorizes them to sell as much of the land as may be sufficient to pay the debts of their testate. He relied upon the statute of limitations of 1835, barring real actions after seven years' residence, under "a connected title in law or equity, deducible of record," etc. He proved residence by some one most (not all) of the time from and after 1839, till suit brought, and that the mill on the premises was run nearly all the time by the hands of the defendant who resided off the land; but does not prove that those who resided on the land had any title. The defendant has not proved a possession of twenty years, nor shown that any one resided on the land under a title in law or equity, deducible of record, etc.

But assuming that either or both these facts were proved, or may be on another trial, what would it avail the defendant? To answer this question, it becomes necessary to look into the plaintiff's title, during the period from 1828, (the date of the deed,) to 1845, (the date of the patent.) It was a confirmation by the governor, ratified and confirmed by congress in 1807, when patents were ordered to be issued in such cases, when the governor had not given the claimants patents. In this and other cases it had not been done. In 1807 the title of plaintiff was an inchoate, legal title, and so remained until the examination of the patent in 1845. The legal title was not perfected until the patent was issued. The plaintiff could not maintain ejectment until the land was separated from the public domain. Before that, the legal title was in the United States. As the plaintiff could not sue, no laches can be imputed to him; therefore the statute of limitations did not begin to run before the date of the patent.

The case of Soulard's Heirs v. U. S., 10 Pet. [35 U. S.] 100, does not contravene this position, because in that case the land had never vested in the United States, having been severed from the domain of Spain before Louisiana was transferred to the United States.

Is the deed of 1828, from the executors of Dubois, operative to convey the estate? This depends upon the construction of the constitution of Illinois, and the law of March 4, 1819 [1 Laws Ill. 115]. The legislature assigns no reason for the passage of the law, but gives to the executors of Dubois authority to sell, in such manner as they please, the lands of their testate, for the payment of his debts, restricting them to the sale of no more than enough to satisfy them. Is this law constitutional? The supreme court of Illinois, in the case of Lane v. Dorman [3 Scam. 238], says no. This is a decision of the supreme court of Illinois upon the power of the legislature. It is made the duty of this court and the supreme court of the United States to conform to that decision. The cases reported in the 2d and 16th Peters' Reports may seem to conflict with that of Lane v. Dorman. Yet the latter case is authority to this court, as it is a decision of the state court, giving a construction to the law of the state. But in the cases in Peters' Reports, it is evident that the supreme court of the United States relied much upon the justice of the case and the antiquity of the transaction. In the case at bar, the defendant does not attempt to show fairness, but relies upon the presumption that the executors acted correctly after a lapse of eighteen years. But length of time is not available against him who can assert his better title.

Another view of this case merits notice, viz.: At the same session of the legislature at which the law of March 4, 1819, was passed, viz.: On the 23d March, a general law was enacted which authorized executors and administrators under certain regulations, to sell lands for the payment of debts of their testates or intestates. These laws are in pari materia and must be construed together: therefore, the regulations in the general law furnished the rule of action for the executors of Dubois under the special law, if it did not supersede it. They have not shown this. Their not doing so is a cause to suspect fraud.

Again, the laws giving power to sell were passed in March, 1819. The sale was made in 1828; nine years. In analogy to statutes of limitations this power expired in 1824. No reason is assigned for the delay. Hence the sale in 1828 was without authority.

Again, the only debt shown to support the

sale in 1828, was one of two hundred and fifty-seven dollars, contracted by the executors in August, 1824. The land sold for more than $1,200,—the surplus unaccounted for. The land was sold, not for a debt of Dubois, but, for a debt contracted by the executors, more than five years after the passage of the law, and it is not proved that they had paid that debt. It is no answer that this debt was contracted by the executors in due course of administration, and for the benefit of the estate. It is sufficient that it did not exist March 4th, 1819, and therefore, not embraced by the law. But certainly it was only a liability and not a debt.

Case No. 4,108.

DUBOIS v. NEWMAN et al.

[4 Wash. C. C. 74.][1]

Circuit Court, D. Pennsylvania. April Term, 1821.

EJECTMENT — PENNSYLVANIA LAND WARRANTS—RETURN OF SURVEY—PRIORITY OF LOCATION.

1. "In Pennsylvania, a warrant, accompanied by payment of the purchase money and a legal survey, confers upon the warrant holder a legal title, sufficient to enable the owner of it to maintain an ejectment. This doctrine, peculiar probably to this state, was, though not without difficulty, adopted by the supreme court of the United States, in reference to Pennsylvania titles, in the case of Sims v. Irwin [3 Dall. (3 U. S.) 425]. This court has always, since that decision, acted upon the principle it establishes; but we do not feel either inclined or authorised to go one step further. To complete the legal title, the plaintiff must show a legal survey. He must produce the survey regularly made, or at least he must prove by parol evidence, or otherwise, that a survey of the land in dispute was actually made for the holder of the warrant."

2. A paper returned into the land office of Pennsylvania by a deputy surveyor, and there accepted as a return of survey, which purported to be a draft of a tract of land, said to have been surveyed by an assistant to a deputy surveyor, is evidence, as it had been received by the land office.

3. If the warrant for lands be special, that is, sufficiently descriptive in its calls to enable others to locate other warrants on the adjoining lands, it amounts to an immediate location; and on the payment of the purchase money to the state, a title commences against the state, and others who may afterwards obtain a right to the same land from the state. It is the duty of the first warrant holder to follow up his right and have it surveyed in a reasonable time, at the peril of losing his priority by the superior vigilance of a subsequent locator.

4. Belief, on the statement of hearsay evidence by a public officer, is no better than that of any other individual. He is expected to certify facts, and such as are of an official nature.

Ejectment for two hundred and eighty acres of land in Susquehanna county. The title of the lessor commenced with a warrant, dated the 13th of June, 1792, granted to Abraham Dubois, for three hundred and fifty acres, lying on the Susquehanna river; bounded by lands of H. Drinker on the north east, by vacant hills on the south east, and on the north west by land of Minna Dubois. On the 14th of the same month and year, the purchase money was paid.

The plaintiff then offered to read a paper, returned by Stevens, a deputy surveyor, into the land office in July, 1816; and there accepted, as a return of the survey of this land. It purports to return a draft of a tract of land, said to have been surveyed for Abraham Dubois, by Jacob Hart, assistant to Mr. Caruthers, deputy surveyor for the above county, in October, 1794; it further certifies, that, by an examination on the ground, made on the 20th of January, 1815, and by the traverse of the river since taken, the survey appears to have been made as above stated. The reading of this paper was objected to, because it was not a survey by Hart in 1794, nor is it a survey made by Stevens, who returns it. He speaks of it as a survey by Hart, merely from hearsay. It certifies no official act, and is, therefore, no better than a certificate given by a person not an officer.

Mr. Sergeant, for lessor of plaintiff.
Mr. Rawle, for defendant.

WASHINGTON, Circuit Justice, delivered the opinion.

The paper is open to all the objections made to it by the defendant's counsel, and we should therefore reject it, were it not that it has been accepted by the proper officers of this state as a return of survey, and it may therefore be considered as such, as between the plaintiff and the state, no right in any third person appearing at this time to have intervened. Besides, the plaintiff may follow up this evidence by proof of an actual survey. Should the defendant set up a title to this land under the state, the objections made to the effect of this paper will have their full weight. In the present stage of the cause, we see no legal reason why it should not be read.

The plaintiff then proved that the warrant was delivered to the surveyor, Caruthers, in August, 1792. The title was regularly deduced from Abraham Dubois to the lessor of the plaintiff.

The defendant claims under an application for a settlement right, commenced in 1809, and a warrant dated in May, 1815, and the purchase money then paid.

Evidence was given by the plaintiff for the purpose of proving that this land was in fact surveyed about the time mentioned in the certificate of Stevens; and very strong evidence on the other side to show that the land in dispute never was surveyed under

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

the warrant to Dubois, but that the surveyor had located the warrant on the hills back of this land.

The question principally debated by the counsel was, whether the warrant was surveyed or not.

WASHINGTON, Circuit Justice (charging the jury). There is but a single point of fact to be ascertained in this cause, and when this is accomplished, it will decide whether the verdict shall be for the plaintiff or for the defendant. That fact is the actual survey of the warrant of 1792 to Abraham Dubois upon the land in question. But as the counsel have extended their observations to other topics, such as the different kinds of warrants; the greater necessity of surveying one kind than the other; and of accomplishing that operation within a reasonable time; it may be proper for the court to state what is the law in relation to those subjects, in order to clear the case of all such considerations, by showing that they are not involved in the present controversy. If the warrant be special, or in other words, sufficiently descriptive in its calls to enable others safely to locate other warrants on the adjacent residuum; it amounts to an immediate location; and when the purchase money is paid, an inceptive title commences against the state, and others who may afterwards derive a right to the same land from the state. But then the first warrant holder is expected to follow up this equitable right by having his location actually surveyed by a proper officer, and this within a reasonable time; at the peril of losing his priority by the superior vigilance of a subsequent locator, who has paid his purchase money, and had his location surveyed. For if his vigilance has not extended thus far he is in pari delicto with the first locator, and it shall not lie in his mouth to question such prior right, by charging the owner of it with a want of diligence, of which he is himself equally guilty. A general or indescriptive warrant, amounts to a location when it is surveyed, and not before. The whole of this doctrine was gone into in the case of Lewis v. Meredith [Case No. 8,328], decided some years ago in this court.

It will be observed, from what has been said, that whether the warrant be special or general, it must nevertheless be surveyed, and that the comparison of titles can only become a question where the subsequent locator has gone to the length of having his warrant surveyed. But the defendant's warrant not having been surveyed in this case, it is of no consequence whether Abraham Dubois was diligent or tardy in having his warrant surveyed, since the defendant, who appears in court without a survey, has no right to question the plaintiff's right on that account. The defendant has an equitable title, and the plaintiff's title is no better, (provided his warrant has not been surveyed on the land in dispute) except that it is prior in time; but no question can arise out of that circumstance to affect this cause, or to become the subject of your deliberations.

After having made these preliminary remarks, for the purpose of relieving you from the consideration of matters which do not belong to the cause, and which can tend only to distract your attention, and withdraw it from the single question which you have to decide; I proceed to state, that that question is, was the warrant of Abraham Dubois surveyed at any time, upon the land in dispute? If it was, the plaintiff is entitled to a verdict, if it was not, your finding must be against him. To enable the lessor of the plaintiff to recover in ejectment, it is absolutely necessary for him to prove a legal right of entry, and this he must do, although the defendant should show no title at all, save his naked possession. If the plaintiff's title be merely equitable, it will be necessary for him to assert it before some other forum than this; here he cannot be heard, because he has not such a right as will entitle him to recover in a court of law. What constitutes a legal title to land derived from the state, must always depend upon the laws and usages of the state where the land lies. In those states with whose laws I am acquainted, the legal title passes by the patent, or grant of the government, and by that only. In Pennsylvania, a warrant, accompanied by payment of the purchase money and a legal survey, confers upon the warrant holder a legal right, sufficient to enable the owner of it to maintain an ejectment. This doctrine, peculiar probably to this state, was, though not without difficulty, adopted by the supreme court of the United States, in reference to Pennsylvania titles, in the case of Lessee of Sims v. Irwin, 3 Dall. [3 U. S.] 425. This court has always, since that decision, acted upon the principle it establishes; but we do not feel either inclined or authorized to go one step farther. To complete the legal title then, the plaintiff must show a legal survey. He must produce the survey regularly made, or at least he must prove by parol evidence or otherwise, that a survey of the land in dispute was actually made for the holder of the warrant.

This then is the isolated question which you must decide, and upon which the fate of this cause must depend. In order to prove the fact of an actual survey, the plaintiff relies, in no small degree, upon the certificate of Stevens returned to the land office, and there accepted in the year 1816. This paper the court permitted to be read in evidence, not as a legal return of survey, but as affecting the right of the state; no other right derived from the state appearing in that stage of the cause, to subsist in the defendant, or in any other person. Having been accepted, it formed a link in the chain of title, and might be followed up for aught the court could say, by proof of an actual survey.

We now see that the defendant claims an equitable title under the state, by warrant and payment of the purchase money. And although he cannot, as before observed, call the plaintiff to account for the want of due diligence in perfecting his title, he may nevertheless demand of him to prove that an actual survey was made; and he may question the sufficiency of this paper, as well as of any other evidence offered to establish that fact. It is essential that this distinction should be understood and constantly kept in mind. The reason on which the first part of the proposition is founded, has been already explained. That which governs the latter part, obviously grows out of the necessity which the law imposes on the plaintiff to prove the existence of a survey as an essential part of his title—not that it was made in or out of time, but that it was made. Now if the certificate of Stevens be in reality no survey at all; is it possible that the board of property, by accepting it as such in 1816, can give it validity so as to cut out the equitable title of the defendant, which was complete in 1815; and which is sufficient for him, unless the plaintiff can prove a legal survey of his warrant? Or, is it possible that the acceptance by the officers of government of a paper as a survey, which to the apprehension of every rational being is no survey, can have the magic power to hoodwink the court and jury, so as to make them believe and say, that it is, what they perceive it is not? The affirmative of these questions this court cannot accede to. For one, I aver that I cannot give my assent to such a doctrine.

What then is the nature and the value of this paper? Stevens certifies that he has heard it said, and he believes it, that the warrant of Abraham Dubois was surveyed on this land in the year 1794. Now the belief, or the statement of hearsay evidence by a public officer, is no better than that of any private individual. He is expected to certify facts, and such as are official. Here he certifies no fact, and if he did, it is not official. It differs therefore in no respect from other certificates, which, not being given under the sanction of an oath and in a due course of examination, must be totally disregarded. But the paper proceeds farther to certify, that he, Stevens, had examined the ground, and that a survey appeared to him to have been made in 1794. What is this but mere evidence, on which, in addition to the hearsay, he grounds his belief? He does not certify that the draught which accompanies the certificate was made by the former surveyor; or that he, Stevens, had made it from the field notes or other works of that surveyor, or that he had himself made a survey. In short, the paper in no respect bears the stamp of an official certificate, and therefore proves nothing of itself. Stevens was afterwards examined as a witness in this cause, and his deposition tends strongly to prove, how delusive the certificate is upon the subject of a survey by Hart. He states that the warrant was put into his hands in 1815, by the executors of Abraham Dubois, and also a diagram, and that he was requested to survey the land. He went to the hemlock on the river, which, being the corner to Minna Dubois's tract, was no doubt easily found. He then went to the pine at the end of that line; and on a subsequent occasion he went to the post at the end of the second line. He boxed none of the trees, and made no examination of the other lines of the draught; but concludes with saying, that he was satisfied that the lines corresponded with a survey of 1794 or earlier. He does not assign a single reason for the satisfaction he felt on this point; and it will be for you, gentlemen, to say, whether so far as Stevens's deposition goes, you are satisfied of the fact. Minna Dubois, another witness examined by the plaintiff, states, that he, as the agent of Abraham Dubois, delivered the warrant to the deputy surveyor in 1792. That in 1794 he went with the surveyor to point out the land, and that he began at the hemlock, corner to witness's land, and ran the first line, when the witness went away. That the surveyor afterwards told him he had completed the survey, and demanded his fees, which were paid. And further, that the witness had since paid the taxes as agent aforesaid.

The effect of this deposition is met by the testimony of many witnesses to prove (1) that Minna Dubois is not reputed, or generally believed, to be a man of veracity, even under oath; and (2) to contradict his testimony, by proving that he had often, when he spoke of the land in controversy, asserted it to belong to the state; and for this reason had always refused to pay the taxes on it. That his brother's land lay in another place on the hills, and that he himself had taken out a warrant for this land in his son's name, to whom it belonged. Evidence was also given to prove that Abraham Dubois had, on two or three occasions, declared that this was not his land, but that it lay on the hills; and that the surveyor had very improperly executed his warrant there, instead of obeying its calls. Two other witnesses prove, that they examined the lines of this land, and boxed many of the trees, from which they were satisfied that no survey of this land was made in 1794. If upon this evidence the jury are satisfied that the warrant of Abraham Dubois was surveyed on the land in dispute, the lessor of the plaintiff is entitled to their verdict; if otherwise, then they will find for the defendant.

Verdict for plaintiff.

Case No. 4,109.

DUBOIS v. PHILADELPHIA, W. & B. R. CO.

[5 Fish. Pat. Cas. 208.][1]

Circuit Court, D. Maryland. Nov., 1871.

RES JUDICATA—PATENT SUITS—WANT OF NOVELTY.

When, in a former suit between the same parties, the defendant had put in issue the novelty of the invention patented to the plaintiff, by proper plea and notice, but, upon the trial of a second suit, attempted to offer additional evidence upon the same issue, including certain English patents not offered or referred to in the first case: *Held*, that the defendant, in the second action, was estopped, by the judgment in the former case, from denying the novelty of the invention.

Action at law. Suit brought upon letters patent [No. 36,512] for an "improvement in the mode of building piers for bridges," granted to plaintiff [John Dubois], September 23, 1862, in the construction of defendants' railway bridge across the Susquehanna river at Havre de Grace. The infringement consisted in the use of water-tight iron caissons, which were added to in height from time to time, as the masonry within them increased in weight, and until they settled on the foundations prepared for them at the bottom of the river. The iron caisson was left on the pier when it was completed. A suit had been brought by the plaintiff against the defendants when five of the piers had been finished. This action was tried in November, 1867, when the plaintiff obtained a verdict. There were fourteen piers in all; and when the remaining nine were finished, a new suit was brought to recover damages arising by reason of their construction. On the trial of the first suit, the pleadings put in issue the novelty and originality of the invention, as well as the question of infringement and the amount of damages. There was a notice and an enumeration of the ground of defense, together with the names of witnesses, under the act of July 4, 1836 [5 Stat. 117]. At the present trial, the same defenses were set up, and a much fuller notice was given; and, among other matters relied on, not mentioned in the first suit, were two English patents—one granted to one Winder for the use of sectional caissons, which the defendants insisted were identical with the plaintiff's; and the other granted to one Beardmere for the use of iron as a protection to the pier when completed. There were other defenses, which the defendant also relied on, but which it is not necessary to detail for the purposes of the present report. When the English patents and the other documentary evidence to the same effect were offered by defendants, the plaintiff objected to their admission on the ground that the defendants were estopped from denying the novelty and originality of the invention by the judgment in the former case, and offered the record thereof in evidence. The plaintiff's counsel, having stated briefly the general doctrine on the subject of estoppels, relied upon its application in the present case, which, it was insisted, had nothing to distinguish it from the class of cases commencing with the Duchess of Kingston's, which, it was contended, had settled the law upon the subject conclusively. In reply, the defendants' counsel insisted that the case was not governed by the general law referred to; that the case, although between individuals, was one in which the public at large was interested, as was shown by the fact that a judgment against the defendant became the foundation for a preliminary injunction against other parties, who might be permanently injured thereby, or, at all events, until upon final hearing, the defense now relied on could be maintained; that assuming, as was insisted, that the defenses sought to be excluded, would, if admitted, prove the plaintiff's patent worthless, the effect of the judgment would be to give him a right as against this particular defendant, which he would have against no one else; that a verdict against him in another suit, brought against another party even, would not, if the plaintiff was right, affect his recovery against these defendants in the event of their again using the invention described in his patent; that it was impossible that a construction of the doctrine of estoppel, which involved such consequences, could be a just one. The defendants further insisted that the issues in the present case were not the issues in the former case; that the issues, then, were whether, as against the special matters then given in evidence, the plaintiff's patent was valid; that the introduction of the English patents, etc., now presented new issues, which had never before been presented to the jury; and that, giving to the doctrine of estoppel the full force contended for, it did not apply to the facts here.

Samuel Linn, Luther M. Reynolds, and William H. Armstrong, for plaintiff.

William Schley, Thomas Donaldson, and J. H. B. Latrobe, for defendants.

GILES, District Judge, stopped the plaintiff's counsel when about to reply, and said: I have no doubt of the application of the doctrine of estoppel to the case. There is no difference in this respect between this case and any other. It is true the point is one that does not appear to have been decided in a patent cause; but, in the opinion of the court, that makes no difference. The principle involved is as applicable to patent cases as to any other cases. If it were not, there would be no end of litigation between the same parties. Every new suit would be met by a new defense. It was the purpose of the law to prevent this continued litigation. (The court referred to several authorities, and

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

particularly to the case of Beloit v. Morgan, 7 Wall. [74 U. S.] 619.)

NOTE. The report of this case is furnished by Mr. Latrobe, one of the counsel, and is indorsed by Judge Giles as a correct report of the point decided.

[For another case involving this patent, see Railroad Co. v. Dubois, 12 Wall. (79 U. S.) 47.]

Case No. 4,109a.

DUBOIS v. The T. B. ABEEL.

[Betts' Scr. Bk. 265.]

District Court, S. D. New York. 1832.

COLLISION IN EAST RIVER—SAILING VESSELS—LOOKOUT.

[A sloop, proceeding to a dock in the East river with a jib only, according to the usual course of navigation at that place, with crew and lookout properly stationed, was run into by a schooner sailing free fully manned, and with plenty of sea room. It did not appear that the schooner had a proper lookout, or that the sloop was guilty of anything leading or contributing to the injury. *Held*, that the schooner was in fault, and liable for the damage sustained by the sloop.]

[This was a libel by William T. Dubois against the schooner T. B. Abeel for injuries sustained by collision.]

Before BETTS, District Judge.

Points ruled in the opinion of the court: (1) The sloop of the libellant had lowered her mainsail in the East river, with intent to come into dock near Maiden Lane. When from 50 to 90 yards from the pier, not perceiving room to enter the pier, she wore round on her jib, and headed across the river. (2) The wind was east of north, and the tide ebb, erroneously charged in the libel to have been flood. (3) The movement of the sloop, whether to get an offing and come back for a berth, or to anchor off, was according to the usual navigation at the place, and prudently and properly conducted of itself, and the crew were properly stationed to navigate her and keep a lookout. (4) The schooner T B. Abeel, coming down the East river from the Sound, with the wind free and on the tide, was running parallel to the piers, and about the same distance from them as the sloop, and, after the sloop had come round, was from 100 to 200 yards above her. She was fully manned, but gives no proof that she had a lookout properly stationed forward. (5) The sloop was running very slowly through the water, and at the time of the collision had run out to the eddy 90 to 100 yards from shore, and touched the tide channel. (6) The schooner, after both vessels were noticed, was at no time further off the docks than the sloop, and the schooner, in crossing the river, was not running into the track the sloop was holding when they came to a situation to see each other. (7) There was no time, after the two vessels were within 200 yards of each other, that there was not sufficient sea room for the schooner to have gone inside or outside of the sloop. (8) The sloop was guilty of no wrong movement, after she came round and stood across the river, which tended to impede or mislead the schooner, or which contributed to produce the collision. (9) The schooner running upon a free and fresh wind, at right angles to the sloop, which was under a jib sail only, had the power, if used in time, and was in law bound, to avoid the sloop. This is the decided weight of the evidence, although, in a case depending in some measure upon the opinions and estimates of witnesses, there is, as might be expected, great discordance in the statements of the witnesses. (10) The facts so found cast the blame and responsibility on the schooner, and a decree must, therefore, be entered condemning her for the damage, with an order of reference to a commissioner to compute the amount.

DU BRUL (MILLER & PETERS MANUF'G CO. v.). See Case No. 9,597.

DUBUCLET (LOUISIANA ex rel. MONCURE v.). See Case No. 8,538.

Case No. 4,110.

The DUBUQUE.

[2 Abb. U. S. 20;[1] 2 Chi. Leg. News, 381.]

District Court, E. D. Michigan. June Term, 1870.

REGISTRY OF VESSELS—STALE DEMANDS.

1. A master has no lien upon the vessel for his wages.

2. Under the laws of the United States governing the registry of vessels, the person in whose name, as master, a vessel is registered, must be deemed her master for every legal intendment and purpose.

3. Where there is a master de jure by virtue of the registry, there cannot be, in contemplation of law, another master de facto. Another person employed by the owners to navigate and even to discipline the ship, does not become master in either sense. The relation of master is fixed by the registry.

[Cited in Peterson v. The Nellie and Annie, 37 Fed. 218.]

4. An alien cannot, under the laws of the United States governing the registry of vessels, be deemed master of a vessel, even for the purpose of defeating his claim to a lien for wages.

5. An indorser upon a note not yet matured, gave a mortgage upon a vessel to secure his contingent liability. Afterwards, the liability became fixed. The mortgage, however, entitled him to an extension of time for payment. *Held*, that the mortgagee was to be deemed a mortgagee for a valuable consideration, and entitled, as such, to intervene for the protection of his interest,[2] in a libel filed against the ves-

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

[2] [See The Old Concord, Case No. 10,482, which was published in 2 Abb. U. S. 20, as a note to The Dubuque.]

sel to recover wages. Either the extension of time for payment of the debt, or the waiver by the holder of the note of the right to sue the indorser, and in such suit to attach the vessel, constituted a sufficient consideration for this purpose.

6. In respect to the question what delay to enforce a maritime lien will warrant its being postponed to subsequent liens acquired without notice, the same rule applies to claims for wages, as to claims for repairs and supplies.

[Cited in The Bristol, 11 Fed. 163.]

7. The general rule is, that a delay to enforce a maritime lien, after a reasonable opportunity to do so, is deemed a waiver of the lien as against subsequent purchasers or incumbrancers in good faith and without notice, unless such delay is satisfactorily explained.

[Cited in The Detroit, Case No. 3,832; The Harriet Ann, Id. 6,101; The Hercules, Id. 6,400; The Virginia Rulon, Id. 16,974. Followed in The Lauretta, 9 Fed. 624.]

[8. Cited in The J. W. Tucker, 20 Fed. 134, to the point that in respect to liens arising in the course of navigation on the western lakes and rivers, where the voyages are short and frequent, the rule has been adopted, to a considerable extent, of making the division of claims by the successive open seasons of navigation, instead of by the separate voyages during each season.]

This was a libel in rem for wages of libelant as pilot and sailing-master of the propeller Dubuque, from April 5 to December 5, 1865, at one hundred and twenty-five dollars per month. The libelant claimed a balance due and unpaid of seven hundred and forty-nine dollars and fifty-three cents. The libel was filed and the vessel seized, February 13, 1869. The answer of the Second National Bank, claimant, intervening for its interests in the proceeds of the vessel, as mortgagee, denied knowledge, &c., of the alleged services of libelant, and denied that there was any thing due him, or that any thing which might be due was a lien upon the propeller or her proceeds. The answer further alleged on information and belief: That libelant was in fact master of the propeller, and therefore could have no lien for his wages. That soon after libelant left the vessel, and on December 8, 1865, he had a settlement with the owner, and received the owner's note in full for the balance due him for wages, and for another small claim he held against the owner, and in full for his claim against the vessel, if any existed. That on October 4, 1866, John Hutchings, sole owner of said vessel, mortgaged the same to claimant for eleven thousand four hundred and sixty-two dollars and fifty-two cents; that the mortgage was duly recorded on October 10, 1866, and there was due and unpaid upon the mortgage at the time of filing the answer the sum of nine thousand two hundred and fifty dollars; that this mortgage was given for a valuable consideration, and without notice of libelant's claim; and that the libelant's claim is stale, and ought not to be enforced as against the mortgage.

Moore & Griffin, for libelant.

Newberry, Pond & Brown, for intervenor.

LONGYEAR, District Judge. The allegations of the libel as to the fact and period of service of libelant, and as to the rate of wages, are fully sustained by the proofs, and are not contested. The questions which are contested, and upon which the decision of the case must turn, will be taken up and disposed of in the order in which they are raised by the answer.

The first question presented is that raised by the allegation in the answer, that libelant was in fact master of the propeller, and, therefore, could have no lien for his wages. The libel alleges that one George Moir was master, and the proof shows that the propeller was enrolled and licensed in his name as such. Moir, then, was the registered master, or master de jure of the vessel, and he remained such during the entire term of service for which wages are claimed by libelant. But it is contended on behalf of respondent that libelant was in fact employed, and that he actually served as master, and, therefore, was master de facto, and that the vessel was registered in the name of Moir as master as mere matter of form, for the reason that libelant was then an alien, and could not be registered as master under the navigation laws. See act of December 31, 1792, (1 Stat. 289, § 4).

There was some evidence adduced tending to prove the above state of facts, which will be considered hereafter. It is a well settled rule of the maritime law that the master has no lien upon the vessel for his wages. He must look to the personal responsibility of the owner alone. See 2 Pars. Mar. Law, 582; 2 Pars. Shipp. & Adm. 182, and the numerous cases there cited. It is essential, therefore, to ascertain and determine in the outset, who was master. I shall consider this question, first, as one of law, and second, as one of fact.

In the absence of the registry laws, or in a case in which the registry laws have not been resorted to, there can be no doubt he would be master to whom the owner actually entrusted the navigation and discipline of the vessel. But how is it when, as in this case, the registry laws have been resorted to?

The registry laws have for their object, among other things, the building up and fostering a commerce purely American. With this object in view, great importance is manifestly attached, and justly so, to the provision in regard to the designation of the master, and his political status. The owner is required to make oath who is master, and that he is a citizen of the United States. And this last requirement is deemed of so much importance that it is further required that if the master is within the district at the time of application for registry, he shall himself make oath to his citizenship. And in case

the facts so required to be sworn to are not as stated, the severe penalty is imposed, in case of the owner thus swearing falsely, of a forfeiture of the vessel, together with her tackle, furniture, and apparel; and in case of the master, of the sum of one thousand dollars.

The master is also required to join with the owner in a certain bond before registry can be obtained. In case of a change of such master, such change must be reported, and a corresponding change in the registry made, under the penalty, in case of neglect, of the registry previously made being made void, and of the payment of the sum of one hundred dollars by such new master.

In view of the importance thus attached by the law to the office of master, the registry certainly ought not to be treated lightly, as evidence of who is master. I think far the safer and more satisfactory rule is to hold that in case of resort to the registry laws, all the incidents of those laws attach, and that the relations required by the law to exist between the owner and the master, and between the master and the vessel, and between the master and the crew become fixed by the registry, and any other arrangements the owner may make for the actual discharge of the duties of master are entirely subject to the relations so fixed, until they are changed in the manner prescribed by the registry laws; and that so long as the person in whose name, as master, the vessel is registered, continues to be master by the registry, he is such to all intents and purposes in the eye of the law.

In the case of Draper v. Commercial Ins. Co., 21 N. Y. 378, cited by respondent's counsel, the question was as to the seaworthiness of the vessel, as affecting the contract of insurance. It was there held that, as affecting that question, it made no difference if the person holding the papers as master was entirely incompetent to sail and discipline the vessel, provided the navigation and discipline of the vessel were intrusted in fact to a competent sailing-master; and that, although the registry is prima facie evidence as to who is master, yet it is not conclusive, as affecting the question of seaworthiness. Anything decided in the case beyond this is mere dictum, and not authority.

But I regard the doctrine upon which the decision is based as unsound, and if it was of binding authority upon this court (which of course it is not), I should not be inclined to extend its application one iota beyond the exact point decided. I consider the argument of the dissenting opinion of Judge Comstock in that case, even as to the point decided, sound, and, as it seems to me, conclusive. The dissenting opinion holds that the nature of the service admits of but one supreme authority, and the laws recognize but one; and that that authority is vested alone in him in whose name the vessel is registered as master, in virtue of his office; and in that opinion I fully concur.

Any other position opens the door wide to frauds upon the law, and at once renders the law of no force or effect whatever. If one person may be entered as master for the purpose of registry, and another be master in fact, whether a citizen or not, and without having executed the required bond, then the law may be violated with impunity, and the sooner it is taken from the statute book the better.

But it is said that Moir was incompetent in point of skill to navigate the vessel. That is a matter entirely between him and the owner, and between the owner and those who might have suffered on account of his incompetency. The only qualification required by the act is, that he shall be a citizen of the United States. He was such citizen. He was made and recognized as master by the registry, and however incompetent he may have been to navigate the vessel, the entire crew, including libelant himself, were, in contemplation of law, subject to his orders.

It is further claimed that libelant actually discharged the duties of master. Concede that he did, still he did not possess the powers of master, such as the power to bind the vessel by his contracts, the power to inflict punishment for disobedience to orders, &c. These powers had been expressly conferred upon another, the person holding the papers as master, by law. See U. S. v. Taylor [Case No. 16,442].

Libelant's assumption of such powers would have been unlawful usurpation, and punishable as such under section 1 of the act of March 3, 1835 (4 Stat. 775). He was also capable of revolt under section 2 of said act. See U. S. v. Winn [Case No. 16,740]. And he could not be punished as master for inflicting cruel and unusual punishments, &c., under section 3 of said act.

In the cases cited by respondent's counsel, holding that where the mate had succeeded to be master by the death of the master, he could not receive extra compensation as master on a libel in rem, but could recover as mate, there was no master. The duties and powers of master devolved upon the mate, it is true, but it was ex officio merely, and because he was mate. He did not cease to be mate when he was acting as master. In other words, he acted in a double capacity, in one of which, that of mate, he had a lien, and in the other, that of master, he had not. These cases decide simply this, that so far as libelant acted as mate, he had a lien, but so far as his claim was increased by his service as master, he had no lien.

As applied to the present case, these cases would sustain the following proposition: that so far as libelant acted as pilot and sailing master, he has a lien for his wages, but if any portion of his claim is for services as master, to that extent he has no lien. But inasmuch as the vessel had a master, the duties of master could not have devolved upon him, as they did upon the mates in the cases cited; and

therefore the cases cited have no application to the present case.

In the case of L'Arina v. The Exchange [Case No. 8,088], cited by respondent's counsel, the ship had a real master, who of his own motion, acting in his capacity as master, hired a man at Havana to lend his name, to be used as nominal master to clear the vessel at that place, and to proceed to Charleston and back to Havana. It was there held that the person so hired never was master, and that therefore he had a lien for his wages. The real master had no authority thus to divest himself of his office and confer it upon another. This could be done by the owners only. Neither are we advised, and it is not material, what was the effect of the transaction at Havana, under the laws there in force. The effect of the registry under our registry laws is alone under consideration in this case.

I hold, therefore, that the person in whose name the vessel is registered as master, is master for every legal intendment and purpose. That where there is a master de jure by virtue of the registry, there can be no master de facto in legal contemplation. That the law recognizes in this respect but one supreme authority, and therefore, if another person than the registered master is employed by the owners to navigate and even discipline the vessel, he does not thereby become master either de facto or de jure. That the relations between master and crew, as they exist by the maritime law and the acts of congress, become fixed by the registry, and cannot be changed by any such interference.

There is, however, another complete answer to the objection of respondent, that libelant was master in fact. He was an alien, and was therefore prohibited by the registry laws from being master de jure. It would be against public policy, and aiding in the perpetration of the grossest of frauds upon the law, to hold that he could be master de facto. As a question of law, therefore, the defense set up that libelant was master in fact, is not well founded.

I should be obliged to hold also, that this defense is not sustained as a question of fact. This is set up by the answer as matter of substantive defense, and must be maintained by respondent by a preponderance of proof. Hutchings, the owner, swears that he employed libelant as master, but that being an alien he could not be registered as master, and therefore it was arranged between him and libelant that the registry should be in the name of Moir (who was in fact engineer of the vessel), as mere matter of form.

Libelant testifies that he was employed expressly as pilot and sailing master, and that not a word was said about his taking or not taking the registry in his name as master, and that there was no arrangement or understanding to that effect. The proof shows that in the discharge of his duties on board the vessel he did and assumed nothing more, with one or two unimportant exceptions, than what would be required of him acting in the capacity of pilot and sailing master.

Libelant and Hutchings stand on an equal footing as to interest and credibility, and neither is corroborated; and partly in consideration of the apparent fact that Hutchings must have sworn falsely when he swore that Moir was master of his vessel for the purposes of registry, or that he has sworn falsely in this suit, I hold that the evidence preponderates in favor of libelant's position, and that this defense is not made out in point of fact. Libelant therefore has a lien upon the vessel for his wages, and is entitled to recover in this suit the balance due him, unless the remaining defenses set up, or some one of them, is made out.

The next defense set up is that soon after libelant's term of service had closed, and on the 8th day of December, 1865, he had a settlement with the owner, and received the owner's note in full for balance due him for wages, and for another small claim he had against the owner, and in full for his claims against the vessel. The rule of law upon this point is that the lien is not waived by simply taking a note, unless it is distinctly so understood. See The St. Lawrence, 1 Black [66 U. S.] 522, 531, 532; Carter v. The Byzantium [Case No. 2,473]; Sutton v. The Albatross [Id. 13,645]; Moore v. Newbury [Id. 9,772].

The proof shows that a settlement was had and a note taken for balance due him at the time stated in the answer; but there is no proof whatever that it was understood that libelant's lien upon the vessel was thereby waived. This defense is therefore unsupported. I shall, however, notice this matter again in connection with the remaining branches of the case.

The next and remaining defense set up is, that on the 4th day of October, 1866, the vessel was duly mortgaged to claimant for a valuable consideration, and without notice of libelant's claim, and claiming that libelant's claim is stale, and ought not to be enforced as against the said mortgage.

The proofs fully sustain the allegations of the answer as to the giving of the mortgage, and want of notice of libelant's claim. As to the consideration, the proof shows that the mortgage was given by John Hutchings, sole owner of the vessel, to secure a previous indebtedness from him to the mortgagees of eleven thousand four hundred and sixty-two dollars and fifty-two cents, of which there remained due and unpaid at the time of filing the answer, the sum of nine thousand two hundred and fifty dollars. That the indebtedness of Hutchings grew out of indorsements of paper held by the bank. That the particular notes representing the amount for which the mortgage was given, were renewals of former notes, upon which Hutchings had in like manner been indorser. That these notes for which the mortgage was given did not fall due until October 26, 1866, and, therefore, Hutchings'

liability had not become fixed at the time (October 4, 1866) the mortgage was given; but it does appear that his liability did afterwards become permanently fixed upon those notes.

On this state of facts the learned counsel for libelant contends: 1. That there was no consideration for the mortgage at the time it was given, as there was then no liability on the part of Hutchings to pay the debt. 2. That even if his contingent liability, having grown, as it did, into a fixed liability, constituted a sufficient consideration as between the parties, it is not a valuable consideration in the eye of the law so as to enable the mortgagee to set up his lien as against the lien of libelant.

1. As Hutchings' liability was contingent only at the time the mortgage was given, the security of the mortgage was, of course, also contingent; but when Hutchings' liability became fixed and absolute, then the security of the mortgage also became fixed and absolute. The mortgage was, therefore, good and valid, as between the parties, from and after the maturity of the notes, October 26, 1866, if not before.

2. The debt to secure which the mortgage was given fell due October 26, 1866, and Hutchings' liability to be sued upon it accrued at that time.

By the terms of the mortgage, the time of payment was extended, in all, to November 25, 1868, with provision for further extension. It is to be presumed that this forbearance would not have been given except upon the giving the mortgage security. This, of itself, constituted a valid consideration for the mortgage, and, it is fair to presume, was the principal motive of Hutchings in giving it.

Again. If the mortgage had not been given, and the time extended, the bank could have sued Hutchings upon the debt, and attached the vessel, or seized the same in execution. And a lien thus obtained has been recognized by high authority as sufficient to entitle the attaching creditor to intervene and contest a previous lien on the ground of laches. See Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; Packard v. The Louisa [Case No. 10,652]. There can be no sound reason why a lien voluntarily given for the same debt, should not be equally effectual.

It expressly appears in the proofs, that the mortgage was taken by the bank without any notice whatever of libelant's claim. I hold, therefore, that the intervenor in this case is a bona fide mortgagee for a valuable consideration, and, as such, is entitled to intervene and contest the priority of libelant's lien.

It remains, therefore, to consider and determine the question of laches on the part of libelant in bringing forward and enforcing his lien. In determining this question, the same rules apply to liens for wages as to liens for repairs and supplies. Notes to Abb. Shipp. 539; Leland v. The Medora [Case No. 8,237]; Stillman v. The Buckeye State [Id. 13,445].

In the case of seagoing vessels, it seems to be pretty well settled that such liens will in no case be extended beyond the next voyage if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. This, however, can hardly be applied strictly to vessels navigating the lakes, where numerous voyages are made during each season, no one voyage occupying more than two or three weeks. But the principle is the same, viz: that such liens should not be enforced to the injury of parties who have acquired subsequent rights and interests in the vessel without notice, where there has been unreasonable delay in enforcing the lien; and it has been held in this district, by my honored predecessor, that, as a general rule, there is great reason to limit these tacit liens to the season of navigation, and not to extend them beyond one year, as applied to the navigation of the lakes. See Stillman v. The Buckeye State [suprâ].

No fixed rule, however, can be laid down upon the subject. What will constitute unreasonable delay, must depend upon the circumstances of each particular case. While liens for seamen's wages are the most favored in the admiralty, the policy of the law is that they should not be protracted beyond a reasonable opportunity for their enforcement, to the injury of third parties acquiring subsequent liens without notice.

Perhaps the safest and most satisfactory general rule to be adopted, deduced from the authorities, and from the nature of the subject, would be that a delay to enforce a maritime lien after a reasonable opportunity to do so, shall be taken and deemed as a waiver of the same as against subsequent purchasers or incumbrancers in good faith, without notice, unless such delay is satisfactorily explained. See Packard v. The Louisa [supra]; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; The Utility [Case No. 16,806]; The Lillie Mills [Id. 8,352]; The Chusan [Id. 2,717]; Stillman v. The Buckeye State [supra].

In this case the service on account of which the lien is claimed, ended December 5, 1865, and the libel was filed February 13, 1869, three seasons of navigation having fully passed. In the mean time, about three days after the service ended, libelant had a settlement with the owner concerning his wages and another matter, and agreed upon a general balance due him, and received a part of the same in money, and the owner's note for the remainder. Nothing more was done by libelant until nearly the close of the next season's navigation, when the intervenors acquired their lien upon the vessel without notice of any claim on the part of libelant; and in this precise shape matters remained

for upwards of two years and four months longer, before any attempt whatever was made on the part of libelant to enforce his lien. During all this time the vessel was engaged in navigation upon the lakes, and where she might have been seized; and no explanation of the delay is attempted or offered.

It is difficult to conceive of an array of facts affording a stronger or more conclusive presumption that libelant had waived his lien, and looked to the owner alone for payment. The settlement and taking of the note is mentioned in this connection because, although not evidence of an express waiver of lien, it is an important link in the chain of circumstances going to prove a presumptive waiver. The rights of the owner are not now under consideration, and the presumptive waiver of lien by libelant is held to apply only as against the mortgage lien of the intervenors. Therefore, if libelant desires to continue his suit as against the owner, a decree must be entered postponing his lien to the mortgage lien of the intervenors, and that such mortgage lien be first paid to the intervenors, together with their costs of suit to be taxed, out of the proceeds of the sale of the vessel. Otherwise, the libel must be dismissed, with costs to intervenors. Decree accordingly.

DUBUQUE The (MOIR v.). See Case No. 9,696.

DUBUQUE & S. C. R. CO. (SAYLES v.). See Case No. 12,417.

Case No. 4,111.

DUCATUR v. The DESIRE.

[Bee, 385.]

Admiralty Court of Pennsylvania. 1779.

PRIZE—RECAPTURE.

French owners are entitled to the benefit of the ordinance of congress relative to recaptures.

The question was whether French owners should have the benefit of the ordinance of congress relative to recaptures, and it was so determined.

[Before HOPKINSON, District Judge.]

DUCHESNE (BROWN v.). See Cases Nos. 2,003 and 2,004.

DUCKETT (ADDISON v.). See Case No. 77.

DUCKWORTH (MINIFIE v.). See Case No. 9,633.

Case No. 4,112.

DUDEN et al. v. ARTHUR.

[24 Int. Rev. Rec. 380.]

Circuit Court, S. D. New York. Oct., 1878.

CUSTOMS DUTIES—CLASSIFICATION — COMMERCIAL DESIGNATION—YAK LACE.

[The question whether, under section 2 of the act of March 2, 1867 (14 Stat. 561), the goods known as "yak lace," which are composed entirely of worsted, are dutiable as "dress trimmings" or as "manufactures of worsted," depends upon whether they are known in commerce as "dress trimmings" or as "laces," which is a question of fact for the jury upon the testimony of merchants dealing in such goods.]

[This was an action by William Duden and others against Chester A. Arthur, collector of the port of New York, to recover duties paid under protest.]

SHIPMAN, District Judge (charging jury). Gentlemen of the Jury: In the year 1873, the plaintiffs imported into this port sundry invoices of an article commonly styled "yak lace," upon which the collector exacted a duty of 50 cents per pound and 50 per cent. ad valorem, upon the ground that the article was dress trimmings made of worsted and dutiable at the rate mentioned under the second section of the act of March 2, 1867. The plaintiffs paid the duty under protest, protesting that the goods were dutiable at 50 cents per pound and 35 per cent. ad valorem as a manufacture of worsted, and not dress trimming, under the same section of the same act which has been cited. Appeal was duly taken to the secretary of the treasury, who affirmed the decision of the collector, and in seasonable time this action was brought for the purpose of recovering the excess of duties which is claimed to have been illegally exacted.

These facts are admitted to have been substantially proven: 1st. That the article is a lace, and is exclusively made of worsted; 2nd, that it is universally bought and sold under the name of yak lace; and 3d, that its general use has been as dress and cloak trimming, though it could be, and has been, used for the trimming of parasols and of curtains. The statute provided a duty of 50 cents per pound and 50 per cent. ad valorem upon "webbings, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress trimmings, etc., made of worsted." Upon "flannels, etc., and all manufactures of every description composed wholly or in part of worsted not otherwise provided for, valued at above 80 cents per pound, 50 cents per pound and 35 per cent. ad valorem." The plaintiffs claim that although the general use of this article has been since its first importation into this country, about the year 1872, for dress trimmings, that is commercial designation and signification among importers and wholesale dealers generally, it is not a dress trimming, but comes under the head of laces. The presumption is that the term "dress trimmings" includes all articles of worsted which are in general specially used for that particular purpose, and this presumption continues until the plaintiffs show by fair preponderance of proof, either that the term "dress trimmings" has in commercial use acquired a special and restricted meaning, or that in trade

and commerce worsted lace, or yak lace, is not a dress trimming, but is separated and set apart from the general class of dress trimmings.

The plaintiffs claim that each position is true, viz., that commercially dress trimmings do not include laces, and also that whatever dress trimmings may include, that this article of yak lace is classed among a species different from dress trimmings. A simple form of the question is, are yak laces commercially included in dress trimming, or are they known in trade as a different article from dress trimmings, and as forming part of a separate and distinct class? The reason why this question becomes material, and in this case the only question of fact is, because the classification of the articles in the tariff laws is understood to be, according to the general usages and known denominations of trade, and because as a general rule the known commercial distinctions which are made in the usages of trade are recognized in the tariff acts, unless congress has indicated in the statute that the language is used in the ordinary sense, or an intention to exclude any other classification than the one which it has specified. It is admitted that this article was not known in this country until 1872, five years after the passage of the act of 1867; hence your duty is to inquire whether the article has been in this country, among importers and large dealers generally, commercially known as not a dress trimming, or has been a separate and distinct class since the period of its introduction to the markets of this country.

Upon this question the plaintiffs, who are obliged to take the burden of proof and to make out their case by a fair preponderance of testimony, introduce many witnesses, all well known in the commercial world or representing well known commercial houses. The testimony of these gentlemen tends to prove upon the disputed point: 1st. That dress trimmings are commercially confined to a class of goods like galloons, fringes, gimps and buttons, which have been universally recognized as ladies' dress ornaments, and that articles which occasionally are used for that purpose by the dictates of fashion as laces, ribbons or detachable pieces of velvet or silk are not recognized as belonging to the class of dress trimmings. 2nd. That laces have uniformly formed a class of goods of their own, because laces are used for a great variety of purposes, and that this new article of yak lace, although used generally for dress trimmings, has been included in the class of lace and has been kept for sale in the department of laces by merchants who had in their store both a lace and a dress-trimming department.

The defendant introduces a number of witnesses who are mostly importers or dealers in dress trimmings, and their testimony is substantially to the effect: 1st. That they being dealers in dress trimmings, keep on hand, buy and sell this article because it is a dress trimming. 2nd. That anything is commercially regarded as a dress trimming, which for the time being is used as a dress trimming, and that there is no distinctive commercial definition of the term other than its general meaning.

This being the general character of the testimony on both sides, I have to suggest that the mere name of the article yak lace is not material except in connection with the fact that it is lace, and the position of the plaintiffs is that all laces are a separate article commercially from dress trimmings, so that the question between the parties may be succinctly stated as follows: Are or are not worsted laces commercially dress trimmings? The important point in the plaintiffs' testimony is that yak lace is commercially not regarded as a dress trimming, because it is kept and catalogued in mercantile houses, which have separate departments of laces and dress trimmings, among the laces. I think that the uncontradicted evidence, establishes this fact, viz., that firms which keep separate departments of laces and dress trimmings catalogue yak laces among the laces and keep them in the lace department. This being a fact, and relied upon by the plaintiffs as an important one, it becomes material to ascertain what it proves. Does it indicate to your minds merely that this is done for convenience' sake because yak lace is a lace, and therefore conveniently placed among the other varieties of laces, or does it go further and show that dress trimmings are in commercial understanding confined to the articles which have been well understood for many years to be dress trimmings, such as gimps and fringes and galloons? If the former is the reason why this classification is made, then this evidence becomes not of great weight. If the evidence points to the latter conclusion it is of high importance. The principle of commercial designation, to wit, that terms in the tariff acts are, as a general rule, unless it appears that the terms are used in the general signification, to be understood according to their meaning among merchants, and that testimony is to be introduced to show and satisfy the trier what the mercantile community mean and understand by a particular word or term is a just and sensible principle which has been recognized by courts for many years. The government has often invoked it to the benefit of the treasury, the importer has often made use of it to his advantage. It is a principle of the law. Thus crape veils do not come within the designation of silk veils, because although made of silk, they are not called silk veils, and are not in commercial phrase silk veils, but are a class of their own.

Whenever this question arises and the affirmative is supported by substantial evidence it necessarily becomes a question of fact for the jury. Juries should see to it that the principle is not abused. That importers

should not by mere names and phrases, or by an arrangement in their business merely for convenience withdraw an article from the place to which the statute has assigned it; but when the principle is applicable and the jury find that importers have uniformly affixed a particular commercial meaning to a particular word in the tariff acts, then the commercial meaning is to control. If then you find that yak lace has not been since its importation in the year 1872 by importers and wholesale dealers generally in this country included within the term "dress trimmings" as that term is used in trade and commerce, and therefore is commercially not a dress trimming, but is included in a separate class, your verdict will be for the plaintiffs, otherwise your verdict will be for the defendant.

Case No. 4,113.

DUDEN et al. v. MURPHY.

[18 Int. Rev. Rec. 174.]

Circuit Court, S. D. New York. 1873.

CUSTOMS DUTIES—CLASSIFICATION—COMMERCIAL DESIGNATION—LACES.

[Whether certain black laces, hand made, and all of silk, are dutiable at 60 per cent., as "silk laces," under section 8 of the act of 1864, or at 30 per cent., as "thread laces," under section 20 of the act of 1861 and section 6 of the act of 1862, depends upon the question whether they were known in commerce by the one or the other designation, which is a question for the jury on the evidence.]

This was an action [at law] brought [by William Duden and others] to recover an alleged excess of duty collected by the defendant [Thomas Murphy] as collector, upon an importation of plaintiffs, claimed by them to be dutiable as thread lace, at 30 per cent. ad valorem, under section 20 of the tariff act of 1861 [12 Stat. 190], and section 6 of that of 1862 [12 Stat. 549]. Duty was exacted at 60 per cent. under section 8 of the tariff act of 1864 [13 Stat. 210], as silk lace. The laces in question were made by hand, and all of silk, and were black. But one witness was examined, and his evidence sufficiently appears in the opinion of the court as stated in the charge herewith given.

Gentlemen of the Jury: In the year 1871 the plaintiffs imported a certain article of laces into this country, which were landed in the city of New York. Upon these laces the collector imposed a duty of 60 per cent. The importers, conceding that upon a portion of these laces 60 per cent. duty was properly exacted, protested that upon another portion, contained in a specified case, a duty of 30 per cent. only should be legally exacted; and having paid the duties under protest, and having appealed to the secretary of the treasury, brought their action within the proper time, to recover the excess of duties paid upon the latter mentioned goods, above 30 per cent. The preliminary steps required by the statute to enable the plaintiffs to bring their action to court were properly taken. It is obvious that where tariff acts are at all minute in their details, and where changes are made from time to time in the schedules of dutiable articles, or in the rates of duty imposed, questions will arise upon which honest differences of opinion will exist. It is to determine which party is correct in his claim that this suit is brought.

It appears that in the year 1846 a duty of twenty per cent. was imposed upon thread lace, a duty of twenty-five per cent. upon all manufactures of silk, and a duty was also imposed upon cotton lace. By the tariff of March 2, 1861, a duty of twenty per cent. was imposed upon thread lace and insertions, and thirty per cent. upon silk lace, and another duty upon cotton lace. By two subsequent statutes passed respectively in August 1861 and 1862, the duty upon thread lace was increased to thirty per cent., the duty upon silk lace was increased to forty per cent. and the duty upon cotton lace was increased to, I think, thirty-five per cent. By the statute of 1864, a duty of sixty per cent. was imposed upon silk laces. The collector claims that these goods are silk lace and properly dutiable at sixty per cent. The importers claim that these goods are thread lace and that thirty per cent. only can be legally exacted. It is conceded that the act of 1864 was not a complete substitute for the acts of 1861 and 1862, and that by the act of 1864 all preceding statutes were not repealed, but that it was an amendment, an alteration of the acts of 1861 and 1862, as to the duties only upon the goods specifically mentioned. For it is conceded in the stipulation that if the plaintiffs can recover, they are to recover the sum of one hundred and eighty-two dollars and three cents in gold, which is the difference between thirty per cent. and sixty per cent. It is true that it was claimed in the argument on the part of the government that the clause of the act of 1864, in regard to silk laces, repealed by implication the clauses of the acts of 1861 and 1862 in regard to thread laces. But it is expressly provided in the act of 1864, that the duties upon all goods not provided for in that act should be and remain as they were according to prior existing laws. It is obvious then that by the present tariff acts now in force two kinds at least of laces, to wit, thread laces and silk laces, pay a duty, the one of thirty per cent. and the other of sixty per cent.

The question before the court then is whether, within the true construction of the tariff act, the goods in controversy pay a duty of sixty per cent. or thirty per cent. In other words are the goods, within the meaning of the tariff acts, thread laces or silk laces. Within the meaning of the tariff acts, I say, because that the goods are laces and are made of silk is not denied. In general (quoting Judge Woodruff's opinion in his charge to the jury upon a similar case) "the construction and effect of a statute de-

volves upon the court as a matter of law, but sometimes the subject to which the statute relates is of such a nature that a knowledge of facts not appearing in the statute, is necessary in order to make a just application of the terms of the act—facts which the court cannot officially know, and which it is for the jury to determine upon evidence. The court could interpret the statute if there was nothing in it but that which the court is bound to know, and take judicial cognizance of, but as the statute employs terms the meaning of which the court does not necessarily know, a question of fact arises which must be submitted for the determination of a jury." Applying the principle which I have just quoted to the present case, what is the result? If there was nothing in this case but the single expression of the act of 1864, "Silk laces shall pay a duty of sixty per cent.," the court might say that this was dutiable at sixty per cent.; but it is evident that thread laces have paid a duty since 1846, and still pay a duty. The plaintiffs say that during all these years, or certainly since 1861, the goods in question have been known in trade and commerce as thread laces, and not as silk laces; that their designation and commercial denomination has not been that of silk laces, but that of thread laces. And here comes the question of fact which is to be decided, and which is to be decided by you. The term "thread laces" conveys of itself to a person not in the trade, no distinct idea. You and I, if we were not in this trade, would not know of our own knowledge what thread lace meant, because it may be made of thread, may be made of silk, or cotton, or linen, or all combined. It is, then, a descriptive term of an article. Now descriptive terms in statutes regulating the duties on imports are to be taken according to their known signification in trade and commerce, as a general rule. There might be a case where an article was so specifically described in a tariff act that a court would judicially say that the commercial signification was excluded. But here you have a duty imposed upon an article called thread lace and an article called silk lace. The plaintiffs insist that their goods are not known in trade and commerce as silk lace; and they claim that the question here to be determined does not depend upon the mere fact that they are laces made of silk. In this respect they are correct. The amount of duty is to be determined by the commercial designation. Therefore the question of fact for you to determine is, whether in the year 1864, at the time when the present tariff act was made, the goods in question were known in this country in trade and commerce, especially among importers and persons who largely dealt in them, as thread laces or as silk laces. For the purpose of determining this question, you have a right to consider all the evidence before you pertaining to the commercial designation of the article during the period covered by the statute, relating to thread laces. No evidence has been given prior to 1861. That you must look at all the facts given in evidence from 1861 down to the present time, and from that evidence determine what is or what was in 1864 the commercial designation of the articles in controversy. Was it thread lace, or was it silk lace? Now it is testified that thread laces are made of silk alone, or of cotton alone; that this article was made of silk alone, but that its material of which it is made does not determine its commercial designation; and I have already said that the real question here is not what they are made of, but what is the commercial designation. It is also testified that silk laces are made of silk, or of silk and cotton combined, and that the commercial designation does not depend upon the component parts, but that silk laces is a commercial term, denoting a particular article, whether composed of silk or of silk and cotton combined. The testimony on this point is confined to one witness, introduced by the plaintiffs; and it is agreed that it shall be deemed and considered by you that his testimony, whatever it may be, and of whatever value it may be, shall apply to the years 1861 and 1862, as fully as it was given by him, with reference to the years between 1863 and 1871. It is claimed by the plaintiffs that his testimony is full, complete, and uncontradicted, that there is no countervailing testimony, and that his testimony is, that from 1861 to 1873 the commercial designation of this article, which was imported, was uniformly and invariably "thread lace," and was universally known and recognized by importers and the trade generally as "thread lace," and was not commercially known as silk lace, but that silk lace was another and distinct article. It is claimed by the defendant that his testimony shows that this term, "thread laces," extended only to linen lace, or to linen and cotton lace combined. If not so, that the term extended only to white lace, and that black thread lace was not, commercially speaking, a thread lace. The question for you, gentlemen, is one of fact: was this article, between March, 1861, and the date of the act of 1864, and particularly at the latter time, commercially known and designated in trade in this country, especially among importers and large dealers in this country, as thread lace, or as silk lace? If it was known at the time of the act of 1864 as thread lace, then it was not dutiable as silk lace, and you will find for the plaintiffs to recover one hundred and eighty-two dollars and three cents in gold. If it was not known as thread lace, and was known commercially as silk lace, then you will find for the defendant; or, if by "thread lace" is commercially meant linen lace and cotton lace, or white lace exclusively, and not black thread lace, then you must find for the defendant. I am asked to charge you that if the jury believe that laces are generally known as of four different kinds, viz.:

linen, cotton, silk, and worsted, according to their material, or chief component material, and that the goods in controversy are not included in any of the designations commercially given to laces of linen, cotton, or worsted, but are included by their commercial name among the laces known to be and recognized as silk laces, they were subject to sixty per cent. duty, and defendant is entitled to a verdict. I have already charged you, gentlemen, that if these laces are commercially known and designated by importers and in the trade as "silk laces," then the defendant is entitled to your verdict. I do not think I can make that any more plain.

Case No. 4,114.
DUDLEY'S CASE.

[1 Pa. Law J. 302; 1 Pa. Law J. Rep. 96.]

Circuit Court, E. D. Pennsylvania. Oct. 31, 1842.

INVOLUNTARY BANKRUPTCY — PROPERTY NOT DIVESTED UNTIL DECREE PASSED—EXECUTION—INJUNCTION TO STATE COURT—JURISDICTION.

1. The court, in this case, confirm the decision of Ex parte Bennet [Case No. 1,309].

2. The property of a petitioner in bankruptcy is not divested out of him till a decree of bankruptcy has passed. Hence, till the decree has passed, the petitioner's property remains subject to execution.

[Applied in Sullivan v. Hieskill, Case No. 13,594; Ex parte Freedley, Id. 5,079.]

3. In this case, the court examine the board question, whether in any case, the district court of the United States has power to issue an injunction to stay the process of state courts, and expresses an opinion that the district court has no such power.

In a former case, Judge Randall decided that the property of a petitioner in bankruptcy, was divested out of him, only from the time of the decree of bankruptcy;[1] and accordingly, allowed an execution creditor who had made a levy after the petition had been filed, but before a decree had passed, to proceed with a sale of the property levied on. In a subsequent case the question was again brought before the court. Dudley filed a petition on the 29th of August last; but before a decree could by the terms of the act be obtained, several executions had issued against him; and on the 9th of September, he applied to the district court for an injunction on the plaintiffs in the several judgments[2] to stay proceedings thereon, and for the appointment of a receiver. Judge Randall, said that he saw no reason to change the opinion which he had expressed in Bennet's Case, and accordingly refused to grant the injunction.

At the request of counsel, the facts were then certified to the circuit court for decision; and the case was heard before BALDWIN, Circuit Justice, and RANDALL, District Judge.

Mr. Reed and Mr. Hopkins, for Dudley, submitted the case, merely requesting the attention of the court, to the case Ex parte Foster, decided some time since by Judge Story [Case No. 4,960]; a case which, it is said, was "argued at very great length by the several counsel and especially by Mr. Rand," and which is regarded by the Suffolk bar, "as entirely conclusive on the points which it embraces." That case was directly in point. It decided that the district court had power to issue an injunction to stay state process; that the decree related to the filing of the petition; and finally, that the "liens" protected by the second section of the act, were those alone where either the property or possession of the thing, passed to the creditor.[3]

Mr. Hirst and Mr. Waln, for the execution creditors.

The general creditors, contend, (however they may disguise the principle, by asserting a doctrine of relation back) that the property of a bankrupt is divested out of the bankrupt from the time of filing his petition. The question must be decided by the act of congress itself. The third section provides. that as the property, &c., of every bankrupt. &c., who shall by a decree, &c., be declared a bankrupt, shall by mere operation of law, &c., from the time of such decree be deemed to be divested out of such bankrupt, &c., and the same shall be vested by force of the same decree, in such assignee, &c. Where language is so clear, no room is left for construction. This language, clearly makes the decree the process by which the property is divested. It would be contrary to the spirit of all legislation thus to permit a debtor to hinder, delay, and baffle his creditors. It has been decided that the petitioner may withdraw his petition at pleasure. He could not do this, if his property had vested in his creditors. He could not annul an act which passed his estate to creditors, without their consent. Then, how could his property pass to an assignee not in existence? or more properly, pass out of the bankrupt, into nobody. Such a construction would present the anomaly of property without any owner. If it were stolen or taken by a trespasser, would it not be laid as the bankrupt's property? He might die,—and then would it not pass to his administrator or executor? In 3 Penn. Dig. p. 531, Judge Dickerson recognizes the dictrine of Ben-

[1] Bankrupt Act 1841, § 111 [5 Stat. 442]. And be it further enacted, That all the property, &c., of the bankrupt, &c., who shall by a decree of this court, be declared to be a bankrupt within this act, shall by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, &c., &c., and shall be vested by force of the same decree, in such assignee as from time to time shall be appointed, &c.

[2] The petition for an injunction made mention only of executions from justices of the peace; but there were in fact other executions from the courts; and the application was considered as for an injunction to creditors generally.

[3] [See note at end of case.]

net's Case. It is said that Judge Story in Foster's Case has held the contrary. The process in that case was mesne process; and it is clear that Judge Story did not intend to decide the point now in issue; or if he did he has overruled himself, for he held in Ex parte Randall [Case No. 11,550], decided in the same court, that a bankrupt may withdraw his petition, before decree, without the consent of his creditors, upon the express ground that no property had passed by the filing of the petition.

After the argument on this point, Judge BALDWIN suggested that the district court, had not, in any case, power to issue injunctions to stay the process of state courts, and referred to some of the acts of congress. The court said that they were willing to hear an argument on that point. On a subsequent day Mr. Reed referred again to the Case of Foster, and the comprehensive language of the act, and Mr. Hirst replied, taking some of the grounds which are so well presented in the opinion of the court as delivered by Mr. Justice BALDWIN. (Curia advis. vult.)

BALDWIN, Circuit Justice. Two points are involved in the motion pending in the district court, and adjourned for decision here. Both points will therefore be considered. The question which has been presented on the first argument, arises on the last proviso in the second, and the first clause in the third section of the act of 1841. That proviso is in these words: "Provided also, that nothing in this act contained, shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." A proviso operates as a limitation to the enacting part of a law, or as an exception of some case which might otherwise be embraced by it. This proviso extends to the whole bankrupt law in the plainest terms, and is most emphatic in its language, expressly excluding any construction of any part of the act, which shall annul, destroy, or impair any lien, mortgage or other security on real or personal property, which is valid by the law of the state where it is situated or found, and is not inconsistent with the second and fifth sections.

The phraseology of this proviso is peculiar, and adopted only in cases where the legislature intend that the court shall give no construction to a law, which shall in any manner affect its provisions, or defeat their declared intention. In ordinary acts of legislation, their effects are prospective in defining some rule of action, leaving it to the court to expound and apply it according to the settled judicial rules of construing statutes; it is only where they mean to be the sole expounders of their laws, that a legislature use the language, "nothing in this act shall be so construed," and where it is used, it operates on the past, the present, and the future. Thus, under the third article of the constitution of the United States, the federal courts assumed jurisdiction of suits against a state by a citizen of another state. The 11th amendment declared that "the judicial power of the United States shall not be construed to extend to any suit" of that description, and the supreme court of the United States decided, that it annulled all jurisdiction of such cases then pending, and they were summarily stricken from their docket. [Hollingsworth v. Virginia] 3 Dall. [3 U. S.] 378. As the constitution created the judicial power of the United States, and could control and annul its exercise by a declaration that it should not be exercised on the forbidden case, even after the court had acted on it for years, so congress may act on the judicial power which they create, and by a subsequent law take from the courts a power which they have assumed. In this case, however, the principle need not be carried to the same extent, for the restraint on the judicial power in bankruptcy, is imposed in the same act which brought it into existence, and this prohibition being clearly within the power of congress, is directed to the courts who are to carry the act into effect, as a rule of judicial action to which they must conform. This proviso may be viewed also as a declaration, that there is no provision in the bankrupt act which has the effect which it shall not be so construed as to have; otherwise there is a manifest absurdity in prohibiting a construction, which would be consonant with the intent of the legislature. So viewed,—in this double aspect of a limitation to the power of all courts, and a declaration of the meaning of the whole law,—this court is bounded in its power to make any order or decision in any manner contrary thereto. It cannot so construe the law, as to impair a valid lien or security.

In deciding what is a valid lien or security on property, this proviso refers us to the law of this state, by which we are to ascertain whether a judgment creditor has a lien or security on the real estate of the defendant in virtue of his judgment, or on his personalty by the delivery of an execution to the sheriff, or to a constable who makes a levy on it; and whether if such lien or security existed, it has become afterwards invalid or inoperative. If the result of this inquiry is favourable to the judgment creditor, the only remaining one is, whether any lien or security which he has obtained by the laws of this state, is invalid by reason of being repugnant to the second or fifth sections of the act; if that inquiry ends in the same result, there is an end to the exercise of any judicial power to impair the efficacy of such lien or security; we are forbidden to so construe the law. As this proviso applies to the whole law, it must be carried into the third section, the

substance of which is, that the property of the bankrupt is divested out of him by operation of law from the time of the decree, without any other act, and vests by force of the decree in the assignee appointed by the court. No words are used which indicate in the least degree, that it was intended that the decree should relate to the petition, or have any retrospective operation on the property of the bankrupt which had been, before the filing of the petition, sold or incumbered by any of his acts which was valid by the law of the state, and not invalid by provision of the bankrupt act. It would be a conclusive objection to such relation, that the law had fixed on the decree as the solemn and definite act, which divested the property of the bankrupt and vested it in the assignee; for by giving such decree a relation to the petition, it would in effect divest the property at a time, and by an act wholly different from that which the law prescribes; thus making the court the real and efficient legislator on the property and rights of purchasers and creditors who had lawful liens before the decree. The words of the third section justify no such construction, and if they could be so construed, it would be in the very teeth of that proviso in the second section which expressly prohibits it.

It would be indeed an anomalous principle to incorporate into a system of bankruptcy, that a debtor by his voluntary act of filing a petition, which he could revoke or withdraw at his pleasure at any time before a decree, should be allowed to have the option to proceed to a decree which should annul the valid liens of his creditors by relation to an act which did not bind himself; or by withdrawing his petition, leave himself free to file a new one or waive all benefit of the act. Another conclusive reason against such relation of the decree to the petition, appears by a comparison of the third section of the act of 1841, with the tenth section of the bankrupt act of 1800 [2 Stat. 19].

"That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity, against the bankrupt; and all persons claiming by, from, or under, such bankrupt, by any act done at the time, or after he shall have committed the act of bankruptcy upon which the commission issued: provided always that in case of a bona fide purchase, made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information, or notice, of any act of bankruptcy committed, such purchase shall not be invalidated or impeached." Now it must be by some new and strange rule of construing laws, that where one, by express words declares that the commissioner's assignment, shall operate by relation to the act of bankruptcy, against all persons claiming under the bankrupt subsequently, except bona fide purchasers before the commission, for valuable consideration, without notice, and the other declares, in equally express terms, that the decree shall operate from the time it is rendered, it shall yet have its effect by relation to the filing of a petition. This construction becomes the more startling, when it is considered that the third section of the act of '41, contains no exception or proviso in favour of bona fide purchasers after the petition and before the decree, whereas the tenth section of the act of 1800, by a proviso declared, that a bona fide purchase after the act of bankruptcy and before the commission, "should not be invalidated or impeached." It must then come to this, that if the decree divests the bankrupt of his property, and vests it in the assignee by relation from the filing the petition, and the law contains no exception of a bona fide purchase without notice, it is consequently cancelled and invalidated by the decree, unless the judicial legislation which interpolates the doctrine of relation into this third section, shall also legislate a proviso to their first legislation, so that the new bankrupt law shall not operate on an innocent purchaser, with a degree of severity which no court could inflict upon him by any authority under the old one of 1800. Taking the third section as it reads, no proviso for the protection of purchasers was necessary, but the enacting clause of the tenth section of the act of 1800, expressly cut out all purchases whatever under the bankrupt after the act of bankruptcy; a proviso was therefore necessary to protect the fairest. To suppose congress ignorant of the provisions of the old act, or to have given the same effect in the new by provisions wholly dissimilar, would be an imputation on their capacity or disposition to act wisely or justly. The same conclusions follow from a comparison of the two acts in relation to liens.

The proviso to the tenth section of the act of 1800, protected purchasers only, but the sixty-third section contained a proviso covering the whole law in these words: "That nothing contained in this act, shall be taken or construed to invalidate or impair any lien existing at the date of this act, upon the lands or chattels of any person who may become a bankrupt." 1 Story, Laws, 750. By the thirty-first section it is enacted: "That in the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt, (provided, there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, for more than a rate-

able part of his debt, with the other creditors of the bankrupt."

An execution executed is thus protected by the proviso in this section, if done before the time the party became a bankrupt, so that the execution creditor so protected, would recover his whole debt out of the property under execution; and by the sixty-third section, every lien existing at the passage of the law, of whatever nature, was excepted from the operation of any of its provisions. But in the third section of the act of 1841, there is not one word on the subject of liens, and this significant silence is conclusive of the intention of the legislature, to leave them under the protection of the proviso in the second section; whereas if the doctrine of relation is applied, an execution executed by a levy, and even a sale of personal property, between the petition and decree, has no protection whatever, though in such case the protection was complete under the act of 1800. If this was the intention of congress, it is unaccountable that they did not (as in the act of 1800) declare that the decree should so operate: it is equally so, that they should have inserted the proviso to the second section, if liens existing at the time were intended not to be protected, but annulled, and the proviso made senseless, as it becomes a dead letter by giving the decree a relation; for it cannot be pretended that it can relate to a lien created after the decree of bankruptcy, when the bankrupt can have no property to bind by it. Independent of these reasons against this doctrine of relation, is the injustice of its operation. It was always deemed an odious and severe feature in the act of 1800; and the old system of bankruptcy in England has been modified by their late act; and it is strange that any attempt should be made here to restore ancient rigour by a construction of a law which was intended to abolish it, and expresses that intention in language, which to this court is unequivocal in its meaning and imperative in its effects.

We now come to the question, whether the plaintiff in the judgment and execution exhibited to us, has a lien or security on the property of the petitioner, by the laws of this state. No objection has been made to these proceedings, on the ground of their want of conformity to the provisions of any act of assembly, or the decisions of the supreme court of the state. Those which have been made, are founded on the decisions of other courts in other districts, in cases arising under the bankrupt act of 1841, and on some late opinions in the house of lords, in England.[4] So far as any decisions of co-ordinate courts in other circuits are founded on the local law of the states in which they sit, they are entitled to every weight which is due to the judgment of the distinguished judges who administer the jurisprudence of a state as the courts of the states do, and we take them as judicial evidence of the local law, not to be questioned by us. So far as any decision of the house of lords in England, has declared what is at the time the common law of the country, we have no right nor disposition to gainsay it; but sitting here to administer the law of Pennsylvania, we cannot look beyond it or through it to any court which does not profess to be guided by it. Nor can we at this time of day recognize as authority, any adjudication elsewhere which contravenes the established principles of the jurisprudence of this state, as declared by its supreme court and that of the United States: we must take the common law as it existed at the time of its adoption, first by usage and afterwards by act of assembly, whereby it has the force of a statute, and is changeable only by statute. Disclaiming any right or power to improve, to amend the law, or to make it what it ought to be, we leave that to another department of the government, and follow the more humble path which leads us to the knowledge of what it is, what it has been, and what it must be declared to be, till the legislative power shall make it otherwise.

In considering the effect of a judgment on the real, and an execution on the personal property of the defendant, it has struck us with no little astonishment, that a doubt could be entertained as to the law of this state; and there is no little cause of alarm for the security of property and the rights of creditors, if it is now open to argument, whether they have a lien or security on the estate of their debtors by judgment, by execution, or by a levy, while the property is in his hands. In a common case it would be deemed sufficient to declare that a judgment is a lien on real estate from the time of its rendition, without an execution or levy during five years; that an execution was a lien on personal property from its delivery to the sheriff till its return, without a levy, and that by a levy the property of the defendant was divested, and vested in the sheriff. To even refer to decisions on the subject, or to go into any reasoning, would have been deemed as unnecessary as dangerous, lest it might be supposed that the law remained to be now settled by this court. But as the authority of the supreme court of the United States has been invoked in a late decision in another circuit (Ex parte Foster, supra)[5] in favour of the doctrine that a judgment is no lien till an execution is issued and a levy made, we cannot decline the inquiry whether that court has so declared the law, or given any opinion which can countenance a doctrine so utterly subversive of the fixed rules of property. The opinions of the supreme court in Thelluson v.

[4] Cited in Ex parte Foster, supra. [Atlas Bank v. Nahant Bank, 23 Pick. 488; Lickbarrow v. Mason, 6 East, 21, 25, note; Hammonds v. Barclay, 2 East, 227, 235; Giles v. Grover, 6 Bligh (N. S.) 279.]

[5] [See note at end of case.]

Smith, 2 Wheat. [15 U. S.] 423, and in Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 442, are supposed to sanction the principle contended for by the petitioner in this case; but so far from doing this, they recognize the existence of a lien on land by a judgment without execution, and the divestiture of the personal property of the defendant by a levy on a fi. fa.

The case of Thelluson v. Smith was a suit by a judgment creditor against the marshal to recover the proceeds of a sale of the real estate of a defendant who was a debtor to the United States on duty bonds on which the United States proceeded to judgment, execution, and sale, after the judgment of the plaintiff who had taken out no execution, he claiming the proceeds of the sale in virtue of his prior lien, the United States claiming under the 65th section of the collection law of 1799, which gave them a preference in case of the insolvency of the defendant, as was the case before the court.

In Conard v. Atlantic Ins. Co. the controversy was, whether the company could recover damages against Conard, the marshal, who had sold the goods of a debtor of the United States for duty bonds under execution issued by them, the plaintiff claiming the goods in virtue of respondentia bonds and an assignment of the bill of lading. Thelluson v. Smith bore on the case only collaterally; it depended not on the law of Pennsylvania, on the nature of the lien of a judgment, presenting the question whether the preference of the United States accruing after the judgment would cut it out, the court held that it did on the words of the act of 1799, which they quoted and then remarked, "These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity. The law makes no exception in favour of judgment creditors, and no reason has been shown, or we think can be shown, to warrant the court in making one." [Thelluson v. Smith] 2 Wheat. [15 U. S.] 425. Any reasoning of the court in Conard v. Atlantic Ins. Co. could therefore relate only to the effect of the judgment on the preference of the United States accruing afterwards, and not on its effect on the debtor or private creditors who had subsequent liens; the case turned on the construction of the act of congress, not on the law of Pennsylvania, and was decided exclusively on the former. It was admitted that the judgment was a lien on the real estate, but the court held that the action could not be maintained by the judgment creditor on the ground of his having a more general lien, without a levy on the land sold. The court considered that the case "may have been decided without touching the general question of lien." They say, "the plaintiffs were entitled to recover only upon the ground that they could establish in themselves a rightful title to the proceeds." [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 442. "The fact that a judgment creditor has a lien, does not place him in a better situation as a creditor over the general funds of the debtor in the hands of the assignee. If he possess such a lien, he must enforce it in the manner prescribed by law, and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no right to the fund until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, but not an actual interest in it." "The real ground of the decision was, that the judgment creditor had never perfected his title by any execution beyond the Sedgeley estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed the general funds of the debtor, the priority of the United States had attached against all other creditors, and that a mere potential lien on land did not convey a legal title to the proceeds of a sale made under an adverse execution. This is the manner in which this case (Thelluson v. Smith) has been understood by the judges who concurred in the decision; and it is obvious, that it established no such proposition, as, that a specified and perfected lien, can be displaced by the mere priority of the United States, since that priority is not of itself equivalent to a lien." [Greenleaf v. Queen] 1 Pet. [26 U. S.] 144.

Thus considered neither of these opinions militates with the existence of a valid lien by a judgment without a levy, as against all persons other than the United States, claiming under the priority acts of 1797 [1 Stat. 515, § 5] and 1799 [1 Stat. 676, § 65]; and even in such cases it is settled that, "This preference is in the appropriation of the debtor's estate; so that if before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither is overreached by the statute; and it has never been decided that it affects any lien general or specific, existing when the event took place which gave the United States a claim of priority. Brent v. Bank of Washington, 10 Pet. [35 U. S.] 611, 612. In Prince v. Bartlett, the United States claimed a priority over a creditor who had attached the personal property of a debtor of the United States on duty bonds, by the process of attachment authorized by the law of Massachusetts, and it was held by the supreme court, that "the property in question being in possession of the sheriff by virtue of legal process before the issuing of the writ on behalf of the United States, was bound to satisfy the debt for which it was taken; and the rights of the individual creditors thus acquired, could not be defeated by the process on the part of the United States, subsequently issued." 8 Cranch [12 U. S.] 434. The same principle has been applied to attachment in Maryland. Beaston v. Farmers' Bank of Delaware, 12 Pet. [37 U. S.] 135, 136.

These principles must be adopted in the construction of the 5th section of the bank-

rupt act of 1841 [5 Stat. 441], which provides that all creditors who have proved their debts, &c., "shall be entitled to share in the bankrupt's property and effects, pro rata without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by lien to persons who by the laws of the United States have a preference in consequence of having paid monies as his securities, which shall be first paid out of the assets," &c. It will not be pretended that this preference of debts due the United States in case of the bankruptcy of their debtor, can be given in cases where they had no preference under the acts of 1797 or 1799, in a case of insolvency. By the act of 1799, the security who pays a duty bond is put in the place of the United States as to a preference: the act of 1841 puts them on the same footing as the United States: the surety can have no preference where the United States had none, nor can the United States have a preference which is not devolved on the surety by the payment of the preferred debt. It follows that the security is the same under the last as the former laws. The distribution is of the bankrupt's or insolvent's property; not of that which he had sold, mortgaged, transferred in the course of business; on which there was a lien general or specific, or an attachment under the local law; or where by a seizure under a fi. fa. the property is divested out of the debtor before the priority occurred. And if the United States have no priority in such cases over the individual purchaser, mortgagee or creditor, it equally follows, that no right can accrue to the assignee, by a decree in bankruptcy.

In their opinion in Thelluson v. Smith, the court say: "The United States are to be first satisfied, but then it must be out of the debtor's estate. If therefore before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa. the property is divested out of the debtor, and cannot be made liable to the United States. A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799." [Thelluson v. Smith] 2 Wheat. [15 U. S.] 426. In reviewing this opinion in [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 442–444, the supreme court assert the existence of the lien by a judgment, but deny that it gives "a right to property in the land itself, but only a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment, and when the levy is actually made on the same, the title of the creditor for this purpose, relates back to the time of the judgment, so as to cut out intermediate incumbrances." Id. 441. It must consequently cut out a preference accruing afterwards. Without stopping to inquire whether by the law of Pennsylvania, a levy is necessary to consummate the lien of a judgment, it is clear that neither of these opinions denies the existence of a lien by a judgment alone; they go no further than to say, that the priority of the United States to the proceeds of the land sold, by an adverse execution, will attach, if no levy has been made on the judgment, leaving the question involved in the case untouched, as levies have been made before the decree. The language of the court is to be referred to the case before them, and the one under review, and when so referred their opinions in both cases are decisive of the present, for if a levy before the insolvency of their debtor will deprive the United States of their priority by divesting the debtor of his property, a fortiori it will prevent the right of the assignee from attaching by relation to the petition, so as to prevent the creditor of the benefit of his levy.

That the supreme court did not intend in Conard v. Atlantic Ins. Co., to deny the right of a judgment creditor, to enforce his lien against all persons and save the United States in virtue of the priority acts by a levy and sale which would consummate his title, is evident not only from the opinion delivered, but from their opinion delivered at the preceding term in Rankin v. Scott, 12 Wheat. [25 U. S.] 179, in which they say, "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered as such an act. The implied lien created by the second judgment, so long as an elegit can issue on the first. A statutory lien is as binding as a mortgage, and has the force and capacity to hold the lands so long as the statute preserves it in force." "In the case at bar, the judgment is notice to the purchaser, of the prior lien, and there is no act of the legislature to protect the purchaser from that lien." [Rankin v. Scott] 12 Wheat. [25 U. S.] 180.

How far the case of Thelluson v. Smith, is overruled on general principles by this, and on the priority of the United States, by subsequent cases, need not now be examined; it suffices for this case to say, that the opinion of the court in Rankin v. Scott, has never been questioned since, and is conclusive on this motion in regard to the effect of a lien by judgment on real property. As to personal property the law is equally well settled, and was thus laid down in this court in Thompson v. Phillips [Case No. 13,974]: "A fieri facias is plenary authority to sell chattels:

a levy under it gives the sheriff a property in them. in virtue of which he may, and is obliged to sell. 1 Salk. 323; 6 Mod. 293; [Zane v. Cowperthwaite] 1 Dall. [1 U. S.] 313; 11 Serg. & R. 304; Barnes v. Billington [Case No. 1,015]; [Wayman v. Southard] 10 Wheat. [23 U. S.] 45; after the levy his property in the goods continues, though the fieri facias is returned he may sell, the court may order him to bring the money into court: issue a distringas or venditioni exponas to compel him to sell, he becomes liable for the money by the levy, if he has made a sufficient one, the goods are his own. and he may sell when he pleases. unless otherwise ordered by the court. 5 Binn. 268, 273; [Wayman v. Southard] 10 Wheat. [23 U. S.] 45; 17 Serg. & R. 438; 2 Saund. 343, 344; 2 Ld. Raym. 1074. When he begins the execution of a fieri facias, he must complete it; his authority continues though he is out of office. 2 Bac. Abr. 366; 4 Day, Com. Dig. 234; 1 Salk. 12, 318, 323; 1 Lil. Reg. 767, 824. A distringas or venditioni gives no new authority to sell, it is merely compulsory process (1 Ves. Sr. 196; 4 Day, Com. Dig. 236; Shep. Abr. 547; 6 Mod. 295; [Zane v. Cowperthwaite] 1 Dall. [1 U. S.] 313) to execute a power resulting from the fieri facias. and the right of property by the levy. As the levy is the operative act, it must be made by an actual seizure of the goods. in whole, or in part in name of the whole; the sheriff may seize them by force (16 Johns. 288), take. and hold possession; the lien on them attaches when the writ comes to his hands till the return day, without a levy, but if no levy is made before it is past, the lien is lost, and the goods may be taken by a purchaser, or on a subsequent writ (2 Serg. & R. 157)."

Being well satisfied that such was the common law of England at the time of its adoption in this state, and that it is now the settled law of property, we deem it unnecessary to inquire whether these principles are the local law in other circuits, or have been repudiated by any decisions in England; and feeling safety in following the supreme court of this state in their exposition of its own laws, and that of the United States in their adjudication on the general principles of jurisprudence, we can have no doubt that the judgments and executions before us constituted valid liens on the property of the defendants, by the laws of this state, and are protected by them as unquestioned and sacred rights.

Our next inquiry is, whether these liens are inconsistent with any of the provisions of the second or fifth sections of the bankrupt act. It is not pretended that these liens are embraced in any part of the enacting clauses of the second section, nor can any be made in this stage of the proceeding under the fifth section: if any matter should arise before the time for distribution, to which any provisions of this section might apply, it would then be proper to examine it; but we cannot see how it can have any effect on the present motion, or on the creditors who have not proved their debts or claimed any thing under or in virtue of the bankruptcy, but claim a priority to it. We are therefore clearly of opinion, that the motion of the petitioner must be denied on the ground, that his real estate was bound by the judgments, and that his personal property was divested by the levies, whereby nothing remains on which the bankrupt law can operate, so as to impair the rights of the creditors who oppose the motion. But if the case was otherwise, we are well satisfied that the district court could not grant the injunction asked for by any authority under the judiciary, or the bankrupt act. The granting an injunction in any case is the exercise of the highest powers of a court of equity, never done in a doubtful case, or where it is not necessary for the purposes of justice which are not otherwise attainable. No case can occur where so much caution would be necessary as in interfering with the proceedings of the courts of a state, if an authority was given by express words in the law, but on a review of the whole legislation of congress on the subject, it is our opinion, that the power does not exist, and that its exercise is positively prohibited.

The judiciary act gave the district court no jurisdiction in cases in equity. The eleventh section conferred it on the circuit court. The fourteenth section gave to all the courts of the United States power to issue certain writs, and all others "not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." A writ of injunction in an appropriate case in equity, could consequently issue from the circuit court, as it was within the jurisdiction of the court, necessary for its proper exercise, and consistent with the established principles of courts of equity; but the district court could issue none, because they had no jurisdiction of such cases, nor could a judge of the supreme court do it in vacation, till the act of 1793 which enacted, "that writs of injunction may be granted by any judge of the supreme court, in cases where they might be granted by the supreme or a circuit court," but with this restriction—"Nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable notice to the adverse party or his attorney, of the time and place of moving for the same." Albers v. Whitney [Case No. 137]. Thus the law stood till the following act was passed in 1807. "An act to extend the power of granting writs of injunctions to the judges of the district courts of the United States. § 1. Be it enacted, &c. that from and after the passing of this act, the judges of the district courts of the United States shall have as full power to grant writs of injunctions, to

operate within their respective districts, in all cases which may come before the circuit courts within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of congress establishing the judiciary of the United States, any law to the contrary notwithstanding: provided, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing; nor shall an injunction be issued by a district judge in any case where a party has had a reasonable time to apply to the circuit court for the writ."

The power conferred by this act is on the district judge in vacation, and not on the district court in the exercise of its appropriate jurisdiction, which is not enlarged by this act: it must be in a case in equity in the circuit court and is granted by the district judge to effectuate its jurisdiction and as a part thereof, as is evident from the proviso, limiting its continuance to the next circuit court, and to a case where the party had not had a reasonable time to apply to that court for the writ. Thus restricted, it is most clear that the power of a district judge or court cannot enjoin state process, by any authority of law previous to the bankrupt act of 1841. The bankrupt act of 1800 gave no such power, and the present act is wholly silent on the subject, giving no color for its exercise, but on the contrary, carefully excluding it by the cautious and well defined terms of the sixth section, which specify the jurisdiction of the district court.

1. It extends to "all matters and proceedings in bankruptcy"—under this or any future act of bankruptcy—to be "exercised summarily in the nature of summary proceedings in equity;" but this does not make a matter or proceeding in bankruptcy a suit in equity, or confer any jurisdiction on any subject not pointed out in the act, as a part of the process in bankruptcy, from its inception to its close. In referring to proceedings in equity, it is to the forms and modes adopted by courts of equity in the exercise of their jurisdiction, as contradistinguished from those of the common law; a new jurisdiction is created, to be exercised by a court with limited and special powers, from whose final orders or decrees no appeal or writ of error is given; a court sui generis—the mere creature of the bankrupt act, with features unknown to our general courts, to whose action only one rule is presented, that it shall be summary in the nature of summary proceedings in equity. This clause refers to matters and proceedings in bankruptcy, as the successive steps to be taken in the progress of the application according to the directions of the act, over all which it gives plenary jurisdiction to be exercised as in analogous proceedings in equity, yet it does not give jurisdiction over all persons and things which may be affected by their proceedings in bankruptcy—as appears by the next clause:

2. "And the jurisdiction hereby conferred on the district court, shall extend to all cases and controversies in bankruptcy, arising between the bankrupt, and any creditor or creditors, who shall claim any debt or demand under the bankruptcy"—2. "To all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed." 3. "To all cases and controversies between such assignee and the bankrupt." 4. "And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." 5. "To compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent (that) the circuit courts may award, in any suit pending therein in equity." This enumeration of the specified cases and controversies wherein jurisdiction is given to the district court, necessarily excludes all others which come within neither class, otherwise this specification is utterly useless; so taking it, as a settled rule in construing laws, the present case being a controversy between a petitioner for the benefit of the act, and a creditor by judgment and execution before a decree, who claims or demands nothing under or in virtue of the bankruptcy, the court has no jurisdiction over him. Nor would they have any if an assignee had been appointed, for the controversy in either case would not be between the bankrupt and creditor claiming under the bankruptcy, or between the assignee and such creditor; for here the creditors claim adversely and paramount to the bankruptcy—not under the bankrupt act, but by their rights at common law and the law of this state. Still less are the proceedings in a state court to recover a debt by its process, either a matter, a proceeding in bankruptcy, or an act, matter, or thing to be done under and in virtue of bankruptcy. On the present motion the controversy is between a petitioner, and execution creditors, whether the latter shall be deprived of the fruits of their judgment, execution, and levy, and be compelled to claim their debt under the bankruptcy. After a decree, the controversy would be between the assignee and such creditors, who was no party before the district court, and had never in any manner submitted to its jurisdiction, by proving his debt or otherwise. Now if between such parties there can be said to be a case, a controversy, or proceeding in bankruptcy, the district court can take jurisdiction, exercise it by an order and decree, and enforce it by the same process as a circuit court can do in a case in equity; but as this is the extent to which a district court can go, they cannot enforce their orders or de-

crees by any process which is forbidden to the circuit court. That court is prohibited by the act of 1793, from granting an injunction to stay proceedings in any court of a state, and should it do so regardless of the prohibition, it would require no small degree of judicial hardihood, to attempt to enforce it by attachment against the plaintiff, the constable, the sheriff, the magistrate, the judge, or the court, who taking their position on the act of congress, would disobey the order. This reference to the power of the circuit court, is conclusive to show the meaning of the law to be, that the district court can make only such orders and decrees in bankruptcy as they may enforce by the legitimate process of a court having jurisdiction of cases in equity, and on parties within their jurisdiction. If the court has no jurisdiction, their orders or decrees are mere nullities. If this motion should be made in a suit in equity in this court, on the clearest case for an injunction according to the settled rules of courts of equity, the act of congress presents an insuperable bar to an injunction, unless there can be found in the bankrupt act, some provision which authorizes a district judge, to do what the supreme court or any circuit court cannot do, and that too without any appeal from his decision. There is not a word in the sixth section which can be tortured into such a grant of power without a gratuitous interpolation, against all sound rules of interpreting statutes, which prescribe rules of action by courts. In this case too, there is a want of jurisdiction in the district court, over the persons of the plaintiffs in the judgments, or the subject matter in controversy; creditors who stand aloof from all proceedings in bankruptcy, and make no claim under it, are not embraced by this section, it is confined to those who claim under the bankruptcy. The subject of the controversy is the right of property, acquired by legal process in state courts before a decree or the appointment of an assignee presenting the question, whether after a levy, it shall be held under a lien valid by the laws of this state, or surrendered to a receiver to be appointed by the district court. No provision is made for such a case, as that of a defendant in an execution contesting the right of the sheriff or plaintiff to property levied on by a summary order of a court other than that by whose process and officers the levy has been made; but there is in the eighth section a provision for such a case after decree and the appointment of an assignee which is the following: "That the circuit court within and for the district wherein decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district—of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt, against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property transferable to or vested in such assignee." Such suits are limited to two years from the decree on or after the cause of action accrued. This section embraces cases to which the sixth does not extend: it discriminates between proceedings in bankruptcy, and suits at law or in equity, and would meet the case before us, if the assignee was a party plaintiff or defendant: and a final judgment or decree would be examinable by an appeal or writ of error under the general provisions of the judiciary act. When we thus find that a controversy between the bankrupt and a creditor before a decree, is neither within the jurisdiction of the district court under the sixth, nor that of the circuit court under the eighth section, it is most manifest, that the parties are left in the same position in which they stood in the state court. On the appointment of an assignee, he can contest the rights of an execution creditor, or any other person who claims an adverse interest in the property of the bankrupt by a lien or purchase—but the bankrupt cannot be an actor. The provision of the eighth section is most wise and just; it puts cases at law and in equity as therein defined, (though between citizens of the same state,) on the same footing as patent and other cases arising under the laws of the United States; it submits rights of property to the decision of courts from whose final decree or judgment there may be a resort to an appellate court, and does not leave the rights of purchasers and creditors dependent on the summary order of a single judge, which is final and without revision. There can be no case which more strongly illustrates the sound policy of the law than this, for if an injunction can be granted by the district judge, to stay proceedings before a justice of the peace or an inferior court, to take property under a levy from a constable or sheriff, and deliver it over to a receiver, the same high power would be equally capable of exercise on the process of this court, or the supreme court of the state. Such a power is unwarranted by any law, and the opinion of this court will be certified accordingly to the district court.

NOTE [from 1 Pa. Law J. 302]. It will be seen, further on, that the court, in this case, decides all these points against the counsel who relied on [Ex parte Foster, Case No. 4,960] the cited decision of Judge Story; and as that decision has been considered as disturbing the security of judicial liens, it is necessary, in order to understand a portion of Judge Baldwin's opinion, to present an abstract of what has been decided and said in the case referred to. The case was this: Certain attachments on mesne process under the laws of Massachusetts, had issued against the property of Foster, who, after the issuing of the attachments, filed his petition in bankruptcy, and within six days afterwards, (and of course before the decree in bankruptcy) applied to the district judge for an injunction "against said attaching creditors, enjoining them from further proceeding against said property, &c., and requiring them to surrender the same to such assignee, as may be

appointed by this court," &c. An injunction was granted, restraining the proceeding until the final event of the proceedings in bankruptcy; and the judge says that if a decree is obtained, it will prove a bar to further prosecution of the suit. The points decided were, accordingly, that the district court had power to issue an injunction; and 2d, that an attachment under the Massachusetts attachment law was not a lien within the saving in section second of the bankrupt law. "The act of congress," says Judge Story, "for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States, than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are by the act of 1841, competent to do." "Nothing in this act contained shall be construed to annul, destroy, or impair, &c., any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively," &c. The last point depended, therefore, on the nature of this local-law attachment—a matter about which, of course, the profession out of Massachusetts is not so accurately informed. It cannot be disguised, however, that even from the authorities cited by Judge Story, this process appears to resemble very closely, what we, familiarly, call a lien, or at any rate, a "security." It resembles very much our foreign attachment lien. Thus, the sheriff takes possession of the chattels attached, which are "held as security to satisfy such judgment as the plaintiff may recover" (Rev. St. Mass. 1836, c. 90, §§ 23, 24, as quoted by Judge Story); and in commenting upon the argument of counsel, who went so far as to contend that an attachment was "a perfect, fixed, and vested lien," and gave "a vested interest," &c., in the estate attached, the judge admits that one of the authorities which he is "unable exactly to comprehend," (but to which he bows as a decision upon the local law, binding on the court) does sustain that position. His honor thinks, however, that another case (Atlas Bank v. Nahant Bank, 23 Pick. 488) shows that if such an attachment be a lien, it is not such a one as is saved by section second of the act. With great respect for the learned judge, it is thought that it could be shown that the latter decision does not overrule the former, and is not an authority for the position to which it is extended by the judge. However, if, as has been already said, the decision in Foster's Case is made on the mere ground of the peculiar nature of the Massachusetts process—and because it is unlike the lien of a judgment or execution as commonly recognized—the decision was of course, improperly pressed upon the court for this circuit, as deciding the principal case; and some portion of the court's commentary on the decision proceeds on a misapprehension of what Judge Story meant to say. While, however, Mr. Justice Story, does say, in one place, that "the case of an attaching creditor is not near so strong as that of a judgment creditor who has obtained a fi. fa. under which the sheriff has actually seized, &c.," he says in another place, "in truth, it bears a closer resemblance to the lien created by a judgment upon the real estate of the debtor," and then says, "yet a judgment creates no interest in the land," and cites Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, to sustain this doctrine. Admitting the resemblance to a lien of a judgment, the argument of the judge, appears to be, that by a judgment against real property, or by a levy on personal property, the general property of the debtor is not divested—that these remedies are not strict common law liens, i. e. liens where the claimant has actual possession of the property—in other words, that they do not constitute a property, on right in the very substance of the thing, but are merely rights to be paid out of the property before any subsequent incumbrances; or what, in common parlance Pennsylvanians call "liens." These points, (as to the first of which, it is believed there never has been any doubt,) being established, the judge proceeds to consider the second section of the bankrupt law, and says, "Now, certainly, the natural interpretation of these words 'liens, mortgages, and other securities on property real or personal,' would seem to be, that they referred to things of a like nature; or, as the maxim of the law is, each may be known from its associates. 'Nascitum a sociis.' The words may be all perfectly satisfied by treating them as referring to liens fixed and vested in the party by a consummate title, such as 'liens by contract, resting on possession or absolute by law such as pledges,' and not merely inchoate and conditional liens dependent on a mere remedial process. The term 'securities,' follows 'mortgages,' which are clearly vested rights under grant of the party, defeasible only upon a future fulfilment of some condition subsequent. * * * If we look back to the enacting clause of this same section to which the saving is appended as a proviso, we shall see that there, the enumeration is confined to 'securities, conveyances, or transfers of property or agreements made or given,' &c. * * * Now the natural inference certainly would seem to be, that the proviso is carved out of the enacting clause; and saves things ejusdem generis." Such language as this would seem to indicate what it has been regarded as declaring, that even judgments and executions before a sale, are not within the proviso; and as the attachment of Foster's goods was before even the petition filed, a discharge would divest judgments of any date.

Judge Story, it is true, says in one place: "The moment that the decree in bankruptcy is passed, it relates back for all purposes of the act, to the time of the petition; and as soon as the assignee is appointed, all the rights, titles, powers of authority of the bankrupt vest in him by relation from the said period." As however the attachment in Foster's Case, issued before the filing of the petition, the decision cannot be carried on the back of this doctrine; and if followed to results divests the lien, no matter when obtained. It is true, indeed, that this general language of the learned judge is found in company with other expressions that would perhaps render it unsafe to say that he means all that is indicated by the general language cited. Taken in connection, however, with the disregard with which the court treats the attachment, it may be thought to justify in some extent, the surprise which has been expressed. Judge Story goes on afterwards, indeed, to decide the case on what he regards as another ground—viz. that the attachment being a merely conditional lien dependent for final effect on the result of the suit, if the bankrupt obtains a discharge, the debt will be discharged likewise, and this discharge would be pleadable in bar to the attachment suit, as a plea puis darrein continuance. But does not this fact depend exactly upon the former question, i. e. whether the attachment is a "lien" as "other security," for if it be, then by the language of the proviso in section 2d, the discharge cannot in any way, "annul, destroy, or impair it."

The reporter begs, however, to refer the reader to the case itself; which, appearing to him to deal in vague, and not always consistent language, he finds himself unable, precisely to present. While as he has said, its language, in places, is, certainly, unprecise, he himself considers the decision rather as an attempt to abrogate in a particular instance, and in favour of the equitable provisions of the bankrupt law, the effect of the Massachusetts attachment process; and that to justify this, the learned judge has been urged into doctrines which are not law; and of which in fairer cases he would be the last person to make a practical application.

The court, in this circuit, as has been said, considers the case as more dangerous, and as going further.

DUDLEY (GRAHAM v.). See Case No. 5,665.

Case No. 4,115.

DUDLEY et al. v. The SUPERIOR.

SEXTON et al. v. The TROY.

[1 Newb. 176;[1] 3 Am. Law Reg. 622.]

District Court, S. D. Ohio. July 3, 1855.

MARITIME LIENS — MATERIALS AND SUPPLIES — HOME AND FOREIGN PORTS — PRESUMPTION OF KNOWLEDGE—ENROLLMENT—PRIORITIES—WAIVER OF LIEN—STATE STATUTES—MASTER'S WAGES.

1. In a controversy, in which the question is, whether a steamboat was a foreign or domestic boat, at the time the account accrued, for which the libel is filed, the enrollment, made under oath by the managing owner, pursuant to the third section of the act of congress, of the 31st December, 1792 [1 Stat. 287], requiring the enrollment to be made at the port nearest the residence of the owner, is prima facie evidence that the boat belonged to such port.

[Cited in Hill v. The Golden Gate, Case No. 6,492; Collins v. The Fort Wayne, Id. 3,012; U. S. v. The F. W. Johnson, Id. 15,179; The Nancy Bell, Id. 9,199; The Albany, Id. 131; The Nancy Dell, 14 Fed. 747.]

2. The proof afforded by the enrollment, in such a controversy, will be *held* conclusive as to the character of the boat, unless contradicted by clear evidence of the notorious residence of the owner, or owners, at a place or port other than that named in the enrollment.

[Cited in The Rapid Transit, 11 Fed. 329.]

3. When the owners of a boat reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled.

[Cited in The George T. Kemp, Case No. 5,341; The Ellen Holgate, 30 Fed. 126.]

4. The presumption of the knowledge that a boat belongs to the port of its enrollment, as to those who furnish supplies or materials at that port, is strengthened by the fact that it bears on its stern, in conspicuous letters, as required by the act of congress, the registered name of such boat, with the port to which it belongs, especially when the evidence is, that such boat made several trips weekly, to and from such port.

[Cited in The Samuel Marshall, 49 Fed. 760.]

5. As to those claiming liens on a boat, as for supplies and materials furnished under the circumstances above stated, proof that they gave credit to the boat, as of a port of another state, will not avail, unless they have used ordinary diligence to ascertain its true character, or fraudulent or unfair means have been used to mislead and deceive them, as to the place to which it belongs.

[Cited in The J. W. Tucker, 20 Fed. 131; The Woodward, 32 Fed. 639.]

6. Where a boat has been sold under an order of the court of admiralty, and the proceeds paid into the registry, and the fund is insufficient to pay all the claims against it; on a question of distribution, the claimants will be paid according to their priorities of privilege. In this case: 1. Claims of seamen for wages; 2. Material men having a lien by the general maritime law; 3. Material men having a lien by virtue of a seizure under a state law, without reference to priority of seizure.

[Cited in Srodes v. The Collier, Case No. 13,272; The St. Joseph, Id. 12,229; The General Burnside, 3 Fed. 229; The J. W. Tucker, 20 Fed. 134; The Lady Boone, 21 Fed. 733.]

7. A claimant, having an original admiralty lien, who has proceeded under a state law, in a state court, to enforce it, will be deemed to have waived such original lien, and must rely solely on the lien acquired by the seizure under the state law. He cannot resume it at pleasure, and thus be reinstated to his original rights.

[Applied in Stapp v. The Swallow, Case No. 13,305; Cited in The D. B. Steelman, 48 Fed. 5 2. Explained in The Cerro Gordo, 54 Fed. 393.]

8. For supplies furnished, or repairs made to a boat belonging to another state, there is an undoubted admiralty lien, equivalent to an hypothecation of the boat; but for repairs and supplies at the home port, there is no lien, unless given by the state law.

9. It is competent for a state to provide such a lien, and the national admiralty courts will execute a state law for such a purpose; but state legislation cannot supersede or destroy a lien acquired by the general maritime law.

[Cited in Harris v. The Henrietta, Case No. 6,121.]

10. A master of a boat or vessel has no lien for his wages as such.

[These are two cases in admiralty,—the first, Stephen Dudley against the steamboat Superior, being a libel for supplies and materials, while the second, James M. Sexton against the steamboat Troy, is a libel for wages.]

John Ganson and D. O. Morton, for libelants.

Passett & Kent and Willey & Cary, for respondents.

LEAVITT, District Judge. The question before the court in these cases being substantially the same, it is not deemed necessary to give them a separate consideration. The principles to be settled apply alike to both, and will be carried out in the decrees to be entered, although the facts of each case are not wholly identical.

In the first-named case, the libelants filed their libel in this court on the 28th of October, 1853, claiming a balance of $1,375.97, for supplies and materials furnished at the port of Buffalo, in the state of New York, averring that the Superior, during the period included in the account, was running between ports and places on the shores of lake Erie, lying in different states, and that she belonged to a port in Ohio. Many intervening claims—upwards of forty in number, and amounting, in the aggregate to $22,654.23, have been filed under the original libel, consisting of claims for seamen's wages, repairs, supplies and materials, and one by mortgage. The interveners are residents of either Ohio, or New York, with the exception of one residing in Erie, in the state of Pennsylvania. Under the original libel in

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

the case of the Troy, there are some forty interveners, all residents of Ohio and New York, whose claims amount in the whole to $17,728.11, and embrace the same classes and descriptions as those against the Superior. Without detaining to notice the previous proceedings and orders in these cases, it will be sufficient here to state, that at the April term, 1854, of this court, by the consent of all the parties in interest, an interlocutory order was entered for the sale of these boats, and directing that the proceeds should be paid into the registry, subject to the future order of this court, for their apportionment and distribution. At the succeeding October term, the marshal returned, that the Superior had been sold for $5,700, and the Troy for $6,610; the amount in each case being altogether insufficient to satisfy the claims exhibited respectively against them. From the number and diversified character of the claims presented, and the complicated questions of priority likely to arise in the distribution of the proceeds, at the October term, A. D. 1854, upon the application of the parties, the cases were referred to H. B. Carrington, Esq., as a special commissioner to inquire into and report upon the character of the various claims exhibited and the order of their priority. The commissioner, in the discharge of his duties, at the late term of this court, submitted a full and elaborate report on the various matters referred to him, which from its fullness and general accuracy, has greatly aided in the right understanding of the claims and interests of the contending parties.

The questions now before the court for its decision, arise on exceptions to the findings and conclusions of the commissioner.

The first inquiry presented, and one which most materially affects the standing and interest of these parties, in a court of admiralty, relates to the port or place to which these boats belonged, during the periods embraced in the accounts now presented as maritime claims. The commissioner has reported, as his conclusion, from the evidence before him, that from the autumn of 1852 till the 5th of June, 1853, they belonged to Buffalo, in the state of New York, and that from the last-named dates they were Ohio boats. As the result of this finding, the claimants residing at Buffalo, whose accounts run from the fall of 1852 till the 5th of June following, would be domestic creditors, and as such, would have no maritime lien on the boats, other than that given by the local laws of New York and Ohio. On the other hand the creditors resident in Ohio, whose accounts run during the time stated, would be foreign creditors, and as such, have a lien under the general maritime law. The facts on which the commissioner bases his conclusions, as to the character of these boats may be briefly stated as follows: The Superior was purchased by William H. Forsythe, at Buffalo, in the fall of 1852, and was fitted out and equipped at that place under his immediate superintendence, during the winter and early part of the spring following. It was enrolled at Buffalo, as of that port, on the 5th of March, 1853, and subsequently, on the 2d of May following, as of the same place. These enrollments were made by Forsythe, the principal owner, under oath, in accordance with the third section of the act of congress of the 31st of December, 1792, which requires among other things, that the enrollment shall be made at the port nearest the residence of the owner. Forsythe, at the time of the enrollments, had the sole management of the boat; his co-proprietor residing at Cleveland, in the state of Ohio. After it was equipped and enrolled, as required by the act of congress referred to, the name was put on its stern, as follows: "Superior, of Buffalo." Early in June, 1853, it ceased to run to Buffalo, and from that time was employed in running from Cleveland and Toledo in Ohio. The Troy was also enrolled at Buffalo, the 26th of October, 1852, as of that port, upon the oath of Forsythe, as the managing owner, having at the time an interest of three-fourths in the boat; the other fourth being owned by a resident of Buffalo. Upon the stern the words, "Troy, of Buffalo," were conspicuously painted. It had been previously enrolled as of Toledo, Ohio; changes in the enrollment having been made after the purchase by Forsythe and his co-owners. In October, 1853, both the boats were mortgaged by Forsythe, and the mortgage was recorded at Buffalo.

In addition to the foregoing facts, bearing directly on the question of the character of these boats during the period referred to, the depositions of several witnesses were taken, in relation to the residence of Forsythe, the principal and managing owner of the boats. From these depositions, it appears, that Forsythe at the time was an unmarried man, of somewhat irregular habits; and although his parents resided in Ohio, he seems not to have had any fixed or notorious residence. It is not strange, therefore, that there should be some conflict in the evidence, touching his residence. I do not propose to analyze this evidence with a view to show in what direction the scale preponderates. It is sufficient to state, that in so far as Forsythe may be deemed to have had any place of residence during the period in question, the weight of the evidence sustains the conclusions of the commissioner, that it was at Buffalo. It is true the oral testimony of Forsythe on the hearing, if accredited, would lead to a different result; but, for reasons not necessary to be stated, but which will be obvious to those acquainted with the facts, the court cannot do otherwise, than to view his statements as wholly unreliable. Under the circumstances of this case, it is clear the enrollments of these boats are prima facie evidence, that they belonged to the port of

Buffalo at the time of their registry. It is true, in controversies between the owners of a vessel, involving a question of title merely. the enrollment is not even prima facie evidence. When offered to show title or proprietorship in the person making it, it is wholly inadmissible as evidence, for the reason that it is proof only of his acts, and cannot be received against other parties. But, upon an incidental question, not affecting the title of the parties, it is competent evidence; and unless contradicted by clear evidence, will be held conclusive as to the port or place to which the vessel belongs. Evidence of the notorious residence of the owner, at a place different from that stated in the enrollment is doubtless admissible, and may be available in contradiction of the enrollment. But, in this case, there is no proof for which this effect can be fairly claimed. In the case of Tree v. The Indiana [Case No. 14,165], the enrollment seems to have been regarded as conclusive evidence of the port to which the vessel belonged. The facts were briefly these: The vessel was built and owned in New Jersey, and was enrolled by the owners at Egg Harbor, in that state, as of that port. Subsequently, a citizen of Philadelphia purchased a part of the vessel, and, on this change of ownership, it was enrolled at that place and as of that port; the other owner still residing in New Jersey. It was insisted that it belonged to that state; but the court held, that from the date of the enrollment at Philadelphia, the vessel was of that port, and not of the port in New Jersey, where a majority of the owners resided. It is urged, however, that the creditors of these boats, residing at Buffalo, aided in the repairs, and furnished supplies and materials, under the belief that they were foreign and not domestic boats, and that they are to be regarded, in a controversy touching their interests as creditors, as having the character which they supposed them to possess. This is doubtless the true doctrine, if fraud or unfair means have been used to lull the vigilance of the party giving the credit, or mislead or deceive him, in respect to the real character of the boat or vessel. There is, however, no evidence in this case. that any such means were resorted to. It is true a card purporting to have been issued by Forsythe and another person, announcing that they had commenced the forwarding and commission business at Cleveland, in the state of Ohio, has been offered in evidence. It is not material to decide whether this can be received as evidence, unaccompanied with proof bringing home the knowledge of such business arrangements to the persons giving the credit at Buffalo. There is no proof of this character offered, and no ground therefore for the inference or presumption, that the card referred to could have misled them in reference to the character of the boats as foreign or domestic. The enrollments of the boats were of record in the custom-house at Buffalo; and slight diligence would have enabled those interested to know to what port or place they belonged. Besides, these boats during that part of the season of navigation in which they were engaged in the Buffalo trade, arrived at, and departed from that port, several times every week, bearing on their sterns the significant announcement, and giving to all a standing notification that they belonged there.

The evidence, therefore, clearly warrants the conclusion that these boats did, in legal estimation, belong to Buffalo up to the 5th of June, 1853, when it was notorious they were wholly withdrawn from that trade, and were thenceforth, during that season, employed between ports and places within the state of Ohio. As a consequence, those who aided in repairs, or furnished supplies and materials at Buffalo, prior to the 5th of June, can be viewed, under the circumstances, in no other light than as domestic creditors, and as such, have no other lien, other than that given by the statutes of New York and Ohio. Subsequent to that date, they occupy the position of creditors of foreign boats, and their rights as such will be recognized and enforced. And, as a further result, the Ohio claimants, whose accounts date from the time of the enrollments of these boats to the 5th of June, 1853, occupy the standing of creditors of foreign boats, and as such, have a clear admiralty lien, which will be enforced as to those who have not waived such lien by resorting to the local law of Ohio for the recovery of their claims. From the report of the commissioner, it appears that many of the Ohio creditors who, in accordance with the conclusion just stated, had a clear maritime lien on the boats, independent of that given by the local law, have proceeded to obtain seizures of the boats under that law, and by process from the state courts. They have included in their claims, not only materials, supplies, etc., furnished those boats, while they were, to them, boats of a home port, but also such as were furnished while they were of a foreign port. I have found no reported case settling decisively the effects on the right of a party having an admitted admiralty lien, who voluntarily waives that lien, and resorts to the local law for his indemnity and protection. There can be no question of his right to do so; but I suppose, in analogy to the doctrine of waiver, as applicable to other cases, that the party thus abandoning his maritime lien, as before stated, cannot resume it at pleasure, and thereby be reinstated in his original rights. Without knowing how or to what extent this principle may affect the interests of the numerous claimants in these cases, I am inclined to sustain it; and the decree to be entered will be framed accordingly.

In this posture of these cases, the important question arises, on what principle is the distribution of the proceeds in the registry to be made? Concerning the claims for seamen's

wages, there is no controversy. It is conceded they must be first paid out of the funds on hand. The next class in the priority of privilege are the material men. As before stated, some of these are residents of Ohio, some of New York, and one of Pennsylvania. Some claim as the creditors of a foreign boat, and rely on their general admiralty lien; and some claim under liens acquired by virtue of the laws of Ohio. The proceeds in the registry, it appears, will not pay more than fifty per cent. of the claims reported by the commissioner as constituting liens on the boat. After paying seamen's wages, the commissioner has adopted the conclusion that the material men, whether having original admiralty liens, or liens acquired by seizure under the statute of Ohio, occupy the same rank of privileges, and must be paid pro rata, so far as the proceeds will reach. And this view is concurred in by the proctors representing a large number of the claimants. The question here indicated is certainly one of great interest, and I regret to say, I am aware of no authorities bearing directly on it. In some of its aspects, as applicable to the present case, the pro rata rule of distribution insisted on seems just and equitable; and I would cheerfully adopt it, if it did not conflict with what I suppose to be the settled doctrines of the maritime law. I am not prepared for, and therefore shall not attempt an extended discussion of the principles involved in the inquiry before stated. I shall content myself with a very brief statement of some of the reasons which occur to me against placing all the material men who are claimants in this case on a footing of equality, and applying to all the pro rata rule of distribution. It is obvious to me that there is a clear distinction between those claimants for repairs made, or supplies and materials furnished to these boats, as boats of a foreign port or state, for which a lien or privilege attaches by virtue of the general maritime law, and those which exist only by seizure under the local law of a state. The former have their origin in the fact, or the presumption of the fact, that the credit is given, not to the owner or master, but to the vessel; and by the admitted doctrine of the maritime law, it attaches from the time the credit is given, and is equivalent to an express hypothecation of the vessel. It adheres to the res as a subsisting and efficient lien, wherever it goes, and into whosesoever hands it may pass. Not so, however, in regard to credits given in a home port. These are supposed to be on the credit of the master or owner, and do not import a lien on the vessel, unless provided by express legislation of the state in which the credit is given, and on grounds unknown to the general maritime law. The right of a state thus to legislate has long since been conceded by the highest courts of the Union; and it is equally well settled, that when such a lien is created by a state law, it may be enforced in the admiralty courts. But I am not aware that it has been anywhere admitted that state legislation can interfere with, supersede or destroy a right or lien previously acquired under the national maritime law. On the contrary, the existence of such a power in the states has been strongly denied. They may declare that a lien shall exist in cases designated, and provide for its enforcement by a seizure in rem; but, clearly, the lien so acquired must be subordinate to those existing before, in favor of other parties. Under the water craft law of Ohio, there is no lien, till after the seizure of the thing. To hold that this lien places the attaching creditor on a footing of equality with one who has an admitted maritime lien on the same vessel, would be virtually to set aside the claim of the latter, and wholly to defeat his right. Such, at least, in cases like the present, where the proceeds of sale are not sufficient to pay all the claims against the vessel, would be its virtual effect. I cannot suppose that such a result was intended by the Ohio statute; but if admitting of such a construction, it implies the exercise of a power by the legislature, in conflict with the constitution and laws of the United States.

But, without pursuing this subject further, I will state, as the result of my reflections on the question stated, that in determining the mode of distribution of the funds in the registry, there must be a discrimination in favor of those claimants who have a subsisting maritime lien, and those who subsequently acquired liens by seizure under a state law. There is certainly a fallacy in the argument by which the conclusion is reached, that because those having these statutory liens, are material men, they are to have the same priorities of privilege as those who have previous maritime liens. The origin and nature of these liens, must be regarded in fixing on a rule by which distribution of the proceeds shall be made. Such I understand to be the rule sanctioned by the learned judge of the district court of Maine, in the case of The Paragon [Case No. 10,708]. He says, "Where all the debts hold the same rank of privilege, if the property is not sufficient fully to pay all, the rule is, that the creditors shall be paid concurrently, each in the proportion to the amount of his demand. But, when the debts stand in different ranks of privilege, then the creditors who occupy the first rank, shall be fully paid, before any allowance to those who occupy an inferior grade." Being as I think, warranted in the conclusion, "that the class of claimants, in whose favor there existed a present valid maritime lien, are entitled to a priority in the disposition of the funds in the registry, I shall decree, that such be first paid, without reference, as between them, to the order of time in which their claims respectively accrued. After excluding those claimants who have abandoned their maritime liens, by resorting to seizure under a state process, there will be but a small number,

occupying the first rank of privilege, among the material men. It appears, however, from the analysis of the claims submitted by the commissioner, that there are some of this description. These will be ascertained by reference to the report; and full payment will be decreed to them, so far as they have admiralty liens. The claim of George F. Morton, of Erie, Pennsylvania, the boats being foreign to him, will be included in the class of privileged claims to be first paid. The claims for seamen's wages, and the preferred class of material men being provided for in the decree, those who have acquired liens by seizure under the laws of Ohio, will constitute the next class. These will be paid pro rata, from the funds remaining, without reference to the order of time in which the seizures were made. It is proper to notice that the claim of James M. Sexton, the original libelant in the case of the Troy, embraces an account for wages, as master of the boat, and also as mate. It is clear, that upon no principle has the master a lien on the vessel for his wages. This part of the claim is therefore rejected, and the decree will embrace only the amount due him for wages as mate.

These are the only material points presented on the exceptions to the report of the commissioner. A decree in each of the cases will be entered in accordance with the principles before stated. The libels filed by interveners having neither an admiralty lien or a lien by seizure under the Ohio statute, are dismissed at the costs of the libelants.

DUDLEY S. GREGORY, The. See Case No. 537.

Case No. 4,116.

DUER v. SMALL et al.

[4 Blatchf. 263;[1] 7 Am. Law Reg. 500; 17 How. Pr. 201.]

Circuit Court, S. D. New York. Feb. 8, 1859.

TAXATION—TAX ON BUSINESS OF NON-RESIDENTS—CONSTITUTIONAL LAW.

1. The law of the state of New York (Laws 1855, c. 37) which provides that all persons doing business in the state as merchants, bankers or otherwise, and not residents of the state, shall be assessed and taxed on all sums invested in said business, the same as if they were residents of the state, is not a violation of the constitution of the United States, or otherwise illegal or void.

2. The provision of such law, that the tax on the personal estate of such non-residents may "be collected from the property of the firms, persons or associations to which they severally belong," cannot, on a bill filed by a non-resident member of a firm doing business in the state, to restrain the collection of such tax, to which bill the other members of the firm are not made parties, be questioned as to its validity.

3. A portion of a law may be invalid, while another portion of it is valid.

In equity. The plaintiff, who was a resident and citizen of the state of New Jersey, and had been such since the month of January, 1855, was, during all that time, engaged in the business of banking in the city of New York, as a partner in the firm of James G. King & Sons. The defendant Small was the receiver of taxes in and for the city and county of New York. The law of the state of New York (Laws 1855, c. 37) provides, that all persons doing business in the state of New York, as merchants, bankers, or otherwise, and not residents of the state, shall be assessed and taxed on all sums invested in said business, the same as if they were residents of the state. Residents and non-residents, with respect to taxes on personal property invested in business in the state, are put on an equality. The plaintiff was assessed and taxed upon his personal property invested in his said business in the city of New York, in the years 1855, 1856, and 1857. The amount of those taxes was about $1,400. He refused to pay them. He alleged, in his bill, that the law of the state of New York was in violation of the constitution of the United States, and was otherwise illegal and void, and prayed for an injunction restraining the defendant Small, and others who might claim authority to act, from issuing any warrant or other instrument, and from taking any steps, for the collection of said taxes, and from levying upon any goods or chattels to satisfy the same. The defendants demurred to the bill.

J. C. Bancroft Davis, for plaintiff.

Abraham R. Lawrence, Jr., for defendants.

INGERSOLL, District Judge. Taxes are a portion that each individual gives of his property, in order to secure or have the perfect enjoyment of the remainder. Governments are established for the protection of persons and property within the limits of the state; and taxes are levied to enable the government to afford or give such protection. They are the price or consideration paid for the protection afforded. When the [person][2] of an individual receives the protection of the state by its laws, it is right that he should afford to the state, in the way of taxes, a recompense or consideration for such protection; for, otherwise, that protection could not be extended to him. Without taxes, the state would be powerless to afford protection; and, when the property of an individual receives the protection of the state, it is equally right that the property protected, no matter whether it be real or personal, should in such way yield a recompense or consideration. The owner of property within the limits of a state, no matter whether the property be real or personal, and no matter where the owner has his domicil, has a right to call upon the government of the state to protect such property

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

[2] [7 Am. Law Reg. 500, gives "property."]

by its laws and its officers acting under such laws. But such protection cannot be afforded, unless means, by the way of taxes, are furnished to afford the protection. And taxes are no more to be levied upon the property of the resident to protect the property of the non-resident, than taxes are to be levied upon the property of the non-resident to protect the property of the resident. The property of a non-resident within the limits of a state, whether it be real or personal, is equally protected by the laws with the property of a resident. There would appear, therefore, to be no good reason why it should not equally pay in taxes for such protection—no good reason why the non-resident, with the resident, should not give a portion, in order to secure the perfect enjoyment of the remainder.

The laws of New York, like the laws of all the states in the Union, declare that all real estate within the state, by whomsoever owned, shall be taxed. The laws of the state, by virtue of which the taxes in the bill complained of were imposed, declare, that all personal estate invested by a non-resident owner in business within the state, (and who, by such investing, calls upon the state for protection to such property,) shall be assessed and taxed the same as if it were so invested by residents—that all personal property invested in business within the state shall pay alike for the security and protection afforded it by the government; and means are provided by the laws to make it pay for such security and protection.

If a non-resident does not wish to pay for such security and protection, he can withdraw his personal property from the state, and thus free himself from such payment. There is no law which compels him to put his property under the protection of the laws of a state of which he is not a citizen or resident. But, while he asks and demands protection from the laws, there is no good reason why he should not pay for it—no good reason why he should demand that the property of the resident should pay for it. And there is no higher law of the United States which gives a non-resident a right to demand that the property of the resident citizen should pay for the protection afforded by the laws to the property of the non-resident citizen. The equal "privileges and immunities," secured to "the citizens of each state," in the several states, does not demand such a requirement as this.

With respect to real estate, the non-resident cannot withdraw it from the state, even if he does not like the law, but is compelled to let it remain within the limits of the state where it is taxed. The superior law of the United States, which forbids the imposition of duties by a state upon property imported from a foreign country, does not forbid the state, after it has been imported and has become mixed with other property in the state, and thereby requires the protection of the laws of the state, from exercising the right to require that such property, by whomsoever it may be owned, shall pay for the protection afforded it.

It is admitted by the plaintiff, that the real estate of a non-resident is liable to pay, in taxes, for the protection afforded it by the state; and the chief reason urged why personal estate is not subject to the same rule is, that the rule of law is, that personal estate follows the person of the owner, and that, therefore, it may be taxed in the state where the owner is domiciled. There is no allegation in the bill that the personal estate of the plaintiff, invested by him in business within this state, has been taxed in New Jersey, the state of his domicil. But, if it were so taxed, it would not follow that it cannot be taxed in the state where it actually is, and where protection is actually afforded it. If a non-resident owner of real estate should be taxed in the state of his domicil on an assessment of what he was worth, which included the value of the real estate which he owned in another state, or if he should be assessed upon his income, which included the rent of such real estate, that would be no good reason why the state in which the real estate was, and which actually afforded the protection of its laws to it, and by which protection he would be enabled to receive rent, should not have the right to compel such real estate to contribute to the expense and cost of such protection actually afforded.

Bank stock is personal estate. According to the rule of law, it follows, with all other personal property, the person of the owner. Such stock, whether owned by a resident or a non-resident, is usually taxed in the state where the bank is located. It is believed that laws taxing such stock are not obnoxious to the charge of being opposed to any constitutional law, either state or national. It would seem to be enough that the property of a non-resident, whether that property be real or personal, should be put upon an equality, in respect to taxation, with the property of a resident, without requiring that it should have greater privileges.

The taxing power of a state is one of its attributes of sovereignty, and where there has been no compact with the federal government, or cession of jurisdiction, for the purposes specified in the constitution, this power reaches all the property and business within the state. Nathan v. Louisiana, 8 How. [49 U. S.] 73, 82. In the case of Catlin v. Hull, 21 Vt. 152, it was held, that the personal property of a non-resident, in a state where he was not domiciled, might be taxed in such latter state.

The law of New York prescribes that the tax on the personal estate of such non-residents may "be collected from the property of the firms, persons or associations to which they severally belong." It is not necessary to consider this portion of the law,

although its invalidity is alleged by the plaintiff. No one but the plaintiff complains of it. Admitting, for the purpose of the argument, that James G. King and the other individuals of the firm of which the plaintiff is a member, could justly complain of this particular mode prescribed for the collection of the tax against the plaintiff, if it should be attempted to be followed, on the ground that it is objectionable, as being opposed to the fundamental law, yet they make no complaint by this bill. They may never have any cause of complaint. They are not parties to this bill. The question is—has the plaintiff any just cause of complaint against this law, or the manner in which the tax has been assessed against his personal property in the state, by virtue of its provisions? The question is—can he resist the payment? A portion of a law may be invalid, while another portion of it is valid. An invalid provision of a law will not affect another and distinct provision which is valid.

Without going into the question, therefore, whether James G. King and the other members of the firm, (excepting the plaintiff,) would have any cause of complaint if the tax should be collected from their property, I hold that the allegations in the bill are not sufficient to justify the court in interposing in favor of the plaintiff, by injunction. The bill, must, therefore, be dismissed.

Case No. 4,117.

In re DUERSON.

[13 N. B. R. 183.][1]

District Court, D. Kentucky. 1876.

CONSTITUTIONALITY OF BANKRUPT LAW—UNIFORMITY — ADOPTION OF STATE EXEMPTION LAWS—EXEMPTIONS.

1. A bankrupt law which is not uniform is void. No law can be uniform which prescribes rules for one state different from those prescribed for another.

2. Congress in adopting the exemption laws of a state as part of the bankrupt law [of 1867 (14 Stat. 517)] cannot dispense with any of the limitations imposed by that law.

3. Under the laws of Kentucky an exemption of land cannot be allowed as against debts contracted before its acquisition.

4. The right of exemption must exist, if at all, at the date of the commencement of proceedings in bankruptcy.

5. Under the laws of Kentucky, a bankrupt is not entitled to an exemption of an undivided interest in land on which there are no improvements, appurtenances, or dwelling houses, although he has expressed an intention to make it a homestead.

On certificate of register in bankruptcy.

By Wilbur F. Browder, Register:

Thomas Duerson, a citizen of Todd county, Kentucky, died intestate November 26, 1873, leaving certain real and personal property which descended to his seven adult children and heirs-at-law, of whom George T. Duerson, the bankrupt, was one. On the 27th day of December, 1873, the heirs-at-law met upon the premises in Todd county, and agreed upon a parol division of the real estate among themselves. No deeds of partition were made; a mere verbal agreement was entered into, whereby each of the parties in interest was to receive certain particular portions of the three hundred and four acres of land which had constituted the farm of their deceased ancestor. On the 27th day of January, 1874, this inchoate division was formally confirmed and perfected by the execution of proper deeds of partition by and to all the parties concerned, and by these conveyances eighty-eight acres of unimproved land were allotted to the bankrupt and his feeble-minded brother, Isaac Duerson, for whom the bankrupt was then and is now acting as a quasi committee. The conveyance was to them jointly, but it was verbally understood at the time that the western moiety of the land was the special property of the bankrupt, while the eastern half should belong to Isaac. The deed under which these parties held contained no such stipulation, the grant being to the two jointly, without any limitations as to the terms of any future settlement between the bankrupt and his brother. At the time of the ancestor's death —November 27, 1873—the bankrupt was a bona fide housekeeper, with a family, near Whippoorwill, in Logan county, Kentucky. On the 12th day of January, 1874, he proceeded to Todd county, rented a dwelling within reach of his newly acquired possession, and began to make rails with which to inclose the land. Pending these operations, his family remained in Logan county, and did not remove to the rented place, in the vicinity of the land, until March, 1874. It is in evidence that the bankrupt stated and declared at the time of the parol division of the land—December 27, 1873—that he intended to improve and occupy his quota of the land as a home for himself and family, but that he could not remove to the place until the fall of 1874. The tract of eighty-eight acres was wholly unimproved. There was no dwelling, no house or structure of any kind upon any portion of it at the date of final settlement between the heirs, on the 27th day of January, 1874. The tract was merely a severed section of the original farm of the intestate. Duerson filed his voluntary petition in bankruptcy in this court on the 23d day of January, 1874, and was thereupon duly adjudged a bankrupt. Charles S. Grubbs was appointed assignee of said estate, and received from the proper officer the usual assignment of the bankrupt's effects, by which conveyance the assignee became the owner of "all the estate, real and personal, of the said George T. Duerson, bankrupt, including all the property of whatsoever kind, of which he was possessed, or in which he was interested, or was entitled to have on the 23d day

[1] [Reprinted by permission.]

of January, A. D. 1874." In due time thereafter, the assignee filed his report of exempted property, in which he declined and refused to set apart and designate any portion of the eighty-eight acres of land aforesaid as a homestead for the bankrupt and his family; whereupon the bankrupt appeared by his counsel and filed exceptions to the report, and prayed for a correction thereof, for the allotment of a homestead in said land, and for all proper relief. The debts proved against the estate of the bankrupt aggregate two thousand and ninety-three dollars and twenty-one cents, all of which, except one hundred and seventy-five dollars, were created prior to June 1, 1866, and all, without exception, were contracted before the acquisition of the land now claimed as exempt. The act of the Kentucky legislature, approved February 10, 1866, commonly called the "Homestead Act," provides as follows: "In addition to the personal property exempted from execution by this chapter, there shall, on all liabilities created or incurred after June 1, 1866, be exempt from sale under execution, attachment, or judgment of any court (except to foreclose a mortgage given by the owner of a homestead or for purchase-money due therefor), so much land, including the dwelling-house and appurtenances, owned by the debtor, as shall not exceed in value one thousand dollars." Gen. St. 433. And further, "All exemptions provided for in this chapter shall apply to all persons, of any race or color, who are bona fide housekeepers of this commonwealth, but shall not apply to sales under execution attachment, or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon."

It is claimed by counsel for the bankrupt that the amendment of March 3, 1873 [17 Stat. 577], now incorporated upon and constituting part of section 5045, Rev. St. U. S., suspended the operation of the foregoing statutes, in so far as the provisions thereof are in conflict with the law of congress, and that under the present bankruptcy system, as amended March 3, 1873, none of the conditions prescribed by the local state law can be exacted of the bankrupt in order to entitle him to the benefits accruing under such state law; that the exemptions allowed by the several states as existing in 1871, must stand, while the conditions upon which those exemptions are guaranteed to the citizen are abolished and taken away by the superior power of congressional enactment; that it is wholly immaterial in this case whether the debts proved were created before June 1, 1866, or thereafter; that it is immaterial whether the debts were existing prior to the purchase of the land or the erection of the improvements.

The amendment of March 3, 1873, provides that all exemptions allowed by the constitution and laws of the several states as existing in the year 1871, shall be allowed and protected by the courts of bankruptcy, and that such exemptions shall be valid against debts contracted before the passage and adoption of such state constitution and laws, as well as those contracted after the same. In this case the exemption of a homestead was expressly allowed by the statute law of Kentucky, provided the debts against which the exemption is claimed were contracted after June 1, 1866, or were contracted after the purchase of the land or the erection of the improvements thereon. The absence of any one of these conditions is sufficient to defeat the exemption, considered with reference to the state statute alone. Congress evidently intended, by the amendatory act of March 3, 1873, to abrogate and destroy the conditions annexed to the exemption privileges by the state legislatures, and to administer the local laws, shorn of these conditions. Is the amendment constitutional? Has congress the power to do what is attempted in the amendment of March 3, 1873? Congress has power to establish uniform laws on the subject of bankruptcies throughout the United States. Const. art. 1, § 8. Uniformity is the essence of any bankruptcy law enacted by congress; and any law adopted by the federal legislature on this subject, which is not uniform in all its operations and results throughout all the states, is ultra vires, is inhibited by the organic law, and is necessarily void. No law can be uniform which prescribes rules for one state different from those prescribed for another. It seems that under the constitution, congress, in establishing a uniform system of bankruptcy throughout the United States, has the authority either to suspend all the exemption laws of the several states, and in lieu thereof to substitute one general law upon the subject of exemptions, applicable alike to all the states, or else to incorporate upon the body of the bankruptcy system the local laws of the states, as they exist, and cause them to be administered and enforced as parts of the general system. In the latter case the operation of the bankruptcy law is uniform in all its results. It changes no subsisting remedy, abridges no subsisting right, but operates alike upon all. Though some of the district judges have held that the amendment of March 3, 1873, is constitutional, I am thoroughly convinced that such a conclusion is not sustained by reason or authority. Chief Justice Waite, in Re Deckert [Case No. 3,728], expressly decided that the act was unconstitutional. He says: "The act of 1873 excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankruptcy law, but that in each state the property specified in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares by its own enactment, without regard to the

laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes to be warranted by the constitution must be uniform in their operation. This is not." In Re Dillard [Id. 3,912] the amendment was also held unconstitutional, null, and void. It is very evident, therefore, that inasmuch as the debts of Duerson, except to the extent of one hundred and seventy-five dollars, were all created before June 1, 1866, there can be no homestead allotted as against these debts. It is in proof that one hundred and seventy-five dollars of the indebtedness was contracted after June 1, 1866, but before the acquisition of the land now claimed as exempt. The statute disallows the exemption of a homestead against debts contracted before the "purchase" of the land or the erection of the improvements thereon. I think the word "purchase," as used in the context, is synonymous with the word "acquisition." In this case the land was not "purchased," but acquired by descent. At any rate, this debt of one hundred and seventy-five dollars was created "before the erection of the improvements" on the land, and this fact of itself is fatal to the claim.

If the preceding views are untenable and unsustained by authority, there is still another, and to my mind, more satisfactory reason why the bankrupt is not entitled to the relief sought. Does the record show that Duerson ever owned a homestead? The land in controversy was never occupied by him. There was no semblance of a home upon it. He owned no specified portion of the land. His highest right therein was an undivided interest. In Schedule B (1), accompanying the petition, the bankrupt describes his "interest in lands" in the following words: "Petitioner owns forty-four acres of land in Todd county, Kentucky. Petitioner is now improving same with a present and actual intention of making same a homestead for himself and family." This declaration was made January 23, 1874, the day on which the petition was prepared and filed. The substance of this declaration was made December 27, 1873, at the time of the verbal division of the land. Duerson had no conveyance to his land until January 27, 1874. Before and up to that date he had an undivided interest of one-seventh in and to three hundred and four acres of land. The verbal parceling out among themselves by the heirs was nugatory, binding on no one, until solemnly ratified by deeds on the 27th day of January, 1874. "No estate of inheritance, or freehold, or for a term of more than one year, shall be conveyed, except by deed or will." Gen. St. Ky. Four days after the commencement of proceedings in bankruptcy by the debtor, four days after the title to all of Duerson's property had fully vested in the assignee, deeds of partition were made. At that time Duerson had no right to convey. His assignee had, four days before that time, succeeded to all his rights in and to said estate. By operation of law, the title to Duerson's property vested in the assignee as of date January 23, 1874, the day on which the proceedings commenced. All participation by Duerson in the subsequent division of the three hundred and four acres of land was wholly unauthorized, and his acts could in no wise affect the rights of the assignee. The assignee had a direct, well-defined, tangible interest in the land, which the bankrupt could not jeopardize or prejudice.

The right of exemption, ex rei necessitate, exists, if at all, at the date of the commencement of the proceedings in bankruptcy. In this case Duerson owned no land in specie. His estate was without that "local habitation and a name" so imperatively demanded by the statute, and this defect cannot be cured by the mere declaration of an intention. Doubtless the intention was expressed. It is part of the original record in the case. It was followed up, after the adjudication of bankruptcy, by acts, the tendency of which was to show the good faith and honesty of the intention. A log cabin was erected on the forty-four acres specially claimed by Duerson, and he states that he ceased building for the reason that the property was in litigation. The Kentucky court of appeals, in the case of Brown v. Martin, 4 Bush. 47, decided that "the right of exemption of a homestead, under the act of February 10, 1866 [Laws Ky. 31], depends upon the actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that this right does not exist where the residence of the debtor is located elsewhere." In that case the defendant in the execution owned an undivided interest of one-fourth in and to a house and lot in Louisville, though he resided elsewhere, and while the court decided that if he had actually resided on the premises at the date of the levy of the execution, his undivided interest would have been exempted, it certainly does not decide that the statute exempts homesteads for the use of families, whose head owns as joint tenant, with others, real estate on which there are no improvements, no appurtenances, no dwelling-house. Unquestionably the bona fide intention of the debtor is of considerable value in ascertaining and settling this right, under certain circumstances, but such intention must, in order to be effectual, be followed up by something more tangible and satisfactory than its bare utterance. Temporary abandonment of property once occupied and owned as a homestead, with the continuous bona fide intention and purpose to return and reoccupy the place as formerly, will not defeat the right of exemption. But where there has never been a vested right, no mere declaration of purpose, however honest, can create it. The

statute unquestionably contemplates an actual residence. Only such land as will include the "dwelling-house and appurtenances" can be laid off to the debtor. Debts existing before the "erection of the improvements" on the land, no matter how long the debtor may have owned the land, are expressly protected, and unless there be "improvements" on the land, such debts, when transformed into the shape of executions, shall be satisfied out of the proceeds of the sale of such land. In the matter of D. B. Thompson, the district court of this district, in January, 1875, decided that "the statute exempts so much land, including the dwelling-house and appurtenances, owned by the debtor, as shall not exceed in value one thousand dollars. The object of the statute is to exempt homesteads. There is no exemption unless the debtor dwell on the land sought to be exempted, and there can be no exemption which does not include the dwelling-house. The land exempted must be one connected body, and must have on it the dwelling-house of the debtor. * * * There can be no exemption unless the debtor owns a dwelling-house, which he can claim as exempt." [Case not reported.]

In the case under consideration Duerson owned no dwelling-house; he did not reside on the land; he had never at any time resided on it; there was no dwelling-house upon it; he owned no definite, fixed situs; his property was an incorporeal interest; he had never abandoned the premises with the intention to return and occupy it as a home; his residence at the date of the commencement of the proceedings in bankruptcy was located in the adjoining county; all of his debts, except one hundred and seventy-five dollars, were created before June 1, 1866; all of them were existing prior to the "purchase" (acquisition) of the land, and before the erection of the improvements thereon; his intentions are wholly unaccompanied by those antecedent facts and circumstances, without which such declarations are worthless, and none of the terms and conditions prescribed by the statute have been complied with by the complainant in this proceeding. The exceptions of the bankrupt to the assignee's report of exempted property are overruled.

Thomas H. Hines, for bankrupt.
James H. Bowden, contra.

BALLARD, District Judge. I concur with the register, and this opinion is in entire accordance with what has been heretofore repeatedly decided by me. If that is a uniform bankruptcy law, which adopts the exemption laws of the several states just as they exist, though those laws as they exist are variant, I cannot see how it can be successfully maintained that it is any the less uniform when it gives a uniform effect to the state laws, though different from each other in their own inherent form. As the effect given by the bankruptcy law to the state exemption laws is the same in all of the states, the law is in my opinion uniform in the sense of the constitution. Situated as I am I have not had opportunity to examine the authorities referred to by counsel, or the statute which they interpret; but I am entirely satisfied that under the true construction of the Kentucky statute, and that which has been given it by the court of appeals, the bankrupt is not entitled to a homestead exemption. I do not hold that to entitle a debtor to a homestead exemption he must actually reside on the land in which he claims a homestead at the time of the issual of an execution against him, but I do hold that he must have a dwelling, a home there, which, if he has ever occupied, he has not abandoned, but to which he has a present purpose to return, or to which, if he has never occupied it, he is proceeding with the intention of occupying. But a homestead cannot, any more than a domicile, be acquired by a mere naked intention. The present purpose to erect at a future time a dwelling-house on land, and to occupy it as a home, is not sufficient to constitute a homestead in it. There must be a dwelling-house on it, which is occupied, or which has been occupied, and which has not been abandoned, or to which at least the debtor, if he has never occupied it, looks as his home. At the time Duerson filed his petition in bankruptcy there was no dwelling-house on the land in which he claims a homestead exemption. He doubtless had a purpose to erect a house on it, and to occupy it at some future time, but it was not then his home. His dwelling and home were then elsewhere. The exceptions by the bankrupt to the action of the assignee are overruled. The clerk will forward a copy of this opinion to the register.

DUFF (MAYNADIER v.). See Case No. 9,349.

DUFFEY (STEWART v.). See Case No. 13,425.

Case No. 4,118.

DUFFY v. BALTIMORE.

[Taney, 200.][1]

Circuit Court, D. Maryland. Nov. Term, 1852.

RIOTS—DESTRUCTION OF PROPERTY—LIABILITY OF MUNICIPAL CORPORATION — REASONABLE DILIGENCE TO SUPPRESS.

1. In an action against the mayor and city council of Baltimore, under a law of Maryland of 1835, c. 137, making any county, incorporated town, &c., in which a riot occurs, liable for injuries to or destruction of property, occa-

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

sioned thereby; with a proviso, "That no such liability shall be incurred by such county, &c., unless the authorities thereof shall have had good reason to believe that such riot, &c., was about to take place, or, having taken place, should have had notice of the same, in time to prevent said injury, &c., either by their own police, or with the aid of the citizens of such county, &c.; it being the intention of this act that no such liability shall be devolved upon such county, &c., unless the authorities thereof, having notice, have also the ability, of themselves, or with their own citizens, to prevent such injury; and provided further, that in no case shall indemnity be received, where it shall be satisfactorily proved that the civil authorities and citizens of such county, &c., when called on by the civil authorities thereof, have used all reasonable diligence, and all the powers entrusted to them, for the prevention or suppression of such riotous or unlawful assemblages:" *Held*, that in order to entitle the plaintiff to recover, it must be shown, by the evidence, that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority.

2. It must appear also, that the city authorities had reasonable grounds for believing that such an assemblage, too strong to be resisted without their aid, had taken place, or was about to take place, and did not use reasonable diligence to suppress or prevent it.

3. If the property was destroyed by a tumultuous or riotous meeting, the corporation is not responsible, if diligent inquiry was made, after notice that danger was apprehended, and reasonable precautions taken by the civil authorities to guard against such a riotous and tumultuous assemblage. Nor are they answerable, if the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or, from the suddenness, had not time to prevent.

4. The city authorities were not bound to place officers or guards to prevent trespasses and depredations, and are not liable to pay for any destruction, unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority, and which tumultuous assemblage the civil authorities had reasonable ground to believe would take place, for the purpose of destroying the property.

5. Even if it were proved that the property destroyed was so dilapidated as to be a nuisance, and dangerous to enter, this would be no defence to such action, as it could not be lawfully abated by a riotous and tumultuous assemblage.

This was an action on the case brought on the 27th of October, 1851, by the plaintiff, a resident of New York. The grounds of action, as stated in the narr., were: "For that whereas the said plaintiff, heretofore, to wit, on the first day of June, in the year 1849, was lawfully possessed of certain buildings, partly built of brick and partly of frame, used in the making and manufacturing of rope, and as places of deposit, which said buildings were situate within the limits of the city of Baltimore; which said buildings were, between the first day of June and the first day of August, in the year one thousand eight hundred and forty-nine, greatly injured, and to a large amount, to wit, to the amount of ten thousand dollars, by certain rioters and tumultuous assemblages of people, in the city of Baltimore, to wit, in the district aforesaid. That the authorities of the city of Baltimore, whose duty it was to have prevented the said riotous and tumultuous assemblages of people, and to have protected the said buildings from the said injury, and who had notice of the said assemblages, in time to have prevented the said injury, and who had the ability to have prevented the said injury, did not use due, reasonable and proper efforts to prevent the said assemblages, nor the happening of the said injury, but neglectingly failed to do so, and owing to the want of due care and proper attention and timely interference, on the part of the said authorities, the said injury was effected and done by the said assemblages of people. That the said city authorities had the ability to have prevented the said injury, and had notice of the said assemblages, in time to have arrested their proceedings, and to have prevented the said injury by them. And so the said plaintiff states that, by force of the act of assembly in such case made and provided, the defendant became responsible to the said plaintiff, to a large amount, to wit, to the amount of twenty thousand dollars, and therefore, he brings suit," &c.

The suit was brought under the act of assembly of Maryland of 1835, c. 137, which provides that any county, incorporated town or city, in which a riot occurs, shall be liable for the injury to, or destruction of property occasioned thereby; "provided, however, that no such liability shall be incurred by such county, incorporated town or city, unless the authorities thereof shall have had good reason to believe that such riot, or tumultuous assemblage, was about to take place, or having taken place, should have had notice of the same, in time to prevent said injury or destruction, either by their own police, or with the aid of the citizens of such county, town or city; it being the intention of this act, that no such liability shall be devolved on such county, town or city, unless the authorities thereof, having notice, have also the ability, of themselves, or with their own citizens, to prevent said injury: provided further, that in no case shall indemnity be received, where it shall be satisfactorily proved that the civil authorities and citizens of said county, town or city, when called on by the civil authorities thereof, have used all reasonable diligence, and all the powers entrusted to them, for the prevention or suppression of such riotous or unlawful assemblages."

The defendant made the following prayers to the court: "The defendant, by its counsel, prays the court to instruct the jury, as follows: 1. That the plaintiff is not entitled to recover in this case, for any damages he may have sustained, by the injury or destruction of property spoken of by the witnesses, unless they shall find, from the evidence in the cause, that such injury or destruction was occasioned by a riotous or tumultuous assembly of people. 2. That even if they shall find that there was injury or destruc-

tion of the property of the plaintiff, and that the same was occasioned by the riotous or tumultuous assemblage of people, still the plaintiff is not entitled to recover in this case, unless they shall also find, from the evidence in the cause, that the authorities of the city of Baltimore had good reason to believe, prior to such injury or destruction of property, that such riotous or tumultuous assemblage was about to take place, or had notice of its existence, in time to prevent such injury or destruction; nor then, if they shall find, from the evidence, that the civil authorities used all reasonable diligence, and exercised the powers entrusted to them for the prevention of the same, so far as it was necessary to exert such powers."

J. Nelson and Geo. M. Gill, for plaintiff.
Wm. Schley, for defendant.

TANEY, Circuit Justice. 1. In order to entitle the plaintiff to recover, it must be shown, by the evidence, that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority.

2. It must appear also, that the city authorities had reasonable ground for believing that such an assemblage, too strong to be resisted without their aid, had taken place, or was about to take place, and did not use reasonable diligence to suppress or prevent it.

3. If it was destroyed by a tumultuous or riotous meeting, yet the corporation is not responsible, if diligent inquiry was made, after notice that danger was apprehended, and reasonable precautions taken by the civil authorities to guard against such a riotous and tumultuous assemblage.

4. Nor are they answerable, if the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or, from the suddenness, had not time to prevent.

5. The city authorities were not bound to place officers or guards to prevent trespasses and depredations, and are not liable for any destruction, unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority, and which tumultuous assemblage the civil authorities had reasonable ground to believe would take place, for the purpose of destroying the property.

Verdict for the defendant.

Some evidence was offered to prove that the property was so dilapidated that it was a nuisance, and dangerous to enter. As no point was made on this evidence, it was not noticed in the opinion; but THE COURT were clearly of opinion. that, if it was a nuisance, it was no defence to this action; it could not be lawfully abated by a riotous and tumultuous assemblage.

Case No. 4,119.

DUFFY v. NEALE'S ADM'R.

[Taney, 271.] [1]

Circuit Court, D. Maryland. April Term, 1841.

EXECUTORS AND ADMINISTRATORS—PERSONAL AND REPRESENTATIVE LIABILITY FOR MONEY RECEIVED—ASSIGNMENT—AGENCY.

1. Whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable in that character to the party entitled to it.

2. If the decedent was not liable for the money in his life-time, and his administrator, after his death, receives it in his representative character, and the receipt and acquittance of the administrator discharge the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character. But the decedent must have held the property, or chose in action, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it and dispose of it in his own name.

3. In such cases, for the purposes of justice, the law permits the party entitled to consider the contract as having been an absolute assignment, and to treat the other party as his assignee, who took the property as his own, and agreed to become debtor to him for the proceeds realized from it; or to regard the contract as one of agency only, in which the property or chose in action is held by the agent, not as his own, but merely as bailee for his principal, and in which he is authorized to receive the proceeds, not as money due to himself, but as money due to the principal, and placed in his hands, subject to the order and direction of his principal.

4. Although, in such cases, either of the contracts above mentioned may have been the real one, yet both cannot exist at the same time, with reference to the same subject-matter, because they are inconsistent with each other.

5. The party entitled may elect to consider either of said contracts the true one, but he cannot proceed upon both.

6. If the party entitled to the money elect to proceed against the administrator in his representative capacity, and recovers a judgment, he cannot afterwards proceed, either at law or in equity, against the administrator, in his individual capacity, or against his individual estate, if he be dead.

TANEY, Circuit Justice. This case has been set down for final hearing, by consent, and has been fully argued by counsel on both sides; and the court have since read the bill, answer and evidence, together with the admissions made by agreement between the parties.

The case, as presented by these proceedings, is this: [John H.] Duffy, the complainant, who was an American citizen, domiciled at Buenos Ayres, shipped a cargo of hides and other property, from the port of —— to Gibraltar. on board of the American schooner President Adams, commanded by Albert P. De Valengin, a citizen of the United States. The bills of lading, and other papers relating to the cargo, were made out in the

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

name of De Valengin, as his property, in order to cover it from the Brazilian cruisers; Buenos Ayres being at that time at war with Brazil. The vessel was, however, captured and both vessel and cargo totally lost while in the possession of the captors.

After the loss, it was agreed between the complainant and De Valengin that the latter should prosecute a claim for indemnity against the Brazilian government, in his own name, claiming the cargo to have been his own property, and therefore, not liable to capture; and if he succeeded in the claim, the money, when received, to be paid over to the complainant, after deducting from it the proper charges. The claim was accordingly made by De Valengin, who died before the Brazilian government finally decided upon it. After his death, James Neale, of the city of Baltimore, obtained letters of administration on his estate, from the orphans' court of Baltimore county, and continued to prosecute the claim, until he finally succeeded. The claim upon the Brazilian government was made by Neale, as the administrator of De Valengin, and upon the ground that the cargo lost belonged to his intestate, and that he (Neale) was entitled, in his character of administrator, to receive the compensation. The indemnity was paid to him accordingly, as the representative of De Valengin, and the amount received was brought by him into his administration account, in the orphans' court, as a part of the assets of the deceased, which had come to his hands as administrator.

In this state of the business, Duffy, the complainant, sued Neale, as administrator of De Valengin, in this court, for the money recovered as aforesaid from the Brazilian government, claiming the whole amount recovered for the cargo, as due to him, after deducting reasonable expenses and commissions, and pending this suit Neale died. After his death, administration upon his estate was granted to William Ridgeway and Mary Neale and administration de bonis non, on the estate of De Valengin, to Mrs. De Valengin and George G. Belt, as stated in the complainant's bill; and upon the application of the plaintiff (the present complainant) in the suit against Neale above mentioned, a summons was issued against the administrators de bonis non of De Valengin, in order to make them defendants in that suit. They appeared accordingly, and the suit was continued against them, until it came on for trial at November term, 1836.

At the trial, the administrators defended themselves upon the ground that they had no assets of De Valengin in their hands, and also that Neale's estate, and not De Valengin's was liable to the plaintiff; and that the suit against Neale ought to have been continued, after his death, against his own administrators, and not against the administrators de bonis non of De Valengin. These grounds of defence were contested by the plaintiff, and under the instructions of the court, which are fully set out in the exceptions taken in the circuit court, and which, upon the last-mentioned point, were in his favor, the jury found that $1403.67 were due to the plaintiff from the defendant, in that suit; but that no assets had come to their hands out of which it could be paid.

It appeared at the trial, that Neale's administrators had not paid to the administrators de bonis non, the money recovered from the government of Brazil, nor any part of it; nor had assets from any other quarter come to their hands; and upon the verdict rendered as above stated, judgment was entered in the circuit court in favor of the plaintiff, which has since been affirmed in the supreme court—[De Valengin v. Duffy] 14 Pet. [39 U. S.] 281; so that the present complainant has, at this time, an indefeasible judgment against the administrators de bonis non of De Valengin, for the money received by Neale, as hereinbefore mentioned, which he has a right to enforce against any assets, which may come to their hands from this transaction, and also against any assets which may come to their hands from any other quarter.

The bill in this case was filed after the judgment had been rendered in the circuit court; and in this proceeding the complainant seeks to charge the administrators of Neale with the same debt. He now places his claim upon the ground that the money received by Neale was due to the complainant directly from the Brazilian government; that the bonds given for it by the government belonged to him, and ought to have been delivered to him by Neale; and that he has a right to the proceeds of these bonds in preference to any of the creditors of Neale; and insists that the judgment at law obtained by him against the administrators de bonis non, is no bar to his recovery against Neale's administrators, inasmuch as the said judgment has not been satisfied.

The principles which must govern this case have been decided by the supreme court. It is now settled by the decision of that tribunal, that whenever money or property is lawfully recovered or received by an executor or administrator, in his representative character, he holds it as assets of the estate, and is liable, in that character, to the party entitled to it. In other words, if the deceased was not liable to an action for the money, in his lifetime, and his administrator, after his death, receives it in his representative character, if the receipt and acquittance of the administrator discharged the debtor, the party entitled to the money may, at his election, hold him responsible, either in his personal or representative character.

This decision is founded upon principles of justice. Generally speaking, an executor or administrator is required to give security for the faithful application of the money which may come into his hands in that character;

it was so in the present instance; and Neale could not have obtained the letters, by virtue of which he was enabled to recover this money, without giving security that whatever he received in his character as administrator, should be paid to the parties lawfully entitled; and it would be manifestly unjust, if these sureties were not responsible for money recovered by him, by virtue of the letters of administration thus obtained. He acquires his representative character, and consequently, his right to receive the money, by means of the security he gives for its faithful application; and the law which confers on him the right to receive, protects, by the sureties it requires, the interests of those over whose property his letters of administration give him power.

On the other hand, it would be equally unjust, to compel the party entitled, to resort in all cases to the administrator in his representative character; for it might happen that the estate of the deceased was insolvent, and the administrator might have a personal interest of his own in increasing the fund to be divided among the creditors; and as it is his duty to know whether the money belongs to the estate of the deceased, or to a third person, he would be justly responsible in his personal character, if he carried into the estate of the deceased the money that rightfully belonged to another. The law therefore provides that the party entitled may elect to take his remedy against the administrator, either in his representative or personal character.

In all cases of the description of which we are now speaking, the intestate must have held the property or chose in action, in his lifetime, under a contract, express or implied, with the party entitled to the money, and must have been authorized to deal with it, and dispose of it, in his own name. And for the purposes of justice, the law permits the party entitled to consider the contract as having been an absolute assignment, and to treat the other party as his assignee, who took the property as his own, and agreed to become debtor to him for the proceeds realized from it; or to regard the contract as one of agency only, in which the property or chose in action is held by the agent, not as his own, but merely as bailee for his principal, and in which he is authorized to receive the proceeds, not as money due to himself, but as money due to the principal, and placed in his hands, subject to the order and direction of his principal.

Now, either of these contracts is consistent with the evidence, in a case where the documents and papers, as in the case before us, furnish primâ facie proof, that the property or chose in action belongs to the person in whose possession it is found, and who is exercising over it the rights of property in his own name; and either of the said contracts is also consistent with the evidence, in cases where a factor in possession, is authorized to deal with the property of his principal in his own name, as if he were the real owner, although there should be no transfer to him, evidenced by written documents. But although in all such cases, either of the contracts above mentioned, may have been the real one, yet both of them cannot exist at the same time, with reference to the same subject-matter; because they are inconsistent with each other. They differ in substantial and important particulars, and give a right of action against the representatives of different estates.

The party entitled may, as before stated, elect to consider either of the contracts above mentioned as the true one; and may pursue his remedy against either estate; but he cannot recover against both, because he cannot be allowed to assume the existence of two contracts, which are inconsistent with each other. Nor can he be allowed to speculate on the shances of success, and elect, in the first instance, to proceed to judgment in one aspect of the case, and afterwards resort to the other, if he finds it likely to be more profitable. He may choose between the remedies offered him against two different estates; but he cannot go against both, for the contract which enables him to recover against one, disables him from recovering against the other.

In the case now before the court, the original right of action which the complainant had, upon the contract between him and De Valengin, is merged in the judgment obtained at law. Whatever may have been the real agreement between them, the complainant cannot now go back and seek a new remedy, and try the case over again, either upon the ground that he has not recovered enough, or that the contract was different in its terms from the one which was relied upon by him at the former trial. There was but one contract between De Valengin and complainant, in relation to this claim against the Brazilian government, upon which the complainant had a right to found an action at law; and that right of action has now become a debt by judgment, and can be enforced against those only who are liable upon the judgment. The complainant could not, therefore, by a proceeding at law, charge the administrators of Neale.

His claim, upon principles of equity, would be equally untenable; for it would be evidently unjust, and would retard the settlement of both estates, and be highly injurious to the parties interested in them, if the complainant were suffered to elect one contract, and after he had pursued his remedy upon it to judgment, suddenly desist, and set up another contract, and endeavor to recover the same money from another estate, which was not liable according to the aspect first given to the contract by the complainant himself. In this case, he deliberately made his election, immediately after the death of Neale, and selected the estate which he de-

sired to charge; and after having proceeded upon that election to judgment, we can see no principle of equity or justice, upon which he can now be allowed to contradict what he before contended for, and proceed upon a contract which was thereby repudiated and disavowed, on his part, in the trial at law.

The bill must, therefore, be dismissed, with costs.

DUFFY (UNITED STATES v.). See Case No. 14,998.

Case No. 4,120.

In re DUGAN.

[2 Lowell, 367.][1]

District Court, D. Massachusetts. Dec., 1874.

EXTRADITION—COMPLAINT BEFORE JUDGE—JURISDICTION—EVIDENCE—ACCUSED NOT COMPETENT WITNESS.

1. Where there is an application for extradition, sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application: he has only to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, to certify the same to the secretary of state.

2. The treaty of extradition with Great Britain does not give the accused the right to be confronted with the witnesses against him: the evidence may be in the form authorized in the country whence it comes, and, in substance, sufficient to warrant action in the country whose action is invoked.

3. The testimony of the accused is not admissible in a case of extradition, tried by a judge of the United States, though he is sitting in a state where such evidence would be received.

[Proceeding for the extradition of J. Dugan.]

W. A. Hayes, Jr., Asst. Dist. Atty., for complainant.

C. J. Brooks, for defendant.

LOWELL, District Judge. The judge has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition to be made. The law is, that, when complaint is made on oath, the judge is to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, shall certify the same to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of the foreign governments. The requisition is to be made to the executive department, and, in the natural order of things, would be made after the evidence is taken and certified. If the authorities of the foreign government should find, on the examination of the evidence, that it does not make out a case which they choose to press, they will make no requisition. And the statute gives them two months in which to complete their action upon the matter.

A complaint was duly made to me, on oath, against the prisoner; charging him with having committed the crime of murder on one Charles Robinson, at Clare, in Nova Scotia, in October last. At the hearing, depositions taken before the coroner in the county where the offence is said to have been committed were given in evidence, with a certificate by the vice-consul of the United States at Halifax that they are duly and legally authenticated, so as to entitle them to be received in evidence to support the charge of murder, and for similar purposes, by the tribunals of Great Britain and its dependencies.

It is objected that the prisoner has the right to be confronted with the witnesses against him. I understand this objection to be founded in part upon the language of the treaty, which says that the offender shall be delivered up, only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." This refers to what may be called the degree of proof, and not to the mode and form in which it shall be given. The statutes of 1848 and 1860 take this view of the matter, and require us to admit depositions and other papers, or copies thereof, duly authenticated, if they would be received for similar purposes in the tribunals of the country where the crime was committed. This is a reasonable and almost necessary arrangement The evidence may be in form what the law of the country from which it comes authorizes, and in substance enough to warrant action in the country whose action is invoked. If this were not so, still a law of congress, constitutionally valid, must govern the courts of the United States, whether it conforms to the treaty or not.

The objection rests in part upon the language of the act of 1860 (12 Stat. 84), which authorizes the use of depositions and other papers, if they could be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped. It was argued that, by the English law, depositions taken ex parte could not be received on a trial for murder. I have not undertaken to examine the English law on this subject, with care; but my impression is, that there are many authorities which hold that such depositions, taken before the coroner at an inquest, are admissible on the trial, though those taken before a justice are not. But I know that some of the best writers on the subject condemn the practice, and I do not rest my decision upon it. The statute does not refer to evidence admissible at the final trial of the cause, but to such as would be received on a preliminary examination; and the consul has certified that these papers are so admissible, and I know of no reason to doubt it.

It is further objected that the certificate of the consul is too general; not designating the

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

papers, excepting that they are annexed, which leaves open the question whether all these papers were annexed when the certificate was attached. The depositions purport to be the original evidence given before the coroner and his jury, and taken down by him; and, besides the general certificate of the consul he gives another, that C. H. Oakes was and is a coroner, and that the annexed verdict and depositions are the originals, &c. On examination of the two certificates and the annexed papers, I think they are sufficiently authenticated. It is a question chiefly of fact, in each case, whether the authentication is regular; but I may observe that it was held in Farez' Case [Case No. 4,645], not to be essential that each deposition should be separately certified, if the court could ascertain with reasonable certainty what papers were referred to in the certificate.

The defendant's counsel intimated that he might desire to examine his client as a witness, if his evidence were admissible. In Farez' Case [supra], the learned judge held that a prisoner whose extradition was demanded under the convention with Switzerland might be examined in his own behalf, because that convention referred the courts to the laws of the country where the examination was had for their guide in conducting it, and by this reference it incorporated the criminal law of the state of New York into its mode of proceeding. No doubt the prisoner is entitled to be heard, and to produce such evidence as would be admissible here; but the admissibility of the evidence must be governed, as it seems to me, not by the laws of the state where the magistrate happens to sit, unless he is a magistrate of the state, but by those which govern his conduct in all other criminal cases. As my powers are derived from the United States, and my action is governed by acts of congress, so far as they apply, I do not feel at liberty to adopt any other rule than that which governs the courts and magistrates of the United States. I should be glad to receive this evidence, which one branch of congress has, twice at least, expressed itself in favor of admitting, but cannot find it in my power to admit it. I do not understand, however, that I am shutting out evidence of any special importance in this case. I do not wish it to be understood that I should not likewise feel bound to admit for the defendant any evidence, whether certified by the consul or not, if it were sufficiently authenticated, which, by the laws of the place where the evidence against him was taken, would be admitted for similar purposes.

It only remains to say that I deem the evidence of the defendant's criminality to be sufficient to require me to certify the same to the secretary of state. I decided in Kelley's Case [Case No. 7,655] that the crime of manslaughter is not within the treaty, and there is some slight evidence tending to show that this may turn out to be such a case; but I think that the whole evidence taken together is clearly such as would require, in a domestic case, that the prisoner should be committed on the higher charge. Indeed, I do not understand that any serious question is made on this point by the learned counsel for the defence. Certificate accordingly.

Case No. 4,121.

DUGAN v. PENTZ et al.

[2 Hughes, 66;[1] 1 Balt. Law Trans. 196; 1 Chi. Leg. News, 225; 16 Pittsb. Leg. J. 326; 1 Leg. Gaz. 22.]

District Court, D. Maryland. March, 1869.

ADMIRALTY — LIBEL IN PERSONAM FOR REPAIRS AND SUPPLIES — MORTGAGEE REGISTERED AS OWNER.

On a libel in personam in admiralty against two owners, where it was proved that one of the owners was in fact but a mortgagee of part of a vessel, though registered as an owner, and was not publicly known as owner, and credit for repairs and supplies was not given on the ground of his partnership, and he had no ostensible connection with the vessel, the libel was dismissed with costs as to that owner.

This libel [in personam] was filed to recover the value of repairs to the boilers and machinery of the steamer Massachusetts, made by the libellant in the years 1866 and 1867. The libel states that it is filed against defendants, as the owners of the said steamer, for repairs to said steamer in the years 1866 and 1867, which repairs were made at the request of the master of the said steamer. To this libel no answer has been filed by Samuel J. Pentz, but John W. D. Pentz has filed an answer, in which he states that in the years 1866 and 1867 the said boat was in the exclusive possession of Samuel J. Pentz, the then half owner, as the owner pro hac vice, and was subject to his exclusive control and management; and that Samuel J. Pentz, without permission from or consultation with this respondent, appointed the captain of said boat, and that he, John W. D. Pentz, was never in possession of said boat, and had nothing to do with its management or business, and that he never gave any authority to either the said Samuel J. Pentz or to the captain of the said boat, to run the said boat for hire, or to contract any debts for him, or on his account, or in his name, for or on account of the said boat. On the trial of this case Samuel J. Pentz testified that in 1866, and before the work was done by the libellant on said steamer, he (witness) being the owner of said steamer, and being indebted to his brother, John W. D. Pentz, in the sum of four thousand dollars, to secure said debt to his brother, executed and delivered to him an absolute bill of sale for one-half of said steamer, which was duly recorded in the custom-house at this port, and the registry surrendered, and a new registry taken out in their joint names as owners. That in June, 1867, John

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

W. D. Pentz united with him in a mortgage of said steamer to the Oldtown Savings Institution, to secure to said institution the payment of $20,000 due to it by him, the said Samuel J. Pentz. That he (witness) never told libellant that his brother had an interest in said steamer, but that he (witness) had the sole control and management of said steamer, and that it was run on his account; and John W. D. Pentz also testified that he had no dealings with libellant, that he was never in possession of said steamer, never appointed any of her officers, never had any control over said boat, and never received any of its freight or passenger-money. Also that the bill of sale was made to him by his brother, Samuel J. Pentz, to secure to him the sum of $4000 which his brother owed him, no part of which sum has ever been paid by him. It was also proved that the repairs stated in the libel were made to said steamer by the libellant, that they were necessary to enable said steamer to resume her trips, and that when said work was done the bill was presented to Samuel J. Pentz, who said the bill was right and should be paid.

J. B. Seth, for libellant.

J. Carson, for respondent.

GILES, District Judge. Upon these facts I am called upon to decide whether they show a case in which John W. D. Pentz is liable as owner of said steamer for repairs, made by the request and direction of her master. There is no evidence in this case that the libellant made the repairs on the credit of the said John W. D. Pentz, or, indeed, that he (libellant) knew when he made said repairs that John W. D. Pentz held the legal title to a moiety of said vessel, or that she was registered in his and Samuel J. Pentz's names.

Now it has been repeatedly decided, that although the conveyance of the vessel to the defendant be absolute on its face, yet even in a controversy between defendant and third parties, defendant can show that it was made to him merely to secure the payment of money due him. The evidence in this case shows conclusively that such was the character of the bill of sale executed by Samuel J. Pentz to John W. D. Pentz. John W. D. Pentz being then only the mortgagee of a moiety of said steamer, and never having taken possession, or united in the control of her, or received any of her earnings, is he responsible as owner because of said absolute conveyance and registry in his name?

Now how stands this question on principle? Why is an owner responsible for repairs to a vessel? Clearly because the captain is his agent, and whatever he does within the scope of his agency binds his principal. And whenever a case is shown in which the captain is proved not to have been the agent of the general owners, you show a case in which the general owners are not responsible. Such cases frequently occur where the vessel has been chartered and the charterer is held to be the owner pro hac vice. And no injustice is done by the adoption of this principle. For in the home port, if the material-man wishes to learn who is the owner responsible for the repairs, he can always obtain the information upon proper inquiry; and if the repairs are made in a foreign port, and are necessary and proper, and the captain ordering them has no funds of his owner to meet the same, the vessel itself is liable, unless it appears that they could be made there upon the credit of the real owner. As the captain of the Massachusetts was in no sense the agent of John W. D. Pentz, I hold that he is not responsible for the repairs of the said steamer. I am aware there has been much conflict of authority on this subject, and that it has been held by learned courts that where a party holds himself out to the world, by the title-papers, as the legal owner of the vessel, and she stands registered in his name, and the material-man who repairs her has no knowledge to the contrary, such party will be responsible as owner, although he may hold the legal title to secure him for money loaned. Such was the case of Tucker v. Buffington, 15 Mass. 479. Also the cases of Lord v. Ferguson, 9 N. H. 380, Ex parte Machel, 1 Rose, 447, and Starr v. Knox, 2 Conn. 215. But in the first-named case the party not only held an absolute bill of sale, but had taken out a new certificate of enrolment in his own name, and had erased from the stern of the vessel the name of the place of residence of the former owner, and substituted his own place of residence. And in the case in Connecticut the court was much divided, four judges holding the party liable as owner, and two holding him not responsible. The tendency of the later decisions has been to hold that the owner who is responsible is the person who, having some kind of claim or title, has the control and management of the vessel, and has the right to receive her freight and earnings. This doctrine has been sustained in the following cases: Duff v. Bayard, 4 Watts & S. 240; Blanchard v. Feaning, 4 Allen, 118 (in 1862); Howard v. Odell, 1 Allen, 85; Ring v. Franklin, 2 Hall, 19; Birkbeck v. Tucker, Id. 121; Macy v. Wheeler, 30 N. Y. 231 (in 1864); Myers v. Willis, 33 Eng. Law & Eq. 204 (afterwards confirmed in the exchequer and reported in 36 Eng. Law & Eq. 350).

There being in this case no proof of any authority in the master or other part owner to bind John W. D. Pentz, no such authority is implied from the facts that he is the registered owner of a moiety of said steamer, and that the conveyance to him is an absolute bill of sale. He held the vessel only as security, never took possession, and never, as I have before stated, exercised any control over her, or received any benefit from her earnings. The material-man under these cir-

cumstances had no right to rely on his credit. The true question is, who was the contracting party? The legal and record title does not of itself decide the question of liability for supplies or repairs to a registered vessel. The question is, as I have said, to whom is the credit given? and in the absence of proof of any special credit, the law adjudges it to have been given to the person in actual possession of the vessel, who controls her operations, receives her freight, and directs her destination. The contract in this case was made by the captain who was appointed by and is therefore the agent of Samuel J. Pentz. It is therefore Samuel J. Pentz's contract, and he alone in this action is responsible. I will therefore sign a decree dismissing this libel as to John W. D. Pentz, and give a decree against Samuel J. Pentz for the claim of the libellant with costs.

DUGAN, In re. See Case No. 4,120.

Case No. 4,122.

The DUIVELAND.

District Court, D. Massachusetts. 1866.

ADMIRALTY PRACTICE — SETTING ASIDE DEFAULT —TWENTY-NINTH ADMIRALTY RULE—ACTIONS IN REM.

1. Under the twenty-ninth admiralty rule, providing that in case of default, for not answering the libel, the court may, in its discretion, set aside such default, the defendant cannot apply to have a default set aside after a decree has been made which would give a right of appeal as from a final decree.

2. It was assumed that this and the fortieth rule apply as well to suits in rem as to those in personam.

[See Scott v. The Young America, Case No. 12,550.]

[Decided by LOWELL, District Judge. Nowhere reported; opinion not now accessible. The statement of the points determined was taken from 2 Pars. Shipp. & Adm. 401.]

DUKER (MYERS v.). See Case No. 9,989.

DULANY (CHESAPEAKE & O. CANAL CO. v.). See Case No. 2,647.

DULANY (HELLRIGLE v.). See Case No. 6,343.

DULANY (MOORE v.). See Case No. 9,758.

DULANY (MURRAY v.). See Case No. 9,-960.

Case No. 4,123.

DULANY v. The PERAGIO.

[Bee, 212.][1]

District Court, D. South Carolina. Oct., 1804.

PILOTS—EXTRA COMPENSATION.

Pilots and others, assisting vessels in distress, beyond what their mere duty requires, are entitled to compensation.

[Cited in The Wave, Case No. 17,297.]

In admiralty.

Before BEE, District Judge.

This case comes before the court as a case of salvage, but on a full investigation of the evidence, it does not seem to be altogether such. The sloop, it is true, had encountered the storm of the 8th September, and had lost her masts, with great part of her sails; but they had two on board, with one of which fixed to the stump of the mast, and a small spar, they had contrived to work her so as to bring her to anchor near Bull's inlet, on the 12th, four days after the storm. Here they were boarded by the pilot, in the forenoon of that day. The vessel was tight, and had provisions sufficient to last some time, and could have sent their boat for further supplies. There is some contrariety of evidence respecting a conversation with the pilot upon his going alongside: but it was proved that the pilotboat took the sloop in tow, and arrived with her at Charleston in the evening of the same day. It is admitted that some compensation is due, over and above the usual rate of pilotage. As no question of law arose in the case, I have consulted persons conversant in these matters, none of whom considered it as a case of salvage, but all agreed that compensation should be granted, by way of encouragement to pilots and others to do more than their mere duty, whenever circumstances might call upon them to exert themselves. Their opinion concurred with my own, that two hundred dollars, over and above pilotage, and costs of suit, would be a sufficient remuneration for this service. I decree accordingly.

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

DULANY (SHREVE v.). See Case No. 12,-817.

DULANY (U. S. v.). See Cases Nos. 14,999 and 15,000.

DULANY (VIRGINIA v.). See Case No. 16,-959.

DULUTH (U. S. v.). See Case No. 15,001.

Case No. 4,124.

In re DUMAHAUT et al.

[15 Blatchf. 20.][1]

Circuit Court, S. D. New York. July 1, 1878.

BANKRUPTCY—COMPOSITION PROCEEDINGS — PRESENCE OF DEBTOR — PREVIOUS VOLUNTARY ASSIGNMENT—ACCOUNTING BY ASSIGNEE.

1. Under section 17 of the act of June 22, 1874 (18 Stat. 182), in relation to compositions in bankruptcy, the debtor is not required to be present at a meeting of creditors called to consider a resolution to vary a composition which has been accepted.

2. Where, at such a meeting, a creditor insisted on the presence of the debtor, but the register decided otherwise, and it did not appear that information was required from the

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

debtor, nor that the creditor might have been injuriously affected by his absence, it was *held* that the absence of the debtor was no ground for refusing to confirm the proceedings.

3. Where the terms of a composition, as originally adopted, ratified a voluntary assignment previously made by the debtor under the state law, it was *held* that the creditors could, by a resolution duly passed, under the statute, at a subsequent meeting, vary such terms, by providing that such voluntary assignment should not be carried out, but that the assets should be distributed in bankruptcy, it appearing that no injury could arise to any creditor from the amendment.

4. After the confirmation of the original resolution of composition, a creditor had brought a suit in a state court, to compel the voluntary assignee to account. The district court, in the order confirming the resolution of variation, provided for the reimbursement to such creditor of his reasonable expenses incurred in such suit: *Held*, that such creditor had no right in the assigned property, which would be prejudiced by such order.

[Petition for review of an order of the district court of the United States for the southern district of New York in the matter of Edward G. Dumahaut and George Spicer.]

Wilson M. Powell, for Bull's Head Bank.
William B. Hornblower, opposed.

WAITE, Circuit Justice. On the 4th of December, 1875, the bankrupts, as partners doing business under the name of E. G. Dumahaut & Co., assigned to one Clement all their partnership property, for the equal benefit of all their creditors. The assignee accepted his trust, and entered upon the performance of his duties, in accordance with the state laws regulating the administration of such trusts. Upon the petition of certain creditors, filed on January 12th, 1876, in the district court, the two partners were adjudicated bankrupts, on September 14th, 1876. On the 18th of October following, a meeting of the creditors was held, to consider a proposition of the bankrupts for a composition. The terms proposed were twenty-five cents on the dollar, in money, payable in one, two, and three years from the date of the order confirming the composition, to be evidenced by the promissory notes of the bankrupts, for like times and amounts, the said composition to be secured and carried into effect as follows: "An adjudication in bankruptcy to be had, and an assignee chosen, the said assignee, however, to make no claim upon Percival W. Clement, the assignee under a voluntary assignment from the firm of E. G. Dumahaut & Co., for the assets in his hands, as such assignee, but the same to be administered and distributed by him, as such assignee, in all respects as if no proceedings in bankruptcy had been had, and any dividend paid by the said Percival Clement, from the said estate, over and above twenty per cent. on the dollar, to be credited upon the composition notes then next maturing," &c., &c. Pending this proposition for composition, and before any final action thereon, to wit, on February 27th, 1877, the Bull's Head Bank, one of the creditors, commenced an action in the supreme court of the state, in its own behalf, and on behalf of all other creditors, against the voluntary assignee, for an accounting under his trust. On March 19th, 1877, a receiver of the assigned property was appointed in such action, but he has never reduced any of the property to his possession. On the 5th of April, a second meeting of the creditors was held, to consider the composition, and on the 12th of May the composition was confirmed by the district court, sitting in bankruptcy. On the 19th of July, the action in the state court was referred to a referee, to hear and determine the same, but, on the same day, the district court, sitting in bankruptcy, on petition of the bankrupts, enjoined the bank from further proceedings in the action. On the 13th of October, this injunction was so far modified as to permit the bank to proceed, and, on the 27th of the same month, the referee directed that the assignee account in that action. The assignee thereupon presented his account, which has been passed, and an order of the court has been made, requiring the creditors to come in and prove their claims. Pursuant to a further order of the court in bankruptcy, made November 15th, 1877, a meeting of the creditors was held to consider the following proposed amendment to the composition: "That the composition heretofore accepted by the creditors herein, and confirmed by the court, by an order entered on the 12th day of May, 1877, be amended so as to provide that the assignee in bankruptcy herein shall make demand upon Percival W. Clement, for the assets in the hands of said Clement, as assignee for the benefit of the creditors of E. G. Dumahaut & Co.; and that the assignee in bankruptcy shall distribute the said assets in accordance with the bankrupt laws of the United States; and that any dividend out of such assets, over and above twenty cents on the dollar, shall be credited on the composition notes then next maturing; and that the said composition, in all other respects, remain unaltered, and in full force and effect." The bankrupts were not present at this meeting. The resolution for the amendment was offered by a creditor. The Bull's Head Bank was present and filed objections to the proceeding. The bank also insisted that the bankrupts should be present, but the register decided otherwise. The meeting voted in favor of the adoption of the amendment. On the 5th of February, the bankrupt court ordered a further meeting, to be held on the 15th, to further consider the matter. At this meeting the bank appeared, and still insisted upon its original protest, and filed other objections. The amendment was again approved by the creditors, and, on the 11th of March, confirmed by the court, upon the condition precedent to the taking effect thereof, that the bankrupts and the creditors who had signed the

resolution of amendment pay to the Bull's Head Bank such sums towards the reimbursement of its expenses in and about the action in the state court, as the bankrupt court should award.

The Bull's Head Bank now asks this court, under its supervisory jurisdiction, to set aside the order of confirmation thus entered. The objections relied upon, on the argument, are: (1) The absence of the bankrupts from the meeting; (2) The voluntary assignment having been ratified by the terms of the composition as originally adopted, cannot now be attacked by the creditors bound by the composition proceedings, or by the assignee in bankruptcy; (3) The bank acquired a vested interest in the general assignment by the operation of the original composition, of which it cannot be deprived without its consent. No one appears to object to the amendment, except the bank. The bankrupts are satisfied, and so are all the other creditors.

The amendment to the bankrupt act, which authorizes and regulates proceedings for composition,—Act June 22, 1874, § 17 (18 Stat. 182),—expressly provides, that "the creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions, who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceeded with in the same way, and with the same consequences, as the resolution by which the composition was accepted in the first instance."

There is nothing which, in terms, requires the debtor to be present at a meeting of creditors called to consider a resolution to vary a composition which has been accepted. His presence at the meeting to consider his own proposition is required, in order that inquiry may be made of him as to the true condition of his affairs, and information obtained from him by the creditors, to enable them to act understandingly upon the matter in hand. The law does not make it his duty to attend any other meetings, though, if summoned to appear, he should attend. The creditors may excuse his attendance at the first meeting, and, if they do, the court will not refuse to ratify the resolution on that account, unless it appears that his presence was important for the due consideration of the proposition. There is no doubt but a creditor may ask that the debtor be summoned to appear at any meeting called in the subsequent proceedings. If, however, from any cause, this request is not complied with the court will not refuse to approve what is done, unless it appears, with reasonable certainty, that information was required from him in respect to the subject-matter under consideration at the time, and that the complaining creditor might have been injuriously affected by his absence. Such a condition of affairs does not appear in this case. The resolution of amendment was proposed by a creditor and not the debtor. It had reference entirely to the manner in which the composition should be carried into effect. The avails of the property assigned had already been secured to the creditors, and the only question to be considered was as to the best mode of realizing the money. It is unnecessary to inquire whether the creditors could take the property out of the hands of the voluntary assignee without the consent of the debtor, for he does not object. Even the complaining creditor was satisfied to remove the assignee, for, in his suit, he had obtained an order that the property in the hands of the assignee be delivered to his receiver. I think, therefore, this objection is not well taken.

The other two may be considered together. The validity of the assignment is not attacked in these proceedings. The effect of what has been done is not materially different from that which has been attempted by the bank. Both parties want the property taken out of the hands of the voluntary assignee. The difference is, that the bank wants the trust administered by the receiver appointed by the state court, while the other creditors desire to have it administered by the assignee in bankruptcy. If the facts stated in the petition for review filed by the bank are true, the same creditors will be entitled to the dividends, no matter who executed the trust. As the assignment was for the equal benefit of all partnership creditors, and the bankrupt law [of 1867 (14 Stat. 517)] will distribute the property in the same way, no injury can arise from the provision in the resolution of amendment, directing the assignee in bankruptcy to make his distribution in accordance with the bankrupt law. The property is still in the hands of the voluntary assignee. The question is, who shall take it from him, the receiver in the state court or the assignee in bankruptcy. A majority of those in interest prefer it should go to the assignee in bankruptcy, and there is nothing in the law to prevent it, unless the bank, which is the only complaining creditor, will be prejudiced in respect to some interest acquired under the original composition, as accepted. All the right it acquired under the composition was to receive its dividend, upon the distribution of the proceeds of the assigned property. That right has not been taken away by the amendment.

Pending the original proposition, and before its acceptance, the bank commenced its suit in the state court to bring the voluntary assignee to an account. That it had the right to do, under the terms of composition originally proposed. That proceeding has resulted in an adjustment of the accounts and a settlement of the amount due. Provision is made in the order now under review for a reimbursement of the reasonable expenses incurred in that suit. The amount is to be as-

certained, and, no doubt, ample justice will be done in the premises. I see, therefore, no right which the bank has in the property that will be prejudiced by the order as it stands.

The order of the district court is affirmed.

[NOTE. For other proceedings arising out of the assignment in the state court, see Cases Nos. 4,125 and 4,126.]

Case No. 4,125.

In re DUMAHAUT et al.

[17 N. B. R. 517.][1]

District Court, S. D. New York. April 26, 1878.

BANKRUPTCY—PREVIOUS VOLUNTARY ASSIGNMENT—ACTION BY CREDITOR—COSTS AND FEES.

Where a voluntary assignment for the benefit of creditors had been executed by the bankrupts, less than three months before the commencement of bankruptcy proceedings; and where, pending the bankruptcy proceedings, and pending a proposed composition in bankruptcy, and before the election of an assignee in bankruptcy, a creditor had brought suit in the state court to compel the voluntary assignee to account, and had obtained the appointment of a receiver; and where an assignee in bankruptcy was subsequently elected, and the composition was subsequently amended so as provide that the assignee in bankruptcy should take possession of the estate in the hands of the voluntary assignee; and where a reference had been ordered by the bankrupt court, to determine how much, if anything, should be awarded to the creditor who had brought the suit, towards reimbursing his expenses in such suit, *held*, that such creditor would not be allowed to apply to the state court for an order directing the payment out of the estate in the hands of the voluntary assignee of the referee's fees incurred in such action.

This was a motion by the Bull's Head Bank, a creditor of the bankrupts, to modify an injunction so as to allow them to apply to the supreme court of the state for an order requiring a voluntary assignee for the benefit of creditors to pay the referee's fees, incurred in a suit brought by the Bull's Head Bank, in the supreme court, against such assignee for an accounting. On the 4th of December, 1875, Edward G. Dumahaut and George Spicer, composing the firm of E. G. Dumahaut & Co., made a general assignment, in conformity to the laws of the state of New York, to one Percival W. Clement, for the benefit of their firm creditors. On the 12th of January, 1876, and within three months after the said assignment, an involuntary petition in bankruptcy was filed against the firm of E. G. Dumahaut & Co. On the 23d of September, 1876, an adjudication was entered against the bankrupts, and at the same time an order for a first meeting of creditors to consider a proposal of composition was granted. On the 18th of October a composition meeting was held, and a composition was accepted, whereby it was provided that the debtors should pay twenty-five cents on the dollar, in one, two and three years, evidenced by their promissory notes, to be secured by mortgages on certain real estate which had formerly belonged to George Spicer, one of the bankrupts. It was also provided that an assignee in bankruptcy should be elected for the purpose of cutting off intervening liens by judgment and otherwise, so that he might convey a good title to the said Spicer, and that Spicer might reconvey to him; but it was expressly provided that the estate in the hands of the voluntary assignee should not be disturbed, but should be distributed by the voluntary assignee, as if no proceedings in bankruptcy had been taken.

After this first meeting in composition had been held, but before a second meeting had been called to consider whether the composition had been accepted in compliance with the law, and whether it was for the best interest of all concerned, an action was commenced, on the 27th day of February, 1877, by the Bull's Head Bank, in the supreme court of the state of New York, against Percival W. Clement, the assignee for the benefit of creditors, to compel him to account, and in this action a receiver was appointed, and the issues were referred to a referee, who proceeded to take testimony and to take and state the accounts of the assignee. The receiver never obtained possession of the property, for the reason that the voluntary assignee lived out of the jurisdiction of the court, being a resident of Vermont. On the 28th day of March an order was made for a second meeting of creditors in the composition proceedings, and on the 12th day of May, 1877, the final order in composition was entered directing the resolution to be recorded and the statement of assets and debts to be filed. On the 13th of June, Thomas Rutherford was elected assignee in bankruptcy, in accordance with the composition resolutions, and he proceeded to conclude the transfers of real estate provided for by the composition. In the meantime, however, the voluntary assignee for the benefit of creditors had been unable to distribute the funds, as had been provided for by the composition resolution, because of the pendency of the accounting suit in the state court, and the appointment of a receiver. It became necessary, therefore, to amend the resolution of composition, in order that the bankrupt court might take possession of the estate and distribute it, free from all claim by the receiver. On the 15th of November, 1877, an order was entered calling a meeting of creditors to amend the composition. On the 5th of December a meeting was held, and the composition amended so as to provide that the assignee in bankruptcy should make demand upon Percival W. Clement, the voluntary assignee, for the estate in his hands as such assignee, and should distribute the same under the direction of the bankrupt court. This amendment was opposed by the Bull's Head Bank, but was finally confirmed by the court on the 11th day of

[1] [Reprinted by permission.]

March, 1878, the court, however, directing that the matter be referred to the register to take testimony and report to the court as to what sum, if any, should be awarded to the Bull's Head Bank to reimburse its expenses in the state court suit. The order calling the meeting to amend the composition had enjoined the Bull's Head Bank from taking any steps to remove the property, or any of it, from the custody of the voluntary assignee into the possession of the receiver. The Bull's Head Bank now comes into court, and moves that the injunction be modified so as to allow them to apply to the state court for an order directing the voluntary assignee to pay the referee's fees, incurred in the trial of the suit.

Wilson M. Powell, for the motion.

Wm. B. Hornblower, for assignee in bankruptcy and creditors opposed to motion.

CHOATE, District Judge. These bankrupts had, before the filing of the petition, made a general assignment under the state law. A composition was proposed and accepted by the creditors at the first meeting, which provided that the property assigned should continue in the hands of the state assignee and be distributed by him. After this composition was accepted by the creditors, the Bull's Head Bank commenced an action in a state court against the state assignee to compel an account and distribution. A reference was ordered and claims proved before the referee, and a receiver was appointed; but by an order of this court all proceedings in that action have been stayed and the receiver has been enjoined from taking possession of the property assigned. These proceedings necessarily led to an amendment of the terms of the composition. A motion is now made by the Bull's Head Bank, on affidavit showing that the referee threatens to sue it for his fees, stated to be five hundred dollars, to modify the injunction staying proceedings in that action so far as to allow the Bull's Head Bank to apply to the state court to have the amount of the referee's fees determined and paid out of the assigned estate. A reference has been ordered by this court and is now pending to ascertain what, if anything, should be paid to the Bull's Head Bank for its expenses incurred in that action. I think the motion should not be granted. If there is any ground on which the Bull's Head Bank can justly claim this expense which it has incurred in that action, I think it should be determined in the same way which has been adopted in reference to its other expenses. But upon the case as it stands, the action brought by the Bull's Head Bank in the state court appears to have been not beneficial to the creditors, but very injurious to them and unnecessary. Motion denied.

[NOTE. For further proceedings relating to the voluntary assignment, see Cases Nos. 4,124 and 4,126.]

Case No. 4,126.

In re DUMAHAUT et al.

[19 N. B. R. 394.][1]

District Court, S. D. New York. Jan. 11, 1879.

BANKRUPTCY—PREVIOUS VOLUNTARY ASSIGNMENT — SUIT BY CREDITOR FOR ACCOUNTING — FEES AND EXPENSES.

A composition was accepted and confirmed, which provided that the assets, which had within three months before the bankruptcy been assigned for the benefit of creditors, should remain in the hands of the voluntary assignee and be distributed by him. Previous to the confirmation, petitioner had commenced a suit against the assignee in a state court for an accounting and distribution of the assigned property. This suit being continued and large expenses incurred, an amendment to the composition was accepted, by which the assigned property was to be delivered to the assignee in bankruptcy and distributed by him. This amendment was confirmed on condition of payment to petitioner of such sum toward reimbursement of his expenses in said suit as the court should award to be proper. It appeared that at the commencement of said suit the voluntary assignee was ready to pay a dividend but was stopped by injunction, and that petitioner reduced the assignee's claims, but had incurred large expenses for receiver's and referee's fees, and also claimed five hundred and fifty dollars as an extra allowance which it was alleged he would have been entitled to if a decree had been entered in that suit. *Held*, that, it not appearing that the assignee's claims could have been adjusted without suit, the suit was not beneficial to the creditors; that under the provisions of the original resolution the petitioner had no absolute right to have the property remain in the hands of the voluntary assignee; that no right to the cost and expenses of the suit had become vested in the petitioner; that it therefore had no interest which was secured to it under section 17 of the bankrupt act [14 Stat. 517], and was not entitled to reimbursement for the expenses and costs of said suit.

[In bankruptcy. In the matter of Edward G. Dumahaut and George Spicer.]

Wilson G. Powell, for Bull's Head Bank.

W. B. Hornblower, contra.

CHOATE, District Judge. In this case a composition was accepted and confirmed by the terms of which the assets of the firm, which, within three months before the bankruptcy, had been assigned by the debtors to a voluntary assignee for the benefit of creditors, were to remain in his possession and be distributed under that assignment and the dividends so made were to be accounted as part of the agreed composition payments after the acceptance of this composition; but before its confirmation the Bull's Head Bank, a creditor, commenced a suit against the assignee, in the supreme court of the state of New York, to compel an accounting by him and a distribution of the assigned property according to the terms of the assignment. In this suit a receiver was appointed who has, however, never taken possession of the property nor been able to do so, partly in consequence of an injunction from this court and partly from the absence of the assignee

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from the state. The suit having gone to a reference, and various expenses having been incurred by the plaintiff for costs and disbursements in the cause, and for counsel fees and referee's fees, and the receiver being, or claiming to be, entitled to fees and for charges for counsel, it was found principally on account of the delay caused by the pendency of that suit and the adverse claims of the receiver appointed therein to carry into effect the composition according to its terms, an amendment thereof was proposed and submitted to the creditors, who approved of the same. The amendment consisted in altering the terms of the composition so that the assigned property should not remain in the possession of the voluntary assignee, but should come into the possession of the assignee in bankruptcy and be administered by him. The court confirmed this amendment, adding to the usual order for recording the resolution the following words: "Upon the condition precedent to the taking effect thereof that the bankrupt and the creditors who have signed the said resolution of amendment shall pay to the Bull's Head Bank such sum toward reimbursement of their expenses in and about the action brought by it in the supreme court of the state of New York against the voluntary assignee as this court shall award to be proper." Such sum to be ascertained by a reference to the register to wnom it was by the same order referred, "to take testimony and to report to this court as to what sum, if any, shall be paid to said bank as aforesaid."

The Bull's Head bank had objected to this amendment, and the condition inserted in the order of confirmation was doubtless designed to protect and provide for any right which the bank might have to the reimbursement of such expenses under the seventeenth section of the act of June 22, 1874 [18 Stat. 183], which provides that a composition may be varied by a new resolution of the creditors, but "without prejudice to any person taking interest under such provisions" (i. e. the provisions of the original composition) "who do not assent to such addition or variation." But it is evident from the very terms of the order of confirmation that the question whether the bank was entitled to the reimbursement of these expenses was not and was not intended to be passed upon by the court, but was reserved until after the testimony was taken and the report of the register was made. From this order, confirming the resolution varying the composition, the bank appealed to the circuit court by petition of review, and the order was affirmed. See opinion of Waite, C. J. [Case No. 4,124]. Before that appeal was taken the bank applied to this court to be permitted to apply to the state court to have the fees of the receiver determined by that court. The application was denied on the ground that if any such expenses could be allowed they should be passed on in the same manner in which the other expenses of the bank in that suit were to be determined. In re Dumahaut [Case No. 4,125]. The register has now made his report, by which and by the testimony taken it appears that the bank has paid out in cash disbursements in that suit seventy-four dollars; that it is liable to the referee for his fees, which he claims to be five hundred dollars; that the receiver claims for his services three hundred and fifty dollars, and for his counsel fees one hundred and fifty dollars; and the taxable costs the plaintiff would be entitled to if a final decree in his favor in the suit were entered would be one hundred and thirty dollars, independently of the foregoing, and it is claimed also that upon such decree the court would award to the plaintiff as an allowance and addition to its costs five hundred and fifty dollars.

No claim seems to have been made by the bank for its counsel fees in the suit beyond said sum of five hundred and fifty dollars. Mr. Register Dwight has reported that the bank is not entitled to be paid any part of these sums, on the ground that the charges, disbursements, and services, for which the bank claims reimbursement, were not beneficial to the creditors but the contrary. And the question now is, whether the report of the register shall be confirmed.

There are two questions to be determined: First, whether the suit brought by the bank nominally for itself and all the creditors was in fact beneficial to them, and secondly, whether, if that suit has not been beneficial to the creditors, the rights of the bank to have its expenses in the end reimbursed is preserved to it, whether it is one of those interests under the provisions of the original composition which are expressly protected by the statute allowing a variation of a composition. If the expenses incurred have been positively beneficial to the estate, then, upon the equitable principle that has been so often applied in the case of expenses incurred by a voluntary assignee, there would seem to be a just and equitable claim for reimbursement. On this question I entirely concur in the conclusion of the register. I think the evidence shows clearly that the suit, instead of being a benefit has been a serious injury to the other creditors and to the estate of the bankrupt. Pending the confirmation of a composition, which the requisite majority of the creditors had assented to, and so far as appears without consultation with any other creditor, the bank commenced proceedings for having the assigned property wound up and distributed in a suit in equity in the supreme court of the state, in its nature a tedious and expensive process. There is nothing to show that such proceedings were necessary. The assignee had given bond which had been approved as sufficient. His delay in distributing what had been turned into money up to that time had been occasioned by the

pendency of the bankruptcy proceedings, but the testimony shows that he was ready and willing to distribute it as soon as the uncertainty about the composition should be determined. Without drawing in question as regards this point the right of the bank as a cestui que trust under the deed of assignment to institute and carry on such suit, he must establish before he can be reimbursed his expenses in this court out of the bankrupt's estate, on the ground that his proceedings were taken for the benefit of the estate, that there was some good reason to believe, in the circumstances existing at the time the suit was commenced, that without such proceedings the assignee would not have gone on and voluntarily have done in the discharge of his trust what the creditor bringing the suit has sought to compel him to do by the suit, that is, to convert the property into money and distribute it among the creditors. This the bank has wholly failed to show; on the contrary, it appears that checks were drawn for the payment by the assignees to the creditors of ten per cent. of their debts, the amount then in his hands in money, which payment was stopped by an injunction in said suit. It is claimed, however, that the bank has by its porceedings in the suit reduced the assignee's claim for disbursement six hundred dollars, and for commission four hundred and ninety-four dollars and eighty-five cents, and he has also had the accounts adjusted and settled, and that this is a sufficient benefit to the whole body of the creditors to entitle the bank to reimbursement. But it does not appear that there was any such dispute about any of these matters, or any such reason to apprehend serious disagreement, as to render a long and expensive lawsuit necessary for their determination, or that all these matters could not have been easily adjusted without any suit. After the composition was accepted and confirmed, the bank still went on with the suit and virtually made it impossible to carry into effect the terms of that composition, and the suit has only caused delay and embarrassment to the creditors.

The composition, as originally adopted, provided that the voluntary assignee should hold and distribute the assigned property. It was not within the contemplation of this provision that the assigned estate should be wound up and distributed at the end of a protracted suit in equity, but voluntarily by the assignee and without any unnecessary expense or delay. The inserting this provision in the composition resolutions, therefore, while it amounted to an affirmance of the voluntary assignment by the creditors to the extent that it was to stand, and so long as the composition was not varied it prevented the bankrupt assignee from attacking the assignment and having it set aside as void under the bankrupt law, it did not, as seems to be supposed by the bank, make all the proceedings of the bank taken afterward in harmony with the terms of the composition, or any the less an obstruction to that composition being carried into effect, for no such proceedings by delegation were contemplated by the creditors. Nor did the fact that the creditors generally appeared before the assignee and proved their claims amount to an approval of the bank's proceedings. They must prove, or run the risk of losing their share of the assigned estate.

The finding of the register, therefore, that the services and charges for which reimbursement is sought were not beneficial but injurious to the creditors, must be approved. To hold otherwise would be to encourage unnecessary litigation.

As to the other question, whether the reimbursement of these expenses is secured to the bank by the statute which provides for an amendment of a composition without prejudice to any person taking interest under the original composition, the decision of the chief justice is conclusive that under this provision of the statute the original composition gave the bank no absolute right to have the assigned estate remain in the possession of the voluntary assignee; that such a provision in a composition regulating the mere modes of administering the property of the person by whom it is to be administered is not such an interest as is saved by the statute. It cannot, therefore, be said that the bank went on after the confirmation of the original composition relying on this arrangement as a thing secured to it of right, and if in fact the bank was induced by the circumstance that this arrangement had been made to believe that it might safely go on and incur these expenses it was because it overlooked the fact that the creditors might at any time vary this provision and direct the administration of the property by the bankrupt assignee. The bank has in this only itself to blame for its want of foresight; its misfortune is not entitled to any consideration, since its own persistent obstruction of the carrying out of the creditors' first plan has led to such a change in the terms of the composition as will now render it impossible for the bank to pursue its suit to a final decree so as to recover its costs in the state court.

Nor is there any accrued right of the bank in these costs and expenses which had become vested in the bank before the change in the composition was made. The right to costs in an equity suit is wholly in the discretion of the court, and does not become a vested right till the court by decree or order awards them, and although it might confidently be expected, according to the known practice of the state court in like cases, that the bank would in the end recover these expenses or the greater part of them, yet no such right has yet accrued. The claim for reimbursement of these expenses and costs cannot, therefore, in any sense be regarded as an interest acquired by the bank under

the original composition which is saved to it by the statute. This question was not before the chief justice, and the allusion to the matter in his opinion, which is relied upon by the learned counsel for the bank, means only, as I understand it, that if the bank has any right to be reimbursed, that right is sufficiently secured by the reference ordered by this court to determine that question.

As to the costs of this reference, the claim of the bank being entirely groundless, I think it should be charged with those costs. Report confirmed and the costs of reference charged against any payment coming due to the bank under the composition.

DUMELL (TOMBECKBEE BANK v.). See Case No. 14,081.

DUMMER (WOOD v.). See Case No. 17,944.

Case No. 4,127.

In re DUMONT.

[4 N. B. R. 17 (Quarto, 4).][1]

District Court, E. D. Michigan. 1871.

BANKRUPTCY—FRAUDULENT MORTGAGE—COSTS AND EXPENSES.

Where a mortgage for four thousand dollars was given, while only one thousand dollars was advanced upon it, and was recorded in full, it is prima facie evidence of fraud, and it was therefore *held*, that out of the proceeds of sale of the property seized, the marshal pay over to the petitioning creditors, or their attorneys, the amount of their reasonable costs, expenses, etc., incurred in the proceedings in this matter, and that the balance be paid over to the mortgagee.

[In bankruptcy. In the matter of Edward Dumont.]

H. B. Brown, for the creditors.

L. Bishop, for George Dahmer.

The property seized in this case consisted of a stock of millinery goods, and was covered by a mortgage to Dahmer for four thousand dollars; upon which Dahmer claims one thousand dollars, and interest at eight per cent. per annum from November, 1868. The goods were seized January 29, 1869; and February 13, 1869, were ordered to be sold by the marshal as perishable property, and were sold accordingly. On the sale the goods only brought eight hundred and thirty-three dollars and sixty-six cents, not enough to pay the amount claimed by Dahmer on his mortgage. There are no other assets; and conceding the mortgage to be valid, the question now is, whether the petitioning creditors shall be reimbursed out of the proceeds of the sale for their costs and expenses of the bankruptcy proceedings.

Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of upon equitable principles. This matter came before the court in March last, upon the petition and answer above, and it was then held that the right of the petitioning creditors to be reimbursed for their costs, out of the fund arising from the sale of the goods, would depend upon the question whether they had probable cause to take and prosecute their proceedings in bankruptcy, as against the rights of the mortgagee. It cannot be denied, upon authority, as well as principle, that if the mortgagee allowed the mortgaged property to be so used and managed, and the mortgage itself to be placed, and continued, upon the records in a condition to induce in the minds of reasonable men a suspicion or belief that the mortgage was intended as a mere cover to protect the property of the mortgagor from his creditors, and the creditors having acted upon such suspicion or belief, the creditors should be reimbursed their costs and expenses out of the mortgage fund, notwithstanding the mortgage is eventually held to be valid, there being no other assets. See Redf. Wills, 493-495; 1 Johns. Ch. 153; 6 Ves. 349. At the hearing in March it was referred to the register to take proofs as to such probable cause, and the question is now to be disposed of upon the proofs taken.

The question now is, not whether the mortgage was actually fraudulent and void as against creditors, but whether the creditors had reasonable cause to believe it to be so? Was there reasonable ground for suspicion as to its bona fides?—such ground as a man of ordinary intelligence, exercising ordinary care and diligence, would be justified in acting upon? The proofs show that the mortgage was given for four thousand dollars, while only one thousand dollars was advanced upon it. How this came to be done is satisfactorily explained as far as the mortgagee is concerned; but the fact remains that the mortgage was placed upon the public records, without any explanation concerning it to show that it was an incumbrance upon the debtor's property for only a fourth of what it appeared to be on its face. In this form it was notice to all the world that the mortgagee claimed an incumbrance on the debtor's property of four thousand dollars. It does not matter that only one thousand dollars is claimed. It was permitted by the mortgagee to appear to be a claim for the larger amount. Such exaggerated incumbrance is prima facie fraudulent as against the creditors of the mortgagor. The Sampson [Case No. 12,279].

It would have been a very easy matter for the mortgagor to have indorsed upon the mortgage a statement of the facts, so that it would not appear to be more than it actually was, and he should have done so. Having omitted this precaution, he cannot complain that others have acted upon his omission and taken his mortgage for what it appeared on its face to be—a fraud upon the creditors of the mortgagor. This one circumstance is sufficient alone to dispose of this question of costs in favor of the creditors. But there

[1] [Reprinted by permission.]

are numerous other appearances of fraud in the future conduct of the parties in relation to the mortgaged property, each of which was sufficient to justify the creditors in proceeding as they did in relation to it; such as the stock remaining in the hands of the mortgagor a considerable time after the maturity of the mortgage; the amount of stock being at the same time rapidly reduced and no payments made upon the mortgage debt; no efforts being made by the mortgagee to take possession of, and sell the goods under the mortgage until creditors became pressing and attachments were imminent.

It is unnecessary to consider in this case the question of the right of creditors, proceeding against their debtor in bankruptcy, to cause mortgaged property to be seized and sold in any case where there are no other assets, and I therefore express no opinion upon that point. The creditors were clearly justified in proceeding as they did in this case, for the reasons above stated, and are entitled to be reimbursed for their reasonable costs and expenses, out of the funds arising from the sale of the property seized. Let an order be entered directing the marshal, out of the proceeds of the sale of the property seized in this case, to pay over to the petitioning creditors, or their attorneys, the amount of their reasonable costs, expenses, and disbursements paid or incurred by them in the proceedings in this matter, including the said sale, upon presentation to him of a taxed bill of the same, and take a receipt therefor, and that he pay over to George Dahmer, as mortgagee of said goods, or his attorney, the balance which shall remain after paying such costs and expenses aforesaid, and take a receipt therefor, and file all receipts taken by him, in pursuance of said order, with the clerk of this court, together with a full report of his doing in the premises from and including the said sale.

DUN (DUNCAN v.). See Case No. 4,134.
DUN (SELMAN v.). See Case No. 12,648.

Case No. 4,127a.

DUNBAR v. ALBERT FIELD TACK CO. et al.

Circuit Court, D. Massachusetts. 1879.

[See 4 Fed. 543.]

Case No. 4,128.

DUNBAR v. BALL.

[2 Cranch, C. C. 261.][1]

Circuit Court, District of Columbia. Oct., 1821.

SLAVERY — BRINGING SLAVES IN DISTRICT OF COLUMBIA—RIGHT TO FREEDOM.

If a citizen of the United States owning a slave in Virginia, and residing there, removes to the county of Washington, in the District of Columbia, with a bona fide intention of settling therein; and afterwards causes the said slave to be brought into said county, through the county of Alexandria, within one year after such removal; and if the owner, within three years after such removal, sell the said slave, the slave thereby becomes entitled to freedom; notwithstanding the acts of congress of the 3d of May, 1802, § 7 [2 Stat. 194], and 24th of June, 1812, § 9 [2 Stat. 757], the said slave having been in Alexandria county merely in transitu.

[Cited in Battles v. Miller, Case No. 1,110.]

Petition for freedom. The facts were agreed to be as follows:—"The petitioner [Leonard Dunbar] is a native-born slave of Virginia, and was there purchased by one John B. Brunet, a citizen and inhabitant of that state, some time in the month of March, 1820; and continued there in the possession and service of said Brunet, until some time about the 25th of March last (1821.) when the said Brunet removed from the said state into the district of Columbia and settled himself as a citizen and inhabitant of Georgetown, in the county of Washington, leaving the said petitioner in Virginia for about three weeks after such removal of said Brunet, the said petitioner continuing to be the bona fide property of said Brunet, and so being the bona fide property of the said Brunet, was, in about three weeks after the removal and settlement of the said Brunet in Georgetown, as aforesaid, brought, by the order of said Brunet, from Virginia, through Alexandria county, into Georgetown aforesaid, and there continually kept in the possession and service of the said Brunet, until some time about the 20th of July last (1821,) when the petitioner was sold in Georgetown, by said Brunet to the defendant [James Ball] as a slave for life."

By the 1st section of Act Md. 1796, c. 67, adopted by congress as the law of this county, a slave brought into the state, for sale, or to reside, ceases to be property, and becomes free. By the 2d section, however, it is provided that it shall be lawful for any citizen of the United States who shall come into the state with a bona fide intention of settling therein, to bring into the state, at the time of his removal, or within one year thereafter, any slave, the property of such citizen at the time of his removal, and to retain the same as a slave. But by the 3d section it is enacted, "that nothing herein contained, shall be construed to enable any person or persons, so removing as aforesaid, to sell or dispose of any slave or slaves, imported by virtue of this act, or their increase, unless such person or persons shall have resided within this state three whole years next preceding such sale, except in cases of disposition by last will and testament, and dispositions by law for bona fide debts, or consequent upon intestacy." By the act of congress of the 3d of May, 1802, § 7 (2 Stat. 193), it is enacted, "that no part of the laws of Virginia or Maryland, declared by an act

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

of congress passed the twenty-seventh day of February, 1801, 'concerning the District of Columbia,' to be in force within the said district, shall ever be construed so as to prohibit the owners of slaves to hire them within, or remove them to, the said district, in the same way as was practised prior to the passage of the above-recited act." And by the 9th section of the act of the 24th of June, 1812 (2 Stat. 755), it is enacted, "that hereafter it shall be lawful for any inhabitant or inhabitants in either of the said counties, owing and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised over him, her, or them, in the county from whence the removal was made, any thing in any legislative act in force, at this time, in either of the said counties, to the contrary, notwithstanding."

Mr. Jones, for defendant, contended that Act Md. 1796, c. 67, was a penal law, and ought to be construed favorably to prevent a forfeiture. It merely prohibits the sale within the three years, but a sale contrary to the act does not give freedom to the slave. The sale is only void. But, under the act of the 24th of June, 1812, Brunet, as soon as he brought his slave into Alexandria county, which he had a right to do under the act of the 3d of May, 1802, had a right to remove him to Washington county, and there exercise over him fully all the rights of ownership.

Mr. Taney, for petitioner, contended that the act of 24th June, 1812, was only applicable to bona fide inhabitants and residents of Alexandria county, not to a person merely in transitu.

THE COURT (nem. con.) rendered judgment for the petitioner.

Case No. 4,129.

DUNBAR v. BROWN.

[4 McLean, 166.] [1]

Circuit Court, D. Ohio. July Term, 1846.

GUARANTY OF DEBT—DEFAULT—NOTICE TO GUARANTOR.

1. Where a debt guaranteed is not paid, notice to the guarantor must be given in a reasonable time.

2. The same strictness is not required in such a case, as to charge the indorser on a bill or promissory note.

3. Nothing can excuse the want of notice, but the insolvency of the debtor.

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

[This was an action at law by Dunbar, Brooke & Dunning against Samuel H. Brown.]

Ewing & Ewing, for plaintiffs.

Mr. Stanbery, for defendant.

OPINION OF THE COURT. This action is brought against the defendant as guarantor. Samuel Cochran, a witness, states that E. C. Brown, brother of the defendant, purchased goods of the plaintiffs in Philadelphia, amounting to the sum of seventeen hundred and thirty dollars and seventy-six cents; for which he gave his note, payable in six months. That the goods were purchased solely on the credit of the defendant, who guaranteed the payment of them. The understanding between the plaintiffs and the guarantor was, that the payment might be made in twelve or eighteen months; the witnesses, as to the time, do not agree. No demand was made of E. C. Brown until three months after the expiration of the year, at which time he proposed to give property in security for payment. In the ensuing May, 1842, the defendant admitted that a notice had been given to him that the note was not paid, and that they looked to the guarantor for payment. At what time this notice was served does not appear. Shortly after April, 1842, or about the time, E. C. Brown became insolvent.

THE COURT instructed the jury, that in a reasonable time after the note became payable, it was the duty of the plaintiffs to demand the payment of the same from E. C. Brown, and give notice to the defendant that it was not paid. That the same strictness in making demand of payment and giving notice to the guarantor was not required, as was necessary to charge an indorser on a bill or promissory note. But that nothing could excuse the want of demand and notice, but the insolvency of E. C. Brown. If the jury shall find that the guarantor was to pay the bill for the goods in twelve months, still it would seem that the demand of payment should have been made of E. C. Brown when the note became due, and a notice of non-payment given to the defendant. If the guaranty was, that the payment by E. C. Brown should be made in eighteen months, contrary to the face of the note, and the payment at that time was guaranteed by the defendant, at the expiration of that time, a notice was indispensable.

The jury found for the defendant.

DUNBAR (ESTABROOK v.). See Case No. 4,535.

DUNBAR (GOODYEAR v.). See Case No. 5,570.

Case No. 4,130.

DUNBAR v. MILLER et al.

[1 Brock. 85.][1]

Circuit Court, D. Virginia. May Term, 1805.

FACTORS—DISCRETION OF CONSIGNEE IN DISPOSING OF GOODS—DUTY OF CONSIGNOR—OPENING SETTLED ACCOUNT.

1. P. H., residing in Richmond, Virginia, of the firm of M., H. & Co., London merchants, wrote to R. D., on the 5th of September, 1793, a merchant of Falmouth, Virginia, informing him of the arrival in James river, of the ship Molly, chartered by M., H. & Co., to load with tobacco to be shipped to Europe, consigned to M., H. & Co., and advising R. D. to embrace this favourable time and opportunity, as he deemed it, of shipping tobacco to Europe. The vessel, he said, would "go to Cork for orders, and from thence to any port in Europe, out of the straits." In another part of his letter, he informed R. D., that "if peace is not established in France, by the time the Molly arrives at Cork, it is most probable she will be sent to Rotterdam, or some port in Holland." On the 19th of the same month, R. D. wrote in reply, after informing P. H. that he had sent 58 hogsheads to be shipped by the Molly,—"I hope the tobacco will go to a saving market, as the quality is well suited to the Dutch market, where I expect it will ultimately go, as appearances, I conceive, strongly indicate a continuance of the war." The Molly arrived at Cork, about the end of the year 1793, when M., H. & Co. determined to send the tobacco to France, the war still continuing, and accordingly consigned it to a mercantile house in Havre. After experiencing great delay and difficulty in obtaining the account of sales from the consignees in Havre, and using every effort to get from them the proceeds of sale, M., H. & Co. finally, in 1803, consented to a compromise, whereby R. D. was only entitled to £142 4s., after deducting costs, commissions, &c., for his proportion of the proceeds of the cargo of the Molly. It seems, that although it was clearly the understanding of R. D., that his tobacco would not be sent to France, should the war continue; yet his letter did not amount to a positive instruction, which would deprive the consignees, after the arrival of the tobacco in Cork, of the discretion of sending it to France, if they should deem it advisable for the interests of the consignor to do so. At all events, if the consignor objected to this destination being given to his tobacco, it was his duty to have informed the consignees of it, and his silence, after he was apprised of its destination, was an implied sanction and approval of the act of the consignees of which he had no right to complain, after the speculation proved to be disastrous. It seems, however, that only half commissions are chargeable by the consignees in such cases.

2. Where extensive and complicated dealings have been carried on between merchants, which have been closed by a settlement of their accounts, and a note has been given by one of them for the amount appearing due on such settlement, a court of chancery may open such settlement for the purpose of correcting any errors which the parties may have committed. But see Brydie's Executor v. Miller, Hart & Co. [Case No. 2,071].

This was a motion to dissolve an injunction obtained by the plaintiff, to restrain the defendants, Miller, Hart & Co., from issuing an execution on a judgment rendered on the law side of this court in their favour, against the plaintiff here.

Robert Dunbar, a merchant living in Falmouth, Virginia, having for a series of years had extensive dealings with Miller, Hart & Co., London merchants, on a settlement of their accounts, on the 28th of June, 1796, executed his note to them for the amount appearing due on such settlement, which was as follows:

"Falmouth, 28th June, 1796. Eighteen months after date, I promise to pay to the order of Messrs. Miller, Hart & Co. of London, $8273, for value received, with interest from the date. Robert Dunbar.

"N. B. 58 hogsheads tobacco, weighing 66,503 lbs., shipped Miller, Hart & Co., in Sept. '93, per the Molly, Capt. Sanford, for which sales are not received, to be accounted for, and to be deducted from the above note when received account of sales appear."

At the November term of this court, 1800, Miller, Hart & Co. obtained a judgment against Robert Dunbar, for the amount of the above recited note, to be discharged by the payment of $7668 75, with interest from the 8th of August, 1798. The reduction of the amount of this note, was effected exclusively by payments made by Robert Dunbar, to Miller, Hart & Co., subsequent to its date, and no credit was allowed on the judgment for the price of the 58 hogsheads of tobacco referred to in the memorandum annexed to Dunbar's note, the account of sales not having been received at that time. The history of the transaction touching this tobacco, is as follows:

On the 5th day of September, 1793, Patrick Hart, of the firm of Miller, Hart & Co., living in Richmond, Virginia, addressed the following letter to Robert Dunbar, at Falmouth, Virginia:

"Dear Sir, I wrote you last post, since which I have advice of the arrival of the Molly, Capt. Sanford, an American bottom, chartered by Miller, Hart & Co., to load tobacco from their friends, at nine guineas per ton two shillings and three pence port charges. She loads at City Point, goes to Cork for orders, and from thence to any one port of Europe, out of the straits. You may have what room in her you want, shipped to their address on these terms, which is above five shillings per hogshead lower than any has been chartered at this way. As I think you will have no chance to sell, till the war is over, it is surely your interest to ship while the weather is good, and a chance of its getting to market in proper time. If peace is not established in France, by the time the Molly arrives at Cork, it is most probable she will be sent to Rotterdam, or some port in Holland; but to give her a chance of going there, she must be loaded in all this month; which I intend at all events to do, as I can get plenty of freight this way. Should we not have enough of our own to fill her I expect you will immediately ship the 60 hogsheads you mention. You may look out a craft and get them on board. My letters from Miller, Hart & Co. do not say, whether the ship loads at

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

City Point, or Norfolk; but suppose the former. I will advise you by next post, which will be as soon as you can have the tobacco in the craft. I will keep room for you for 100 hogsheads, as I think it your interest to ship it, but you will say by Monday's mail, whether or not you will ship it."

On the 19th of the same month, Robert Dunbar wrote in reply to the above letter: "This hands you two receipts and invoice of 58 hogsheads of tobacco, shipped to the address of Miller, Hart & Co., which I hope will go to a saving market as the quality is well suited to the Dutch market, where I expect it will ultimately go, as appearances, I conceive, strongly indicate a continuance of the war."

The Molly, having taken in her cargo, sailed for Cork, where she arrived about the latter part of 1793. Miller, Hart & Co., on the arrival of the ship in Europe, determined, on consultation, to send the tobacco to Havre in France, while the war yet continued, and accordingly consigned it to the house of Jean Baptiste Teray & Co., of that place. The speculation proved to be a very unfortunate one. The account of sales rendered by Miller, Hart & Co., of Dunbar's tobacco, which was dated 31st January, 1803, after deducting therefrom the freight, commissions, and other charges, left a balance in favour of Robert Dunbar of £142 4s. The deposition of James Colquhoun, of the firm of James and Robert Colquhoun, of London, stated, that his firm were consignees of 250 hogsheads of tobacco, part of the cargo of the ship Molly, shipped in Virginia, by R. and W. Colquhoun of Petersburg, about October, 1793, with which she arrived at Cork in the month of December of the same year for orders, and that the advices from France were so encouraging at that time, as to induce the house of J. & R. Colquhoun to agree with Miller, Hart & Co. to send the ship Molly and cargo to Havre, as being, from every appearance at that time, the best market for tobacco in Europe; that he was privy to the correspondence of Miller, Hart & Co. with J. B. Teray & Co. of Havre, to whom the said cargo was consigned, and consented to the same, and was fully satisfied that every thing was done by Miller, Hart & Co. which was possible to get the best price and speedy remittance; that after long delay and much correspondence, he consented to compromise on behalf of his firm with Teray & Co. in the latter end of 1802, and to take for the cargo of the Molly, of 627 hogsheads of tobacco, the sum of 130,000 livres, of which his house received of Teray & Co. 51,502 livres, being their proportion agreeably to the invoice weight of their 250 hogsheads of tobacco.

The difference of exchange on payments made by Dunbar to Miller, Hart & Co. in favour of the former previous to their judgment against him, was shown to be $382 83, for which Dunbar was not allowed a credit. The commissioner also reported a balance in favour of Dunbar of £286 17s. 4d. resulting from errors and miscalculations of interest when the settlement took place between the parties. The plaintiff prayed to be allowed a credit on the judgment against him. 1. For £717 8s. 7d., the invoice price of his tobacco with interest. 2. For the difference of exchange on payments made before judgment. 3. For the balance appearing in his favour in the commissioner's report.

MARSHALL, Circuit Justice. The principal question in this case is: What is the complainant entitled to for the tobacco consigned by him to Miller, Hart & Co. in Sept., 1793? In discussing this question he has made two points. 1st. That in shipping the tobacco to France his orders were violated; in consequence of which, the consignees are responsible for its value. 2d. That the account of sales they now render ought not to bind him.

The nature of the trade between the consignor and consignee of tobacco, requires that a great degree of confidence should be placed by the former in the intelligence and integrity of the latter. He is frequently empowered to choose the market in which the commodity is to be disposed of. This arises from the circumstance that his situation enables him to decide on the interests of the consignor with better information than the consignor can decide for himself. A great latitude is therefore allowed for the exercise of his judgment, but it must be exercised within the limits prescribed by the consignor, or, where he is silent, within those prescribed by custom. In the case at bar, the limits prescribed by the consignor are to be looked for in the two letters of the 5th and 19th of September. The letter of the 5th contains the proposition of the consignee. He offers to receive consignments to Miller, Hart & Co. in the Molly. This vessel, he says, "goes to Cork for orders, and from thence to any one port of Europe out of the straits." This is a plain intelligible proposition, which authorized the consignee to order the vessel to France or elsewhere in Europe, provided it was not into the Mediterranean. It is observable, that Mr. Hart then proceeds to state the advantage which Mr. Dunbar might derive from accepting it before he advances any opinion respecting the probable particular destination of the vessel. This is a circumstance which may not be entirely immaterial. It may serve to show that in the opinion of the writer, the principal proposition was stated. After recommending a shipment in the vessel, whose orders were to be received at Cork, and whose destination from thence was to depend on the discretion of the partners in Europe, Mr. Hart proceeds to say something respecting the manner in which the discretion would probably be exercised. "If," says he, "peace is not established in France, by the time the Molly arrives at Cork, it is most probable she will be sent to Rotterdam or some port of Holland." It is

contended, on one side, that this amounts to a declaration that the tobacco would not be sent to France if the war should continue. On the other side, that this is merely a conjecture respecting the manner in which the discretion of the consignee would be exercised without forming a limitation of that discretion. With the proposition, is to be taken into view the declaration of the sense in which it was accepted. For this purpose, the court is referred to the letter of the 19th of September. This was after the tobacco had been put on board the craft; but, as no intermediate letter is produced on either side, it is presumed that none passed which would affect the case. In the letter of the 19th of September, Mr. Dunbar says, "I hope the tobacco will get to a saving market, as the quality is well suited to the Dutch, where I expect it will ultimately go, as appearances, I conceive, strongly indicate a continuance of the war." That both parties believed the Molly would not be ordered to France, should the war continue, is apparent; but whether either of them designed to prohibit Miller, Hart & Co. from giving such orders, if in their judgment it should be for the benefit of the cargo to give them, is not so clear.

Throwing the two letters into the form of an agreement, and construing that agreement literally, the express power given to order the Molly to any port in Europe, out of the straits, would not be restricted by any express declaration, that the right to send her to France depended on the restoration of peace. But there is great weight in the argument, that in mercantile transactions of this sort, the impressions made by the communications between the parties, ought to be considered, and if a meaning is fairly and justly to be implied, which the words themselves, if digested into a formal agreement, would not completely bear, that meaning ought not to be entirely disregarded by the court. Although the letter written by Mr. Hart reserves to his partners the power of ordering the Molly to any port in Europe, and does not positively restrict their exercise of this power, with regard to France, to the contingency of peace, yet its terms are such as clearly to convey the opinion, that the tobacco would not be sent to France, but on that contingency. "If," says he, "peace is not established in France by the time the Molly arrives at Cork, it is most probable she will be sent to Rotterdam, or some port in Holland." This reference, with respect to France, to the single contingency of peace, unconnected with the state of the market, shows, that in the mind of the writer, her being ordered to France would depend on that contingency only. It might, certainly, be fairly so understood by Mr. Dunbar. In strict prudence, the complainant ought to have observed the equivocal expressions of the proposition, and ought to have objected to the sending of his tobacco to France, unless peace should be re-established; but if he understood that the general power was reserved solely for the purpose of being exercised in its extent in the event of peace—and he might so understand the letter—he may be excused for not directing that which Miller, Hart & Co. had declared themselves previously to have resolved on.

It is believed, that no person can read that letter without a conviction, that at the time of writing it, Mr. Hart considered it as perfectly certain, that the Molly would not be ordered to France if the war should continue. The letter would not be a fair one, if such had not been his opinion. That Mr. Dunbar did believe the possibility of the power he gave, being so exercised, as to occasion the tobacco to be shipped to a port in France, depended on peace, is strongly to be inferred from his letter of the 19th of September. The whole context of that letter shows it. These communications, then, are to be viewed as an agreement by which the tobacco is consigned to Miller, Hart & Co., with a general power to ship it from Cork, to any port of Europe, out of the straits. But the application for that general power is accompanied with a representation of the manner in which it is to be exercised, which might well be understood, and which most probably was understood, as a declaration, that the vessel would only be sent to France on the contingency of peace. Whether this representation is so strong as to charge the consignee with the loss occasioned by sending the vessel to Havre, pending the war, is a point not absolutely decided by the court, because there is another part of the case which renders its decision unnecessary.

The agreement under which the tobacco was shipped, might be understood in the one way or the other. If, in the opinion of Mr. Dunbar, the consignees had transcended their powers, and he did not mean to abide by their conduct, it is perfectly clear, that on mercantile principles, he should, on notice of what they had done, have declared to them, that the responsibility of their conduct rested on themselves; that the tobacco was theirs: and that he claimed a credit for its reasonable value, at those ports to which, in conformity with the contract, they might have shipped it. He was certainly not at liberty to reserve to himself the power of taking or rejecting the sales at Havre, at his discretion; but his silence on the subject, if not an approbation of their conduct, is an acquiescence under it. It has been contended, that this transaction was not communicated to Mr. Dunbar; but the fact will not support his counsel in this respect. His bill admits a knowledge of it when his note was given. Had the pressure of Mr. Dunbar's circumstances been such as to leave him not a free agent in this respect, the court would not have considered his silence as a waiver of his right to object to the shipment of his tobacco to Havre. But this is not pretended. His silence, therefore, can

only be attributed to one of two motives: either he chose to take the chance of a favourable account of sales, or, which is more probable, he expected that the loss would not be considerable, and preferred a submission to it, to a rupture with his friends and creditors. Let this be his motive, and it will not support him in the attempt now made. If then, silence had been observed on the part of Mr. Dunbar, he would have been precluded from objecting to the act of sending the Molly to Havre. But he has not been silent. The memorandum at the foot of his note, is a complete relinquishment of all objection to that transaction, so far as a relinquishment can be implied. This memorandum is said to have been made for his advantage, and this is true. But what was the advantage he expected to derive from it? Clearly only this. It proves, that from the note was to be deducted the tobacco, when the account of sales should be received. Why refer to the account of sales, if he did not mean to admit that he was to be bound by them? Why not claim an immediate, in stead of a future, credit, if the invoice price, or any other known standard, ascertained the credit to which he was entitled?

The subsequent correspondence on which the defendants rely, is certainly equivocal in its expression. But when the fact, that Mr. Dunbar had full knowledge of the Molly having been ordered to France, is ascertained, that correspondence ceases to be equivocal. It relates exclusively to the circumstance, that the sum for which Mr. Dunbar ought to be credited on account of this tobacco, is uncertain. The court, then, is perfectly satisfied that the orders given the Molly to sail for Havre, are sanctioned by the subsequent conduct of Mr. Dunbar, after having full notice of the fact. To the account of sales which has been returned, the objections are to the commissions and to the compromise With respect to the commissions, the court has required information respecting the custom, and has stated an opinion, that only half commissions is chargeable in such cases. If there be no custom, the court will direct that only half commissions be allowed in this case. With respect to the compromise, the circumstances under which it was made, and the deposition of Mr. Colquhoun, satisfy the court, that it was prudent to compromise the claim. The power of the consignees probably extended to a compromise, unless it was the will of the consignor to take the transaction into his own hands. The court perceives no such disposition in him. Yet, under the circumstances of this case, it is the opinion of the court, that Miller, Hart & Co., ought to explain to the plaintiff, the terms and principles of the compromise. There is so little probability that the transaction has been unfair, that the court will not continue the injunction on that account, but will retain the suit on the docket if it be requested.

2. The accounts between the parties constitute the next subject of consideration. The court is of opinion, that any errors which may have existed in dealings carried on under the circumstances in which these parties were placed, ought to be corrected. It does not appear clearly, that a formal and complete settlement has ever taken place. The accounts were conducted under so many different forms, as to contribute something to the opinion that they have never been completely adjusted, and the early application of Mr. Dunbar on the subject, weakens the argument drawn from the time which has elapsed since accounts have been rendered. With respect to the credit claimed for difference in exchange, the arguments of the defendants themselves, if rightly understood, are in favour of it to a certain extent. The payments made before the judgment, ought certainly to be credited, according to agreement, at the current rate of exchange. The balance for which judgment was rendered, ought not to be affected by the exchange.

DECREE. The injunction was perpetuated as to the net amount appearing due by the account of sales rendered, adding thereto half commissions. 2. As to the difference of exchange on payments made by Dunbar to Miller, Hart & Co., before judgment; and 3. As to the amount appearing on the commissioner's report in favour of Dunbar, growing out of erroneous calculations of interest, and was dissolved as to the residue.

NOTE. See a summary of the decisions of the courts of the United States, respecting the relation between principal and agent, and consignor and consignee: 1 Pet. Cond. R. 594; 2 Pet. Cond. R. 533; and 3 Pet. Cond. R. 351, in notes [Manella v. Barry, 3 Cranch (7 U. S.) 415; Lee v. Munroe, 7 Cranch (11 U. S.) 366; The Frances, 9 Cranch (13 U. S.) 183].

DUNBAR (MYERS v.). See Case No. 9,990.

END OF CASES IN BOOK 7.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ACCOUNT STATED.

Page

Equity may open the settlement of accounts between merchants having extensive and complicated dealings, for the purpose of correcting errors therein..............1187

ACKNOWLEDGMENT.

The certificate of acknowledgment of a deed or mortgage is not conclusive in Minnesota as to the facts stated therein......1118

ADMIRALTY.

Jurisdiction—In general.

The remedy at law on an average bond given on a jettison of goods does not deprive admiralty of jurisdiction........... 697

—— Persons and property.

Courts of common law have a jurisdiction concurrent with the admiralty over maritime contracts...................... 418

Though both the American and English maritime courts may have jurisdiction over actions between foreigners, such actions will not be entertained except where necessary to prevent a failure of justice........ 134

—— Waters and places.

Admiralty has no jurisdiction of a contract for the navigation of a boat on the Erie canal from Albany to Rochester, and back to Albany and New York.......... 120

Goods taken by pirates, and sold upon land, may be recovered from the vendee by suit in the admiralty.................. 192

Admiralty has jurisdiction in the case of salvage for a retaking on land of property captured by pirates..................... 192

—— Rights and controversies.

Admiralty jurisdiction is generally determined by the subject-matter........... 144

Admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations............. 418

Such jurisdiction includes all contracts which relate to the navigation, business, or commerce of the sea, and the building, repairing, or supplying of vessels........... 144

A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction 418

Admiralty has general jurisdiction to enforce all maritime liens............112, 1085

A claim for wharfage is not a maritime lien enforceable in admiralty............ 413

Admiralty has jurisdiction over a bottomry bond given by the owner in a home port, where there is an express pledge as security 1032

Admiralty has no jurisdiction to enforce specific performance of an agreement relating to maritime affairs................. 112

Admiralty has no jurisdiction to enforce a mortgage upon a vessel where the mortgagee is out of possession, nor to enforce the payment of freight to the mortgagee.. 345

Page

The surrender or avoidance of a mortgage of a vessel on the ground of laches will not be enforced in admiralty. The remedy, if any, is in equity, after the disputed rights are settled at law...................... 299

Admiralty has no direct jurisdiction over trusts or accounts, although they may relate to maritime affairs................. 112

Admiralty possesses exclusive jurisdiction to ascertain who are the captors in a prize case 2

Admiralty has jurisdiction of a libel on a charter party under seal for freight due, where no penalty is demanded...........1085

Shipowners have a lien on goods for freight due for maritime transportation, enforceable in admiralty by libel in rem, whether the contract is by bill of lading or charter party........................1085

Where the charter party gives the charterer the possession and control of the ship, it is a letting of the ship, and not a contract of affreightment, and the owners have no lien on the cargo for the stipulated price.1085

A contract for the use of a barge at a stipulated rate is cognizable in admiralty, and a libel may be maintained against the steamboat using it..................... 678

Admiralty has jurisdiction of a libel by owners against the master for satisfaction of the damages sustained in consequence of a wrongful capture made by him...... 294

Admiralty has jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbors within the ebb and flow of the tide........................ 418

Procedure.

A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities.................. 616

ADVERSE POSSESSION.

The statute of limitation can only run against the legal title...................1135

AFFREIGHTMENT.

See, also, "Bill of Lading"; "Carriers"; "Charter Party"; "Demurrage."

The condition, "privileges of lighting and reshipping," authorizes the vessel to reship as its interest or convenience may advise, and imposes the duty to do so when necessary and practicable.................... 931

Such condition does not authorize reshipping before the voyage has been commenced by the original vessel.................. 931

Lighterage does not apply to overloading at the commencement of a voyage....... 931

A carrier receiving goods improperly packed is bound to stow them with reference to their condition............... 16

The carrier is not liable for a loss of part of the cargo on the pier after actual receipt by the consignees of all the cargo shipped, and their verification thereof by weighing.. 698

Page

When sued for freight, the owner may offset damages caused by improper stowage ... 337

The ship is not liable for a loss caused by bad stowage, where the goods were stowed by stevedores employed, directed, and paid by the shipper ... 633

The vessel is entitled to recover the amount of freight shown by the bill of lading, in the absence of proof that she did not deliver all the cargo that was received ... 354

The master on a tender of freight at the ship, may take a reasonable time to ascertain the correct amount from the consignees of the ship, but cannot, in the meantime, order the goods to be stored at the expense of the owner ... 633

APPEAL AND ERROR.

An appeal lies from a decree of the district court refusing an order for the sale of a vessel on an application by one of two equal part owners ... 174

An appeal will not lie to the circuit court of the District of Columbia from the judgment of a justice of the peace on a trial by jury ... 30

The vessel libeled is not under the control of the district court after an appeal from its decree ... 174

Where the record states that the jury were sworn, it will be presumed that the proper oath was administered to try the case before the court ... 707

A decree will not be disturbed on appeal as against evidence, where the evidence is conflicting and the preponderance is doubtful ... 192

Allowances for salvage services will not ordinarily be disturbed upon appeal ... 393

On affirmance of a decree for libelant in a collision case, the decree will be entered for the amount of the loss at the time of the loss, with interest from such time, and for costs in the district court, without interest thereon ... 348

An executrix may appeal from the orphans' court to the circuit court of the District of Columbia without giving security ... 460

The bond is waived by an appearance and failure to object, and the want of it does not affect the jurisdiction ... 707

Where an appeal bond is defective, a new one may be filed at any time before the case is finally acted on, and the appeal will not be dismissed ... 350

A bond with security is a substantial compliance with the statute requiring a recognizance ... 350, 998

Sureties on an appeal bond *held* absolutely fixed without ca. sa. or any step against the principal on his failure to prosecute the appeal with effect ... 998

When bail become fixed, they cannot be discharged from liability, either by the surrender, bankruptcy, or arrest of the principal on a ca. sa. ... 998

Debt is the proper action on an appeal bond or recognizance, but by the common-law rule the plaintiff must sue all, if living, or one, and not an intermediate number ... 998

APPEARANCE.

A corporation does not waive an objection to jurisdiction by appearing and pleading, by attorney, to the jurisdiction ... 333

An appearance, after decree rendered, for the mere purpose of moving to strike the case from the docket on the ground that no process had been served, will not validate the decree ... 923

Where an unincorporated association of persons sued in the association named waive process, and appear and answer without objecting, they cannot afterwards raise the objection that it was improperly sued ... 348

ARBITRATION AND AWARD.

See, also, "Reference."

The submission of a controversy to arbitration by an attorney binds the client ... 490

When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted ... 200

An arbitration award is conclusive as to the parties thereto, and can only be avoided or vacated for fraud or gross misconduct ... 490

The reservation in a submission to referees of the right to move to set aside their report takes away its character of a submission to arbitration; and an agreement for a cognovit for the amount of the report will be deemed to refer to the amount as finally settled by the court ... 490

Mistakes of law by arbitrators, or errors of judgment by them on the evidence, cannot be reviewed or rectified ... 490

ARREST.

Defendant may be arrested to compel his appearance on the return day of the writ. (Act June 17, 1844.) ... 579

ASSIGNMENT.

An assignment of a claim made to an agent, to enable him to collect it in his own name, *held* an absolute assignment of so much of the claim as the agent was entitled to retain as agreed compensation ... 990

ASSIGNMENT FOR BENEFIT OF CREDITORS.

One to whom partners have become individually liable may, on an assignment of their individual and firm assets, prove the claim against their separate estates and the surplus against their joint estate after payment of their joint debts ... 1055

ASSOCIATIONS.

The members of an insurance association are bound by the act of the majority, unless there be some restriction in the articles ... 306

Individual members of banking associations, who employed a laborer, *held* liable to a suit at law by him, irrespective of articles of association ... 112

ASSUMPSIT.

Indebitatus assumpsit will lie against a corporation aggregate upon an account stated by their treasurer, without examining him as a witness ... 131

ATTACHMENT.

An attachment under Act Md. 1795, c. 56, will not lie for a debt under $20 ... 746

In an affidavit to obtain an attachment under such act, it is not necessary to state the plaintiff to be a citizen of the county of Washington, D. C. ... 324

Such affidavit may be made by one of the copartners, and need not state that he is the acting partner, nor that the other partners were absent ... 1048

Two non ests *held* to be requisite for the issuing of an attachment ... 1031

Page

The proceedings upon attachment, upon an assigned cause of action, must be in the name of the legal plaintiff; and all the requisites of the statute must be complied with 191
The bill cannot be taken for confessed for nonappearance in a chancery attachment if the subpoena be served on the principal without an affidavit and publication. 304

ATTAINDER.

The husband need not put in a claim for his wife to protect her rights in property forfeited as belonging to him........ 371
The legal estate will not be allowed to be set up to bar a fair purchaser of the equitable interest forfeited under the law...... 371

ATTORNEY AND CLIENT.

An attorney may confess judgment for his client in an action on contract........ 490
An attorney is not privileged from disclosing facts relating to his client's cause not confided to him by the client......... 899

AVERAGE.

To make a case for general average, the property saved and the property sacrificed must be exposed to a common danger. The sacrifice of a part must contribute to the saving of the residue, and must be voluntary 376
The owners of the vessel and the cargo saved must contribute where a part of the cargo is jettisoned for the safety of vessel and passengers........ 697
There can be no contribution for damage caused by the common danger to which both ship and cargo are exposed......... 376

BAIL.

Act July 17, 1862, giving the courts authority, in their discretion, to impose fines and imprisonment, instead of death, as punishment for treason, makes the offense available 63
The material parts of the obligation and the condition in a recognizance should be set forth in the body, so as to admit of extension, consistently with its terms....... 708
In an action on the recognizance, it must be clearly proved that the party was called and warned, and neglected to appear..... 708
A material variance between the warrant and the recognizance set forth in the declaration and those given in evidence is fatal 708
Bail required in slander, when.........1031
To hold the defendant to bail in debt on a bond, the bond need not be produced until oyer demanded, if there be a sufficient affidavit of debt........ 240
A defendant discharged under a state insolvent law may appear in the district of Columbia, and discharge an attachment, without giving special bail............. 141
The court will not decide upon the merits, on a motion to appear without bail....... 240

BANKRUPTCY.

Operation and effect of bankrupt laws and of proceedings thereunder.

All the property and assets of the bankrupt are considered in custodia legis from the filing of the petition. (Act 1867.).... 103
The petitioner's property remains subject to execution until the adjudication. (Act 1841.) 1150
In voluntary petitions the rights of the bankrupt to the disposition of his property cease on the filing of the petition, but in involuntary petitions only upon the adjudication 703
A bankrupt court, which first takes jurisdiction by ordering a sale of mortgage premises discharged of liens, thereby ousts the state courts of jurisdiction to foreclose the mortgage........ 570
Though notes secured by a deed of trust mature before the adjudication, the bankruptcy court has custody of the estate, and the trustees cannot foreclose or sell without its consent........ 912
A sale by the trustee on direction of the creditor, without permission of the bankruptcy court, will be set aside on application of the assignee........ 56
The district court in bankruptcy *held* not to have the power to issue an injunction to stay the process of a state court.........1150
The enforcement in a state court of a valid lien attaching before the commencement of the proceedings in bankruptcy will not be restrained by the bankruptcy court on the ground of a probable sacrifice of the property 881
The jurisdiction of ordinary tribunals over suits against the bankrupt is not impaired by an adjudication in bankruptcy, and their judgments are valid in the absence of interference by the bankruptcy court 58
The bankruptcy court has no power to discharge, upon habeas corpus, a bankrupt who is held under arrest upon state process in an action of tort in obtaining the possession of goods, under color of a contract, by false and fraudulent representations 565
Evidence cannot be received to contradict the declaration, and to show that no such cause of action really exists as is therein set forth........ 565
A creditor not allowed to apply to a state court for an order directing the payment, out of the estate in the hands of a voluntary assignee, of referee's fees incurred in an action in the state court.............1180
The taking possession by a marshal, under warrant in bankruptcy, of alleged property of a bankrupt, of which plaintiffs in replevin had obtained possession, is not a case of conflict between the marshal and the officers of the state court, and summary relief will not be granted........ 26
A sale of the debtor's land on an execution levied after, though the judgment was entered before, the filing of the petition in bankruptcy, will not pass title as against the assignee........ 103
The court has no jurisdiction to make an adjudication against one who was an infant at the time of filing the petition; and a petition by the bankrupt, after he comes of age, for a confirmation of the proceedings, cannot give jurisdiction........ 513
A proceeding to have a debtor adjudged bankrupt is a civil, and not a criminal, proceeding 363

Register—Powers and duties.

The register has power to take affidavits and depositions at any time after petition filed 291
The register has power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default.... 362

Commencement of proceedings—Voluntary bankruptcy.

A voluntary petition in bankruptcy need not allege the insolvency or dissolution of a firm of which petitioner was a member.. 785
A bankrupt to whom a discharge has been refused, and who has contracted new debts, may file a new petition............1092, 1104

Page

The authority of the officer of a corporation to file a petition in bankruptcy cannot be disputed in a collateral proceeding..... 164

A contumacious resignation by officers of a company cannot prevent the company from filing a petition in bankruptcy authorized by the majority shareholders........ 164

Commencement of proceedings—Involuntary bankruptcy.

Since Act June 22, 1874, a corporation cannot be subjected to compulsory bankruptcy upon the petition of a single creditor 553

When two distinct matters, each of which contains a good cause of action or defense, are alleged conjunctively, it is enough if either of them be satisfactorily proved 1108

—— Acts of bankruptcy.

A failing debtor who gives a preference to a part of his creditors commits an act of bankruptcy..........................1108

A debtor suffers his property to be taken on legal process where, knowing that a debt is past due, or being insolvent or contemplating insolvency, he refrains from voluntary bankruptcy, and his property is taken on legal process.................. 651

An intention in law to give a preference is conclusively shown from a levy which operates as a preference, suffered by a debtor, insolvent or contemplating insolvency.. 651

The giving of a confession of judgment does not of itself raise a presumption of insolvency 651

The fact that a confession of judgment was signed by only one member of the firm will not impair the effect of the judgment in determining the question of bankruptcy. 651

The fact that the debt paid was a fiduciary debt, and that the creditor pressed for payment, will not prevent the payment's being an act of bankruptcy.............. 651

The return to the seller of a piano ordered for a customer who refused to receive it, made pending the negotiations for an extension of time on business paper, *held* not a preference nor an act of bankruptcy. 776

A sale of a stock of goods, not made in the usual and ordinary course of business, is prima facie evidence of fraud. (Act 1867, § 35.).......................... 291

A sale of a stock of goods at night, without invoice, for cash, *held* not made in the ordinary course of business............ 109

A trader is insolvent (Act 1867) when he is unable to pay his debts as they fall due in the ordinary course of business........ 651, 1021, 1078

Failure to pay a single debt when due is not sufficient to establish insolvency....1078

A firm is insolvent, within the meaning of the act, if, at the time the sheriff appears with an execution, it is unable to pay its debt to the judgment creditor in the ordinary course of business. 651

The ordinary course of business does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due.......... 651

If a debtor, at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature in the ordinary course of business, he contemplates insolvency...... 651

A suspension of payment of commercial paper for 14 days, where the debtor subsequently obtained an extension of time from all but one creditor, *held* not an act of bankruptcy 776

The fact that the debtor ceased to be a trader before the period of suspension of payment of his negotiable paper is no defense 109

The suspension of payment must be shown to have been fraudulent........... 50

An order of arrest in a civil action, where defendant immediately gave bail and was not lodged in jail, though it remained in force for more than seven days, is no ground of adjudication.................. 50

The giving of a mortgage by an infant is not an act of bankruptcy, as it is subject to the infant's election to affirm or disaffirm it after coming of age.................. 513

The verdict on a question as to an act of bankruptcy will not affect the question of the right to recover back the property transferred, or a right to a discharge..... 651

The bankruptcy court has the same power over verdicts of juries in bankruptcy cases as courts of common law........... 363

Schedule.

A schedule of real estate which states the county and town in which the property is situated, together with the name of the grantor, is sufficiently accurate.......... 785

Adjudication.

Mortgagees in a chattel mortgage given by an infant may petition to vacate an adjudication in bankruptcy against the mortgagor, made in proceedings on a petition filed before the mortgagor came of age 513

Assignment.

It is not essential to the title of the assignee that the assignment to him by the register should be recorded within six months from its date.................. 103

Assignee—Appointment and removal.

A creditor holding security, although he has proved his debt as provided in Act 1867, § 22, cannot vote in the election of assignee 49

The court will not sanction the election of an assignee who makes it a regular business to solicit creditors' votes........... 802

The court exercises a judicial discretion in affirming or refusing to affirm the action of creditors in the removal of an assignee. (Act 1867, § 18.)........................ 572

Assignees will not be removed on the vote of majority creditors who were all parties to transactions which the assignees were seeking to impeach...................... 572

—— Powers and duties.

The assignee is not empowered to compound all doubtful debts with the consent and approbation of a committee of creditors 657

Meeting of creditors.

Notices of the first meeting of creditors must be served, and the publication completed, before the commencement of the 10 days immediately preceding the return day of the warrant. (Act 1867, § 11.)........ 563

Where there was no proper publication and service of notice of the first meeting of creditors, the register may adjourn the meeting, from time to time, to permit the same 563

The register has no power to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling... 675

The fact of prevalence of yellow fever in the district does not alter the rule....... 675

Property of bankrupt — What constitutes.

A draft drawn by the bankrupt, not payable out of any particular fund, is not an assignment of the money in the hands of the drawee before acceptance............ 674

The seller of goods purchased by an insolvent without intent to pay therefor may recover them as against the purchaser's as-

Page

signee, if he can identify them, and exercises his right within a reasonable time.. 883

—— Possession and custody.

Bankrupt will be committed for contempt in failing to pay over money returned in the schedule as "cash on hand"..........1069

The prior possession of a receiver in a mortgage foreclosure cannot be disturbed by the bankruptcy court................ 164

—— Exemptions.

Act March 3, 1873, only allows the exemptions granted by state laws in 1871, as against judgments of state courts when such judgments are rendered after the passage of such act...................... 703

Congress, in adopting the exemption laws of a state as part of the bankrupt law, cannot dispense with any of the limitations imposed by that law.....................1166

Act March 3, 1873, in so far as it attempts to exempt property specified in the state laws in a different manner or with different effect from that of the laws themselves, is in violation of the constitutional requirement of uniformity..........334, 1166

Act March 3, 1873, so far as it is declaratory of the meaning of the act of June, 1872, *held* null and void................ 703

The right of exemption must exist, if at all, at the date of the commencement of proceedings in bankruptcy..............1166

Under the laws of Kentucky an exemption of land cannot be allowed as against debts contracted before its acquisition....1166

In Kentucky, an undivided interest in land on which there are no improvements, appurtenances, or dwelling houses, although the bankrupt has expressed an intention to make it a homestead, will not be allowed as exemption.........................1166

The bankrupt may retain all his necessary household and kitchen furniture exempted by the state law from forced sale. (Act 1867, § 14.)........................ 61

Both the right to a homestead and dower in land revive where the conveyance is set aside as an illegal preference under the bankrupt law, or is surrendered by the creditor 545

—— Liens.

A lien must have existed at the commencement of the proceedings to be recognized by the bankruptcy court........... 625

A lien by attachment is preserved by the act of 1841, equally with the lien by judgment 1001

In the absence of fraud or collusion, a sale on execution of property seized before the filing of the petition which had been attached before the alleged acts of bankruptcy by mesne process will not be restrained. (Act 1841.)..................1001

An attachment within four months of the commencement of bankruptcy proceedings gives no lien.......................... 52

A lienor whose lien expires by limitation between the order of sale of realty discharged of liens and the actual sale is still entitled to share in the proceeds of sale... 179

A lien attaches, under the New Jersey mechanic's lien law, as of the time the labor is performed or materials furnished, which will be enforced by a court of bankruptcy, though the claim therefor is not filed until after the bankruptcy proceedings were commenced. (Reversing 625.)...... 627

A sister of the bankrupt, who for years handled her funds and securities, *held* entitled to be considered holder of a mortgage which the bankrupt took up with the proceeds of her government bonds, sold without her knowledge....................... 573

In the case of vendor's liens and liens attaching prior to the title of the vendor, resort must be had to a proceeding in equity to determine the title and rights of the parties 1074

—— Sale.

The bankrupt's property may be sold under order of the court, free and clear of incumbrances, leaving the secured creditor who has proved his debt to his remedy against the fund........................ 103

The bankruptcy court has power to take possession of and order the sale of property of the bankrupt incumbered by valid liens exceeding its value, but such order will be set aside on review as an improper exercise of the court's discretion................ 703

Sale of realty *held* void as to lien creditors who had no personal notice thereof....1074

Where property is unlawfully taken from the possession of a state court receiver, a sale by the assignee will be set aside as against one having notice of the illegality, and the purchase money ordered refunded. 164

Confirmation of sales by assignees not practiced, as being liable to compromise right of third parties.................... 889

Proof of debts.

No debt can be proved on which an action could not be maintained against the bankrupt in the state where the petition is filed, in case bankruptcy proceedings were not instituted.......................... 957

A claim in equity to rescind a contract is not provable........................ 821

Attorney's commissions and costs stipulated to be paid on foreclosure are not allowable when the proceedings to foreclose are invalid 570

The bona fide holder for value of an accommodation bill is entitled to prove as to all parties against whom he could have supported an action on the bill...........1008

The receipt of partial payment from an accommodation acceptor after the bankruptcy of the drawer does not prevent the holder from proving the full amount due at the time of the adjudication...........1008

The expenses of an attachment to secure a debt made within four months of the bankruptcy proceedings are not a lien on the property, nor allowable as a claim against the estate..................... 52

The solvent partner in a firm of four partners, two of whom were insolvent, and the other bankrupt, who pays the firm debts out of his separate estate, is entitled to prove half the amount against the separate estate of the bankrupt................. 415

Creditors holding security of any kind must prove their debts and obtain permission to foreclose their liens............56, 103

A creditor who, knowing the debtor to be insolvent, procures judgment against him, and causes his property to be sold, and contests the claim of his assignee, cannot prove his debt............................ 27

A creditor, receiving a fraudulent preference, who voluntarily surrenders the same to the assignee before suit brought on account thereof, may prove his claim; otherwise not.............................1110

A mere covenant by a creditor not to sue an accommodation acceptor does not prevent him from proving against the drawer's estate 1008

A nonnegotiable chose in action may be proved by the deposition alone of the assignee thereof, but such deposition should show the name of the original creditor.... 6

The creditor who has proved his debt is remitted to his former rights and remedies where the bankrupt's discharge is refused. 724

Payment of debts: Priority: Dividends.

A claim for a loss under an insurance policy may be set off against an indebtedness to the bankrupt company. (Act 1867, § 20.) 1053

Page

The rights of the parties are to be determined by the state of facts at the time of the loss 1053

If claimant's indebtedness is not due, a bill in equity will lie to establish the set-off.1053

Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution................ 570

Assets are to be marshaled between firm and separate creditors of partners only when there are firm and separate assets, and proceedings are instituted against the firm and individual members, as provided in section 36 1005

Individual creditors and partnership creditors share equally in the estate of a partner who, on dissolution of the firm, agreed to pay all the debts, where both partners are individually put into bankruptcy......1005

The state is entitled to be preferred to private creditors. (Rev. St. § 5101.)..... 788

Costs: Fees: Disbursements.

Costs not allowed to a claimant where expense and delay in proof of claim was caused by his failure to make full disclosure of the transactions on which it was founded 451

A claim by petitioning creditors for counsel fees incurred before adjudication must be first presented to the court by petition.. 657

A mortgage of $4,000, given on an advancement of $1,000, *held* prima facie evidence of fraud, and ground of proceeding in bankruptcy justifying an allowance of petitioner's costs and expenses...........1184

Decision as to the fees of registers' clerks, marshals, and assignees, deciding what are legal and what unwarranted and improper. 286

Rule as to the legal rate of charges for printing advertisements of sale of real estate by order of the court.............1008

Allowance of fees and expenses to assignee for various services in his dealings with the bankrupt's property, its sale, etc. 6

The compensation of the assignee's attorney must be reasonable, and proportioned to the value of the estate...............1046

An attorney, in performing the ordinary duties of the assignee, cannot claim from the estate compensation as for professional services 1046

Assignee can only properly charge commission on the amount of debt canceled by compromise with a lienholder............ 6

An involuntary bankrupt, equally with a voluntary bankrupt, is entitled to his disbursements in proceedings to obtain a discharge. (Act 1867, § 47.)............... 658

A creditor *held* not entitled to reimbursement for expenses and costs of a suit in a state court to compel a voluntary assignee to distribute the estate, where the suit was not beneficial to the creditors............1181

Discharge—Proceedings to obtain.

A discharge, although not applied for within a year, may be granted where there are no assets, and the delay is satisfactorily excused. (Act 1867, § 29.).......... 882

The assent of creditors to the discharge (Act June 22, 1874, § 9) must be in writing, and it is sufficient if filed before the hearing of the application...................... 517

The one-fourth of creditors in number and one-third in value whose assent is necessary (Act June 22, 1874, § 9) are those to whom the bankrupt is liable as principal debtor, and who have proved their debts against the estate......................... 517

It is a case of "no assets" (Act 1867, § 29) where the assignee after 60 days has collected nothing on notes which constituted the bankrupt's entire assets......... 786

Discharge—Opposition: Acts barring.

Page

A general assignment before the passage of Act 1841, with preference of fictitious debts, will not operate as a bar........... 388

Putting a fictitious debt upon the schedules of the bankrupt is admitting the same, within the meaning of Act 1841......... 388

Opposition to discharge grounded upon the fact of debt being fraudulently created is insufficient 906

A payment to a creditor out of the ordinary course of business, and within four months of filing the petition, by a debtor knowing himself to be insolvent, will prevent a discharge, although the preferred creditor had no knowledge or reasonable cause to believe the debtor to be then insolvent 1021, 1024

A prima facie case of fraud *held* to have been established on 11 specifications of objections to the discharge................1026

Vague and general specifications reciting fraud, etc., will not be received in opposition to discharge 1077

Declarations of a debtor, at the time of his failure, that he has means to pay all his debts, are not sufficient, by themselves, to show a fraudulent concealment of assets 388

An order refusing a discharge may be entered nunc pro tunc where the parties have acted on the theory that the order was in force, and the rights of third parties will not be prejudiced..................1092, 1104

—— Scope and effect: Vacating.

The summary jurisdiction of the bankruptcy court over the person of the bankrupt ceases on the granting of the discharge 828

The lien of a debt is not released by the discharge, and it may be enforced by a state court when the property does not form part of the assets in bankruptcy, or by the bankruptcy court when it does, and subsequently comes into possession of the bankrupt 748

After the discharge is granted, the bankrupt cannot by summary order be required to submit to an examination touching property alleged to have been concealed or fraudulently transferred 828, 832

All debts existing before and at the date of the decree of bankruptcy are provable under the bankruptcy, and all debts up to that time are barred by the certificate of discharge 1001

Liens of creditors cannot be enforced in a court of bankruptcy after the bankrupt has obtained his discharge.............. 293

Prohibited or fraudulent transfers.

A bona fide conveyance by an insolvent for an adequate consideration, made more than two months before petition filed, to one who had no notice of a previous act of bankruptcy or of intention to take the benefit of the act, is not void. (Act 1841.).... 462

A new bill of sale of a merchant's stock in trade taken by the managers of a bank to secure overdrafts which the cashier had secretly allowed and secured by a prior bill of sale *held* a valid security, where the prior bill of sale was given four months before the commencement of proceedings.... 915

Both an intention to dispose of property in fraud of the act, and a knowledge of such intention by defendant, are necessary to entitle the assignee to recover personal property sold on the eve of bankruptcy... 676

A mortgage given by an insolvent debtor with an intent to secure a preference to a creditor, who had at the time reasonable cause to believe the debtor insolvent, is void 1078

Page

The intent to give a preference is conclusively shown from the necessary operation of the transaction..................1078

The question of insolvency is one of fact, and depends in part upon the usage and understanding which prevails in the locality with reference to which the question arises 1078

—— Suit to set aside.

The limitation of two years (Act 1867, § 2) applies only to property held adversely to the bankrupt and his assignee......... 103

Property fraudulently conveyed by the bankrupt was levied upon and sold after proceedings in bankruptcy commenced. *Held*, that the cause of action against the purchaser to set aside the sale did not accrue until he acquired his title........... 103

Arrangement with creditors.

A composition ratifying an assignment under the state law may be varied by creditors at a subsequent meeting by providing for distribution of the assets in bankruptcy, where no creditors are prejudiced thereby.1177

The debtor is not required to be present at a meeting of creditors called to consider a resolution to vary a composition which has been accepted......................1177

The absence of the debtor *held* no ground for refusing to confirm the proceedings, where it did not appear that creditors' rights were injuriously affected by his absence. 1177

At the meeting of creditors called to take action on a resolution of composition, the register has no authority to require any person to testify except the debtor........ 781

On a petition to set aside a composition for alleged greater payments to other creditors, testimony will be ordered to be taken on notice to all creditors................ 693

BANKS AND BANKING.

See, also, "Bills, Notes, and Checks"; "Usury."

A bill drawn by a bank in express violation of its charter cannot be set up by it in payment........................... 111

Notes of a state bank or state banking association used for circulation, and paid out by it, whether previously issued or not, are liable to the tax of 10 per cent. (Rev. St. § 3412.).......................503, 504

The tax upon the average amount of circulation "issued" (Rev. St. § 3408) applies both to the making of notes and the putting of them in circulation.............. 504

One holding shares in a national bank as trustee is personally liable for debts of the bank, unless his trusteeship appears on the bank's books........................... 126

A religious society purchasing national bank shares with a bequest of money is an ordinary stockholder, liable to assessment for debts.............................. 126

Individual liability for the debts of a national bank cannot be escaped by a transfer of stock to a person pecuniarily irresponsible, by a purchaser who remains the actual owner.......................... 177

The estate of a stockholder of a national bank, who died prior to its insolvency, but whose stock had not been transferred at the date of the comptroller's order making an assessment, is liable therefor. Rev. St. § 5152, does not affect such liability...... 186

BILL OF LADING.

See, also, "Affreightment."

The bill of lading, and not the charter, will control as to the liability of the cargo for freight, as against consignees advancing money thereon.................... 128

Page

A clause acknowledging goods to have been in good condition when shipped raises an inference that an injury subsequently discovered arose from a cause for which the vessel is responsible................. 699

The breaking down of a wharf by the pounding of a vessel which had broken from her moorings in a hurricane will not excuse a vessel for loss of goods landed thereon, as a danger of the sea, where they could have been saved by due diligence.. 648

A landing of goods piled in one bulk upon the wharf on a stormy day, and covered with tarpaulins, so as not to be open to inspection, is not a good delivery, though the bill of lading provides that the landing upon the wharf shall be considered a delivery 648

The exception of leakage, breakage, or rust will not excuse the vessel from negligence or want of skill or care in lading, stowing, or delivering the cargo.......... 16, 337, 340, 413

Cases of plate glass placed endwise on unloading were found to contain broken glass, as well as those placed flatwise on each other. *Held*, that it did not appear that the breakage in the latter was caused by the manner of unloading.............. 413

BILLS, NOTES, AND CHECKS.

A draft drawn and indorsed in Ohio for the accommodation of the drawee in New York, in which place it is negotiated for a usurious consideration, is avoided for usury under the New York laws............... 117

A promissory note given by the heir in renewal of a note made by his ancestor, which was barred by limitation at the death of the ancestor, is void for want of consideration 680

An agreement to accept bills renders it unnecessary that the drawee shall have funds in his hands belonging to the drawer. 542

The assignment of a note by writing guarantying "the ultimate payment" does not change the liability from that of an ordinary assignor...................... 497

The assignee of a note must use due diligence to recover of the maker, who is not notoriously insolvent or removed from the state, before he can resort to the assignor 497

The drawer, having paid the bill to the payees after the acceptors refused to pay it, had a right to sue the acceptors....... 140

Where the drawer of a bill of exchange may sue in the name of the payees for his own benefit, his payment of the bill to the payees is no bar....................... 140

The holder of a promissory note has no equity against a remote indorser unless he has used due diligence to recover from the parties liable to him at law............. 305

The drawer of a bill is only liable as indorser where it is remitted to, and received by, his creditor in payment of a debt. 485

The holder of a note cannot be chargeable with gross negligence in failing to sue the maker, who resides in another state... 41

Where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday will hold the indorsers............ 917

Notes secured by a trust deed were paid by the maker as they matured, with funds borrowed from a third person under an agreement that he should hold the notes on the same security, of which the payees had no knowledge. *Held*, that the lender was not subrogated to any rights under the trust deed............................ 913

The holders of a promissory note may recover the costs of protest against an indorser, where such protest is evidence of a demand 965

Page

The holder of a note with a blank indorsement may sue the indorser by filling up the blank indorsement.............. 479

The last indorser, who takes up a draft when due, may cancel the names of the prior indorsers without impairing his title to recover against the acceptor.......... 286

The declaration may describe the note in terms, or according to its legal effect.....1049

A plea that defendant, sued as a principal, indorsed the note as guarantor, and not as principal, *held* good on demurrer... 646

BONDS.

See, also, "Railroad Companies."

A statutory bond which contains more than the statute requires is not vitiated by the surplus matter, but is vitiated by the omission of a material condition required by the statute......................... 761

A bond made payable to "the United States of America" is binding at common law 761

Evidence of the handwriting of the obligor and subscribing witnesses residing abroad is only prima facie proof on the issue of non est factum..................... 44

BOTTOMRY AND RESPONDENTIA.

A bottomry bond is a contract for a loan of money on the bottom of the ship at an extraordinary interest, upon maritime risks, to be borne by the lender, for a voyage or a definite period....................1032

A bottomry bond may be upon time as well as upon a specific voyage...........1032

A valid bottomry bond may be made by the owners of a vessel in a foreign or a home port............................1032

It is not necessary to the validity of a bottomry bond, made by the vessel owner, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage......................1032

A bottomry bond need not be recorded under a state statute (Act Mass. 1832, c. 57) providing for the registration of chattel mortgages 1032

A valid bottomry bond will be upheld, where there are no laches on the part of the lender, even against a bona fide purchaser without notice..................1032

A sale or transfer of the vessel, or a breaking up of the voyage, by the borrower, after a risk on bottomry has commenced, renders the bond immediately payable...1032

Trover will lie at common law in favor of the lender, against a purchaser who has taken possession of the vessel..........1032

A bond conditioned to be void in case of utter loss of the vessel is not discharged by its stranding and abandonment to insurers as a total loss, and a sale by them at the place of stranding as not worth repairing; and the holder is entitled to the proceeds as against the insurers........ 404

CARRIERS.

See, also, "Affreightment"; "Bill of Lading"; "Charter Party"; "Shipping."

A carrier receiving goods for transportation to a point beyond its terminus is not bound to account for a loss, where it has delivered at its own terminus to a proper person 751

The burden is upon plaintiff to show that a railroad company which received goods for transportation to a point beyond its terminus undertook to carry the whole distance by rail...................... 751

Page

The burden of proving breach of duty by the carrier, whether it be alleged as a malfeasance or a nonfeasance, is upon the party alleging it......................... 751

Goods, whether conveyed in the body of a steamboat or in a barge attached thereto, are subject to the same guaranties and protection 678

A freight bill is a contract, and its effect cannot be varied by parol evidence...... 751

A freight bill ending "Acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee 751

CHAMPERTY AND MAINTENANCE.

A deed executed for land, which is held adversely to the grantor by an individual in possession, is void under the champerty act 1135

CHARTER PARTY.

A representation that the ship would sail for the port of lading on a day certain, made in correspondence with reference to its charter, *held* to amount to a warranty, and, where the ship did not sail until later, charterer not bound.................... 527

Where the charter operates as a demise of the vessel, the charterer becomes the carrier, and the master his agent, in contracting for the carriage of merchandise; otherwise, where the charter operates merely as a contract of affreightment.... 877

The owner is not liable for the contracts of a master, where the charterer was to have entire control, and to victual and man the vessel.........................566, 877

A stipulation to victual and man the vessel, pay all port charges, and deliver her to owner at end of voyage, makes charterer owner for the voyage, though one of the owners was named as master...........1085

A charter providing that the owner shall victual and man the vessel, and that the whole of the vessel, except that necessary for the men and stores, shall be at the sole use and disposal of the charterers during the voyage, *held* to constitute a contract of affreightment 877

Under a charter for a voyage out and return for a round sum, the owner cannot recover a proportionate amount of the charter money, where the voyage was not completed 877

Right to lien on cargo for the amount due under the charter.................. 579

Charterers are liable for the detention, not due to the fault of the vessel, caused by intervening Sundays, holidays, customhouse and port regulations as to taking in or discharging cargo, and by lack of wharfage or lighterage facilities, under a charter which provided for 45 running days for loading and discharging, and damages for further detention happening "by default" of the charterer. (Reversing 159.)....... 161

Charterer *held* liable for costs of discharging, port charges, and demurrage, where naval vessel to which a cargo of coal was consigned was wrecked, and master had to wait for berth to land the cargo, where the charter provided that the cargo should be discharged free of all expense to the vessel, the charterer to pay port charges..... 984

The charterer instructed the master of a vessel, ready to sail, to proceed if the charterer did not come on board in the morning. *Held*, that the master was not guilty of misconduct in setting sail where the charterer failed to appear........... 984

CIVIL RIGHTS.

Page
The court will enforce civil rights acquired under a foreign law.............. 415

CLAIMS.

An agent employed to collect a claim against the United States for a certain per centum of the amount realized, whether in cash or scrip, has a lien upon the fund for his compensation...................... 990
The term "claim" (Rev. St. § 3477) *held* not to include claims for supplies furnished the Oregon expedition to protect the emigrants of 1854........................ 990

COLLISION.

Nature of liability—Contributive fault.
Misconduct causing a collision precludes recovery by the party in fault for injuries sustained 793
Rules of navigation.
Barges navigating the Ohio and Mississippi *held* subject to the rules of navigation. 678
Sail vessels meeting.
The vessel sailing free must give way to the one closehauled.................... 793
Steam vessel meeting sail vessel.
The burden of showing that the sail vessel changed her course is on the steamer..1132
A steamer approaching a sail vessel should take all precautions to guard against contingencies and accidents to which a sail vessel is liable......................... 389
The fact that a steamer has vessels to her right and to her left will not excuse a collision with an approaching sail vessel, which kept her course, where she could have passed without danger by making a sufficient change of course.............. 307
The sail vessel will be presumed to have been in fault where the steamer was in her regular course, and adopted all the usual precautions to avoid the collision........ 673
Steam vessels meeting.
The rule as to crossing courses, requiring the vessel to starboard to keep her course, is inapplicable to navigation in a dense fog. 1127, 1130
Tugs and tows.
Tug *held* liable for collision between schooner being towed out of slip and bark lying at adjoining pier, caused by the casting off of a line by the schooner, which held her against flood tide............... 888
River and harbor navigation.
The attempt to pass a ferryslip at such a rate of speed as renders it impossible to stop in time to avoid hitting a ferryboat, in case one should come out, is negligence..1106
Steamer *held* in fault for collision with ferryboat coming out of slip, where she was running at full speed close to the piers...1106
Speed: Fogs.
"Moderate speed" (Act 1864, c. 69, art. 16) is a speed sufficiently moderate to enable the steamer, under ordinary circumstances, when approaching another ship so as to involve risk of collision, seasonably and effectually to slacken her speed, or, if necessary, stop and reverse.......... 858
A sail vessel under way must sound a fog horn when there is fog enough by day to shut out the view of the sails or hull, or at night the lights, of a vessel within the range of the sound of the horn. (Act 1864, c. 69, art. 10.).................... 858
A steamer entering crowded harbor in a dense fog *held* not negligent in anchoring over night near a ferryslip, where she took all precautions, by signals, to make her position known..................1121, 1129
Lights: Signals, etc.
The omission to carry side lights required by statute will not necessarily prevent a recovery of damages for collision........1031
Lookouts.
A lookout must be constantly at his post, and must not be interrupted in the performance of his duty...................... 974
Particular instances of collision.
Between two schooners, one of which, having no side lights, was *held* solely in fault 1031
Between two sail vessels, one closehauled and the other sailing free, where the latter was *held* in fault for an insufficient lookout and failure to keep away.. 677, 974
Between sloop proceeding to dock in East river under a jib, and schooner sailing free with plenty of sea room, the latter being *held* solely in fault................1141
Between a schooner and a steam tug in a narrow channel, where the latter was *held* in fault for not keeping away.......1132
Between steamer and schooner at night in a fog, where both were *held* in fault,—one for immoderate speed and a wrong maneuver, and the other for not sounding a fog horn.............................. 858
Between schooner and propeller at night on Lake Erie, both being *held* in fault,—the former for not holding her course, and the latter for failure to keep away.......... 389
Between two ferryboats on crossing courses in a dense fog, where one backed before the lights of the other were seen, and the other kept on at full speed. .1127, 1130
Between steamer coming into harbor in fog, and anchoring near ferryslip, and ferryboat which had full notice of her position, where the latter was *held* in fault.. 1121, 1129
Between ferryboat crossing the North river and steamboat coming down the river, where both were *held* in fault for failure to slow and stop when danger of collision was apparent 1122
Procedure.
Consignees of a cargo may maintain a libel in personam against the owners of a vessel for a loss sustained by collision.... 857
The pendency of a suit by the consignees in another district against the vessel is no bar to such proceeding................ 857
A libel by the owners of a tow, alleging that it was run upon a sunken pier known to the tug, where the answer denies negligence, may be amended by averring negligence 351
A libel for injuries sustained by collision must allege facts showing the proper conduct of libellant's vessel, and the fault of the vessel sought to be charged therewith. 793
It is no defense to a libel for injuries to a passenger on a ferryboat on her way to attend divine service, caused by a collision with such boat, that libellant was traveling on Sunday.............................1122
In the case of a collision between a steamer and a sail vessel which failed to carry a light at night, the presumption is against the latter........................ 396
The opinions of experts as to the vessel's course, when founded upon very nice calculations, will not obtain as against the clear testimony of eyewitnesses...............1031
The admission of a master that his vessel was in fault, coupled with a promise to pay the damages, though he was not on deck at the time of the collision, is entitled to great weight 974

Page
But little credence can be given to the testimony of a sailor who contradicts statements deliberately made by him, in writing, immediately after the collision....... 974
The admission of the superintendent of defendant's towing line that it would cost more to raise the vessel sunk by one of its towboats than she was worth, and that he regarded her as a total loss, is competent on a libel for such loss.................... 987
On the question of the actual market value of the boat at the time of loss, plaintiff may testify as to what he had paid for her, and what he had expended upon her... 987
A party claiming a total loss must prove either an actual total loss, or that it would cost more to raise and repair the vessel than she would be worth when repaired...... 987

Rule of damages.

The circumstances stated, under which the value of a sunken canal boat was allowed as upon a total loss................. 348

COMMISSIONERS.

A commissioner of a United States court has not power to commit a citizen for an alleged contempt......................... 854

COMPOSITIONS.

See, also, "Bankruptcy."

Creditors agreed to accept notes for 50 per cent. from an embarrassed debtor, on condition that the agreement be signed by all principal creditors. *Held*, that a creditor who had accepted notes was estopped to claim that the agreement was not so signed. 324

COMPROMISE.

Compromise settlement of a decree for damages for collision in a suit brought by a married woman, as owner, *held* should not be set aside after eight years, as unauthorized by her....................... 352

CONGRESS.

Sufficiency of indictment against member of congress for unlawfully franking a letter 571
Though unlawful, it is not penal for a member of congress to frank envelopes to be used in transmitting printed circulars through the mail. (Act March 3, 1825, § 28.) 571

CONSTITUTIONAL LAW.

The United States have no power to levy a tax upon the salary of a state judge of a court of record payable out of the state treasury 222
The erection of a bridge under state authority, which will prevent navigation of a public stream lying wholly within the state upon which there is commerce with other states, may be enjoined by a federal court. 566
The question in such case is relative, whether the bridge be or be not a greater obstruction to commerce than benefit to the public 566
In such case an interlocutory injunction may be granted, though the answer deny both the law and the facts, and an issue directed to determine whether the bridge contemplated or any other bridge at such spot will be a nuisance..................... 566

CONTEMPT.

Defendant should clearly prove his financial inability to entitle him to mitigation of fine imposed for a contempt............ 959

CONTRACTS.

Page
A note given upon a wager as to the result of the local vote for presidential electors, though between parties not qualified to vote, is void........................... 464
A contract in restraint of trade, made at a time when it is the policy of the law to restrict such trade, is not invalid........ 761
Particular words in a contract should give way to the evident intent appearing from a view of the whole instrument.......... 877
The word "or" cannot be construed to mean "and," to change a contract at pleasure 975
Plaintiff agreed to let defendant have in exchange 6 extra copies of his printed testimony. The amount was subsequently increased to 40. *Held*, that defendant was liable only for their extra cost, and not for a ratable proportion of the cost of the entire edition 555
A government contractor is not liable for extra work done by a subcontractor by direction of the government superintendent without proof that the work was embraced in the contract with the government, and not embraced in the subcontract......... 900
Where acceptance was refused because a delivery is accompanied by a demand for a greater price than agreed, the party is not bound to pay anything................. 555

CONVERSION, EQUITABLE.

The proceeds of sales of lands made under a will to pay debts are equitable assets. 761

COPYRIGHT.

The person who writes a book, and prepares it for publication, is the author, whom the copyright law was intended to protect, and not the one who employed him for such purpose...................... 575
The person who furnishes the incidents and events of a person's life to another, who prepares them for publication, is not the author, and his assignee of the copyright taken out by him cannot maintain an action for infringement................ 575
A chart on a single sheet, containing diagrams representing a system of taking measures for and cutting women's dresses, with instructions for its use, is a "book," within the copyright law................1113
To constitute infringement, it is not necessary that there should be a complete copy of one book by another..................1113
The fact that one publication is an improvement on the other will not prevent it being an infringement if a material part of the other publication is used............1113
Where it appeared that the pirated publication was substantially identical with that of complainant, the defendant was ordered to surrender all copies within her control, and the plates on which they were printed 1113

CORPORATIONS.

The acceptance of the charter essential to constitute a corporation will be presumed from facts consistent only with such hypothesis, without proof of express declaration 939
Letters patent issued under a general law, when produced by a corporation to establish its existence, will be presumed to have been granted in conformity to the requirement of the law, at the instance of the corporation, and accepted by it....... 939
A corporation has power to purchase an invention which would tend to facilitate the purposes of its incorporation, as indicated

Page
by its corporate name, even in the absence of any law expressly conferring it........939
Where a corporation has acted under a contract, and received the benefits arising under it, it is not competent for it to deny its validity as being "ultra vires"......... 722
The president of a corporation cannot sue in his own name for injuries done to him, as such officer, and as a stockholder and creditor 901
A corporation may sue in the name of its president as a citizen............... 726
The general issue pleaded to a suit by a corporation admits corporate existence.... 498
A corporate body created by a sister state can have no corporate existence beyond the limits of the territory of that state....... 245

COSTS.

Costs will be allowed neither party on libel for collision where both claim a greater amount of damages than they were able to prove 20
Claimants in admiralty, not tendering the actual amount due until after appeal, allowed only costs of appeal, on reversal... 128
Circumstances *held* equivalent to a tender of the balance of freight after sale of damaged cargo, and before suit brought..337, 340
On removal to the circuit court of an appeal in admiralty before the passage of Act Feb. 26, 1853, the fee for removal is not taxable 339
A fee of $2.50 for reading, on an appeal in admiralty, a deposition read below, is not taxable 339
A docket fee of $20 is not taxable on a reference in a suit in equity under an interlocutory order before final hearing. (Act Feb. 26, 1853.).................. 971
No item of costs other than those specified in the fee bill in Act Feb. 26, 1853, can be taxed in the circuit court of the United States 339
The $20 docket fee allowed to a proctor or attorney by that act, can be taxed only on a final hearing, and can be taxed but once in a cause...................... 339
That fee is not taxable, after a decree on an appeal in admiralty, on a motion that the stipulators on the appeal pay into court the amount of their stipulations.......... 339
The cost of printing papers which, by a rule of court, a party is required to have printed, can be taxed against the adverse party 472
Fees of a witness attending under a subpoena who resides without the district, and more than 100 miles from the place of holding the court, cannot be taxed.....1068, 1069
Fees of necessary witnesses residing within 100 miles, who were examined, may be taxed, though they were not served with subpoena.............472; contra, 1068, 1069
The indorsement, by a witness, of "Accepted" on a subpoena never placed in the hands of an officer, will not take the place of service of the subpoena.........1068, 1069
Specific objections are necessary to reach charges for clerk's fees and affidavits on an appeal from taxation............... 339
If the plaintiff has not a domicile in this district, he may be ruled to give security for costs 1135
After the term at which a rule was laid upon the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a nonresident 560
The remedy on attachment for costs, etc., in admiralty is to be governed by the rules which belong to courts of admiralty as contradistinguished from courts of common law 394

COURTS.

Page

Comparative authority of federal and state courts: Process.

An attempt to disturb by proceedings in the state court the possession of a receiver previously appointed by the federal court is a contempt of such court............. 562

Federal courts—Jurisdiction in general.

The federal judiciary has no authority to assist in the execution of the penal laws of a foreign country by surrendering a fugitive from the justice of a foreign government, or to detain him in custody until a formal demand can be made or the executive. Piracy is no exception to this rule............... 949
An action will lie in the federal court against the principal and surety jointly on a supersedeas bond given on appeal in the state court, on affirmance of the judgment.. 217

—— Grounds of jurisdiction.

The title to real estate may be transferred to an alien to give jurisdiction to the federal court, though the consideration was nominal, if there be no agreement to retransfer.. 389
Where the real parties in the record are not citizens of different states, the court has no jurisdiction.......................... 798
The fact that intestate was a citizen of another state will not give the administrator, who is a citizen of the same state with defendant, the right to sue in the federal court................................. 798
An action by the indorsee against the indorser of the note may be brought in a federal court in one state by a citizen of another, though the assignment was made by a citizen of the former state............ 479
The fact that the original ground of suit in a state court between citizens of different states was a negotiable chose in action (Act 1789, c. 20, § 11) will not prevent the federal court taking jurisdiction of a bill in equity in favor of the assignee of the judgment, who is a citizen of the same state with plaintiff.............................. 621
In a suit in equity brought by aliens against citizens of the district, a person not stated to be a citizen of the state cannot be made a defendant on his application, because the jurisdiction of the court would thereby be ousted.....................1050
A person sued by the payee on a partnership note in the federal court cannot object that the nonresident plaintiff and his codefendant, not served with process, are citizens of the same state................. 916
The fact that, upon the trial of an action arising out of contracts or dealings of the parties, a question may arise involving the construction of a federal law, will not give the court jurisdiction. (Act March 3, 1875, § 1.).............................. 996
The averment that complainant is a joint stock association, formed in the state of New York, under the laws of such state, neither imports that it is a corporation created by another state, nor that its members are citizens of another state........ 727
In all bills in equity the citizenship should appear on the face of the bill, to entitle the court to take jurisdiction.............. 798
Citizenship, where it gives jurisdiction, is a preliminary inquiry; and, if it be properly averred in a bill in equity, the denial of the fact must be made by way of plea.. 798
A mere averment that the action arises out of a law of the United States is insufficient to confer jurisdiction; the facts showing it must be stated...................... 996

—— Circuit courts.

Defendant in a case arising under the patlaws must be an inhabitant of the district

Page
in which the suit is brought, or be found within it at the time of serving the original process.............................. 245
Jurisdiction over a Connecticut corporation cannot be acquired by a federal court in another state by service of process on one of its officers, in the district............. 333
Jurisdiction cannot be obtained of a foreign corporation by attaching goods in a store conducted by its agents within the district, and service of summons on its president within the district................. 245
A federal court cannot acquire jurisdiction in a suit against a foreign corporation by the adoption of the state practice, which authorizes the institution of such suits by attaching their goods within the jurisdiction. (Judiciary Act 1789, § 11.)......... 245

Federal courts—District courts.

Causes within the admiralty jurisdiction are within the jurisdiction of the district courts by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction."................. 418

—— Administration of state laws and decisions.

A suit on a bond given in the federal court will be sustained in such court if the state court would be compelled under the statutes to sustain the same suit................. 281
In a case of conflict of state decisions in the construction of a state statute, the last decision of the highest court will control.. 696
The decisions of the state courts that its statutes compelling a holder of a note to sue the principal within a certain time after notice, as a condition of holding the indorser or surety liable, are binding on the federal court.............................. 41
State statutes authorizing and regulating references have no application to federal courts.............................. 490
A state law allowing a party to be examined as a witness on his own behalf is binding on the federal court as a rule of decision. (Act Sept. 24, 1789, § 34.)....... 658

—— Procedure.

Chancery jurisdiction or rules of practice are not derived from state authority, and a state statute regulating the procedure on a bill of foreclosure does not apply to the federal courts........................... 983
Where both state and federal courts have concurrent jurisdiction to enforce a right given by a state law, the procedure must be according to that of the court in which the suit is instituted.................... 144
The federal courts may in their discretion adopt any part or all of the remedies provided by the state legislature............ 779
The adoption of a state statute, as part of the final process of the federal court to enforce judgments against counties, *held* valid................................. 779
The Rhode Island statute respecting the redemption of mortgages *held* properly followed by the circuit court of the United States, sitting in equity................ 606

CRIMINAL LAW.

A conviction or acquittal of the offense of keeping a faro table *held* a bar to all acts of keeping prior to the issuing of the warrant.. 766
The daily penalty for keeping a faro table can only be recovered by issuing warrants for the offense daily................... 766
The day laid in the warrant for the offense of keeping a faro table is not material, so that the time actually proved be subsequent to a former prosecution, and before the issuing of the warrant, and within the time of limitation..................... 766

CUSTOM AND USAGE.

Page
Usages among merchants should be sparingly adopted as rules of law by courts of justice.............................. 889

CUSTOMS DUTIES.

Rates of duty.

Articles specifically provided for in a tariff act cannot be subjected to duty at a different rate under a general designation which would otherwise include them...... 789
A question of classification of certain laces *held* one of fact for the jury upon the testimony of merchants dealing in such goods.. 1146, 1148
Tin plates and terne tin imported subsequent to the enactment of the Revised Statutes *held* subject to the combined operation of sections 2503 and 2504.............. 789
"Twist," composed of goat or mohair and silk, or entirely of silk, if not known as "sewing silk" in commerce, is not dutiable as such. (Act March 2, 1833.)........926, 927
Worsted cravats woven on stocking frames, and known in commerce under the general class of "hosiery," are dutiable as such. (Act 1832.)...................... 927

Invoice: Appraisal.

The actual value of the articles at the time and place of shipment will control in fixing the duty (Act June 30, 1864), irrespective of the price fixed in the invoice.... 31
Under the power to make regulations for estimating duties in the case of depreciated foreign currency (Act March 2, 1799, § 61), the president cannot fix an arbitrary value for foreign currency, without regard to its intrinsic value................. 364
Where the invoice and entry are made out in a denomination of foreign money not enumerated in the statute, the value of the goods must be estimated according to the intrinsic value of such foreign money, compared with money of the United States. (Act March 2, 1799, § 61; Act March 3, 1801, § 2.)........................... 364
A consular certificate as to the value of foreign currency, attached to an invoice, may be contradicted by the importer...... 364

Payment: Protest: Appeal: Action.

Though the collector improperly classified the goods, excess duties cannot be recovered where the importer also improperly classified them in his protest................. 43
Plaintiff, to recover back money paid as duties, must show that the duties were not authorized by law; that at or before payment he distinctly specified, by protest in writing, the grounds of objection; and that the payment was made to enable him to obtain possession of the goods.........1052
An excess of duties paid under protest after the importer obtained possession of the goods cannot be recovered back......1052

Collection officers.

Customs collectors, as respects compensation, are divided into two classes,—collectors of the seven enumerated ports, and collectors of nonenumerated ports........... 905
The aggregate compensation of the surveyor of the port of St. Louis cannot exceed $5,000 per annum. (Acts 1822, 1831, 1841, 1857, 1872.)..................... 905

DAMAGES.

Damages consequent on her diminished earning capacity, compensation for pain and mental distress, and expenses in consequence of the injury, including the value of care and services gratuitously bestowed, *held* recoverable for personal injuries.........1122

Page

Ten thousand dollars allowed to a domestic servant 40 years old, earning twelve dollars a month, for permanent injuries, where both legs were broken....................1122

DEATH BY WRONGFUL ACT.

An action to recover damages for the death of an infant child by negligence of defendant can be maintained only under the statute, and in the manner there prescribed 1071

DEBT, ACTION OF.

Debt will lie upon an open account for goods sold and delivered, as well as assumpsit.................................... 707

Debt will lie on a contract, express or implied, for a sum certain, or capable of being ascertained.. 707

DEED.

The covenant in a deed does not affect the grant. The grant passes the title, operating in praesenti, though the covenants have not been performed.................... 262

A deed conveying lands lying in different counties need be recorded in only one county, under Act Pa. 1715. An exemplification of it will be evidence as to any of the lands so conveyed......................... 374

Petition for leave to record deed granted, where the neglect was without any fraudulent design............................ 650

DEMURRAGE.

Consignees cannot select a place of discharge within a port which would necessitate greater delay in discharging than the charter allowed......................... 182

The local usage in respect to reception and delivery of cargo is not admissible to interpret provisions as to demurrage not obscure or equivocal........................... 182

The vessel has a lien on cargo for damages in the nature of demurrage, where the consignee fails to receive it within a reasonable time, although the bill of lading contains no demurrage clause........... 887

No orders as to place of discharge were given for three days after notice of arrival. The vessel was detained four days after reaching the wharf, by reason of lack of teams and the loading of other vessels. *Held*, that demurrage should be allowed only for the delay after arrival at the wharf, where the charter provided for quick dispatch in discharging.................... 182

A stipulation that the cargo should be delivered at the port of discharging, as customary, is inapplicable to a delay caused by the vessel being required to wait her turn at the wharf...................... 182

DEPOSITION.

It is not necessary that the notice of taking under Act Sept. 24, 1789, should state the reason for taking it............ 313

A deposition under section 30, Act 1789, may be taken before a notary public. (Act July 29, 1854.)........................ 726

The certificate and seal of the notary are sufficient proof of his authority to act as such............................ 726

The deposition is admissible where the adverse party appears, and cross-examines the witness, although notice of the taking was not given as required by section 30.. 726

Where the certificate states facts showing the notice to be unnecessary, it need not state the reason why no notice was given.. 726

Page

The failure to answer a general interrogatory is fatal to the whole deposition.... 792

DESCENT AND DISTRIBUTION.

Second cousins of the whole blood *held* entitled to share with first cousins in the ancestral property of an intestate. (Laws R. I. 1882, p. 222.)....................... 611

A Connecticut court cannot enforce payment of a debt from personal estate previously distributed....................... 179

An administrator who has distributed personalty by order of the probate court may bring a bill in equity to compel the distributees to contribute to payment of a newly-accrued debt; or the creditor who has obtained judgment for such debt may him self bring such bill...................... 179

EJECTMENT.

Mere possession of land, or offering to sell it, or even partial sales actually made, are not, alone, sufficient to authorize a presumption of ownership................ 371

A notice to quit, by the English rule, is necessary only where the relation of landlord and tenant subsists................ 803

A Pennsylvania warrant holder, to maintain ejectment, must produce a survey regularly made, or show, by parol or otherwise, that a survey was actually made...1137

What will be *held* a sufficient survey in such case...............................1137

After notice of trial, defendant cannot demand payment of costs of a former judgment as a condition of proceeding....... 456

The payment of costs on an ejectment decided in the state court is not a condition to a trial of an ejectment in the federal court................................ 456

EMBARGO AND NONINTERCOURSE.

An embargo bond made payable to the United States is good under an act requiring it to be given to the collector of the district.............................761

A declaration on an embargo bond is not good without an assignment of breaches.. 761

EMINENT DOMAIN.

A state legislature, under the right of eminent domain, may transfer to a municipal corporation for a public use, such as an almshouse, an absolute title to private lands, without possibility of reverter, on making just compensation to the owner.... 558

The right of one whose property has been taken for public use, arising on a change in its destination, is of an equitable character, not cognizable at law............... 558

EQUITY.

See, also, "Injunction"; "Pleading in Equity"; "Practice in Equity."

Equity may reform a policy of insurance, even in material clauses, where through fraud or mistake, it violates or does not express the intention of the parties....... 301

The party alleging the mistake must show exactly in what the error consists........ 301

Equity will set aside a sale procured by false representations of the vendor, going to the essence of the bargain, though there be no fraud.............................. 804

The lapse of six years is no bar to a suit to set aside a sale for fraudulent representations brought immediately upon discovering the fraud..................... 804

Page

On the rescission of the sale of timber lands, the purchaser who had not realized from the sale of timber cut by him was required to file a bond to pay the amount as soon as collected 821

Where a conveyance is set aside for gross misrepresentations and deceit, interest is to be paid on the money refunded from the time it was received, without demand 821

A bill of review lies for matter of error apparent on the face of the record, shown by the decree and pleadings 583

A bill of review lies for newly-discovered evidence material to the issue, if such evidence was not known until after the period in which it could be used in the cause, and could not have been obtained by reasonable diligence before the original hearing 583

A bill of review does not lie where the party seeks to set out a new title, and not to support the title in the original cause .. 583

A bill of review will not lie for error in law where the original decree is not enrolled. The remedy is a rehearing 583

If the decree be not enrolled, a bill in the nature of a bill of review, and not strictly a bill of review for newly-discovered evidence, lies 583

The granting of a bill of review for newly-discovered evidence is matter of discretion, and must be brought forward by petition 583

Such petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree .. 583

On the hearing, affidavits may be admitted on each side, if necessary to explain the nature of the evidence 583

Upon a bill of review for newly-discovered evidence, the other party may controvert by plea or answer that it is newly discovered 583

Petition of review for matters of fact denied upon all the circumstances of the case 583

A bill of review lies for the party who obtained the original decree in his own favor, if the original decree was injurious to him 583

ESTATES.

The effect of a legislative release and sale of entailed lands 453

ESTOPPEL.

The payment of part of the purchase money of land, the property of a feme covert, in her presence, cannot prejudice her right to claim the land after the termination of the coverture 371

EVIDENCE.

Best and secondary.

Oral evidence is inadmissible as to the contents of letters received by the witness .. 542

Hearsay.

The hearsay evidence of a public officer is no better than that of any other individual 1137

Parol, etc., affecting writings.

A freight bill signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, cannot be shown by parol to be the contract of the company 751

Parol evidence is admissible to show that there was in fact no judgment rendered by a justice of the peace, as stated in the execution 564

Parol testimony is inadmissible to charge a party on negotiable paper, where neither his name nor any other circumstance appears on its face to connect him with it 540

Where there is sufficient on the face of negotiable paper to create a doubt to whom credit was given, parol evidence is admissible 540

Where the intent with which an indorsement was made is doubtful, it may be explained by parol 646

Declarations: Admissions.

Declarations of a person at the time of changing his residence are admissible to show the intent, but not to make out a case for himself 1028

The declarations of the agent in support of his authority will not be received in evidence unless contemporaneous with the act, and constituting part of the res gestae 166

Weight and sufficiency.

The manner and demeanor of witnesses in giving testimony will be considered where they conflict in their statements 673

Where, in a dispute as to wages of seamen, the master fails to call available witnesses to support his testimony, the question will be determined by the greater number of witnesses 861

EXECUTION.

Execution is not void because issued prematurely. If issued pending motion for new trial, the irregularity is cured on denial of the motion 214

The withdrawal of a watchman by the levying officer is no abandonment of the levy 214

The judgment creditor may have several writs of the same species running at the same time, or writs of different species issued in succession 779

Taking out a fi. fa. in the first instance, without success, for costs in admiralty, does not prevent resorting to process of ca. sa. or to an attachment 394

An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void 564

EXECUTORS AND ADMINISTRATORS.

Auxiliary administration is not within the meaning of Rev. Iowa 1860, § 2357, providing that administration shall not be "originally granted" after the lapse of five years from the death of decedent 872

A judgment against an administrator appointed in one state cannot be made the basis of an action against an administrator appointed in another state 496

An administrator is not liable to pay interest upon assets in his hands, unless under special circumstances 580

An administrator is not liable to account, as such, for money which he received upon a sale, as mortgagee of the real estate of his intestate, although he sells with general warranty 580

Such sale does not bar the equity of redemption of the heirs 580

The general administrator upon an estate may be a purchaser at a sale by a person appointed by the legislature to sell intestate's estate in payment of his debts 612

An executor or administrator who lawfully recovers or receives money or property in his representative character holds it as assets or the estate, and is liable in that character to the party entitled to it..1171

The administrator is also liable personally if the decedent was not liable in his lifetime, and the administrator's receipt discharged the debtor 1171

Page

An election to proceed against the administrator in his representative capacity will prevent the creditor subsequently proceeding upon individual liability............1171

Failure to take from distributees the statutory bond for the payment of any debts subsequently shown *held* not to render administrator liable for devastavit......... 179

In Connecticut, real and personal estate are alike a fund for the payment of debts, and both are assets in the hands of the administrator........................... 186

A claim accruing after the time limited for presentation is not barred, in Connecticut, if presented within one year after it accrued.......................... 186

An order of the probate court of settlement and distribution of the estate does not bar a claim subsequently accruing....186

The validity of a claim accruing after distribution of the estate, contested by the administrator, must be determined by a suit thereon against the administrator before a court of common-law or of equity jurisdiction.......................... 186

An action in behalf of creditors will lie against an administrator of an insolvent estate for payment, where new assets come into his hands after decree of distribution, though the statute of limitation precludes an original suit....................... 580

Sales of lands by executors to pay debts under the Illinois statutes...............1135

Sale of realty by administrator on notice of petition to sell to pay debts, served upon the widow and heir, *held* valid, though a purchaser of the land was not notified.... 872

Counts charging defendants as executors, upon the testator's promise and upon their own promise as executors, in consideration of assets, may be joined............... 760

Exemptions.

See "Bankruptcy."

EXTRADITION.

The right of a foreign government to demand the surrender of a fugitive from justice has no existence, and can only be secured by a treaty stipulation........... 949

A person committing a crime abroad, who comes to this country before the making of a treaty covering a surrender for such crime, has not a right of asylum.......... 366

A person may be surrendered under the treaty of March 23, 1868, for murder committed in Italy before the treaty was made. 366

Such a construction does not make the treaty open to the objection that it is a bill of attainder or an ex post facto law nor as depriving a person of liberty without due process of law, or violating the right to be secure against unreasonable seizures.............................. 366

The court cannot question the authority to make the application for extradition where it is sustained by complaint on oath..1174

The treaty with Great Britain does not give accused the right to be confronted with the witnesses against him..........1174

The evidence against accused may be in the form authorized in the country whence it comes, and, in substance, sufficient to warrant action in the country whose action is invoked..........................1174

The testimony of accused is not admissible in a case of extradition, tried by a federal judge, though sitting in a state where such evidence would be received..........1174

FACTORS AND BROKERS.

Part owners of vessel acting as factors in a certain adventure *held* to have a right to retain, out of a part owner's share of the proceeds of the adventure, advances and disbursements in his behalf made in such adventure.............................. 575

A bill drawn on such part owner for such advances, and accepted by him, *held* not a waiver of the lien on the proceeds as against one having notice............ 575

Shipments made, after the death of a member of a firm, to its regular factor, cannot be applied in liquidation of the general debt for advances on shipments prior to the dissolution, until after payment of the bills drawn upon the credit of such shipments 668

The making of a freight list by the factor of the vessel owner, prepared as if the whole cargo was shipped at specified rates of freight, where a portion is shipped at half profits, amounts to a misrepresentation 384

A cargo was shipped during a war, without positive instructions as to its destination. *Held*, that the silence of the consignor, after apprised of its destination, was an implied approval of the act of the consignees 1187

FALSE IMPRISONMENT.

An action for false imprisonment will not lie for an arrest upon an execution which is only voidable, and not void....... 564

FRAUDS, STATUTE OF.

An unsigned memorandum made by plaintiff may be aided by parol evidence that it was made in the presence and with the consent of defendant, and by letters of defendant not referring thereto, so as to take the case out of the statute.......... 800

FRAUDULENT CONVEYANCES.

See, also, "Bankruptcy."

A mere volunteer from a grantee under a fraudulent conveyance stands in the same predicament as his grantor, as against the persons intended to be defrauded......... 621

A purchase by the wife with money received from the sale of her property, which had become the husband's by virtue of the marriage, *held*, in effect, a voluntary conveyance 660

Credit will not be presumed to have been given upon the faith of property occupied by the debtor in conjunction with the wife, the record title of which is in her name... 660

A subsequent creditor has no claim on the property of the wife for money expended thereon, unless it appear that it was so expended with intent to defraud such creditor.................................. 660

Creditors have no claim on the property of the wife of the debtor for the value of repairs made by the debtor, who occupies the premises with his family............ 660

The release of dower is a sufficient consideration for the conveyance of property to the wife by a third person............ 660

A conveyance to a married woman in consideration of a promissory note signed by herself and husband, secured by a mortgage on her separate property, will be presumed to have been made on the faith of such security.......................... 660

GRAND JURY.

The government attorney may be present before the grand jury to submit evidence, examine witnesses, and advise on ques-

Page

tions of law, but he should neither give advice as to the sufficiency of evidence nor take part in the deliberations........... 745
The minutes of the evidence taken before the grand jury should be deposited with the district attorney, to be kept among the records of the government................. 745

GRANT.

Nothing passes to the heirs under a grant to a deceased person.................. 962
Under Act N. C. 1779, a grant in the name of a deceased person, founded on a removed warrant, will pass the land to his heirs, if an entry was made in his lifetime. 962
A patent of the state, valid on its face, cannot be collaterally impeached by matter dehors the patent, by a party having no title, in an action at law brought in the national courts to recover the land....... 794
The court refused to confirm the Spanish grant of 1795, to De Villemont, of land on the Mississippi river because of failure to comply with the conditions, and because the land could not be located by a survey..... 560
A warrant for lands in Pennsylvania, if special, amounts to an immediate location.1137
A warrant holder in Pennsylvania must have the lands surveyed in a reasonable time, or lose his priority by the superior vigilance of a subsequent locator........1137
Claim to Mexican land grant rejected in the absence of documentary proofs....... 642
A decision of the circuit court as to the proper location of a Mexican grant is entitled to great weight on a similar issue of fact, submitted on identical testimony, in another proceeding..................... 794
Lands not embraced within the exterior lines designated in a Mexican grant cannot be included in the juridical possession given by a magistrate.................... 794
Lands excluded from the external limits of a Mexican grant by the express terms of the decree for confirmation cannot properly be embraced within a survey of the grant 794
Such lands *held* subject to selection by the state of California as school lands........ 794
A claimant under a Mexican grant, who has never presented his grant for confirmation, is not within the act authorizing the purchase of lands excluded by final survey. (Act July 23, 1866, § 7.)................ 794
Where precise locality is not given to a concession, a survey is necessary to sever the land from the royal domain.......... 560
Surveys were necessary under the Spanish government......................... 560

GUARANTY.

A guaranty of paper of a certain person payable at a certain bank will not cover paper not made payable at such bank..... 782
Notice of the giving of credit upon a guaranty should be given to the guarantor in a reasonable time thereafter.......... 782
A guarantor *held* discharged by five days' delay in giving notice of a six months' credit given upon a guaranty............... 782
Where a debt guarantied is not paid, notice to the guarantor must be given in a reasonable time, unless the debtor is insolvent 1186
The same strictness is not required, in such a case, as is required to charge the indorser on a bill or promissory note......1186

HABEAS CORPUS.

The writ is not granted of course without reasonable cause shown............. 45
The circuit courts and federal judges may apply the writ to all cases which it would reach at common law, provided it is not issued to any person in jail, unless confined under or by color of the authority of the United States......................... 537
An error in a certificate under the fugitive slave law, by which it appears that the adjudication was made without evidence, may be corrected on habeas corpus....... 45

Homestead.

See "Bankruptcy."

HUSBAND AND WIFE.

At common law, a conveyance to a married woman in consideration of her promissory note for the purchase money is in effect a gift to her.......................... 660
A husband has no right in or to realty conveyed to the wife, to hold free from the control of her husband and for her own use. 660
Money belonging to a fund conveyed to trustees for the sole and separate use of a married woman, free from the control of her husband, loaned and unpaid at the death of the wife, does not become the property of the husband, nor is he entitled thereto in equity...................... 935
A deed of a married woman void when acknowledged, by reason of containing blanks, cannot be ratified except by a reacknowledgment 1118
A married woman, in carrying on business on her own account and for her own interest, may employ her husband as agent.1084

INDICTMENT AND INFORMATION.

In an indictment for a statutory offense it is sufficient if the offense be substantially set forth, though not in the precise words of the act........................... 571
On a motion to quash an indictment for treason, *held*, that defendant's counsel would be required to file with the clerk a formal statement of the grounds upon which the motion was based............ 63

INJUNCTION.

Action at law not restrained where the allegations set up a defense proper for the consideration of a jury................ 240
The federal court will stay execution in ejectment until the equity between the parties shall be investigated in a state court, only when the federal court has not jurisdiction of the equity.................... 803
An action will not lie in the federal court upon a bond conditioned to pay all damages awarded upon final hearing or upon dissolution of the injunction, where no damages are awarded upon such final hearing or dissolution, though action might be maintained on such a bond in the state court 283
On motion for attachment for contempt in violating an injunction, the original decree cannot be impeached except for fraud or defect of jurisdiction as to the subject-matter 1113
A motion for an interlocutory injunction is heard on affidavits alone, without the right of cross-examination............... 221

INSOLVENCY.

See, also, "Bankruptcy."

A state insolvent law cannot discharge the obligation of a contract with a citizen of another state, though made and to be performed within the state............... 450

Page

A discharge in insolvency will bar a judgment obtained in a court of the state by a nonresident, and a judgment obtained thereon in a federal court of another state. 38
A debtor found guilty of having disposed of his property with intent to defraud his creditors will be denied the benefit of the act 895

INSURANCE.

A policy issued at the home office of the company, where the premiums and loss are made payable upon an application of a citizen of another state received through its local agent, who had no authority to contract, is governed by the law of the state of the company's domicile.......... 529
The Massachusetts nonforfeiture acts are not applicable to contracts made without the state by foreign corporations doing business within the state............. 529
The assured by taking advantage, after failure to pay premiums, of an alternative provision in a policy, by receiving dividends thereunder, waives the provisions of the nonforfeiture statutes.................. 529
The waiver of conditions is within the apparent scope of authority of an agent of a foreign company who made the contract 10
Such agent may by his acts waive the condition requiring indorsement on the policy of consent to nonoccupancy.......... 10
But mere knowledge and failure to cancel a policy, or inform the company, does not amount to waiver.................. 10
A statement by the agent, on delivering a policy, that there was no hurry about paying the premium, is not a waiver of a condition requiring the premium to be paid before the policy takes effect.............. 141
A stranger, who procures an application upon which a policy is issued and delivered to him, to be delivered to the insured upon payment of the premium, becomes a special agent to receive the premium and deliver the policy...................... 313
The policy becomes a binding contract from the time it is assented to by the assured, provided he pays the premium within the time as agreed by the agent; and a change in condition in health thereafter need not be disclosed................... 313
If the statements made in an application which becomes part of the policy be untrue in a material respect at the time they are made, the policy is void, whether they be regarded as warranties or material representations 313
A conveyance from fraudulent grantees of a bankrupt to the trustee of his estate will avoid a policy issued in their names, but made payable to him as trustee, if made without the consent of the insurer, as provided in the policy................ 301
The policy is not avoided by an alteration in the building which does not increase the risk, where there are no express provisions against alterations.................... 922
Plaintiff is not concluded by the statements in a physician's certificate furnished as part of her proofs of loss, which is not required by the terms of the policy...... 313
A condition limiting the time to commence suit for a loss to 12 months thereafter is valid.......................... 37
The equitable value of Northern policies of Southern holders, which lapsed during the Civil War by default in paying the annual premium, is to be determined by the jury or chancellor; and a verdict founded upon competent testimony, not grossly excessive, will not be set aside.......... 150
Whether a death resulting from the use of liquors during a period of three weeks is caused by an "habitual" use of intoxicating liquors, within the meaning of a condition in the policy, is a question for the jury.. 313

Interest.

See "Usury."

INTERNAL REVENUE.

The salary of a judge of a court of record, payable out of the state treasury, cannot be taxed as income.................. 222
The constitutionality of an internal revenue act canot be tested in a suit to restrain the collection of a tax levied thereunder.... 408
The assessor acts judicially in determining what persons and things are subject to taxation, and a mistake in this respect, or an irregularity of proceedings, does not invalidate his action so as to make the collector a trespasser..................... 408
An assessor has power to reassess the income tax of a citizen who has already paid the tax first assessed against him........ 855
Removal of goods for delivery to the persons on whose orders they were manufactured, on the agreement that they should be stored for the manufacturer until after Act July 13, 1866, reducing the tax, took effect, renders them liable for the original tax.................................. 693
The word "brick" *held* not to include fire brick. (Acts 1862. § 75. 1864, § 94.)..... 321
The imposition of an addition of 100 per cent. as a penalty for the return of a false or fraudulent valuation is constitutional.. 855
A forfeiture for a violation of the law is of the thing itself, and not the interest of the mortgagor, and the mortgagee has no right to intervene to prevent the forfeiture.. 730

JAIL AND JAILER.

A sentence to imprisonment for a year at Blackwell's Island does not direct imprisonment in any particular state prison or penitentiary (Act March 3, 1863, § 3), but the prisoner is properly delivered to the custody of the keeper of the Blackwell's Island penitentiary............................. 506

JOINT TENANCY.

The possession of one cotenant is not, ordinarily, to be treated as adverse to that of other cotenants........................ 606

JUDGMENT.

Rendition and entry.

All decrees in the courts of the United States are deemed to be enrolled at the term in which they were passed.......... 583
Semble, that the two-term rule, based upon the old Pennsylvania practice, may be acted upon in a case not within the affidavit of defense law........................ 546

Operation and effect.

The limitation of 12 years in Act Md. 1715, c. 23, § 6, does not apply to judgments which have been revived by sci. fa. within the 12 years.................... 691
An agreed statement of facts may be the proper foundation of such a judgment as will bar a new suit between the same parties for the same cause of action......... 521
The whole controversy is submitted, without limitation, under an agreed statement providing that "the court may make any other order or judgment in the case which they shall think it may require".......... 521
A final judgment upon the merits, by a state court of Massachusetts, in a writ of

Page
entry, is a bar to a writ of right between the same parties, and for the same premises, in the federal courts.............. 521
Defendant, in a second suit on the same patent, *held* estopped, by the judgment in the former suit, from denying the novelty of the invention put in issue therein......1140
The purchaser of a patent and one associated with defendant in the manufacture of an infringing article, pending assessment of damages for infringement after decree for injunction, are in privity to the decree, and are bound thereby.......... 278

Relief against: Opening: Vacating.

Decree for perpetual injunction in a patent case will not be opened to let in a defense after a delay of 11 months from the payment of an execution issued for costs.. 959
Judgment by default will not be set aside unless defendant can show that he was guilty of no negligence in suffering the judgment, and has a meritorious defense.... 213
Equity will grant relief against default decrees against corporate stockholders in a suit to enforce subscriptions, where there was no just claim, and other defendants, who contested their liability, were successful, where there was no regular service of process, and counsel appeared without authority 259
The fact of giving bail after decree is not necessarily estoppel and release of all errors 259

Actions on judgments.

Where a judgment is superseded in the court in which rendered, action on the judgment in another state will be stayed..... 213
In a suit on a judgment of another state, the court cannot look to the merits, though it may be founded on an illegal contract.. 213
A judgment in France, based upon a local law designed to regulate the domestic relations of residents, and to protect the public against pauperism, is not enforceable by action in this country............ 309
A judgment founded upon the statutory obligation to make an allowance to a son-in-law in need comes within such rule... 309

JUDICIAL SALES.

A release to a purchaser at a marshal's sale by the judgment debtor, who holds the estate both by mortgage and by a distinct conveyance, conveys both titles.......... 612

JURY.

The jury cannot be asked generally as to their conscientious scruples on certain questions. The inquiry must be made of the individual members.................1093
The right to peremptory challenge *held* not to exist where the offense was not a capital offense..........................1063
Peremptory challenges of jurors need not be made at the same time, but the parties may alternate..........................1093

JUSTICES OF THE PEACE.

The expression, "I give judgment," includes the technical and formal words of a judgment, and is sufficient............. 281
The only process a justice of the peace is authorized to issue is a capias, the service of which is an arrest.................. 579
Unless it appears that a jury was required, and refused by the justice, the judgment will not be reversed............... 281
In the case of a jury trial before a justice of the peace, there can be no review of the law separated from the facts...... 492

LANDLORD AND TENANT.

Page
On a holding over under a lease with a fixed annual rental, the landlord may recover at the rate stipulated in the lease upon a count in indebitatus assumpsit for a greater sum......................... 526

LARCENY.

Inducing slaves to go aboard a vessel under a promise to be transported into a free state *held* not larceny...............1063

LIBEL AND SLANDER.

Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred, or which accuses him of a crime punishable by law, or of an act odious or disgraceful in society, is a libel........ .. 624
An action for libel in respect to plaintiff's business cannot be maintained when such business is unlawful; as, for instance, acting as agent for a lottery............ 4
The publisher is equally responsible with the author of a libel.................... 624
It is no justification or excuse for a newspaper libel that the publisher did not personally know the person libeled........ 624
Where a publication is libelous, and is knowingly made, the law presumes it malicious, unless it is proved to be published on an innocent or justifiable occasion..... 624
"Malice," in the sense of the law, means "willfulness" 624
A declaration in slander may be amended by adding a new charge, on payment of costs and continuance.................. 962
Words spoken of one of the plaintiffs cannot be given in evidence to support an averment of words spoken of both plaintiffs 176
Words spoken by each defendant separately, out of the presence of each other, will not support an averment of words spoken jointly by defendants............. 176

LIENS.

An equitable lien cannot be enforced against money, or its representative, unless the money, or a specific substitute for it, can be identified........................1055
An agent having a lien upon a fund for his services may sue in equity to enforce his rights therein against a third person receiving the same with notice, without regard to his claim against the principal.... 990

LIMITATION OF ACTIONS.

The statute runs in favor of an insolvent debtor, notwithstanding his discharge.. 492
There is no fixed limitation of time within which suits must be brought in admiralty. It is discretionary with the court to determine whether a demand has become too stale to support an action............1132
The period of a war, during which a party is absent, will be excepted in computing the time for bringing ejectment...... 371
A second departure from the state is not to be considered in computing the running of the statute, under 2 Rev. St. N. Y. 297, § 27.......................... 928
The return into a state after a departure must be such as will give the plaintiff opportunity, by the exercise of reasonable diligence, to serve process.................. 928
A promise to pay "when able" will take the case out of the statute, without proof of ability to pay........................ 181
An acknowledgment of liability for excess duties paid made by an ex-collector of cus-

Page

toms will not take the case out of the statute as against him, unless made with reference to his individual liability............ 928

The commencement of a suit, to defeat the statute of limitations, must be the same suit to which the plea is pleaded.... 387

MANDAMUS.

A writ against a board of supervisors should be served upon the individual members. An acceptance by the clerk, although "by order of the board," is not sufficient..1011

MARINE INSURANCE.

The order for insurance will be considered as containing the contract, where it is materially departed from in the policy; but it can only be resorted to so far as it varies from the policy........................ 403

The words "in each case," in a clause fixing the minimum of loss on goods, vessel, and freight at 5 per cent., *held* not to mean "at each time of loss," but to refer to the subjects insured, and successive losses on the cargo may be added to make up the aggregate of 5 per cent................. 889

The necessity of repairs, in the course of the voyage, on account of mere wear and tear, does not impair the original warranty of seaworthiness........................ 889

Seaworthiness at the commencement of a voyage is not prima facie evidence that subsequent necessary repairs arose from extraordinary peril 889

When different causes concur in occasioning a loss, it must be attributed to the efficient predominating peril, whether or not it was in activity at the final consummation of the disaster.......................... 837

The attempt by the master of a vessel which was captured on the ground that a war had been, or was about to be, declared, who was left on board with the prize crew, to rescue the vessel, *held* good ground of condemnation, but not a barratry......... 341

The capture and burning of a vessel by a duly-commissioned Confederate privateer is not a taking by pirates or assailing thieves. 837

Under the marginal words in a policy "warranted free from capture, seizure, or detention," the insurer is not liable for a loss caused by the capture and burning of the vessel by a duly-commissioned Confederate privateer 837

A consent to a verdict, subject to the report of auditors to ascertain the amount of the loss, does not preclude inquiry as to the cause and nature of the loss, and the amount attributable to the perils insured against 889

Depositions from the record of a prize court are admissible to show the ground of condemnation 341

MARITIME LIENS.

Nature and grounds.

An hypothecation of a vessel on maritime risks draws after it a maritime lien..1032

The underwriter has a lien upon a ship, enforceable in admiralty, for premiums due upon marine policies..................... 862

Lumber sold to a shipbuilder, who has several vessels on the stocks, but not for use in any particular one of them, gives rise to no lien against one, in which part of it is used..............................1070

A person lending money to be used for repairs and supplies stands in the same position as a material man............... 112

A vessel owned in Philadelphia is subject to a lien for advances made in New York, on her credit, for the payment of necessary port disbursements and for repairs....... 308

The enrollment of a vessel under Act Dec. 31, 1792, is prima facie evidence of the home port, and will be *held* conclusive unless contradicted by clear evidence of the notorious residence of the owners at another place 1160

The presumption and knowledge of the home port is strengthened by the fact that the name is conspicuously painted on the vessel's stern, and a lien for supplies will not be allowed unless it appear that the claimant was deceived by fraudulent or unfair means............................1160

When the owners of a boat reside at different ports, the vessel is to be considered a domestic vessel at the port where she is enrolled 1160

A lien enforceable in admiralty arises for repairs and supplies to a vessel in the port of a state to which she does not belong 112, 144, 1160

No lien arises for building a vessel, or for repairs and supplies furnished a vessel, in a port of the state to which she belongs, unless given by the local law......112, 144, 1160

A lien on a steamer for fuel arises upon the delivery thereof on a wharf near by, in pursuance of the orders of her officers.... 399

The laborer's and material man's lien attaches when the work and materials are furnished, and cannot be afterwards divested by the act of one of the parties.... 144

A usage, to effect the lien of workmen and material men on a vessel, must be clearly and uniformly well known and understood among the parties...................... 144

A mariner's services will be deemed maritime if substantially performed on waters within the ebb or flow of the tide......... 279

A maritime lien arises for services as a mariner on board a vessel having no propelling power, and towed between Philadelphia and New York upon tide waters... 279

No lien arises for services as master, or in taking and discharging cargo at wharves, in no way connected with the vessel's navigation 279

A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly with the other owners, possession of the vessel, cannot acquire a lien for maritime services..................1000

Priority and enforcement.

Liens on proceeds are paid in the following order: (1) For seamen's wages; (2) for materials arising by the general maritime law; (3) by virtue of a seizure under a state law, without reference to priority of seizure 1160

A claimant waives his original admiralty lien by proceeding under a state law, and cannot be reinstated to his original rights..1160

Claims on the western lakes and rivers are classed by the successive open seasons of navigation, instead of by separate voyages 1141

The lien for work or materials in the construction of a vessel may be enforced before it is finished or sold.................... 144

Where a lien in admiralty attaches, it follows the proceeds into the hands of assignees 697

A libel to enforce a lien upon a vessel or its proceeds for premiums due upon marine policies should aver their amounts and dates, the names of the insured, and the extent and character of their interests, and that the policies covered the vessel during the season of navigation.............862, 866

A libel in admiralty to enforce a mortgage given for advances to fit a vessel for sea will be dismissed where the claim of the libellant has been put in and allowed as to

Page
the balance of proceeds of a sale on prior libel on bottomry bond.................. 528

Waiver; discharge; extinguishment.

A lien for work and materials, given by the local law, is not lost by a transfer of the vessel or a change of masters......... 144

Secret liens must be enforced with reasonable diligence as against bona fide purchasers without notice.................. 769

A delay, after reasonable opportunity, to enforce a lien, will be deemed a waiver as against subsequent purchasers or incumbrances in good faith and without notice..1141

Claims for wages are subject to the rule that delay to enforce a maritime lien will postpone it to subsequent liens acquired without notice, the same as claims for repairs and supplies.......................1141

Lien for towage services *held* waived by delay, for an entire season, to file a libel as against bona fide purchaser without notice 550

A bona fide purchaser does not lose the protection of the law by taking the collateral guaranty of a third party indemnifying him against liens...................... 550

A lien arising upon advances made to pay for salvage and repairs is waived, as against a subsequent bona fide purchaser without notice, by taking a time draft duly accepted 10

The taking of a time note *held* not a release of a lien unless so understood by the parties 1051

A libel filed four years after a collision *held* too late, as against a bona fide purchaser without notice, where the vessel had previously been within the jurisdiction of the court, to libelant's knowledge......... 769

A part owner agreed to pay petitioner for supplies, to permit the vessel to leave a foreign port, and subsequently, to prevent an attachment in another port, agreed to consign the vessel to him. *Held*, in the circumstances, the court would allow a lien on the proceeds of sale on a libel by others.. 377

Liens under state laws.

The district court in admiralty has jurisdiction to enforce a lien on a vessel given by a state law...................144, 1160

The procedure in such case must be according to that in admiralty............. 144

Where the lien is given by the local law, the lienors may elect to enforce it either in admiralty or in the state court............ 144

MARSHAL.

A marshal having two or more processes at the same time, in the same proceeding, can charge mileage but once; but additional travel made necessary may be charged 875

The marshal must name the place of service in his return, so that the correctness of the mileage charged may appear upon its face 875

The marshal may be allowed interest on expenditures, but not upon fees.......... 875

Martial Law.

See "War."

MASTER AND SERVANT.

The general doctrine of the nonliability of the employer for an injury by a fellow servant, established by the English and American ports, will obtain in the federal courts 718

Such doctrine will not relieve an employer who failed to use ordinary care in providing competent servants and safe materials and structures.......................... 718

A servant who voluntarily continues in the employ of the master with knowledge of the incompetency of fellow servants and of defective machinery cannot recover for an injury thereby caused................ 718

A locomotive engineer cannot recover for an injury caused by the want of a signal bell in the engine cab, known to him when he entered defendant's employ........... 718

Mechanics' Liens.

See "Bankruptcy."

MORTGAGES.

See, also, "Railroad Companies."

A deed absolute upon its face may be shown, by parol evidence, to have been intended as a security....................... 983

A warranty deed with a defeasance construed as a mortgage, although the grantee was given a right to sell the whole or part of the property, at a price fixed, in payment of the debt....................... 983

An absolute deed of mortgaged premises given by the mortgagee operates as a conveyance of a defeasible title only, and not as a disseisin, as between the mortgagor and mortgagee......................... 597

The release of the equity of redemption does not enlarge the estate conveyed by a mortgage in fee, but merely operates to remove the condition by extinguishing the equity of redemption................... 612

A mortgagee in possession is liable for damages caused by willful default or gross neglect in making reasonable and necessary repairs 597

Where the security is inadequate, a receiver may be appointed for the rents and profits pending foreclosure sale and time for redemption though the mortgage gives no lien upon the rents and income.......... 29

The trustees under a will, vested with the legal estate, are the proper parties to file a bill to redeem a mortgage given by testator 594

To a bill to redeem, the heirs of the mortgagee, as well as his personal representative, are ordinarily necessary parties...... 594

If the mortgagee has never taken possession during his lifetime, the mortgage belongs, in Rhode Island, to his personal representative, and the heirs need not be made parties to a bill to redeem............... 594

Twenty years' undisturbed possession, without any admission of the mortgage, is a bar to a bill to redeem...........594, 606

An acknowledgment of the mortgage by the mortgagee, in his answer to a bill in equity between other parties, is sufficient to allow redemption........................ 594

An acknowledgment in deeds and and other writings with third persons is sufficient to allow redemption............... 606

Quaere, whether parol admissions, within 20 years, are sufficient to keep open the equity 606

Acknowledgments by the mortgagee after sales by him do not affect bona fide purchasers without actual notice of the mortgage 594

The fact that the right to redeem is barred as to certain parcels separately sold will not affect the right to redeem as to the others................................ 594

On a bill to redeem, the mortgagee, who has failed to keep an account of rents and profits, is properly chargeable with what he may be presumed to have received...... 597

On a bill to redeem from a mortgage, the master need not inquire as to the original consideration of the mortgage, where no question was raised in the pleadings..... 597

Page
The master, on a bill to redeem from a mortgage, *held* right in refusing to open an account settled 30 years previously....... 597

MUNICIPAL CORPORATIONS.

What is essential under Act Md. 1835, c. 137, to recover against a city for the destruction of property in a riot. Pleadings and proof 1169
The common council of Alexandria has no authority to make by-laws operating beyond the limits of the corporation........ 306
The corporation of Alexandria cannot enforce its by-laws by corporal punishments.. 306
Judgment for penalty of a by-law will be reversed on appeal where the warrant does not set forth the offense with sufficient certainty 387
A warrant charging the sale of liquor without a license "during the last or present month" will not support a conviction.. 387

Navigable Waters.

See "Constitutional Law."

NEGLIGENCE.

Upon a count charging negligence of the defendant and his servants, it is sufficient to prove negligence of the servant........ 781

NEW TRIAL.

A new trial will not be granted against strong circumstances of equity.......... 487
A new trial will not be granted to enable a party to introduce evidence which was in his control at the time of trial, but not used because not advised of its importance.. 679
A verdict or nonsuit will be set aside where reasonable notice to the adverse party was not given of formal objections to a deposition 792

OFFICE AND OFFICER.

An appointment by the president to an office, during a recess of the senate, to fill a vacancy happening by the expiration of a term when the senate was in session, cannot constitutionally take effect.......... 731
The clerk of the house of representatives is not personally responsible in damages for refusing to give the public printing to a person to whom the preceding clerk had promised it.................................. 129
The rule that public acts of public officers, purporting to have been done in an official capacity, will be presumed to have been done by authority, applied in the case of Spanish officials in Mexico........... 456

PARDON.

A pardon has no validity until its delivery, and consequently may be revoked at any time before delivery............... 506
A delivery of a pardon to a marshal is not sufficient to give it validity.......... 506
A pardon by an outgoing president may be revoked by the incoming president before its delivery to the prisoner.......... 506

PARTIES.

In Arkansas, all or any number of the parties to a joint and several contract may be sued; and, after bringing suit against all, plaintiff may discontinue as to any one before final judgment.................. 416

PARTNERSHIP.

Page
An agreement between equal owners of a vessel, whereby they assumed various duties as master and supercargo, and agents and factors, *held* not to constitute a partnership 575
One advancing money for the purchase of materials to be manufactured, retaining a lien thereon as security, *held* not liable as a partner because held out as such by the debtor........................... 451
A partner is not liable for interest on partnership account, before settlement and balance struck....................... 580
The partnership is bound by a settlement made by one partner who is authorized by an advertisement giving notice of dissolution to settle the firm accounts, but not by a new note given in payment............1058
A promise by partners to pay notes given by one after dissolution, in settlement of firm debts, is a ratification, and will render them liable thereon.....................1058
The surviving partner cannot charge the estate of the firm by drawing bills, after the dissolution, for advances on shipments made to its regular factor............... 668

PATENTS.

Patentability.
The patentee cannot recover for an infringement if he was not in fact the original inventor as to every part of the world. 216
An old article, though made by a new machine, is not patentable as a new article of manufacture.......................1059
A change of form or proportion, producing a new effect, is not within the inhibition of the statute as a simple change of form or proportion.................... 154
A patent once granted will not be set aside as invalid as not useful, if it be useful, even in a small degree............ 827
A mere difference in the manner and form of applying an invention, which is the same in principle with one previously used, will not justify a patent............ 378
A mode of bookkeeping whereby a balance sheet and statement of assets and liabilities are constantly shown on a single sheet, thus obviating reference to the ledger, is not patentable................. 747

Who may obtain patent.
An invention not actually reduced to practice, and not embodied in some distinct machinery, etc., is not patentable...........1060
Priority will be adjudged to him who first conceived the idea, and, using due diligence, so described it by words or drawings as to enable a skillful workman to bring it into useful, practical operation, although another first succeeding in perfecting the machine....................... 33
A person employed to make experiments under a contract by which the employer is to be treated as inventor, although conducting such experiments to a successful issue, *held* neither a sole nor a joint inventor 498
An inventor who described his invention to a workman, so as to enable the latter to construct it, will be entitled to a patent, if due diligence is used, as against a subsequent inventor, who first perfected his machine and obtained a patent............ 684
A patent cannot be said to be obtained in fraud of the right of another, who had given up his rights to the plaintiff, by expressly or tacitly permitting him to obtain a patent for it......................... 758

Prior public use or sale.
The purchase, sale, or prior use, etc., to defeat a patent, must have been with the

Page
knowledge and consent of the inventor. (Act March 3, 1839, § 7.)................1061
Quaere, whether a patent is defeated by the prior sale of an article which is not the whole of the patented invention.........1061
The mere deposit of a model in the patent office, will not warrant an inference that the model was accompanied by an application for a patent..................1061

Abandonment: Laches.

Delays in the patent office, which the inventor cannot prevent, will not affect the validity of his patent when granted...... 498
The protection of the patent will be carried back to the time when the invention was conceived, if the patentee has exercised reasonable diligence in perfecting and adapting it, and applying for a patent....1060

Application and issue.

A delay of eight years to make a new application after the first application was rejected, during which time the invention had gone into public use with the consent of the inventor, who had made assignments of interest therein, *held* not to show actual abandonment 498
A delay of 12 years after withdrawal of application, in the absence of good excuse, *held* an abandonment................... 343
The patent to the discoverer will be as broad as his mental conception which he embodies in some mechanical device or some process of art................... 547
Where the discoverer discloses only one or more of the derivatives or secondary truths of the principle discovered, his patent will be limited accordingly........... 547
The patent will be liberally construed in favor of the patentee, but the description must be so certain as to be understood by those acquainted with the subject-matter. 197
But the whole of the specification, as well as the summary and the drawings, will be examined and compared.......... 197
The specification is sufficient if a mechanic skilled in the particular art, from the specifications and drawings, can construct and use the invention............ 939
The specification must point out the new improvement of the patentee, so as to show in what the improvement consists....... 758
A claim is properly rejected when it does not set forth particularly and specifically the points of novelty relied on to distinguish the machine from prior ones............ 53
The patent for an improvement need not contain a particular description of the things already in use.................. 154
Independent separable and separate things, provided they relate to the same subject, may be separately claimed in the same patent........................... 493
Two combinations, separate in their nature, and capable, if desired, of separate use, may be claimed in one patent, and the use of either one is an infringement...... 493
The action of the patent office in allowing a separation of claims for the purpose of filing divisional applications is conclusive, and not reviewable in the courts.... 966
A patent not erroneous on its face is not subject to collateral attack on the ground that the commissioner exceeded or irregularly exercised his authority............ 939
The decision of the patent office, in granting a patent, that the inventor had made the necessary preliminary statutory oath, is final.............................. 355

Appeals from commissioners' decisions.

The statute confers no jurisdiction on the judge to hear and determine any appeal, on behalf of a patentee, from a decision of the commissioner of patents against his claim of priority......................1048

Reissue: Disclaimer.

Page
The claims of a reissue may be restricted or enlarged to cover the real invention.... 939
A reissue may include mere matters of mechanical adaptation or mechanical equivalents 328, 682
A reissue cannot embrace devices not described or specified in the original....... 966
To sustain the defense that a reissue patent is broader than the original, the latter must be introduced in evidence....... 827
The action of the commissioner on a reissue is not re-examinable elsewhere, in the absence of fraud........................ 240
Irregular proceedings in the granting of a reissue are no defense to a wrongdoer unless they were contrary to law, and the patent was granted to the wrong person.. 498
A reissue granted to an inventor after he has assigned his entire interest, by writing duly recorded, is not void where the surrender was made with consent of the assignee, in the absence of fraud or concealment 498
The act of congress does not, in terms, require that a surrender shall be in writing. 498
Where a reissue contains nothing that might not have been claimed in the original patent, it is not for a different invention..1061

Repeal of patent.

Sections 6 and 10 of Act Feb. 21, 1873, relating to the repeal of patents, construed. 378
The patent may be repealed where the patentee was not the original inventor, though he believed himself to be such.... 378
The patent is invalidated by a false suggestion in any of the several material facts set forth in the specification............ 378
Actual knowledge of a previous patent or specification is required to establish fraud in a subsequent patentee.......... 378
An order, on a rule to show cause why a sci. fa. should not issue to repeal a patent, is merely a preliminary proceeding, and does not determine the question of its validity 378
A judgment in favor of a patentee on a scire facias issued to obtain a repeal of a patent is not conclusive of his right in a subsequent suit for infringement......... 378

Extension: Renewal.

It is no objection to a renewed patent that part of the original patent is omitted. 939
The decision of the officer granting an extension is not subject to appeal or revision. 939
The equitable rights of defendants, arising out of an agreement, for valuable consideration, to convey an extended patent, made before the extension, will be protected as against the owner of the legal title 230
Assignees and grantees of rights during the original term have a right to use the patented invention during an extension under Act July 4, 1836, § 18, whether such right arose from the purchase of a machine or from the grant of a limited or unlimited right to use.......................... 271
The same rules apply in the case of patented processes 271
An exclusive right during the original term is limited to a mere right to use during the extension...................... 271
All limitations of use during the original term continue under the extension........ 271
The right to use, resulting from the purchase of a machine, expires with the existence of the machine.................. 271

Assignment.

A power of attorney to hold a patent for the benefit of others who have paid a valuable consideration therefor is, in equity at least, equivalent to a formal assignment, and is not revocable...................... 230

Page

The consideration for a contract to convey an extended patent, when granted, being an agreement to pay therefor, a failure to pay will not authorize a revocation of the contract........................ 230

An assignment of all "right, title, interest, claim, or demand whatsoever, in, to, or under" a certain patent, *held* not to convey claims for past infringements............ 642

An assignment, construed with a contemporaneous agreement, *held* to vest in a person, as trustee for corporations, the patentee's interest in the patent, and to the same person, as trustee for the patentee, all interest in claims for past infringements. 642

Licenses.

A patentee, while granting to another a right to make and sell, may retain to himself the exclusive right to make and sell for export or use in other countries...... 946

A patentee who has sold the right to make and sell the patented machine within a certain territory cannot limit to such territory the use of the machines so made and sold 946

A sale, by the owner of two patents, of the right to manufacture generally, will be *held* to be a conveyance of the right under both patents, notwithstanding a previous conveyance to another of the right under one specifically 262

An agreement in a license not to make any further claim of license fees under other patents owned or controlled by the licensee *held* not to apply to past infringement of a patent, the control of which, including the right to recover for infringements, subsequently passed to the licensor. 642

Construction of a deed from Goodyear to Day of the right to manufacture rubber goods 262

Infringement—What constitutes.

There can be no infringement of a patent before the date of the application or of the patent 758

The use of less than all the elements of of a combination, unless mere mechanical equivalents are substituted for the others, is not an infringement.............493, 791

A patent for an improvement upon a patented device gives no right to use the latter 325, 355

A patent confined to mold boards for plows, whose faces are worked upon transverse circular lines whose radii are in the exact proportion of three to one, is infringed by a mold board which contains a slight variation only for the purpose of evading the patent...................... 154

—— Who liable.

A mere workman employed, by a person who is not the patentee, to make parts of a patented machine, is not liable to damages. (Act Feb. 21, 1793.).............. 378

—— Preliminary injunction.

Will be withheld on the giving of an ample bond, where defendant is an extensive manufacturer with a large capital invested, and complainant is not a manufacturer 939

Refused where there did not appear to be danger of irreparable injury to plaintiff, and his right was not clear............ 946

Will be refused if, upon the facts presented, there be a fair doubt of infringement 791

A licensee will be compelled to pay the fee as a condition of using the patent..... 241

An injunction will be refused until after the determination of a motion for new trial on a verdict for plaintiff in a trial at law.. 241

The case is the same on bill of exceptions and writ of error sued out......... 241

Neither the verdict at law nor finding of the jury in a feigned issue are ever conclusive upon the judge sitting in equity, upon a motion for an injunction.......... 241

The court, or a judge out of court, may permit plaintiff, on motion for preliminary injunction, where defendant sets up a license, to put in rebuttal evidence......... 248

The order to permit such rebutting proof, when made by the court, is regular, although not made until the proofs are received 248

Defendant cannot reply to such rebutting proofs by further proofs on his part....... 248

Inexperience and lack of legal knowledge of counsel and ignorance of defendant in not setting up foreign patents, to show want of novelty, *held* not sufficient ground for opening interlocutory decree.......... 357

The rules laid down under which preliminary injunctions are granted............ 969

Neither an absolute nor conditional injunction will be granted where there is more probability of incalculable mischief from the granting than from the withholding 230

—— Procedure.

The owner of the legal title is properly joined as plaintiff with one holding an exclusive right to make and vend the patented article for use in foreign countries in a suit to restrain defendant from making the patented article, and selling to persons who buy for export.................... 946

Suits for infringements *held* properly brought in the name of a trustee of the patentee, joining the patentee as owner of the equitable interest.................... 642

Special pleas with the general issue, setting up a license from the patentee paramount to plaintiff's right, are proper in an action at law........................ 250

Defendant cannot set up in defense that the patent was issued unintentionally, through a blunder of a subordinate in the patent office 966

Upon the plea of not guilty, plaintiff must prove that the article made, used, or sold by defendant substantially resembled his invention 758

The claim that a reissue was obtained under false representations must be distinctly alleged, and as distinctly proved... 969

An averment that the patent was duly extended by the commissioner of patents is supported by proof that the extension was granted by an acting commissioner, without proof that he is such de jure..... 939

The testimony of a witness to prove prior knowledge stricken out, at the hearing, on motion, on the ground that his place of residence was not given in the answer.... 328

The word "about," in a specification, rejected for uncertainty, where to give it effect would invalidate the patent.......... 154

It is the province of the court to construe the patent to ascertain the intent, and of the jury to decide whether the description is sufficient 154

In the absence of explanatory or contradictory evidence, it is the province of the court to construe the language used in the specification 197

The court, upon final hearing, may pass upon a patent without reference to the fact whether or not it has been before a jury.. 969

The omission to allege, in a declaration by an assignee, the due recording of the assignment, *held* cured by the verdict....... 783

—— Evidence.

A prima facie presumption that the patentee was the first inventor arises from the grant of the patent........................ 827

Page

Under notice confined to a prior use in the United States, evidence of a prior use in England is not admissible............. 758

In an action at law by an assignee for infringement of a patent, in which defendant claimed by assignment from a trustee of the patentee, *held*, that plaintiff might show that the instrument creating the trust was procured by fraud from the patentee, and that the burden was on defendant to show that he was an innocent purchaser.. 252

The purchase by plaintiff from defendant, in the usual course of defendant's business, of the infringing article, will sustain a decree for an injunction and an accounting as to other sales........................ 355

An exemplification of a patent afterwards surrendered and canceled may be given in evidence to show that an improvement, subsequently patented, is not original........ 378

Infringement--Accounting: Damages.

The right to an account in patent suits in equity is incident to, and depends upon, the right to injunction and discovery......1059

—— Violation of injunction.

Fees and disbursements on application for an attachment for contempt in violating the injunction, and on a reference to take testimony, allowed as part of the fine, though the extent of the violation was not shown 959

The punishment limited to a fine of the amount of such fees and disbursements and the taxed costs, and commitment until payment 959

Various particular inventions and patents.

Billiard table cushions. No. 60,657 (reissued, No. 3,323), for improvement, construed, and *held* valid and infringed..325, 326, 328

Bonnets and bonnet frames. No. 15,570, for improvement in machine for pressing, *held* not infringed 958

Such patent construed, and *held* to be infringed 960

Cultivators. No. 19,412 (reissued, No. 1,515), for improvement, *held* valid and infringed *473

Cultivators. No. 55,630, for improvement, *held* valid and infringed............ 475

Fireplaces. No. 14,447, for improvement, *held* not infringed................ 791

Harvester rakes. No. 14,350 (reissued, No. 2,982, and extended March 4, 1870), for improvement, *held* valid and infringed.. 939

Hats. No. 30,379, for improvement in curling hat brims, construed, and *held* to be infringed 961

India rubber. No. 16, to Chaffee, covers both the process and the machinery used in carrying it on........................ 271

Lanterns. No. 13,286, for improvement relating to the attachment for securing the globe, *held* invalid..................... 470

Plows. Patent to Davis for improvement in mold boards construed, and *held* valid.... 154

Saddles. The Dixon patent for improvement, *held* invalid..................... 758

Sewing machines. Patent to Robertson for improvement construed, and *held* valid and infringed............................ 642

Sewing machines. No. 26,205, relating to braiding attachments, construed, and *held* not infringed........................... 650

Skirts. No. 25,701 (reissued, No. 870), for improvement in skeleton skirts, construed, and *held* not to be infringed.............. 969

Skirts. Reissue of August 1, 1865, for improvement in skeleton skirts, *held* invalid and infringed............................ 966

Skirts. Doughty & Draper patent for woven skeleton skirts *held* valid..........1060

Skirt hoops. No. 20,681, for improvement, construed, and *held* valid and infringed.... 963

Speeder for roving cotton. No. 3,089, for improvement in, *held* valid and infringed.. 197

Stoves. Reissue No. 6,979, for improvement in base-burning stoves, *held* valid and infringed............................ 555

Telegraph. No. 42,842 (reissued, No. 3,335), for improvement in electro-magnetic telegraph, *held* void for want of novelty.. 217

Tin cans. Reissue No. 1,804 *held* not invalid as broader than the original claim... 355

PAYMENT.

Where a bill is receipted, "Received payment by note," the giving of the note must be treated as a payment thereof, in the absence of any evidence to qualify the receipt..1070

A presumption of payment of a debt arises at common law after the lapse of 16 years. After the lapse of 20 years, the presumption is conclusive................ 680

The presumption of payment of a bond or note, arising from the lapse of 20 years, may be rebutted by circumstances........ 487

A marshal will not be required to pay into court the proceeds of a sale of property claimed by a third person pending suit against him therefor, in the absence of collusion or danger of loss.................. 240

Where plaintiff does not establish more at the trial than the amount paid into court, he must be nonsuited, or have a verdict against him.......................... 889

PIRACY.

Robbery on the high seas is piracy; but to constitute the offense the taking must be felonious, and the quo animo may be inquired into............................ 192

A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself, without discrimination, every vessel he meets with.................................. 192

PLEADING AT LAW.

In suits originating before justices of the peace, no formal pleadings are necessary.. 163

The facts and circumstances upon which jurisdiction depends must be stated in the pleadings.............................. 886

A jurisdictional defect in the declaration may be taken advantage of at any time before final judgment or by writ of error.... 886

After a complaint is amended on demurrer to cure a jurisdictional defect it becomes substantially a new suit, and defendant may interpose another plea to the jurisdiction.............................. 886

A count for injuring the plaintiff's mare by negligence, and a count upon a promise to return the mare safe, may be joined.... 781

Defendant not permitted to withdraw the general issue and file a general demurrer... 285

The objection to misjoinder of counts can only be taken by special demurrer........ 781

A plea in abatement pleaded with matter to the merits is considered waived or abandoned.............................. 990

In special pleas in bar, color to the plaintiffs' right must be given............... 646

A special plea which amounts only to the general issue is bad.................... 646

A plea of non assumpsit to a declaration sounding in tort is fatally defective....... 130

A plea will not be considered double for setting up matter which is immaterial to the issue of law raised by the demurrer.... 521

A declaration on a note signed by A. & L. without their Christian names need not aver a partnership, where their names are stated in full in the declaration........... 102

Page

An averment of the demise from year to year for three years, at a certain sum per year, is not supported by evidence of a demise where the rent for one year was to be less than such sum.................. 938

The words "I. & C. Central R. R." cannot, without an allegation of misnomer, or offer to prove the identity, be taken to mean the Columbus & Indianapolis Railway Company 751

The words "in the state of Ohio," in the description of a note, may be rejected as surplusage 1049

Where the declaration omits to state a fact which must necessarily have been proved at the trial to justify the verdict, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof.... 783

PLEADING IN ADMIRALTY.

The court has no power to permit a libel to be amended by striking out the name of a sole libelant, and substituting another in its place.............................. 550

A claimant, however, who fails to put his objections upon the record, will be deemed to have waived them by appearing and contesting the case upon the merits....... 550

A decree cannot be rendered upon proofs as to matter not embraced within the allegations, but the pleadings should be amended to embrace the merits................. 134

PLEADING IN EQUITY.

An allegation, in relation to an action at law, should not be set up as any portion of the foundation of a proceeding in equity, unless there was a bona fide trial and complete judgment 969

A demurrer to a bill in equity admits only facts well pleaded....................... 714

It does not admit averments of conclusions of law, nor the construction of documents or parol agreements inconsistent with the written agreements alleged...... 714

If the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive, unless disproved by something more than the testimony of one witness 384

The separate answer of one defendant is not evidence as against a codefendant unless the defendants' admissions out of court would be evidence against each other.. 660

The answer of a defendant in another suit, though good evidence against him, is not admissible against a codefendant..... 606

A joint answer is sufficient if all the parties swear to it....................... 119

Counsel must sign the answer unless it is taken by commissioners................ 119

POWERS.

A power of attorney which gives to the agent a veto upon the acts of his principal is equivalent to a power coupled with an interest 230

PRACTICE IN ADMIRALTY.

Concurrent actions in rem and in personam may be prosecuted in the same suit, under the supreme court rules..........1060

The stipulation or bond in such a suit only covers the value of the property attached and surrendered................1060

A libel is informal if it proceed against both vessel and owners................. 299

Each party has a right to require the personal answers of the other, under oath, to any interrogatories touching the matter in issue 22

The answers to special interrogatories are evidence in favor of the party answering.. 22

The charge in the libel to which a special interrogatory relates will be taken pro confesso where defendant refuses to answer.. 22

The court may receive evidence offered by defendant's counsel, where defendant was absent at the time of hearing, and, through ignorance, failed to answer...... 22

A libel was dismissed for delay in prosecuting the same, where libelant refused the option of going to trial on the libel and answer and the replication filed on the day appointed for the special hearing........ 978

Default for want of an answer not set aside after a decree from which an appeal might be taken. (Rule 29.).............1177

Rules 29 and 40 apply as well to suits in rem as to those in personam..........1177

The court has no discretionary power to refuse or postpone an order of sale, where a libelant in rem establishes a clear right.. 144

On default of stipulators for costs an order or decree must be obtained, on which execution may issue against the entire estate of the parties.................... 394

PRACTICE IN EQUITY.

A person cannot be made a defendant to a suit in equity on his own application or compel plaintiff to join him as coplaintiff..1050

An attachment for not answering the bill must not be made returnable to the clerk at the rules, but to the court.......1021

The issues in equity cases must be raised by the allegations in the bill and answer. Special notices are irregular. Defects can only be cured by amendment............ 969

A bill will not be dismissed for want of proceeding for three terms, without giving one term's notice of the application....... 388

The court will not receive viva voce testimony at the hearing, unless to prove an exhibit 313

Issue directed out of chancery to ascertain whether a partnership, asserted by complainant and denied by defendant, was formed as alleged.......................1108

In exceptions to a master's report, a general assignment of errors is insufficient, unless specific errors are shown............ 597

Exceptions to a master's report must be founded on the facts stated in the report, or in the accompanying documents and proofs 597

The master or auditor should be requested to report specially such evidence as furnishes ground of exception. The facts will not be opened except to correct unquestionable error............................ 889

A case heard and decided in vacation before one judge, by agreement of the parties, is to be considered as if heard and decided before and by the court................. 819

If the decree be not actually entered till after the death of the judge who drew it up and announced it, an entry may be made at the next term.................. 819

A rehearing in the case of the death of the judge will be granted only where the opinion was not actually delivered....... 819

The court may alter its judgment at any time before it is entered up, or, if entered, before it is made final; but after it has been announced it should not be altered without adequate reason and full hearing......... 819

Fees of masters in equity suits, the amount, and how determined............ 971

PRINCIPAL AND AGENT.

If the agency be special, the plaintiff must show the transaction to be within the scope of the agency.................... 166

Page

The principal is responsible for the misrepresentations of his agent in making a sale, though in excess of his authority, where he subsequently ratifies the sale.... 804

If a subagent receives from the vendee a part of the purchase money, and pays it over to the principal, taking land instead of it for his compensation, the principal is liable, on a rescission of the purchase for fraud, to repay that part as well as what he received directly.................... 821

An agent to receive a deed for joint purchasers, being one of the number, who procures a deed to be executed directly to a third person for part of his own share, *held* liable, on rescission of the sale, for the whole consideration received............ 821

The neglect of a merchant, who was in the habit of insuring vessels for his correspondent, to make insurance as ordered, will render him liable as the insurer, and he is entitled to the premium............... 542

An agent is not liable in failing to effect insurance on a vessel as ordered by the principal, if he used reasonable diligence.. 542

The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance will make him liable in damages................. 542

PRINCIPAL AND SURETY.

The surety is discharged at law by a change in the contract by the obligee..... 477

The surety is not released at law by the principal's becoming insolvent after he has requested the creditor to bring suit....... 477

The surety, on the payment of the debt, is entitled to be substituted to all the rights of the creditor in securities for the debt... 477

PRIZE.

See, also, "War."

French owners are entitled to the benefit of the ordinance of congress relative to recaptures 1146

Property belonging to a merchant residing and trading at an enemy port, on capture may be condemned as enemy property 444

The transfer of a vessel during the war, by an enemy to a neutral, to continue in trade with the enemy county, is void, even though made in good faith for value...... 444

A shipment made after known war, by an American citizen from an enemy's port to one of her colonies, is illegal, as a trading with the enemy.................... 634

The offense of attempting to carry contraband of war to the enemy is complete at the moment when a vessel begins her voyage for that purpose, and she is from that time liable to capture................. 868

The voyage of a vessel to a blockaded port, although broken by a stop at a neutral port, is one continuous illegal voyage.. 868

The act of knowingly sailing for a blockaded port, with intent to enter, will render the vessel and cargo liable to capture at any part of the voyage................ 868

A vessel having knowledge of a blockade at the time of sailing cannot lawfully approach the port for the bona fide purpose of inquiring as to the continuance of the blockade..........................444, 449

The master is entitled to make inquiry and to receive notice of blockade of whose existence he had no previous knowledge... 449

A contingent destination to a blockaded port, if it in fact existed, must appear on the ship's papers..................... 444

Claimants *held* not estopped, by license and clearance for one place, to show that the primary destination of the voyage was another place, so as to save forfeiture.... 16

The captors must immediately upon arrival in port, deliver, upon oath, all the papers of captured vessels into the registry of the prize court...................... 634

A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute........ 722

The test oath is the oath of ownership simply, and, with a general denial that the captured property is lawful prize, is all that is proper to include in the claim.......... 444

Effect of a claim and answer in a prize suit put in and verified by an agent, and not by the owner.....................1120

A mortgagee cannot assert his claim in a prize court......................... 444

A citizen of a state in insurrection has legally no locus standi in a court of the United States to contest a prize seizure....1120

During war, no claim standing in opposition to the ship's papers and preparatory evidence is ever admitted in a prize court... 634

A commission to take evidence in an enemy's country will not be allowed........ 634

Prize goods are never delivered on bail until after a hearing, and not then unless claimant shows a prima facie legal title... 634

The appellate court will not hold itself bound by the action of the district court in allowing a delivery on bail in a gross case of illegality....................... 634

A vessel was condemned which had among her cargo arms, described in her freight list as "hardware" and cotton cards, not marketable at the port for which the vessel cleared, though her papers did not show any other destination.............. 868

Vessel and cargo condemned for an intent to violate a blockade............444, 449

Vessel and cargo condemned as enemy property, and for a violation of blockade.. 415, 1120

Vessel and cargo condemned for violation of blockade of the port of Wilmington, N. C., in a case of spoliation of papers.... 979

Sale by order of the provisional agent at Barracoa is valid, being subsequently confirmed by the proper jurisdiction at Guadaloupe, under a law existing before the capture................................ 476

In cases of joint capture by privateers, they share in proportion to the number of men composing their respective crews.... 536

Officers and crew are entitled to the shares given under the prize act, where the shipping articles omit to state them...... 2

A parol agreement as to distribution of prize money being void, distribution will be made under the statute. (Act 1812.)... 2

A parol assignment of a share in prizes is void................................ 2

The commander of a squadron is entitled to the flag twentieth of all prizes made by a ship attached to his command, although the other part of the squadron never sailed on the cruise, being blockaded by a superior force................................ 322

To deprive such a commander of his flag twentieth on account of having left his station (Act April 23, 1800, c. 33, § 6), it is indispensable that some local station should have been assigned to him......... 322

A court of prize has power to give salvage in lieu of prize money to persons, not of the navy, who have rendered valuable service in making a capture................ 353

Four per cent. of the value of the prize and counsel fees granted to two persons who made known the rebel signals, and thus enabled the naval officers to make the prize... 353

The prize court has jurisdiction to decree restitution of a vessel recaptured from the enemy, and to award damages against the recaptors for embezzlement.............. 979

PUBLIC LANDS.

Page
A claim to lands *held* to have been abandoned ... 355

RAILROAD COMPANIES.

The means of consolidation of railroads under the statute of Illinois were left to be adjusted by contracts between the parties .. 722
Stockholders cannot question contracts of consolidation after the lapse of several years, where mortgage bonds of the consolidated company have been sold to bona fide purchasers on the faith of such contracts .. 722
A company is not bound by the parol promises of its officers to guaranty the bonds of another company, nor by their false representations on the sale of such bonds ... 1012
Neither officers nor directors have authority to bind the company to supervise the construction of a railroad for another company, or to make it responsible for wasteful and extravagant expenditures in connection therewith ... 1012
The mere presence and assent of a member of an executive committee with a subcommittee when an agreement was made, though, taken collectively, they constituted a majority of the executive, *held* not to make the agreement binding ... 1012
A guarantor of bonds expressly subrogated to the rights of mortgagees in respect to payments made by it may foreclose for interest payments which it has made ... 1012
A contract by a guarantor company to either furnish equipment or to lease and operate the road on terms to be agreed on *held* not a contract to lease for a rental sufficient to pay the interest on the guarantied bond ... 1012
A subsequent agreement in relation to a branch line *held* to refer merely to leasing and operation, and not to include an agreement to guaranty its bonds ... 1012
Bondholders cannot complain of extravagant construction contracts made by the lessee of the road and custodian of its bonds and funds, where, out of the lessee's own means, it has placed the road in first-class condition ... 1012
Provisions in mortgage given to secure bonds, providing for consent of trustee to contracts before they shall be a charge on proceeds of sale of bonds, *held* not to create a charge in favor of a contractor who built a portion of the road ... 714
A judgment against receivers for personal injuries to a passenger does not take priority over mortgage bonds ... 8
Material men are not entitled to payment, in advance of mortgage bondholders, out of the fund arising from a foreclosure sale, notwithstanding promises of payment by the receiver ... 482
Misconduct of mortgage trustees in bringing foreclosure suit *held* no ground of denying relief, where all the parties in interest are brought before the court, so that their rights may be properly guarded ... 1012
Trustees in mortgages represent the bondholders, and the bondholders need not be made parties to a cross bill in foreclosure proceedings ... 1012
The substitution of municipal subscriptions for that of private citizens does not invalidate the bonds issued therefor, where there was no deceit or misconception of the facts .. 131
Recitals in the bonds that they have been issued in compliance with the law will estop the city from alleging defects in the proceedings as against a bona fide holder .. 131
A resolution of a common council declaring the subscription, and approved by the mayor, is sufficient to show a subscription by the city ... 131

RECEIVERS.

A receiver may be appointed on a creditor's bill against the surviving partner of a mercantile firm ... 668
On petition of receiver, persons claiming to have pre-existing liens on realty in his possession were required to release them, and an order was made setting apart sufficient of the proceeds of sale to pay them after the determination of their respective rights ... 562

REFERENCE.

See, also, "Arbitration and Award."
The federal courts will not entertain questions on a referee's report, but will regard and treat it as an award by arbitration ... 490
A reference under state statutes not being recognized by the federal courts, a stipulation to confess judgment for the amount reported by the referee will not be enforced therein ... 490
Consent to a reference does not authorize a judgment in invitum on the report ... 490

REMOVAL OF CAUSES.

See, also, "Courts."
Right to removal.
A suit to foreclose a mortgage is not removable by a nonresident junior incumbrancer party defendant, where the other parties are citizens of the same state, and the only question is as to the validity of the mortgage and the amount due on it. (Rev. St. § 639, Act March 2, 1875, § 2.) .. 895
A citizen of the state sued in the state court by a citizen of a foreign country may remove the cause under Act 1875, § 2, cl. 1. 281
The last clause of section 2 of the act of 1875, relating to separable controversies, authorizes removal only in suits between citizens of different states, and does not apply to foreigners ... 281
The act of March 2, 1867, is not repealed by the act of March 3, 1875 ... 467
A cross bill by a nonresident defendant, merely setting up matters put in issue by the original bill and answers, cannot change the character of the case, or affect the question of jurisdiction ... 895
Time of removal.
After new trial granted, the case stands for trial as if no former trial had occurred, and is removable. (Act 1866.) ... 1
Proceedings to obtain.
The removal is imperative where the proceedings taken therefor are in conformity with the statute. (Act March 2, 1833, § 3.) 488
Both the signing of the petition for removal and the making of the affidavit may be done by the petitioner's attorney in fact. 467
The approval, by the state court, of the bond of removal, is not necessary to the jurisdiction of the federal court ... 467
Form of the order on the filing of the papers from the state court ... 1
A defect or omission in the transcript of the record of the state court can be cured by certiorari ... 467
Effect of removal: Subsequent proceedings.
New pleadings are not necessary on removal by one of two defendants after the cause is at issue in the state court. (Act 1866.) ... 1
The entry of an appearance solely for the purpose of joining in a petition for removal,

Page
and for no other purpose, so expressed, will give the court jurisdiction on removal, the same was as though process had been personally served 283
The question whether defendant had in fact a right to remove the suit cannot be raised by a motion to remand, made before the trial 488
Any question as to jurisdiction, based on the point of an alleged absence of right in defendant to remove the suit, can be raised at the trial 488
A cause will not be remanded unless the court is satisfied that it has no jurisdiction 281
In the absence of jurisdictional objections, a cause once removed will not be remanded for defects in the bond, insufficiencies of sureties thereon, or other irregularities, which can be remedied, or are not prejudicial to the opposite party 467
A subject of Great Britain brought suit on a joint and several bond in an Illinois state court against a citizen of Illinois and two subjects of Great Britain. The latter were not served, but entered an appearance for the purposes of removal, and all three petitioned. *Held*, the bond being given in the federal court, it would retain jurisdiction 281
Property in custody involved in a replevin suit, removed to the federal court, should be sold, and the proceeds deposited on interest to abide the result 488

REPLEVIN.

Property seized to enforce collection of taxes is in custodia legis and irrepleviable. 767
Possession by the plaintiff, and an actual wrongful taking by the defendant, are necessary to support replevin 679
A mortgagee who has no right of immediate and exclusive possession cannot maintain replevin against a tax collector who has seized the property under a void assessment against the mortgagor 767
To recover possession of personal property under the Missouri statute, plaintiff must show the same right of property and possession as in the common-law action of replevin 767
Property in the defendant must be specially pleaded, and cannot be given in evidence under non cepit 679
If the jury find for plaintiff in replevin upon the plea of "non dimisit modo et forma," the judgment must be for the plaintiff upon the whole case, although they find for the defendant upon the issue of "No rent arrear" 938

SALE.

A contract to deliver flour on or before a certain day is not void because the seller has not the flour on hand at the time of the contract 800
A sale obtained by false representations is affirmed by an action for the purchase price, brought after knowledge of the fraud 659
There can be no implied warranty of the quality of goods which for some time before the sale have been, and at the time of the sale, are, in the custody of the purchaser 906
If a contract be absolute to deliver flour on or before a particular day, the seller will not be excused by an obstruction of navigation 800
A bona fide purchaser without notice can convey an equally good title to any purchaser 769

SALVAGE.

Page
Right to salvage compensation.
The extinguishment of a fire in a ship lying at the wharf of a city, by its fire department, does not entitle the firemen to salvage, even though there is no city ordinance requiring them to extinguish fires. (Affirming 11.) 14
To entitle a person to salvage upon property taken from pirates, the taking must have been lawful and meritorious 192
Salvage will not be awarded upon property taken, without authority, from pirates within the territorial jurisdiction of a country at peace with the United States 192
The crew of a vessel in peril transferred to another vessel cannot recover for subsequent labors in saving the distressed vessel, according to the agreement under which they were transferred 770
Pilots and others, assisting vessels in distress beyond what their mere duty requires, are entitled to compensation 1177
Contracts to perform services.
An agreement made with the head and spokesman of wreckers, by persons who had bought the wreck, to assist in saving materials, *held* binding on the wreckers, though special authorization to make the agreement was not shown 873
Forfeiture or reduction of salvage.
Slight misconduct of salvors under great provocation, not resulting in any loss, should not reduce the amount 770
The fact that a different course of conduct would have been better will not prevent compensation where the course followed was adopted in good faith 770
Amount.
The amount awarded may be affected by the number to share therein 770
The amount awarded should be more than a compensation for the mere labor employed 770
Avarice and hard dealing by a salvor should reduce, and extraordinary energy should increase, the amount of his compensation 770
$60,000, allowed upon a valuation of $260,000 for nine months' labor, where the salvor vessel abandoned a whaling cruise at is commencement 770
$12,000 *held* reasonable award for getting ship worth, with cargo, $125,000, off a reef at Key West, but reduced one-half because of delay resulting from negligence and gross errors of judgment 632
Remedies for recovery.
Libelants permitted to amend and file a supplemental bill for extra compensation as pilots where their services were *held* not to constitute a claim for salvage 620
On a libel for salvage, where a special agreement is shown in defense, but no tender of the balance of the stipulated price is shown, a decree will be entered for such amount, with costs 873
Apportionment.
Cargo *held* not chargeable with portion of allowance on libel of vessel for salvage, where the disaster occurred through unseaworthiness, and the point as to liability of cargo was not made in the answer 393

SEAMEN.

The contract of shipment.
Ambiguity in shipping articles ought to be resolved in favor of seaman, it being the duty of the master or owner to have such contracts couched in plain language 729

Page

Shipping articles *held* not controlling as to the destination, where it does not appear that they were originally explained to the seamen, and it appears upon their face that their names were not affixed on the date of execution.......................... 908
Articles describing a voyage from England to the United States and back *held* not to include ports on the Pacific coast...... 729
Shipping articles for a voyage "from P. to G., other ports in Europe, or South America, and back to P.," do not authorize a return to a European port after proceeding to South America.................. 975
A change of a voyage from that specified in the shipping articles must be actually resolved on and known to a seaman, to authorize him to leave a vessel without forfeiting his wages..................... 975
A shipwreck discharges the principal obligation, but does not release seamen from the obligation of rendering their best services in saving the ship and cargo......... 204
For such services the seaman may be allowed extra compensation.............. 204
Wreck and loss of freight caused by a master's negligence do not free the owners from liability for seamen's wages......... 121
The master is negligent in not promptly changing his course when the lead shows a rapid shoaling of the water near dangerous and well-known shoals.............. 121
Where the negligence of a master is in issue, the failure to show or account for the chart used by him raises an inference that the shoal where the vessel was wrecked was set down thereon................ 121
Liability exists for wages of seamen duly discharged in a home port after a wreck, notwithstanding general maritime law, when the shipping articles promise wages unless forfeited by misconduct................. 121
Seamen discharged without reason before commencement of the voyage are entitled to damages for the loss of the voyage........ 861
In the case of a voyage from New York to San Domingo, half a month's wages allowed as damages................... 861
A seaman cannot recover against a vessel for gratuitous hospital treatment. The right to recover is limited to actual charges and disbursements.......................... 120
Nor can he recover for injurious effects still remaining because of the injury, in the absence of negligence............... 120

Wages—Right to.

The English rule that freight is the mother of wages does not obtain in this country. 204
Seamen are entitled to full wages up to the time of shipwreck, provided, by their exertions, enough is saved of the freight and wreck to pay them.................. 204
Extra wages (Act 1803, c. 62) are not allowed on a discharge abroad on shipwreck, unless the vessel can be repaired at a reasonable expense and in a reasonable time, the burden of negativing which is upon the owners............................200. 204
On a shipwreck and sale of the vessel abroad, a seaman not entitled to extra wages is entitled to a sum to defray his expenses home, to be paid from the proceeds. 204
An extra award to seamen for services in saving property in cases of shipwreck may be allowed against the cargo as well as against the ship......................... 204
The rule of the maritime law allowing a seaman his wages out of the savings of wrecked vessel, and expenses of his return home, superseded by Act Aug. 18, 1856...1071
The amount of a cooper's lay on a whaling voyage fixed where he was disrated for alleged incompetency.................. 874
A seaman discharged in foreign port for going ashore in violation of orders *held* entitled to his wages to the date of discharge, with $10 damages and half costs........ 961

Wages—Remedies for recovery.

A minor may recover wages in his own name when the contract was made personally with him, and it does not appear that he has any parent, guardian, or tutor entitled to receive them.................. 18
An action to recover wages notwithstanding loss of vessel, authorized by the British statute on production of the certificate showing fidelity, is not upon the statute, which simply removed a disability previously imposed by the maritime courts............ 134
In such case, proof of fidelity may be shown by other legal evidence than the certificate................................ 134
A libel in rem for wages, brought within 10 days after discharge of cargo at the last port of delivery, will be dimissed as premature.................................. 18
The seamen need not wait the 10 days where he is discharged................. 18
The charges made on the shipping papers of advances to the seamen in the course of the voyage are not evidence until verified by the suppletory oath of the master...... 22

—— Deductions: Extinguishment, etc.

A release under seal on payment of wages is only prima facie proof of payment...... 22
The payment to the consul of the extra wages required by law. on the condemnation and sale abroad of an injured vessel, discharges the owner's liability, though the seamen refused to receive it............1071
In such case the master has no right to deduct, from the amount due, a charge for exchange 1071
A discharge need not be shown by direct evidence, but may be inferred from circumstances.............................. 18
An entry in the log book is prima facie evidence of its truth in every particular, and, to be falsified, must be disproved by satisfactory evidence..................... 975
Wages not always forfeited by disobedience of a captain's orders' unattended by aggravating circumstances...............1118
Seamen refused to proceed to sea until the rigging was repaired, and on arrival in the outward port, finding other persons employed to unload the ship, they went on shore. *Held*, that wages should not be forfeited................................. 755

Foreign seamen.

Act July 20, 1790, c. 29, regulating seamen in the merchants' service, does not apply to foreign seamen on foreign ships.... 853

SET-OFF AND COUNTER-CLAIM.

Defendant cannot set off plaintiff's acceptance of defendant's draft, not due at the commencement of the action, but due before plea pleaded; nor can it be allowed as payment on the general issue of non assumpsit.............................. 286
In an action on a bill of exchange, defendant may set off a claim for neglect to insure a vessel in a certain amount, as plaintiff was bound to do, where the vessel was lost without insurance.............. 542
Damages on bills of exchange, paid by the defendant, upon bills drawn by him on the plaintiff, and which the plaintiff was bound to pay, may be set off.................. 542
Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence, upon non assumpsit.............................. 460

SHIPPING.

Public regulation: Title to vessel. Page

Compulsory sale of vessel not ordered on application of one owner, where the other equal part owner in possession offered to stipulate for her safe return from the voyage contemplated....................*166

The majority owner of a foreign vessel merely touching at an American port en route *held* entitled to recover possession against an alien minority owner acting as master.................................. 681

One of two part owners in a vessel run for their common profit cannot contract with a shipper, without the consent of the other, to apply freight earned on his individual debt.................................. 903

The part owners may jointly maintain a suit in admiralty to recover the freight, notwithstanding such contract............ 903

Carriage of passengers.

Passengers for New York, having certificates from a ship agent engaging that they should be carried to Philadelphia and forwarded to New York free of expense, were received on board a vessel at Cork, and the certificates retained by the master without dissent until arrival at Philadelphia. *Held* a maritime contract binding on the ship, and not separable as to the two stages of transportation............................ 480

Liability of vessel or owners, etc.

Vessel owners are not personally liable for a loss by fire occurring without their design, or neglect of cargo delivered on the wharf into the charge of the officers of the vessel, though they were negligent in not promptly putting the goods on board. (Act March 3, 1853, § 1.).................. 698

A vessel is exempt from liability for wages of seamen who hire with knowledge that she is chartered by the master on condition that he victual and man her, and divide the earnings with the owner........ 566

A libel against owners for supplies will be dismissed as to one who, though registered as owner, was in fact but a mortgagee of part of the vessel, where he had no ostensible connection with the vessel, and credit was not given on the ground of his partnership 1175

The mortgagee of a vessel to secure a contingent liability as indorser upon a note *held* to have a right to intervene to protect his interest in a libel against the vessel for wages 1141

Necessary averments and proofs to support a libel between co-owners for supplies furnished ship's husband, or against mortgagee therefor........................ 794

The master.

Under the registry laws, the person in whose name, as master, a vessel is registered, must be deemed her master for every legal intendment and purpose, though another person is employed to navigate and discipline the vessel......................1141

An alien cannot be deemed master of an American vessel, even for the purpose of defeating his claim to a lien for wages....1141

The master and co-owner of a whaling ship *held* entitled to recover in admiralty the amount due him as master after the voyage had been made up, and his share of the lay ascertained 616

Unascertained indebtedness in the capacity of owner, unconnected with the contract of hiring, cannot be set off in such case.... 616

A master has no lien upon the vessel for his wages......................1141, 1160

The master has a lien on freight for necessary disbursements for incidental expenses and liabilities incurred therefor during the voyage, and also for his wages..........1085

Page

Such lien will be paid prior to that of general creditors and prior claims.........1085

The master is not answerable for losses arising from unavoidable accidents, mere errors of judgment, or failure of success, after having exercised all reasonable diligence and discretion.................. 297

In the case of a cargo found in a perishing condition the master is quasi agent for both consignee and vessel owner, and the vessel is not liable for his acts honestly put forth in an emergency............. 312

Owners are answerable for the master's torts under a general principle of the maritime law, and not by virtue of any special contract............................. 294

The owners of a vessel are not liable for the acts of the master in excess of his authority, to the injury of others, in a business different from that for which he was employed................................ 637

SLAVERY.

The list of slaves (Act Md. 1796, c. 67) must be filed with the county clerk within three months.......................... 111

Color is a prima facie evidence of slavery, but the presumption can be overcome by proof to the contrary...................1063

The fugitive slave law is not retroactive. 45

What constitutes a hindering or obstructing the arrest of fugitive slaves, or of harboring them, within Act Feb. 12, 1793, giving a right of action therefor..1093, 1095, 1100

Competency and sufficiency of evidence in an action for the penalty given by the statute.......................1093, 1095, 1100

Construction and effect of commissioner's certificate under fugitive slave law....... 45

Slave removed from Virginia to the District of Columbia *held* entitled to freedom..1185

Record and hearsay evidence of freedom. 129

SPECIFIC PERFORMANCE.

A bill will not lie to enforce a contract to sell land, whose consideration was money to be paid and certain work to be done, where the work is not done, and there has been no offer to perform................ 483

STATES.

The compact between Virginia and Maryland does not prevent Maryland from prohibiting the importation of Virginia slaves from Virginia......................... 415

As to a reconstructed state, *held*, that constitutional provisions for homestead exemptions took effect from the date of ratification by the people, though the state was not admitted to representation in congress until later............................ 334

STATUTES.

A statute must be so construed, if possible without doing violence to language, as to give force and meaning and effect to every part of it....................... 50

A section in a revision will not be given a construction in opposition to its positive provisions, in order to conform it to the preexisting statute......................... 789

Part of the tariff act of June 6, 1872, having been embraced in the Revised Statutes, that act was consequently repealed on June 22, 1874, by the express provisions of Rev. St. § 5596....................... 789

TAXATION.

Constitutional provisions for the protection of taxpayers must be strictly construed. 460

Page

A state law taxing nonresident merchants, etc., on all sums invested in business in the state, is not unconstitutional............1164

The validity of a provision as to collection of taxes against nonresidents from property within the state of the firms, etc., to which they belong, cannot be determined on a bill filed by a nonresident to restrain collection, to which the other members of the firm are not made parties.......................1164

Municipal taxes are levied under the same general authority as state and county taxes, and a sale by municipal authority is essentially a sale by state authority...... 460

The purchaser at a tax sale in Illinois must show that the person in whose name the land was taxed resided in the county when the notice of sale and time for redemption was served upon him........... 460

The right of a purchaser at a tax sale in Illinois to a deed is postponed on a resale within two years for taxes........... 460

TELEGRAPH COMPANIES.

Telegraph companies are bound to deliver messages impartially, in good faith, and in the order in which they are received.... 918

A person using the telegraph, unless he insures his message, takes the risk of delay and failure to deliver, arising from accidents and obstructions incident to telegraph lines........................... 918

The fact that a message left at a telegraph office in New York at 5:20 p. m. was not delivered at Mobile until 10:30 a. m. on the next day *held* prima facie evidence of negligence........................... 918

A contract exempting the company from liability for damages resulting from delay, unless the message was ordered repeated, is void, as against public policy........... 918

The company is only liable for damages which were within the reasonable contemplation of the parties at the time of making the contract for transmission.......... 918

The liability is limited to nominal damages merely, notwithstanding the agent was informed that the message was important, where the dispatch does not in any way indicate that damages will be suffered by delay................................. 918

TOWAGE.

A tug is liable for damages, resulting from negligence in her navigation, to a vessel in tow, whether she is towing under a contract or not......................... 351

The condition in the towage contract, "All towing at the risk of the master and owners of the boat or vessel towed," will not exempt the tug from liability for negligence 348

The running of the tow on a sunken pier known to the master of the tug *held* conclusive evidence of negligence, in the absence of proof of vis major............ 351

The tug will be *held* solely liable for a collision between boats in her tow, caused by the grounding of one on attempting to pass a raft moving in the same direction in a narrow channel..................... 20

TRADE-MARKS AND TRADE-NAMES.

A registered trade-mark for plug tobacco, consisting of longitudinal and transverse lines for dividing the plug, will not prevent the use of Greek crosses and half crosses for the same purpose........... 4

Acts of acquiescence in the use of complainant's alleged trade-mark by defendant will estop complainant to claim that the defendant has no right thereto............. 399

The basis of the action of a court of equity to restrain infringement is fraud on the part of the defendant............... 399

TREASON.

Quaere, whether the constitutional disqualifications from holding office by having engaged in Rebellion (Amend. 14) operates to exempt from prosecution for treason.. 63

TRESPASS.

The person who forcibly carries another on board a steamer, and the master who carries him to sea against his will, are joint trespassers, and a recovery and satisfaction against one will bar an action against the other 1132

It is the province of the jury to ascertain the damages when they are uncertain.... 163

TRIAL.

If there be only one issue, and the defendant holds the affirmative of that, he has a right to open and close............ 33

A party producing a record in evidence is not obliged to read the whole of it; but the opposite party may read it.............. 129

Impertinent inquiries in examining a witness, having no bearing upon the case, should not be allowed.................. 220

Leading questions may be asked in cross-examining a witness.................... 200

The construction of an oral contract is for the jury, where there is a conflict as to the words used or ambiguity; otherwise, it is for the court....................... 555

Neither the testimony of witnesses in general nor of experts is admissible to prove the construction of a written instrument; but such testimony is admissible to explain terms of art, etc., and to acquaint the court with the circumstances under which the writing was made............. 262

Form of verdict on bond conditioned to pay money by installments, rendered before all installments are due................. 29

Plaintiff is entitled to legal interest on a verdict where judgment is delayed by defendant by motion for new trial or otherwise 995

TRUSTS.

A deed of trust to secure creditors with ascertained debts marshaled them into four classes. *Held*, that a bill would lie by one of the fourth class for breach of the trust without making the others parties........ 923

USURY.

See, also, "Bills, Notes, and Checks."

Under a constitutional provision that no higher rate of interest than 6 per cent. shall be taken or demanded, and that the legislature shall provide by law all necessary forfeitures and penalties against usury, a contract for a greater rater of interest is void in toto, though the legislature has not provided forfeitures, etc................ 699

Accommodation paper made in New York was placed in the hands of note brokers there, who sold the same by correspondence at 10 per cent. discount, as first-class business paper, to a Connecticut corporation, who paid for the same by check on a New York bank. *Held*, that the transaction was governed by the law of New York, and that the notes were void for usury........ 786

VENDOR AND PURCHASER.

Page

A bona fide purchaser for a valuable consideration, without notice of any fraud in the grant to his vendor, takes a good title as against the original grantor and his heirs 612

A bona fidè purchaser without notice, at a sale by a person appointed by the legislature to sell intestate's estate for payment of his debts, takes a good title as against the heirs, though the sale be fraudulent... 612

A purchaser has not by law constructive notice of all matters of record, but only of those to which the title deeds of the estate refer, or put him upon inquiry.......... 612

A purchaser *held* to be entitled to recover back his deposit and expenses incurred in searching and examining the title, where the order compelling him to complete the purchase is withdrawn by consent of the vendor, a receiver.....................1051

WAR.

Neither the chief justice nor any associate justice of the United States can sit either as a circuit court or as a single judge in a region subject to martial law, even to the extent of hearing an application to admit to bail........................... 63

Where a prisoner is in the custody of the military power in a region subject to martial law, the judge of a civil court cannot hear an application to admit the prisoner to bail until the legality of the military custody has been inquired into, by means of an application for a writ of habeas corpus... 63

Interest will not abate during a war, where the alien enemy has a resident agent known to the debtor.................... 485

The usage of making annual rests in an account does not apply where commercial intercourse is suspended between the countries of the parties' residence by war..... 485

Payment of a debt, by the trustee, to a receiver under a decree of confiscation of a Confederate court, *held* a breach of trust as against a loyal citizen.............. 923

A decree in an attachment case instituted during the war by seizure of the property and publication of notice *held* void as against a loyal citizen................. 923

The Georgia statutes (Act Dec. 14, 1861; Act Oct. 1, 1865) suspending the statute of limitations, however defective in point of original authority, were ratified by the state constitution of 1868.............. 41

Only those cases in which the statute had fully run before the passage of such retroactive legislation are within the control of Act Ga. March 16, 1869, declaring such legislation null and void in certain cases.. 41

A military officer acting under the law martial is justified by an order from a superior officer, apparently within the scope of his authority....................... 534

If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable........... 534

Vessel belonging to alien woman residing transiently in rebel territory, not engaged in mercantile business, *held* not subject to confiscation. (Act July 13, 1861.).. 631

The extent of the liability of the owners of a commissioned privateer for acts of the officers and crew discussed............. 637

WATERS AND WATER COURSES.

Page

On a bill to restrain maintenance of a well alleged to have caused a diversion of plaintiff's stream, where the testimony was voluminous and contradictory, the facts were submitted to a jury............... 617

WILLS.

A will may be republished by the testator's verbal declarations, so as to include property acquired after its original execution. (Act Pa. 1833.)................... 696

WITNESS.

The constitutional provision securing to an accused the right to have compulsory process for obtaining witnesses does not authorize process to ambassadors or consuls. 710

The federal courts will not grant a subpoena duces tecum for the purpose of bringing up the original papers in a cause in a state court.............................. 625

On application for a subpoena duces tecum directed to a consul, it must appear that the document is not an official paper protected by law from examination and seizure 710

The witness' privilege of refusing to answer on the ground that the answer would criminate him does not extended to examinations before a grand jury............. 560

A creditor of a voluntary bankrupt is a competent witness for other creditors opposing the bankrupt's discharge.......... 217

A surety in defendant's administration bond is a competent witness for defendant.. 44

Defendant in replevin, bailiff of the landlord, and indemnified by him, may be examined as a witness in the cause......... 767

Particular acts of turpitude cannot be given in evidence to discredit a witness. The question is only as to his general character for veracity..................... 129

Inconsistencies and incongruities in the testimony of witnesses whose general character for veracity has not been impeached will be reconciled if possible............ 684

A witness attending voluntarily is entitled to his fees from the party at whose instance he attends, though they cannot be taxed against the losing party...........1069

WRITS AND NOTICE OF SUITS.

A service of a subpoena in equity by a person other than the marshal, unless specially appointed by the court, will be set aside on motion........................ 281

Service of notice on clerk of corporation, as directed by president and directors, *held* sufficient 30

It is sufficient service of the subpoena, in a suit to enjoin ejectment, to serve it on the attorney of the plaintiff in the ejectment 803

Service on defendant by leaving a copy of the process at his residence, it not appearing that it was left with any person, is not valid. (Equity Rule 13.)............... 259

An attachment cannot be served in court. 176

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